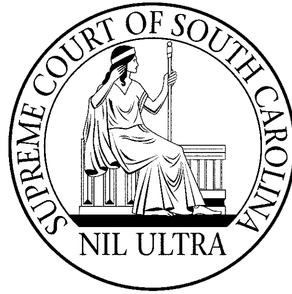

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 10

February 28, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

Page

Order - In the Matter of Steven Robinson Cureton 15

UNPUBLISHED OPINIONS

2005-MO-008 - State v. Anthony W. Nellis, Jr.
(Dorchester County - Judge Jackson V. Gregory)

2005-MO-009 - Theresa Kaiser v. John Christopher Kaiser
(Beaufort County - Judge Robert S. Armstrong)

PETITIONS - UNITED STATES SUPREME COURT

25529 - In the Interest of Michael Brent H. Pending

25850 - Larry Eugene Hall v. William Catoe Pending

25861 - Herman Henry "Bud" Von Dohlen v. State Pending

PETITIONS FOR REHEARING

2005-MO-006 - D'Angelo Stradford v. State Pending

25922 - Henry McMaster v. SC Retirement Systems (Adolph Joseph Klein, Jr., Johnny M. Martin, and Edward Thomas Lewis, Jr.) Pending

25932 - Gloria Cole and George Dewalt v. SCE&G Pending

25934 - Linda Angus v. City of Myrtle Beach Pending

25935 - Danny Whaley v. CSX Transportation Pending

EXTENSION OF TIME TO FILE A PETITION FOR REHEARING

25934- Linda Angus v. City of Myrtle Beach Granted 02/11/05

UNITED STATES SUPREME COURT EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

2004-MO-053 - Video Management v. City of Charleston Granted 01/27/05

25886 - State v. Bobby Lee Holmes Granted 02/17/05

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

Page

3944-Lloyd Pinion, by Amanda Montague, as personal representative for the estate of Lloyd Pinion, and Helen Pinion v. Edie J. Pinion 18

3945-S.C. Labor Limited, LLC v. Eastern Tree Service, Inc. 21

3946-John C. Conway, Jr. v. Charleston Lincoln Mercuty Inc. and Haywood B. Hyman, Sr. 25

3947-Vicki F. Chassereau v. Global-Sun Pools, Inc. and Ken Darwin 33

3948-The State v. Russell Carl Carlson 40

3949-Liberty Mutual Insurance Company v. South Carolina Second Injury Fund In re: Timothy Paul Williams, Employee v. Tate Metalworks/Liberty Mutual Insurance Company, Employer/Carrier 61

3950-The State v. Melissa Passmore 73

3951-Brenda Jones v. Lake W. Daley 92

UNPUBLISHED OPINIONS

2005-UP-128-Discount Auto Center v. Nancy D. Jonas
(Beaufort, Curtis L. Coltrane, Special Circuit Judge)

2005-UP-129-Albert Clay v. Debbie Holmes Strother
(Beaufort, Judge Jackson V. Gregory)

2005-UP-130-Starr Gadson, by her guardian ad litem Kathy Gadson, v. ECO Services of South Carolina Inc. and Joseph Jenkins
(Jasper, Judge Paul M. Burch)

2005-UP-131-Herbert Drucker and Marilyn R. Drucker v. Ralph F. Witt and Deborah Witt; Gordon Plastering Company, Inc.; European Stucco, Inc.; and Parex Inc.
(Richland, Judge J. Ernest Kinard, Jr.)

2005-UP-132-James Bruce Saxon, Jr. v. Curtis Stokes, M.D.
(Colleton, Judge John M. Milling)

2005-UP-133-The State v. Aundray Livingston
(Beaufort, Judge Diane Schafer Goodstein)

2005-UP-134-Donnie Hildreth v. County of Kershaw
(Kershaw, Judge Rodney A. Peeples)

2005-UP-135-Brenda L. Woolridge v. Greenwood Mills, Inc.
(Greenwood, Judge Wyatt T. Saunders, Jr.)

2005-UP-136-Marion T. Burnside, Jr., Marion T. Burnside, III, and David B. Burnside v. Mary Clare Matthews
(Fairfield, Judge Kenneth G. Goode)

2005-UP-137- Ex parte: South Carolina Department of Probation, Parole and Pardon Services In re: The State v. Elijah Byrd
(Fairfield, Judge Kenneth G. Goode)

2005-UP-128-North Charleston Sewer District v. Berkeley County, South Carolina acting by and through the Berkeley County Water and Sanitation Authority
(Berkeley, Judge R. Markeley Dennis, Jr.)

PETITIONS FOR REHEARING

3902-Cole v. Raut	Pending
3924-Tallent v. SCDOT	Pending
3926-Brenco v. SCDOT	Pending
3927-Carolina Marine Handling v. Lasch et al.	Pending
3928-Cowden Enterprises v. East Coast	Pending
3929-Coakley v. Horace Mann	Pending
3932-Nasser-Moghaddassi v. Moghaddassi	Pending
3936-Rife v. Hitachi Construction et al.	Pending

3937-State v. Thompson	Pending
3938-State v. Yarborough	Pending
3939-State v. R. Johnson	Pending
3940-State v. Fletcher	Pending
3941-State v. Green	Pending
3943-Arnal v. Arnal	Pending
3944-Pinion v. Pinion	Pending
2004-UP-600-McKinney v. McKinney	Pending
2004-UP-630-Kiser v. Charleston Lodge	Pending
2004-UP-653-State v. Blanding	Pending
2005-UP-001-Hill et al. v. Marsh et al.	Pending
2005-UP-006-Zaleski v. Zaleski	Pending
2005-UP-008-Mantekas v. SCDOT	Pending
2005-UP-025-Hill v. City of Sumter et al.	Pending
2005-UP-029-State v. Harvey	Pending
2005-UP-039-Keels v. Poston	Pending
2005-UP-050-State v. Jenkins	Pending
2005-UP-053-SCE&G v. Sanders	Pending
2005-UP-054-Reliford v. Sussman	Pending
2005-UP-056-State v. Moore	Pending
2005-UP-058-Johnson v. Fort Mill Chrysler	Pending

Case	Status
2005-UP-067-Chisholm v. Chisholm	Pending
2005-UP-072-Carolina Outdoor Dev. V. SCDOT	Pending
2005-UP-077-Est. of Strickland v. Est. of Strickland	Pending
2005-UP-082-Knight v. Knight	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

Case	Status
3676-Avant v. Willowglen Academy	Pending
3683-Cox v. BellSouth	Pending
3684-State v. Sanders	Pending
3690-State v. Bryant	Pending
3703-Sims v. Hall	Pending
3707-Williamsburg Rural v. Williamsburg Cty.	Pending
3709-Kirkman v. First Union	Pending
3712-United Services Auto Ass'n v. Litchfield	Pending
3714-State v. Burgess	Pending
3718-McDowell v. Travelers Property	Denied 02/17/05
3717-Palmetto Homes v. Bradley et al.	Pending
3719-Schmidt v. Courtney (Kemper Sports)	Pending
3720-Quigley et al. v. Rider et al.	Pending
3724-State v. Pagan	Pending
3728-State v. Rayfield	Pending
3729-Vogt v. Murraywood Swim	Pending

3730-State v. Anderson	Pending
3737-West et al. v. Newberry Electric	Pending
3739-Trivelas v. SCDOT	Pending
3740-Tillotson v. Keith Smith Builders	Pending
3744-Angus v. Burroughs & Chapin	Pending
3745-Henson v. International (H. Hunt)	Pending
3747-RIM Associates v. Blackwell	Pending
3749-Goldston v. State Farm	Pending
3750-Martin v. Companion Health	Pending
3751-State v. Barnett	Pending
3755-Hatfield v. Van Epps	Pending
3757-All Saints v. Protestant Episcopal Church	Pending
3758-Walsh v. Woods	Pending
3759-QZO, Inc. v. Moyer	Pending
3762-Jeter v. SCDOT	Pending
3765-InMed Diagnostic v. MedQuest Assoc.	Pending
3767-Hunt v. S.C. Forestry Comm.	Pending
3772-State v. Douglas	Pending
3775-Gordon v. Drews	Pending
3776-Boyd v. Southern Bell	Pending
3777-State v. Childers	Pending

3778-Hunting v. Elders	Pending
3779-Home Port v. Moore	Pending
3780-Pope v. Gordon	Pending
3784-State v. Miller	Pending
3786-Hardin v. SCDOT	Pending
3787-State v. Horton	Pending
3790-State v. Reese	Pending
3794-State v. Pipkin	Pending
3795-State v. Hill	Pending
3800-Ex parte Beard: Watkins v. Newsome	Pending
3802-Roberson v. Roberson	Pending
3808-Wynn v. Wynn	Pending
3809-State v. Belviso	Pending
3810-Bowers v. SCDOT	Pending
3813-Bursey v. SCDHEC & SCE&G	Pending
3820-Camden v. Hilton	Pending
3821-Venture Engineering v. Tishman	Pending
3825-Messer v. Messer	Pending
3830-State v. Robinson	Pending
3832-Carter v. USC	Pending
3833-Ellison v. Frigidaire Home Products	Pending

3835-State v. Bowie	Pending
3836-State v. Gillian	Pending
3841-Stone v. Traylor Brothers	Pending
3842-State v. Gonzales	Pending
3843-Therrell v. Jerry's Inc.	Pending
3847-Sponar v. SCDPS	Pending
3848-Steffenson v. Olsen	Pending
3849-Clear Channel Outdoor v. City of Myrtle Beach	Pending
3850-SC Uninsured Employer's v. House	Pending
3851-Shapemasters Golf Course Builders v. Shapemasters, Inc.	Pending
3852-Holroyd v. Requa	Pending
3853-McClain v. Pactiv Corp.	Pending
3855-State v. Slater	Pending
3857-Key Corporate v. County of Beaufort	Pending
3858-O'Braitis v. O'Braitis	Pending
3860-State v. Lee	Pending
3861-Grant v. Grant Textiles et al.	Pending
3863-Burgess v. Nationwide	Pending
3864-State v. Weaver	Pending
3865-DuRant v. SCDHEC et al	Pending
3866-State v. Dunbar	Pending

3871-Cannon v. SCDPPPS	Pending
3877-B&A Development v. Georgetown Cty.	Pending
3879-Doe v. Marion (Graf)	Pending
3883-Shadwell v. Craigie	Pending
3884-Windsor Green v. Allied Signal et al.	Pending
3890-State v. Broaddus	Pending
3910-State v. Guillebeaux	Pending
3911-Stoddard v. Riddle	Pending
3912-State v. Brown	Pending
2003-UP-565-Lancaster v. Benn	Pending
2003-UP-566-Lancaster v. Benn	Pending
2003-UP-592-Gamble v. Parker	Pending
2003-UP-593-State v. Holston	Pending
2003-UP-633-State v. Means	Pending
2003-UP-642-State v. Moyers	Pending
2003-UP-659-Smith v. City of Columbia	Pending
2003-UP-672-Addy v. Attorney General	Pending
2003-UP-705-State v. Floyd	Pending
2003-UP-711-Cincinnati Ins. Co. v. Allstate Ins.	Denied 02/17/05
2003-UP-716-State v. Perkins	Pending
2003-UP-723-Derrick v. Holiday Kamper et al.	Denied 02/17/05

2003-UP-736-State v. Ward	Pending	
2003-UP-755-Abbott Sign Co. v. SCDOT #2	Pending	
2003-UP-757-State v. Johnson	Pending	
2004-UP-011-Baird Pacific West v. Blue Water	Denied	02/17/05
2004-UP-050-Lindsey v. Spartan Roofing	Denied	02/17/05
2004-UP-061-SCDHEC v. Paris Mt.(Hiller)	Denied	02/17/05
2004-UP-098-Smoak v. McCullough	Pending	
2004-UP-100-Westbury v. Dorchester Co. et al.	Pending	
2004-UP-110-Page v. Page	Pending	
2004-UP-119-Williams v. Pioneer Machinery	Pending	
2004-UP-142-State v. Morman	Pending	
2004-UP-147-KCI Management v. Post	Pending	
2004-UP-148-Lawson v. Irby	Pending	
2004-UP-149-Hook v. Bishop	Pending	
2004-UP-153-Walters v.Walters	Pending	
2004-UP-200-Krenn v. State Farm	Pending	
2004-UP-215-State v. Jones	Pending	
2004-UP-219-State v. Brewer	Pending	
2004-UP-221-Grate v. Bone	Pending	
2004-UP-229-State v. Scott	Pending	
2004-UP-237-In the interest of B., Justin	Pending	

2004-UP-238-Loadholt v. Cribb et al.	Pending
2004-UP-241-Richie v. Ingle	Pending
2004-UP-247-Carolina Power v. Lynches River Electric	Pending
2004-UP-251-State v. Davis	Pending
2004-UP-256-State v. Settles	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-289-E. Hathaway Const. v. Eli	Pending
2004-UP-306-State v. Lopez	Pending
2004-UP-319-Bennett v. State of S. C. et al.	Pending
2004-UP-336-Clayton v. Lands Inn, Inc.	Pending
2004-UP-344-Dunham v. Coffey	Pending
2004-UP-346-State v. Brinson	Pending
2004-UP-356-Century 21 v. Benford	Pending
2004-UP-359-State v. Hart	Pending
2004-UP-362-Goldman v. RBC, Inc.	Pending
2004-UP-366-Armstong v. Food Lion	Pending
2004-UP-371-Landmark et al. v. Pierce et al.	Pending
2004-UP-381-Crawford v. Crawford	Pending
2004-UP-394-State v. Daniels	Pending
2004-UP-397-Foster v. Greenville Memorial	Pending
2004-UP-407-Small v. Piper	Pending

2004-UP-409-State v. Moyers	Pending
2004-UP-410-State v. White	Pending
2004-UP-422-State v. Durant	Pending
2004-UP-427-State v. Rogers	Pending
2004-UP-430-Johnson v. S.C. Dep't of Probation	Pending
2004-UP-439-State v. Bennett	Pending
2004-UP-460-State v. Meggs	Pending
2004-UP-482-Wachovia Bank v. Winona Grain Co.	Pending
2004-UP-496-Skinner v. Trident Medical	Pending
2004-UP-500-Dunbar v. Johnson	Pending
2004-UP-504-Browning v. Bi-Lo, Inc.	Pending
2004-UP-505-Calhoun v. Marlboro Cty. School	Pending
2004-UP-513-BB&T v. Taylor	Pending
2004-UP-517-State v. Grant	Pending
2004-UP-520-Babb v. Thompson et al (5)	Pending
2004-UP-521-Davis et al. v. Dacus	Pending
2004-UP-542-Geathers v. 3V, Inc.	Pending
2004-UP-546-Reaves v. Reaves	Pending
2004-UP-550-Lee v. Bunch	Pending
2004-UP-554-Fici v. Koon	Pending
2004-UP-555-Rogers v. Griffith	Pending

2004-UP-556-Mims v. Meyers	Pending
2004-UP-560-State v. Garrard	Pending
2004-UP-596-State v. Anderson	Pending
2004-UP-598-Anchor Bank v. Babb	Pending
2004-UP-609-Davis v. Nationwide Mutual	Pending
2004-UP-613-Flanary v. Flanary	Pending
2004-UP-627-Roberson v. State	Pending
2004-UP-635-Simpson v. Omnova Solutions	Pending

The Supreme Court of South Carolina

In the Matter of Steven Robinson Cureton, Respondent.

ORDER

Respondent has been arrested for possession of Alprazolam, Hydrocodone Biterate, and morphine sulfate, in violation of S.C. Code Ann. § 44-53-370(d)(2); possession of marijuana, weighing less than 28 grams, in violation of S.C. Code Ann. § 44-53-370(d)(3); and possession of cocaine, in excess of 10 grains, in violation of S.C. Code Ann. § 44-53-370(b)(1). As a result, the Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to these requests.

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

IT IS FURTHER ORDERED that Kenneth S. Roper, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust

account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Roper shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Roper may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

s/James E. Moore A.C.J.

FOR THE COURT

Columbia, South Carolina

February 23, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lloyd Pinion, by Amanda Montague, as Personal Representative for Estate of Lloyd Pinion and Helen Pinion, Respondents,

v.

Edie J. Pinion, Appellant.

Appeal From Pickens County
John C. Few, Circuit Court Judge

Opinion No. 3944
Heard January 12, 2005 – Filed February 7, 2005

AFFIRMED

Michael Anthony Andrews, of Easley, for Appellant.

Perry Hudson Gravely, of Pickens, for Respondents.

STILWELL, J.: South Carolina Code section 62-2-803 prevents a person who feloniously and intentionally kills another from benefiting from the death, from either the deceased's estate or contractual arrangements the deceased had, such as life insurance. S.C. Code Ann. § 62-2-803 (1987). Our supreme court has previously held the statute is broad enough to cover conspiracy such that a conspirator would be barred from benefiting from the death. Wilson v. Wilson, 319 S.C. 370, 372-73, 461 S.E.2d 816, 817 (1995). In this case brought under section 62-2-803, the sole issue presented is whether the trial court correctly refused to charge the jury that proof of an overt act was required to prove the alleged conspiracy. We affirm the trial court's refusal to so instruct the jury.

BACKGROUND

Following their son's murder, Lloyd and Helen Pinion brought this action against their son's widow, Edie Pinion, to prevent her from benefiting from his death. Based on a jury's finding that Edie had conspired with another person to feloniously and intentionally kill her husband,[1] the court ordered she could not be an heir or beneficiary from or through his estate and was not entitled to collect his life insurance proceeds, retirement benefits, or similar contractual payments.

DISCUSSION

A criminal conspiracy is the combination of 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 (2003). "It may be proven by the specific overt acts done in furtherance of the conspiracy but the crime is the agreement." State v. Buckmon, 347 S.C. 316, 323, 555 S.E.2d 402, 405 (2001). Under South Carolina law, criminal conspiracy does not require overt acts. State v. Wilson, 315 S.C. 289, 294, 433 S.E.2d 864, 867-68 (1993). A civil conspiracy is the combination of two or more persons to injure a plaintiff and cause him special injuries thereby. In contrast with a criminal conspiracy, a civil conspiracy is actionable only if overt acts

[1] Edie's son, Matt Baum, was convicted of the murder.

pursuant to the conspiracy proximately cause damage to the plaintiff. Future Group, II v. Nationsbank, 324 S.C. 89, 100, 478 S.E.2d 45, 50-51 (1996). Edie sought a jury charge based on the law of civil conspiracy. However, section 62-2-803, although not itself a criminal statute, applies only to situations where the deceased was intentionally and feloniously killed, which is a crime. Thus, it follows any conspiracy triggering this statute would also be criminal, rather than civil. Our conclusion is supported by Wilson v. Wilson, the case in which our supreme court held the statute was broad enough to cover conspiracy. In that case, the court held "[w]hile conspiracy could be sufficient to invoke the statute, the elements of criminal conspiracy were not established in this instance to support a finding that petitioner feloniously and intentionally killed the insured." Wilson, 319 S.C. at 373, 461 S.E.2d at 817 (emphasis added and footnote listing the elements of criminal conspiracy omitted). This clearly shows our supreme court concluded any conspiracy triggering the application of this statute would be criminal.

Nevertheless, Edie contends because this is a civil action with a civil burden of proof, the civil rather than criminal definition of conspiracy should apply. Subsection (e) of section 62-2-803 provides a conviction for felonious and intentional killing is conclusive proof under the statute. In the absence of a conviction, subsection (e) states the civil "preponderance of evidence" standard applies. However, use of a civil burden of proof does not negate the fact the triggering event is the criminal act of a "felonious and intentional killing."

Because an overt act is not required to establish criminal conspiracy, and the statute applies to one who criminally conspires to commit a felonious and intentional killing, the trial court properly refused to instruct the jury that an overt act was required in this case.

AFFIRMED.

ANDERSON and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

S.C. Labor Limited, LLC, Respondent,

v.

Eastern Tree Service, Inc., Appellant.

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

Opinion No. 3945
Heard January 11, 2005 – Filed February 14, 2005

REVERSED and REMANDED

Rhett D. Burne and Matthew P. Turner, both of Laurens, for Appellant.

C. Richard Stewart, of Greenville, for Respondent.

GOOLSBY, J.: South Carolina Labor Limited, LLC, a corporation that provides temporary workers to businesses, sued Eastern Tree Service, Inc., alleging Tree Service failed to pay Labor Limited for workers. Labor

Limited filed a motion for summary judgment. In support of the motion, Labor Limited submitted invoices as evidence of the existence of an agreement and as evidence of the amount of payment Tree Service owed. In opposition, Tree Service submitted the affidavits and depositions of Walter T. Caldwell, who purchased Tree Service during a time it did business with Labor Limited, and John Martin, Jr., a Tree Service manager. In the affidavits and depositions, Caldwell and Martin questioned the credibility of the Labor Limited invoices based on their knowledge of the normal business practices of Tree Service. The trial court granted the summary judgment motion and entered judgment in favor of Labor Limited. Tree Service filed a motion to alter or amend pursuant to Rule 59(e), SCRCP, and the trial court denied the motion. Tree Service appeals. We reverse.

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). "Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999).

In granting Labor Limited summary judgment, the trial court found the affidavits and depositions offered by Tree Service did not create a genuine issue of material fact as to the number of workers Labor Limited supplied Tree Service and the number of hours they worked. In reaching this conclusion, the trial court found the affidavits were not in conformity with the requirements of Rule 56(e), SCRCP, in that neither Caldwell nor Martin had personal knowledge "of what transpired between [Labor Limited] and [Tree Service]" but rather "[t]he affidavits expressed opinion as to what those individuals felt should have been done."

Tree Service argues the trial court erred in finding Caldwell's and Martin's affidavits were not based on personal knowledge. We agree.

Rule 56(e) provides, "affidavits shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence." See Hall

v. Fedor, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) (holding "materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence").

The information included in the affidavits at issue, as well as the information supplied by Caldwell and Martin in their depositions, are based on personal knowledge and, moreover, are admissible in evidence to counter the evidence supplied by Labor Limited as to the number of workers it furnished Tree Service and the number of hours these workers performed labor for Tree Service. Statements as to a routine practice of an organization are admissible to prove what was done in a given situation was in conformity with routine practice. Park Club, Inc. v. Resolution Trust Corp., 967 F.2d 1053 (5th Cir. 1992); see Danny R. Collins, South Carolina Evidence §9.3, 252-253, 257-258 (2d. ed., South Carolina Bar 2000); Russell v. Pitts, 123 S.E.2d 708, 710 (Ga. Ct. App. 1961) ("[I]t is generally permissible to allow a witness to testify from his own knowledge as to the usual custom or course of dealing involving the business routine of the party involved."); Micke v. Jack Walters & Sons Corp., 234 N.W.2d 347 (Wis. 1975) (finding evidence of a corporation's routine practice was relevant and properly admitted to determine whether a manager explained the corporation's policy concerning commissions to a prior employee); Spartan Grain & Mill Co. v. Ayers, 517 F.2d 214 (5th Cir. 1975) (holding evidence of how the seller customarily handled eggs was improperly excluded). Furthermore, evidence of custom and practice can be used to rebut evidence of fact. See Park Club, 967 F.2d at 1057; Meyer v. United States, 638 F.2d 155 (10th Cir. 1981) (holding evidence that a dentist customarily warned his patients of the risks of surgery was adequate to rebut a patient's testimony that the dentist did not warn her).

Labor Limited supplied weekly invoices that included the number of workers, the number of hours each worker labored, the rate of pay, and the total amount due. Most of the invoices show three workers labored forty hours.

Caldwell, as an owner of Tree Service during a time it did business with Labor Limited, is qualified to describe the routine practices of Tree Service to counter the invoices supplied by Labor Limited. Caldwell stated

in his deposition Tree Service employees typically worked only four days a week.

Martin, who worked for Tree Service during the time Labor Limited supplied workers to Tree Service and later became its manager, personally ordered workers from Labor Limited on several occasions. In his affidavit, he stated that Tree Service, when using Labor Limited workers, customarily employed two workers "at the most" and these workers "would not have worked ten hour days on most occasions."

Although the question is a close one, we cannot say that a rational trier of fact could not find that the number of Labor Limited workers retained by Tree Service and the number of hours they worked were less than the Labor Limited invoices show.

REVERSED and REMANDED.[1]

HEARN, C.J., and WILLIAMS, JJ., concur.

---

[1] Tree Service also raises an issue concerning the Dead Man's Statute, S.C. Code Ann. § 19-11-20 (2003). We do not address this issue because we do not give advisory opinions. See Springob v. Farrar, 334 S.C. 585, 592, 514 S.E.2d 135, 139 (Ct. App. 1999).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John C. Conway, Jr., Appellant,

v.

Charleston Lincoln Mercury Inc. and Haywood B. Hyman, Sr., Respondents.

Appeal From Charleston County
Gerald C. Smoak, Circuit Court Judge

Opinion No. 3946
Heard December 8, 2004 – Filed February 14, 2005

AFFIRMED

George Hunter McMaster and Nelda T. Smyrl, both of Columbia, for Appellant.

G. Dana Sinkler, of Charleston, for Respondents.

STILWELL, J.: John Conway sued Charleston Lincoln Mercury (CLM) and Haywood Hyman, its sole shareholder and president, alleging

breach of contract, unpaid wages, fraud, and constructive fraud arising from an alleged oral agreement between Hyman and Conway to pay Conway a severance allowance. After a bench trial, the trial court issued an order finding for CLM and Hyman on all claims. We affirm.

BACKGROUND

CLM initially hired Conway as an independent contractor when Hyman was negotiating to sell the company. After one negotiation fell through, Conway and another employee, Al Shuman, discussed purchasing CLM. However, on a trip to Hyman's home in Richmond, Virginia, Hyman informed Conway he did not intend to sell the company to Conway and Shuman and was in talks with another party. Conway alleges Hyman asked him to work to get the company ready for sale and to keep Shuman from leaving the company. Conway contends Hyman promised him $120,000 in severance in exchange for his efforts should he not be offered employment comparable to his then employment following a sale. Conway testified he prepared a memorandum memorializing the agreement he made with Hyman. Conway asserts he presented a copy of this memorandum to Hyman, but Hyman did not sign it. Later, Conway drafted another memorandum, entitled "Memorandum to File," setting forth his version of the events surrounding the agreement and reciting the terms of the agreement as presented to Hyman. Conway placed a copy of this memorandum in his personnel file where a CLM accounts payable clerk found it approximately a year later.

Eventually, another buyer was identified and a contract was executed for the sale of CLM's assets. After the sale closed, Conway continued his employment with the dealership for a short time as an independent contractor, but never became a full-time employee of the new owner.

Conway then filed this action, alleging CLM and Hyman failed to pay him the $120,000 severance as promised in the oral agreement. Following a non-jury trial, the court ruled in favor of CLM and Hyman on all of Conway's claims. Among other things, the trial court ruled no valid contract between the parties for severance ever existed because the written agreement

was never executed as Conway anticipated. The court also denied Conway's post-trial motions.

DISCUSSION

I. Existence of an Oral Contract

Conway contends the trial court erred in not finding an oral contract existed between he and CLM. We disagree.

An action for breach of contract seeking damages is an action at law. Sterling Dev. Co. v. Collins, 309 S.C. 237, 240, 421 S.E.2d 402, 404 (1992). In an action at law tried without a jury, the trial court's factual findings will not be disturbed on appeal unless those findings are wholly unsupported by the evidence or controlled by error of law. Gordon v. Colonial Ins. Co. of California, 342 S.C. 152, 155, 536 S.E.2d 376, 378 (Ct. App. 2000).

Because Conway alleges he and Hyman formed the contract in Virginia, Virginia law must be applied to determine whether a valid contract was formed. Unisun Ins. Co. v. Hertz Rental Corp., 312 S.C. 549, 551-52, 436 S.E.2d 182, 184 (Ct. App. 1993) ("Unless the parties agree to a different rule, the validity and interpretation of a contract is ordinarily to be determined by the law of the state in which the contract was made."). Under Virginia law, a writing is not always necessary to form a valid contract. Harris v. Citizen Bank & Trust Co., 200 S.E. 652, 665 (Va. 1939). However, "[i]f it be understood that its terms are to be reduced to writing as an ultimate expression of conclusions reached . . . then a writing is necessary." Id. at 665.

The trial court's conclusion that no valid agreement existed is supported by the evidence. The record indicates the parties meant for the agreement to be reduced to writing as a prerequisite to the formation of a contract. Conway testified that after his conversation with Hyman regarding the payment of severance, Conway reduced the terms of that agreement to writing and gave Hyman a copy the next morning. Conway admitted Hyman told him he was not feeling well and could not read it at that time.

Conway's memo to file also contains evidence of the parties' intentions. The memo's subject line states: "Employment Agreements & Severance Pay." Conway testified he created the document after his trip to Richmond and it "memorialized the agreement Mr. Hyman and I came to [during his trip]." The memo states:

> Mr. Conway presented Mr. Hyman a new <u>written</u> Employment Agreement for himself as well as a Memorandum outlining the Estate and Business Planning that had been discussed previously with Mr. Douglas. Mr. Hyman started to look the documents over and then said that he wasn't feeling well and that he couldn't go through them right then because he wasn't feeling well and was tired. He said he would look them over later and get back to Mr. Conway, since he (Mr. Conway) was preparing to leave to return to Charleston.

(Emphasis added.) The memorandum then recites the "text of the written text of the Employment Agreement." The terms of this Employment Agreement included Conway's right to receive a $120,000 severance at the closing of the sale of CLM if CLM were unable to offer him continued employment.

Additionally, Conway's wife, Carol Conway, testified she was present when the alleged oral agreement was formed. She confirmed Conway produced a written memo the next day that included the points he and Hyman discussed. She stated Conway gave a copy of the memo along with other documents to Hyman in her presence and said Mr. Hyman remarked "he didn't feel well. That he didn't want to read over anything like that because he was feeling bad and I assume that he really was and that he would sign it, just to leave the papers and he would sign them and send them to John. And that was it."

The trial court could infer from this evidence that the parties presumed their oral negotiations were to be reduced to writing before a contract was

formed. Additionally, according to the memo Conway placed in the file, the terms of the agreement were in fact reduced to writing in the form of an employment agreement. Therefore, Conway's testimony, his wife's testimony, and the file memo contemplating a written agreement, sufficiently support the trial court's finding that the parties intended for the agreement to be reduced to writing. Because the trial court found the prerequisite of a written agreement was not satisfied, it properly determined a valid agreement did not exist.[1]

II. Hyman's Deposition

As part of his argument that an oral agreement existed, Conway contends the trial court erred in allowing the defense to admit Hyman's deposition in lieu of testimony. The trial court allowed the deposition after the defense submitted a physician's letter documenting Hyman's Alzheimer's disease and significant deterioration of his memory. Conway complains the deposition was the sole evidence in support of the position of CLM and Hyman that no valid agreement existed and should not have been admitted. We disagree.

The decision to admit or exclude evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of discretion. Gamble v. Int'l Paper Realty Corp. of South Carolina, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996). To warrant a reversal based on the admission of evidence, the appellant must show both error and resulting prejudice. Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs. Inc., 347 S.C. 545, 559, 556 S.E.2d 718, 726 (Ct. App. 2001). When improperly admitted evidence is merely cumulative, no prejudice exists, and therefore, the admission is not reversible error. Creech v. South Carolina Wildlife & Marine Res. Dep't, 328 S.C. 24, 35, 491 S.E.2d 571, 576 (1997).

---

[1] Because we affirm the trial court on this issue, we need not address Conway's argument that the trial court erred in concluding severance pay is not wages under S.C. Code Ann. section 41-10-80 (Supp. 2004).

Regardless of whether the trial court properly admitted Hyman's deposition, Conway did not suffer prejudice from its admission. This evidence was merely cumulative to the evidence discussed above. Conway's own testimony, his wife's testimony, and the Memorandum to File support the court's finding that no valid agreement existed. In addition, when the court ruled the deposition admissible, it specifically informed the parties they were free to call Hyman as a witness. Conway chose to forgo this opportunity. Therefore, we find no basis for reversal.

III. Alleged Discovery Abuses

After trial, Conway moved for relief from judgment on several grounds under Rule 60, SCRCP, including newly discovered evidence. At the hearing on the motion, Conway asked for a new trial and argued Hyman and CLM had engaged in a pattern of discovery abuses. The trial court denied Conway's motion. Conway argues the court's ruling as to discovery abuses was error. We disagree.

Discovery rights afford a trial attorney the opportunity to prepare for trial. Samples v. Mitchell, 329 S.C. 105, 113-14, 495 S.E.2d 213, 217 (Ct. App. 1997). Where these rights are not accorded, prejudice is presumed and unless the party that failed to comply establishes a lack of prejudice, reversal is required. Id. at 114, 495 S.E.2d at 217.

Conway asserts three instances of discovery abuse by CLM and Hyman. They neither individually nor collectively support his request for a new trial.

First, he contends the defendants should have apprised him of Hyman's medical condition or provided him with a copy of his doctor's letter prior to trial. Assuming this information should have been revealed to Conway pretrial, we are unable to discern how advance warning of Hyman's condition would have aided Conway or made any difference in the case. There is no indication that advance knowledge of Hyman's ailment would have assisted Conway in doing anything more than he did.

Next, Conway points to a document the defense offered though an expert witness that had never been provided to Conway during discovery. Although the document was initially admitted, the trial court later struck it pursuant to Conway's motion to strike. Because the document was stricken from the record and there is no indication that it was relied on by the trial court in its decision, we find no prejudice.

Conway's final assertion of discovery abuse concerns the defense's failure to provide him with notes and a memo written by James Starnes, a consultant Hyman hired to investigate CLM's outstanding liabilities. Conway alleges an excerpt from Starnes' handwritten notes shows three attorneys who represented the defendants, including one who also served as a fact witness in the case, all believed Conway was entitled to severance. CLM and Hyman had listed Starnes as a fact witness several months before trial, but later decided not to call him. After learning he would not be called, Conway cancelled his scheduled deposition of Starnes.

After trial, as a result of a case Al Shuman brought against CLM, Conway discovered Starnes' documents. The passage in question is from Starnes' handwritten notes and reads:

> J.C.
> Ry [Marchant] thinks ~~Al~~'s entitled to the severance
> Zuckerman " " " " " "
> Thompson " " " " " "

Conway argues the note suggests three of Hyman and CLM's attorneys (Marchant, Zuckerman, and Thompson) believed Conway was entitled to a severance and the defense made a deliberate decision to withhold this information. First, we note the passage originally said "Al's entitled to severance" and it is not clear who struck Al and inserted J.C. or when this took place. Furthermore, the passage comes from a portion of the notes Starnes labeled "Conversation w/J. Conway." A thorough review of the notes and a comparison of them to the memo Starnes prepared based on the notes clearly indicate the source of the statements was Conway himself, rather than the three attorneys referenced. This deduction is supported by

affidavits of Starnes and Marchant. In his affidavit, Marchant denied ever telling Starnes or anyone else that he believed Conway was entitled to severance pay. Starnes, in his affidavit, stated the disputed passage refers to statements Conway made to him and not to comments made by Marchant, Zuckerman, or Thompson. He further stated none of the three attorneys ever told him they believed Conway was entitled to the severance. Conway was not prejudiced by the defense's failure to produce Starnes' documents containing Conway's own self-serving statements.

Through their argument and the record, Hyman and CLM have established Conway was not prejudiced by any of the discovery abuses he alleges occurred. The trial court properly denied Conway's motion for a new trial.

AFFIRMED.

ANDERSON and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Vicki F. Chassereau, Respondent,

v.

Global-Sun Pools, Inc. and Ken Darwin, Appellants.

Appeal From Hampton County
Perry M. Buckner, Circuit Court Judge

Opinion No. 3947
Heard January 11, 2005 – Filed February 22, 2005

AFFIRMED

Michael H. Montgomery and Frank S. Potts, both of Columbia, for Appellants.

John E. Parker, of Hampton, for Respondent.

GOOLSBY, J.: Global Sun-Pools, Inc. and Ken Darwin appeal from the circuit court's order denying their motion to compel arbitration. We affirm.

FACTS

On April 19, 2003, Vicki Chassereau and Global-Sun Pools signed a contract for the construction of an aboveground pool at Chassereau's residence in Varnville, South Carolina. The purchase price was $6,765.00. The contract contained an arbitration provision, more fully described below, that requires any arbitrable dispute to be conducted not in Varnville, South Carolina, but in Carson City, Nevada. At the same time, Chassereau signed an installment sales contract to finance the transaction.

Shortly after Global-Sun Pools completed construction, Chassereau began experiencing problems with the pool. She requested a part from Global-Sun Pools so the pool would function properly. After Global-Sun Pools failed either to replace the part or to repair the pool, Chassereau stopped making payments on the pool.

On September 18, 2003, Chassereau filed a complaint against the appellants alleging that, after she stopped making payments, Ken Darwin and other employees of Global-Sun Pools made a series of harassing and intimidating telephone calls to her workplace, Harper Skilled Nursing Facility. Chassereau asserted Darwin and the other employees left "messages disclosing [her] private and personal finances to her co-employees" and "made false and defamatory statements about [her] during their conversations with [her] co-employees and supervisor." Chassereau specifically alleged that Darwin "falsely and with malice defamed [her] by accusing her of dishonesty" in conversations with her supervisor, co-employees, and relatives. Darwin also allegedly "made numerous [tele]phone calls" to Chassereau "in an effort to intimidate and harass her" and made harassing telephone calls to Chassereau's relatives. Chassereau asserted the calls continued despite her repeated requests that the harassment stop and her supervisor's request that the calls to their place of employment cease.

In her complaint, Chassereau asserted causes of action for (1) defamation; (2) violation of South Carolina law prohibiting unlawful use of a

telephone, S.C. Code Ann. § 16-17-430 (2003)[1]; and (3) intentional infliction of emotional distress.

The appellants filed a motion to stay and to compel arbitration, asserting clauses contained in the construction contract and the installment sales contract require arbitration. After a hearing, the circuit court denied the motion, finding "[t]he complaint is based upon tortious conduct of the employees of [Global-Sun Pools] unrelated to the contract" and "the allegations of the complaint do not arise out of nor do they relate to the contract[.]" This appeal followed.

STANDARD OF REVIEW

The question whether a claim is subject to arbitration is a matter for judicial determination, unless the parties have provided otherwise.[2] Appeal from the denial of a motion to compel arbitration is subject to de novo review.[3]

LAW/ANALYSIS

The appellants contend the circuit court erred in refusing to stay the legal action and to compel arbitration of Chassereau's claims because the

---

[1] This statute makes it a misdemeanor to use a telephone to make harassing, intimidating, threatening, or obscene phone calls. No issue is before us as to whether this statute creates a private right of action. See, e.g., Whitlaw v. Kroger Co., 306 S.C. 51, 55, 410 S.E.2d 251, 253 (1991) (holding statutory prohibitions on selling alcohol to a person under the age of twenty-one create a private right of action if the plaintiff can establish negligence per se and "that violation of the statute[s] was causally linked, both in fact and proximately, to the injury").

[2] Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001).

[3] Thorton v. Trident Med. Ctr., 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003); Rich v. Walsh, 357 S.C. 64, 590 S.E.2d 506 (Ct. App. 2003).

contracts mandate arbitration and the claims are so interwoven with the contracts that the claims could not be maintained separately.

Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that the party has not agreed to submit.[4] "Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement."[5]

"To decide whether an arbitration agreement encompasses a dispute a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim."[6] "Any doubts concerning the scope of arbitration should be resolved in favor of arbitration."[7]

In the current appeal, the parties' construction contract contains an arbitration provision that, because of its length and format, taxes the eyes. It states in pertinent part:

> SECTION G) BINDING ARBITRATION AGREEMENT: ANY DISPUTES ARISING IN ANY MANNER RELATING TO THIS AGREEMENT THAT CANNOT BE RESOLVED BY NEGOTIATION BETWEEN THE PARTIES SHALL BE SUBJECTED TO MANDATORY, EXCLUSIVE AND BINDING ARBITRATION IN CARSON CITY, NEVADA . . . . THE SOLE AND EXCLUSIVE REMEDY OF THE PURCHASER AND THE OBLIGATION OF THE DEALER FOR

---

[4] Zabinski, 346 S.C. at 596, 553 S.E.2d at 118.

[5] Id. at 596-97, 553 S.E.2d at 118.

[6] South Carolina Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc., 312 S.C. 559, 563, 437 S.E.2d 22, 25 (1993).

[7] Id. at 564, 437 S.E.2d at 25.

> THE MATTERS SET FORTH HEREIN WHETHER ON WARRANTY, CONTRACT, NEGLIGENCE OR STRICT LIABILITY, IS THE REPAIR OF THE DEFECT. THE DEALER SHALL IN NO WAY BE LIABLE FOR SPECIAL OR CONSEQUENTIAL DAMAGES. . . . THE COURT SHALL DECIDE WHETHER AN AGREEMENT TO ARBITRATE EXISTS OR A CONTROVERSY IS SUBJECT TO ANY AGREEMENT TO ARBITRATE.[8]

The language at issue here is the phrase "any disputes arising in any manner relating to this agreement."

We recently held that "a clause compelling arbitration for any claim 'arising out of or relating to this agreement' may cover disputes outside the agreement, but only if those disputes relate to the subject matter of that agreement."[9] We observed that, the mere fact that an arbitration clause could apply to matters beyond the express scope of the underlying contract did not imply that arbitration would be required for every dispute between the parties.[10] We distinguished this language from clauses compelling arbitration of any matter arising out of the "relationship of the parties." In the latter case, it would not matter whether a claim related to a contract containing an arbitration clause or not.[11] Rather, the only question would be whether the claim concerned the relationship of the parties.[12]

---

[8] The financing statement also references an arbitration clause, but it was not relied upon in the circuit court's order.

[9] Vestry and Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., 356 S.C. 202, 209, 588 S.E.2d 136, 140 (Ct. App. 2003), cert. denied, (S.C. Oct. 6, 2004).

[10] Id.

[11] Id. at 210, 588 S.E.2d at 140.

[12] Id.

Our supreme court has held that "[a] broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained."[13] The court noted the following test has been used in some jurisdictions to determine whether a particular tort claim falls within the scope of an agreement to arbitrate:

> The test is based on a determination whether the particular tort claim is so interwoven with the contract that it could not stand alone. If the tort and contract claims are so interwoven, both are arbitrable. On the other hand, if the tort claim is completely independent of the contract and could be maintained without reference to the contract, the tort claim is not arbitrable.[14]

In our opinion, Chassereau's claims for defamation, unlawful use of a telephone, and intentional infliction of emotional distress cannot be considered claims "arising out of" the contract[15] any more than would a claim that Darwin and other employees of Global-Sun Pools had gone to Chassereau's workplace and verbally or physically attacked her.

---

[13] Zabinski, 346 S.C. at 598, 553 S.E.2d at 119.

[14] Id. at 597 n.4, 553 S.E.2d at 119 n.4.

[15] We note that the arbitration provision in this case specifies that arbitration is the exclusive remedy for matters whether "warranty, contract, negligence or strict liability" and it limits any remedy to repair of the defect. [Emphasis added.] Negligence, while itself a tort, does not encompass all torts, particularly intentional torts such as defamation and intentional infliction of emotional distress alleged by Chassereau. Moreover, as noted above, unlawful use of a telephone is a misdemeanor.

Not only do Chassereau's claims involve actions taken by the appellants that do not arise out of the contract between Chassereau and Global-Sun Pools, the claims can also be proved independently of that contract. Being called "dishonest" to one's supervisor, co-workers, and relatives, harassed by repeated phone calls, and subjected to intentional infliction of emotional distress, as alleged in the complaint, constitutes tortious behavior that the parties, it seems to us, could not have reasonably foreseen and for which we seriously doubt they intended to provide a limited means of redress.[16]

Based on the foregoing, we agree with the circuit court's finding that "[t]he complaint is based upon tortious conduct of the employees of [Global-Sun Pools] unrelated to the contract" and "the allegations of the complaint do not arise out of nor do they relate to the contract[.]" The circuit court, therefore, did not err in denying the motion to compel arbitration.

AFFIRMED.

HEARN, C.J., and WILLIAMS, J., concur.

---

[16] Fuller v. Guthrie, 565 F.2d 259 (2d Cir. 1977). Fuller involved an action brought by a concert promoter against a performer and others to recover damages for breach of contract and, as here, slander. The arbitration clause in the performer's contract "provide[d] that 'the parties will submit every claim, dispute, controversy, or difference involving the musical services arising out of or connected with' the contract to" arbitration. Id. at 260. The United States Court of Appeals for the Second Circuit found this clause did not require arbitration of the slander claim because "the agreement to arbitrate was undoubtedly intended to cover disputes arising from the character of Guthrie's performance and his payment for it, [but] it is highly unlikely that the parties could have foreseen, no less intended, to provide a forum for wholly unexpected tortious behavior." Id. at 261 (emphasis added).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,	**Respondent,**

v.

Russell Carl Carlson,	**Appellant.**

Appeal From Georgetown County
J. Michael Baxley, Circuit Court Judge

Opinion No. 3948
Heard February 9, 2005 – Filed February 22, 2005

AFFIRMED

Gene McCain Connell, Jr., of Surfside Beach, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General David A. Spencer, Office of the Attorney General, all of Columbia; and Solicitor John Gregory Hembree, of Conway, for Respondent.

ANDERSON, J.: Russell Carl Carlson appeals his convictions for assault and battery with intent to kill and first degree burglary. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

Junior DeWitt lived with his fiancée, Stephanie Davis, and her two children. One morning, as Davis's daughter was getting ready for school, two men entered DeWitt's home wearing all black and carrying guns. DeWitt was in bed asleep when he was awakened by the sound of the door being kicked open, glass breaking, and gunshots. One of the intruders was a man with several gold teeth who was wearing a bandana. He was carrying guns in both hands and shot DeWitt multiple times as DeWitt stumbled out of bed. The intruders rifled through DeWitt's clothes, took approximately $500, and then left. DeWitt sustained severe injuries. He was in a coma for a month and is now paralyzed; he will never walk again.

DeWitt recognized Carlson as the shooter and identified Demar "Demond" Moore as the other intruder. DeWitt had known Moore for approximately ten years before the incident. He recognized Carlson because Carlson and Moore had come to his house a couple of weeks before the shooting, and the three had engaged in conversation for around fifteen to twenty minutes.

Moore and Carlson were tried together. The jury convicted Carlson of assault and battery with intent to kill, and burglary in the first degree, and sentenced him to twenty years in prison. Carlson raises eight issues on appeal. Due to the number of issues, and for the sake of clarity, we set forth the remaining facts necessary for our decision in the discussion of the issues to which they pertain. See Hundley v. Rite Aid of South Carolina, Inc., 339 S.C. 285, 293, 529 S.E.2d 45, 49 (Ct. App. 2000).

[1] We note that Carlson's appellate counsel was not his trial counsel.

LAW/ANALYSIS

I. In-Court Identification

During the investigation police showed DeWitt a photo lineup. DeWitt picked out Carlson without hesitation. However, the picture of Carlson was approximately four to five times larger than the other photos. The trial judge decided to exclude the lineup, finding it unduly suggestive. Although the prior identification was not admitted, the trial judge did allow DeWitt to identify Carlson in court. The judge found DeWitt could make a reliable in-court identification of Carlson based on factors independent of the improperly suggestive lineup.

Carlson first argues the trial court failed to conduct a proper hearing on the admissibility of DeWitt's out-of-court identification pursuant to Neil v. Biggers, 409 U.S. 188 (1972) and State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001). Generally, a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation. Ramsey at 613, 550 S.E.2d at 297 (citing State v. Cash, 257 S.C. 249, 185 S.E.2d 525 (1971)); State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002). The purpose of the in camera hearing is to determine whether the in-court identification was of independent origin or was the tainted product of the circumstances surrounding the prior, out-of-court identification. See Ramsey at 613, 550 S.E.2d at 297.

Defense counsel did not object to the procedure used in the present case. During pretrial motions, the trial judge suggested that the court merely view the pictures rather than require testimony. Counsel for Carlson responded: "No objection, Your Honor."

"An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review." State v. Nichols, 325 S.C. 111, 120-21, 481 S.E.2d 118, 123 (1997) (citation omitted); accord State v. Fleming, 254 S.C. 415, 175 S.E.2d 624 (1970);

State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003), cert. denied. A party cannot complain of an error which his own conduct has induced. State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984). "Where an objection and the ground therefore is not stated in the record, there is no basis for appellate review." State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991). A contemporaneous objection is required to preserve issues for direct appellate review. State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999); State v. Thomason, 355 S.C. 278, 584 S.E.2d 143 (Ct. App. 2003); State v. Greene, 330 S.C. 551, 499 S.E.2d 817 (Ct. App. 1997). Cf. State v. McCrary, 242 S.C. 506, 131 S.E.2d 687 (1963) (opining the court was without authority to consider question on appeal where defendant consented to being tried on two indictments at same time and raised no objection to such mode of trial in trial court).

Not only did Carlson fail to object, but he consented to the procedure proposed by the trial judge. Consequently, Carlson failed to preserve this issue.

At oral argument, Carlson's appellate counsel contended that the right to a hearing was a constitutional due process issue and could not be waived. We disagree. A plethora of cases from the appellate entities of this state recognize that constitutional rights may be waived. For example, in Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003), our supreme court observed that "[e]ntering a guilty plea results in a waiver of several constitutional rights . . . ." In State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000), this Court held that the appellant waived his First Amendment right to free speech by failing to preserve the issue for review. We noted that constitutional arguments are no exception to the error preservation rule, "and if not raised to the trial court are deemed waived on appeal." Id. at 339, 526 S.E.2d at 250. See also State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004) (acknowledging a defendant may waive the right to a trial by jury on both guilt and sentencing); State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001) (providing the Fifth Amendment privilege against self-incrimination may be waived); Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000) (same); State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001) (recognizing the Sixth Amendment right to confrontation may be waived); State v. Thompson, 355 S.C. 255, 584 S.E.2d 131 (Ct. App. 2003)

(explaining the waiver of the Sixth Amendment right to counsel and comparing waiver by affirmative, verbal request with waiver by conduct).

In the case sub judice, consent was given and constituted waiver of any procedural due process rights.

II. Use of Photograph at Trial

Carlson asserts the trial court erred in allowing a photograph of Carlson to be admitted into evidence. We disagree.

The trial judge did not allow the State to use DeWitt's identification of Carlson from the photographic lineup because the judge found the disproportionality of Carlson's picture vis-à-vis the other photos rendered the lineup inappropriately suggestive. Carlson argues "it was error to allow the same photograph or a similar photograph into evidence when the court had held the photographs inadmissible as being too suggestive from the photo lineup shown to the victim." He explains: "It seems logical that the court should not allow the admission of a photo into evidence after the court has found that the same photo was too suggestive to be used as part of the photo lineup."

Initially, we note there are two photographs of Carlson in the record. The first picture was taken within a month following the shooting. This photo depicts Carlson with his mouth closed and is not marked as an exhibit. The second photograph was taken approximately a year after the shooting, while Carlson was in jail. In the second picture, Carlson has his mouth open, his gold teeth prominently displayed. This picture is marked "State's Exhibit 29."

We find the record clearly establishes that the second photograph—which was not utilized in the pretrial lineup—is the photo that was entered into evidence and shown to the jury. In arguing Carlson's motion to suppress the pretrial photo lineup as unduly suggestive, the State mentioned that DeWitt could make an independently reliable in-court identification of Carlson because DeWitt observed the shooter had gold teeth, and in the

picture used in the lineup, Carlson's mouth was closed, so his teeth were not visible.

Additionally, counsel for Carlson objected to the admission of State's Exhibit 29 on the ground that it might not be an accurate depiction of Carlson at the time the shooting occurred, because it was taken about a year after the attack. The picture taken a year after the crime cannot be the same photograph utilized in the lineup viewed approximately one month after the attack. Thus, by counsel's own admission, the photo entered into evidence was not the photograph employed in the pretrial lineup.

Further, the preservation of this issue is dubious. A defendant must object to an in-court identification to properly preserve the issue for appeal. See State v. Wakefield, 323 S.C. 189, 196, 473 S.E.2d 831, 835 (Ct. App. 1996) ("Wakefield was required to object to the in-court identification at trial to properly preserve this issue for appeal."). Arguments not raised to or ruled upon by the trial court are not preserved for appellate review. State v. Wise, 359 S.C. 14, 596 S.E.2d 475 (2004), cert. denied; State v. Perez, 334 S.C. 563, 514 S.E.2d 754 (1999). "A defendant may not argue one ground below and another on appeal." State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003), cert. denied; see also State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."); accord State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001). Carlson noted he "would certainly vehemently oppose the introduction of the evidence," and cited the justification that the photograph was "taken . . a year after he was in jail," and therefore did not "represent his appearance at the time of the crime." Now, on appeal, Carlson contends the photograph was unduly suggestive and violates Biggers and Ramsey. This constitutional argument was not the basis of the objection at trial.

Nevertheless, we do not find Neil v. Biggers, 409 U.S. 188 (1972), or State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001), controlling. Biggers addressed whether a showup identification was so suggestive that it violated the defendant's right to due process. The victim in Biggers viewed several suspects in both lineups and showups, and was shown thirty or forty photographs, but was unable to identify her attacker. The police called her in

to view a suspect who was being detained on another charge. Officers attempted to construct a lineup, but were unable to find anyone at the city jail or city juvenile home matching the defendant's description. Thus, they conducted a showup instead, and the victim identified the defendant as the perpetrator. Under the totality of the circumstances, the identification was reliable even though the confrontation procedure was suggestive. Biggers at 199-201. The Supreme Court found "no substantial likelihood of misidentification." Id. at 201.

In State v. Ramsey, a distinctive sweater was found near a murdered body. Several witnesses testified to seeing the defendant wearing the sweater on the day of the murder. Two of the witnesses were police officers who had seen an individual wearing the sweater outside the county courthouse several days before the homicide. The officers identified the defendant from a photo lineup. On appeal, the defendant argued the trial judge erred by refusing to hold an in camera hearing to challenge the identification procedure. The court noted that the defendant in Ramsey cited cases "involving situations where an in-court identification [was] the product of an unlawful confrontation or lineup." 345 S.C. at 613, 550 S.E.2d at 297. The court held those cases were "immaterial because the issue in this case is simply whether an out-of-court photographic lineup was impermissibly suggestive, not whether the subsequent in-court identification was tainted." Id. In the case sub judice, the trial judge found the out-of-court photographic lineup was impermissibly suggestive; therefore, he did not allow evidence of the pretrial identification. Ramsey is inapposite to the facts in this case.

Further, we disagree with Carlson that "[i]t seems logical that the court should not allow the admission of a photo into evidence after the court has found that the same photo was too suggestive to be used as part of the photo lineup." First, Carlson's assertion is factually erroneous because the photograph admitted into evidence was not the same picture used in the lineup. Second, the trial judge found the photo lineup procedure suggestive because Carlson's picture was four or five times larger than the other photos; in other words, the procedure's suggestiveness emanated from the discrepancy between the sizes of the pictures—not Carlson's picture itself. It does not follow that because a picture stands out from a group it is thereby unduly suggestive in isolation. We reject Carlson's argument that the picture

should not have been entered into evidence. The admission of State's Exhibit 29 in no way introduced evidence of the suggestive pretrial identification. The picture is relevant because it prominently shows Carlson's gold teeth, a distinctive feature that was significant in DeWitt's description of his assailant.

Finally, we find the in-court identification was proper. Criminal defendants are constitutionally protected from identification procedures that are so unnecessarily suggestive and conducive to irreparable mistaken identification as to deprive them of due process of law. Manson v. Brathwaite, 432 U.S. 98 (1977); Stovall v. Denno, 388 U.S. 293, 301-02 (1967), overruled on other grounds by Griffith v. Kentucky, 479 U.S. 314 (1987). The determination is to be made based on the totality of the circumstances. Stovall at 301-02; see also State v. Patterson, 337 S.C. 215, 229, 522 S.E.2d 845, 852 (Ct. App. 1999) ("The query posited is whether under the totality of the circumstances the identification was reliable even though the confrontation procedure may have been suggestive.") (internal quotation marks and citation omitted).

Because the trial judge in the instant case did not allow the out-of-court photographic lineup into evidence, the issue here is DeWitt's in-court identification of Carlson. A conviction based on a suggestive pretrial photographic lineup and a subsequent in-court identification will be set aside only if "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968); accord State v. Moore, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000) ("An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification."); State v. Tisdale, 338 S.C. 607, 611, 527 S.E.2d 389, 392 (Ct. App. 2000). The in-court identification is admissible if based on information independent of the out-of-court procedure. State v. Rogers, 263 S.C. 373, 210 S.E.2d 604 (1974). The State bears the burden of proving that the identification was based on an independent source by clear and convincing evidence. Id. at 377, 210 S.E.2d at 606.

The record contains ample evidence supporting the reliability and independence of DeWitt's identification of Carlson. DeWitt talked to Moore and Carlson for fifteen to twenty minutes about two weeks before the shooting took place. During that time, Carlson was standing approximately a foot away from DeWitt, directly in front of him. When the shooting occurred, DeWitt was two to three feet from Carlson. The light in the room was shining brightly. DeWitt recognized Carlson because he could see through the sheer bandana Carlson was wearing. DeWitt recalled seeing Carlson's gold teeth, "the same teeth I seen him that same day when he came with Demond Moore to the house." DeWitt testified that he had a clear view of Carlson throughout the shooting.

When DeWitt awoke from the coma approximately one month later, he was presented with the photo lineup. DeWitt picked out Carlson without hesitation, saying that he was one hundred percent certain of Carlson's identity. At trial, DeWitt again asserted with certitude that Carlson was the attacker.

Thus, DeWitt had an opportunity to view Carlson closely both before and during the time the shooting occurred, with an elevated degree of attention. He demonstrated a high level of certainty as to the accuracy of the identification, and the identification was made as soon as possible after the incident occurred. There was no likelihood of misidentification.

Therefore, use of the State's Exhibit 29 at trial was not improper. The photograph from the lineup was never admitted into evidence, and Carlson did not make a specific objection. The identification was sufficiently reliable to make the probability of misidentification insubstantial.

III. Replay of Testimony During Jury Deliberations

Carlson next challenges the trial judge's decision not to require the jury to review DeWitt's entire testimony. We affirm.

During deliberations, the jury requested to rehear DeWitt's testimony. The trial judge granted the request. The poor sound quality, however, required the court reporter to read the solicitor's questions before replaying

the answers. When dinner arrived, the trial judge recessed the reading and stated: "We'll come back and conclude this at that time after you finish, all right?" The jury sent an oral message to the court through the bailiff that it would consider whether to hear the remainder of the testimony after the break. The jury never requested to hear the remaining testimony.

After the verdict was returned, counsel for Moore moved for a new trial, arguing that only a portion of the direct examination of DeWitt had been replayed, and none of the cross-examination. Counsel for Carlson joined the motion. The trial judge denied the motion, noting that the playback had been "a laborious and cumbersome procedure," and finding the decision not to continue it was within the jury's discretion.

"The trial judge, in his discretion, may permit the jury at their request to review, in the defendant's presence, testimony after the beginning of deliberations." State v. Plyler, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). The extent of the review is within the trial judge's discretion, which is to be exercised in the light of the jury's request. Id.

The facts of the case sub judice are similar to those in Plyler, where the jury requested the testimony of a key witness be read back to them. There, "[t]he tape was replayed, and upon the conclusion of the direct testimony, the foreman informed the court that the jury had heard all they desired. The tape was stopped and the jury returned to their deliberations." Id. at 298, 270 S.E.2d at 129. The defendant's motion that the jury be required to hear the cross-examination was denied by the trial judge. Our supreme court affirmed, holding: "The court is not required to submit evidence to the jury for review beyond that specifically requested but may, in its discretion, have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested." Id.

Similarly, in State v. Summer, 276 S.C. 11, 274 S.E.2d 427 (1981), overruled on other grounds by State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000), the jury requested to hear both the direct and cross-examinations of the victim and a doctor. Apparently, only the direct examinations were played. When the jury returned to its deliberations, defense counsel objected to the court "'not allowing the jury to listen to the cross-examination of the

prosecuting witness in the same area of testimony that the jury listened to of the direct examination.'" Id. at 16, 274 S.E.2d at 430. The court, citing Plyler, emphasized "the broad discretion vested in the trial judge in dealing with requests of the jury to review evidence during their deliberations." Id. The court explicated: "While the record fails to show what testimony was reproduced for the jury, it is reasonably inferable that the jury was satisfied with the court's response to their requests and indicated no further need for a review of the testimony." Id. In view of the appellant's failure to "clearly show a failure of the court to comply with the request of the jury and the inference that the jury apparently felt their request had been met," the court found "no abuse of discretion." Id. See also State v. Lincoln, 213 S.C. 553, 50 S.E.2d 687 (1948), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). The rule in federal courts is similar. U.S. v. Holmes, 863 F.2d 4, 5 (2nd Cir. 1988).

We find no abuse of discretion in the trial judge's actions. The law imposes no duty on the judge to require the jury to hear additional testimony. Plyler, 275 S.C. at 298, 270 S.E.2d at 129.

Additionally, the preservation of this issue is questionable since no objection was made until after the verdict was returned. In order to preserve this issue, Carlson must have made a request at trial to have the remainder of the testimony replayed. State v. Hartley, 307 S.C. 239, 414 S.E.2d 182 (Ct. App. 1992). Carlson made such a request, but it was not contemporaneous. In Hartley, the jury "asked to hear replayed only the solicitor's cross-examination of Hartley." Id. at 243, 414 S.E.2d at 185. This Court held that "[w]e need not address Hartley's complaint concerning the failure of the trial judge to require the jury . . . to listen to other portions of [Hartley's] testimony . . . ." Id. at 244, 414 S.E.2d at 185. We expounded: "Hartley never asked the trial judge to have the 'other portions' of Hartley's testimony . . . played back to the jury. Moreover, he never objected at trial to the playback of only Hartley's cross-examination by the solicitor." Id. We concluded that, even if we were to reach the issue, "we would hold the trial judge committed no abuse of discretion." Id. (citing Plyler, 275 S.C. at 298, 270 S.E.2d at 129). See also State v. Curtis, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004) (holding that an objection made after several pages of testimony came too late to preserve the issue); State v. King, 334 S.C. 504,

510, 514 S.E.2d 578, 581 (1999) (concluding that appellant waived review by failing to object before the jury verdict); State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (holding that a contemporaneous objection is required to preserve an issue for appellate review).

IV. Interaction Between Jury and Bailiff

Carlson contends he should be granted a new trial because the bailiff allegedly engaged in an improper discussion with the jury during deliberations. The record indicates that during the dinner break the jury sent an oral message to the court through the bailiff that it would consider whether it wished to hear the remainder of the testimony. Defense counsel moved for a new trial, and the trial judge denied the motion, explaining:

> As to the hearing the entire testimony of the witness, Mr. DeWitt, I will say this to you and you may not be aware of it, it would have occurred off the record, but when dinner concluded last night the foreperson of the jury informed the bailiff who was removing the trash and other cups and things of that nature from the room that the jury was going to first consider whether they wished to hear any further testimony, and we never heard back from the jury again. The implication to the Court, of course, being that they didn't care to hear any more testimony. That was a laborious and cumbersome procedure, most difficult for our court reporter and one that was difficult for those listening, and I certainly can understand why the jury would not have wanted to continue listening to the testimony. I find no error in that, sir. In fact, I find that to have been within the discretion of the jury and they exercised their discretion and that's appropriate.

Carlson argues this to be a violation of the sanctity of the jury system, entitling him to a new trial. Carlson relies on State v. Cameron, 311 S.C. 204, 428 S.E.2d 10 (Ct. App. 1993), wherein the court remarked: "there was the private communication of the court official to members of the jury, an occurrence which cannot be tolerated if the sanctity of the jury system is to be maintained." Id. at 208, 428 S.E.2d at 12. In Cameron, the defendant was accused of entering a bank with intent to steal. The trial judge charged the

jury that if it found the defendant guilty it would have to decide whether or not to recommend mercy. If the jury decided not to recommend mercy, the defendant would be given a life sentence. The jury returned a verdict of guilty without a recommendation of mercy. However, after the verdict, the trial judge discovered that the bailiff had a discussion with the forelady of the jury during deliberations. When the forelady informed the bailiff that the jury "wanted a description about if they went with the sentence of mercy that he wouldn't make it life," the bailiff responded, " . . . don't worry about it the Judge is fair." Id. at 206-07, 428 S.E.2d at 11.

The trial judge refused to declare a mistrial, but a divided court of appeals reversed. We held that when a court official engaged in private communication with the jury, "'a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict.'" Id. at 207-08, 428 S.E.2d at 12 (quoting Holmes v. United States, 284 F.2d 716, 718 (4th Cir. 1960)). Yet, we observed, "The mere fact . . . that some conversation occurred between a juror and the court official would not necessarily prejudice a defendant." Cameron at 207-08, 428 S.E.2d at 12.

In this case, there was no communication by the bailiff to the jury. The bailiff simply relayed the message without responding. Nor was there any indication of improper outside influences. Cameron deals only with "private communications of the court official to members of the jury" and is thus inapplicable. Id.

Our supreme court has outlined the proper procedure for this situation:

> If, during deliberation, the jury finds need to review portions of the testimony or to consult the court regarding questions of law, the foreman should inform the bailiff that the jury wishes to consult with the judge. The subject matter of the jury's inquiry should not be discussed at all. The bailiff's single responsibility is to advise the court of the foreman's request. The matter is then completely in the hands of the trial judge.

Jacobs v. Am. Mut. Fire Ins. Co. of Charleston, 287 S.C. 541, 543, 340 S.E.2d 142, 143 (1986).

We find no error here. The bailiff did exactly what he should have done—he advised the trial judge of the jury's communication without commenting on the subject matter of the case. Furthermore, defense counsel made no objection on this ground at trial. Nor was any request made to have the bailiff or jurors examined to determine if any prejudicial exchange occurred.

V. Closing Remarks

Carlson's next ground for appeal deals with the following remarks made by the prosecutor during closing arguments:

> Now, the Defense made a big deal about, you know, "Don't get carried away with the brutality of it. We're not saying it's not brutal. We're so sorry this happened," which I'll submit to you I didn't—these Defendants have the right not to testify, and they can, you know, we have the burden of proof and they've got a constitutional right not to testify but they can't come in and apologize.

Counsel for Moore immediately objected. The trial judge sustained the objection and gave a curative instruction: "There's no inference to be taken. The Defendants have a right to remain silent and have a right not to testify." The judge charged the jury that defendants have a constitutional right not to testify, and that their failure to testify could not be used against them, even to the slightest degree. Defense counsel did not make any further motions.

Once again, this issue has not been preserved for review. "Failure to object to comments made during argument precludes appellate review of the issue." State v. Varvil, 338 S.C. 335, 339, 526 S.E.2d 248, 251 (Ct. App. 2000). In the instant case, counsel for Moore objected, but Carlson did not. In State v. Carriker, 269 S.C. 553, 238 S.E.2d 678 (1977), the court held appellant's assertion of error was not preserved because "appellant's counsel made no objection . . . at trial. While appellant's co-defendant did object, the

appellant may not utilize the objection of another defendant to gain review." Id. at 555, 238 S.E.2d at 678; see also State v. Brannon, 347 S.C. 85, 89, 552 S.E.2d 773, 775 (Ct. App. 2001) (finding failure to suppress evidence not preserved where appellant did not join in co-defendant's motion to suppress); State v. Nichols, 325 S.C. 111, 123, 481 S.E.2d 118, 124 (1997) ("Finally, the remaining issues raised by appellant are not preserved for review since appellant failed to object during trial or join in his co-defendant's objections."). Because Carlson did not raise an objection to the solicitor's comments and did not join in his co-defendant's objection, this issue is not preserved.

Additionally, neither party moved to strike or requested a curative instruction. See State v. Patterson, 324 S.C. 5, 18, 482 S.E.2d 760, 766 (1997) (holding that where an appellant objects to improper comments in closing arguments and the objection is sustained, the issue is not preserved unless the appellant further moves to strike or requests a curative instruction); State v. Primus, 341 S.C. 592, 604, 535 S.E.2d 152, 158 (Ct. App. 2000), (providing a thorough discussion and concluding "the cases are legion in holding that if an appellant objects and the objection is sustained but he does not move for a curative instruction or request a mistrial he has received what he asked for and cannot be heard to complain on appeal."), rev'd in part on other grounds, 349 S.C. 576, 564 S.E.2d 103 (2002); State v. McFadden, 318 S.C. 404, 410, 458 S.E.2d 61, 65 (Ct. App. 1995) (noting that appellant must move to strike to preserve issue for appeal).

Even if the issue were properly preserved, there would be no reversible error. Improper closing argument does not automatically require reversal of a conviction. State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997); State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). "It is impermissible for the prosecution to comment, directly or indirectly, upon the defendant's failure to testify at trial." State v. Cooper, 334 S.C. 540, 544, 514 S.E.2d 584, 591 (1999). "However, improper comments on a defendant's failure to testify do not automatically require reversal if they are not prejudicial to the defendant." Id. The appropriateness of a solicitor's closing argument and the decision whether to grant a defendant's motion for a mistrial are matters within the trial judge's discretion that ordinarily will not be disturbed on

appeal. State v. Sweet, 342 S.C. 342, 347, 536 S.E.2d 91, 93 (Ct. App. 2000).

Negative inferences created by prosecutors can be cured if the trial judge gives an immediate curative instruction to the jury. Cooper, 334 S.C. at 554, 514 S.E.2d at 591. If the trial judge charges the jury during jury instructions that the burden of proof is fully on the State, and that the jury may not consider a defendant's failure to testify in its deliberations, any prejudicial effect can be cured. Id. The appellant has the burden of proving he did not receive a fair trial because of the improper argument. State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). Because the trial judge gave an immediate curative instruction upon objection of defense counsel, and charged the jury that failure to testify could not be used against either defendant, any prejudicial effect was cured.

VI. Brady Claim

Carlson contends the prosecution violated his rights under Brady v. Maryland, 373 U.S. 83 (1963), by failing to provide a forty-page transcript to defense counsel prior to trial. During cross-examination of Carlson's alibi witness, Heather Wilson, the prosecution used a transcribed conversation between Wilson and an investigator to impeach her. Counsel for Moore objected on the ground that he had not been provided a copy. The trial judge required the State to provide the transcript to the defense. Counsel for Moore further objected that he had not had time to review the document. The trial judge allowed cross-examination to continue, but announced that he would permit defense counsel to recall the witness after a recess. Moore and Carlson both opted to reserve the right to recall Wilson for redirect; however, neither defendant recalled her.

Wilson averred Carlson was in bed with her on the morning DeWitt was attacked. She claimed that Carlson had gotten up that morning to get her son to school on time, and, therefore, could not have been at the site of the shooting. The State then called the principal of the school Wilson's son attended. The principal testified that Wilson's son had been tardy the morning of the attack and had not checked into the office when he arrived.

Carlson's argument is not preserved. We reiterate, Carlson cannot use an objection by his co-defendant to preserve an issue for appellate review. State v. Carriker, 269 S.C. 553, 555, 238 S.E.2d 678, 678 (1977). Additionally, Carlson did not enter a copy of the statement into the record, so review is not possible. In State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642, (1998), the appellant argued the trial judge improperly refused to consider a written statement, allegedly made by one of the State's eyewitnesses, which was discovered after the jury began deliberating. The court noted that "the statement is not in the record on appeal and therefore this Court does not know exactly what information it contained." Id. at 199, 498 S.E.2d at 647; see also State v. Hutto, 279 S.C. 131, 303 S.E.2d 90 (1983) (affirming dismissal of indictment for insufficiency of evidence where the State failed to meet its burden of presenting a record which was sufficiently complete to permit review by the appellate entity). The burden is on the appellant to provide a sufficient record for review. State v. Williams, 321 S.C. 455, 464 n.4, 469 S.E.2d 49, 55 n.4 (1996); State v. Tyndall, 336 S.C. 8, 17, 518 S.E.2d 278, 283 (Ct. App. 1999).

Moreover, Carlson has not established a Brady violation. Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998) (citing Brady v. Maryland, 373 U.S. 83 (1963)); Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Brady only requires disclosure of evidence that is both favorable to the accused and material to guilt or punishment. Taylor, 333 S.C. 159, 508 S.E.2d 870 (citing United States v. Bagley, 473 U.S. 667 (1985)).

A Brady claim is based on the requirement of due process. To establish a due process violation, an accused must demonstrate that the evidence was (1) favorable to the accused; (2) in the possession of or known to the prosecution; (3) suppressed by the prosecution; and (4) material to guilt or punishment. Gibson at 524, 514 S.E.2d at 324 (citing Kyles v. Whitley, 514 U.S. 419, 432-42 (1995); Brady, 373 U.S. at 87; State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996)); State v. Jarrell, 350 S.C. 90, 107, 564 S.E.2d 362, 372 (Ct. App. 2002), cert. denied. The rule applies to

impeachment evidence as well as exculpatory evidence. Gibson at 524, 514 S.E.2d at 324 (citing Bagley, 473 U.S. at 676).

There are three categories of Brady violations: (1) cases involving nondisclosed evidence or perjured testimony about which the prosecutor knew or should have known; (2) cases in which the defendant specifically requested the nondisclosed evidence; and (3) cases in which the defendant made no request or only a general request for Brady material. Gibson at 524-25, 514 S.E.2d at 325 (citing United States v. Agurs, 427 U.S. 97 (1976)).

Prior to trial, defense counsel moved to compel copies of any Brady material and any statements made during the investigation of the case. In "specific-request" or "general- or no-request" situations such as this one, favorable evidence is considered material for Brady purposes. Gibson at 525, 514 S.E.2d at 325. Reversible error occurs when the prosecution suppresses material that had a reasonable probability of achieving a different result in the proceeding if it had been disclosed to the defense, thereby undermining confidence in the outcome of the trial. Id. Exculpatory evidence is that which creates a reasonable doubt about the defendant's guilt. State v. Forney, 321 S.C. 353, 468 S.E.2d 641 (1996); Jarrell at 107, 564 S.E.2d at 372. The court must make the materiality determination on a case-by-case basis. Gibson at 525, 514 S.E.2d at 325.

We cannot say that nondisclosure of the transcript of Wilson's prior inconsistent statement to the defense undermined confidence in the outcome of the trial. Courts have held that when defense counsel is given the opportunity to review and use the inconsistent statement in cross-examination, as was done here, there is no reasonable probability the outcome of the trial would have been different. See, e.g., Sheppard v. State, 357 S.C. 646, 660, 594 S.E.2d 462, 470 (2004). Here, Carlson was given a copy of the statement, and he was afforded the opportunity to recall Wilson, which he did not do. Additionally, Wilson's impeachment did not turn on the transcript, but on the school principal's testimony that Wilson's son had been tardy on the morning of the shooting. Thus, the suppression did not undermine confidence in the outcome of the trial.

VII. Request for New Trial

Carlson argues the trial judge erred in allowing the prosecution to continue cross-examining Wilson using the forty-page transcript of her prior statement after defense counsel objected. He contends a new trial is warranted. We disagree.

Counsel for Carlson did not make a contemporaneous objection or provide a copy of the statement in the record for appellate review. Carlson has failed to establish a Brady violation and thus cannot show entitlement to a new trial. Finally, Carlson did not request a new trial on the basis of Brady. Issues not raised and ruled upon by the trial court are not preserved for appellate review. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003).

VIII. Use of Prior Criminal Record

Carlson's final argument on appeal is that the trial court erred in informing him that any criminal conviction would be admissible against him if he took the witness stand. This argument fails for several reasons.

Carlson did not testify. The issue, therefore, is not preserved for our review. In State v. Glenn, 285 S.C. 384, 330 S.E.2d 285 (1985), the South Carolina Supreme Court observed:

> In Luce v. United States, 469 U.S. 38, 105 S.Ct. 460, 83 L.E.2d 443 (1994), the United States Supreme Court recently refused to review a claim, under Federal Rule of Evidence 609(a), of improper impeachment with a prior conviction. The Court reasoned that when the defendant does not testify, appellate review is too speculative for several reasons. Those reasons include: the freedom of the trial judge to later alter his ruling; the possibility the prosecution may not have sought to impeach the defendant with the prior convictions; the likelihood that an adverse ruling might not have been the real motivation for the defendant's decision not to testify; and the inability of the appellate court to review any error for harmlessness.

Glenn at 385, 330 S.E.2d at 285-86. The Glenn court adopted Luce, holding: "when the trial judge chooses to make a preliminary ruling on the admissibility of prior convictions to impeach a defendant and the defendant does not testify at trial, the claim of improper impeachment is not preserved for review." Id. at 385, 330 S.E.2d at 286; see also State v. Ford, 334 S.C. 444, 454, 513 S.E.2d 385, 390 (Ct. App. 1999).

Further, the trial judge never ruled on the admissibility of Carlson's prior convictions. Carlson made a motion in limine to exclude any mention of Carlson's prior criminal record, which the trial judge took under advisement. After the State rested its case, the trial judge informed both defendants of their right to testify and stated: "if you do testify, if you have some prior record, then that will come into evidence on the basis of your believability and credibility, not on the basis of your guilt or innocence with regard to these charges . . . ." Immediately after the address, the trial judge asked them whether they had any questions about their right to remain silent or their right to testify.

Carlson contends that the judge's statement constituted a ruling on the prior motion in limine. However, we find the trial judge was only generally advising the defendants of the possibility they would be impeached. Immediately prior to the colloquy, Carlson's counsel requested that the judge "allow him to defer his decision [whether to testify] until after we present the rest of our case." The judge consented. After Carlson's witness testified, counsel for Carlson asked the court for a moment to discuss with Carlson whether to call another witness or testify. He chose to rest. Carlson never sought clarification on the ruling as to which charges would be admissible. We are not persuaded a final ruling was made.

Carlson did not testify. Therefore, pursuant to Glenn, the issue is not preserved for our review.

CONCLUSION

We hold that Carlson consented to the procedure used for determining the admissibility of the photo lineup. The in-court identification was proper because the suggestive photograph was not used, no specific contemporaneous objection was raised, and there were sufficient indicia of reliability to indicate the in-court identification had an independent basis. We find no abuse of discretion in the judge's decision not to order the jury to review the entire testimony of DeWitt. Additionally, the bailiff's action in relaying the message from the jury to the judge was not improper. Carlson's Brady claim is not preserved. Carlson failed to demonstrate a Brady violation. Finally, we hold the trial judge's address to the defendants was not a ruling on the admissibility of Carlson's prior criminal record, and, even if it were, the issue is not preserved. Accordingly, Carlson's convictions are hereby

AFFIRMED.

BEATTY and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Liberty Mutual Insurance Company,	**Appellant,**

v.

South Carolina Second Injury Fund,	**Respondent.**

In Re:

Timothy Paul Williams,	**Employee,**

v.

Tate Metalworks/Liberty Mutual Insurance Company,	**Employer/Carrier.**

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

Opinion No. 3949
Heard February 9, 2005 – Filed February 22, 2005

AFFIRMED

Pope D. Johnson, III, of Columbia, for Appellant.

Robert M. Cook, II, of Batesberg-Leeseville, and Terry Michael Mauldin, of Columbia, for Respondent.

ANDERSON, J.: Timothy Paul Williams (Claimant) lost his right leg in a work-related accident. Liberty Mutual Insurance Company (Liberty) sought reimbursement for compensation benefit payments from the South Carolina Second Injury Fund (the Fund) based on Claimant's preexisting impairment. The circuit court ruled that Liberty was not entitled to reimbursement of the controverted payments. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Claimant sustained a compensable injury when a steel I-beam fell on his legs. His right leg was essentially amputated above the knee in the accident, and his left leg was crushed. Claimant was awarded 100% permanent partial disability to his right leg and 45% permanent partial disability to his left leg. The orders of the single commissioner, the appellate panel, and the circuit court all found that Claimant's 100% disability to the right leg was caused by the industrial accident alone, and his diabetes, a preexisting impairment, played no role in the loss of that leg.

Liberty seeks reimbursement from the Fund pursuant to section 42-9-400 of the South Carolina Code (1985), because of Claimant's preexisting diabetes. The Fund reimbursed Liberty's claim regarding all medical payments and disability compensation, with the exception of the 100% permanent disability paid for the right leg. The Fund argues the claim does not qualify for reimbursement because the total loss of the right leg was solely attributable to the industrial accident. The hearing commissioner ruled in the Fund's favor. The appellate panel reversed. However, the appellate panel's decision was reversed by the circuit court.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the workers' compensation commission. Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004); see Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Bursey v. South Carolina Dep't of Health and Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004); S.C. Code Ann. § 1-23-380(A)(6)(e) (Supp. 2003). Under the scope of review established in the APA, this Court may not substitute its judgment for that of the commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Stone v. Traylor Bros., Inc., 360 S.C. 271, 600 S.E.2d 551 (Ct. App. 2004); Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(A)(6)(d) (Supp. 2003).

The substantial evidence rule of the APA governs the standard of review in a workers' compensation decision. Frame, 357 S.C. 520, 593 S.E.2d 491; Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002). This Court's review is limited to deciding whether the commission's decision is unsupported by substantial evidence or is controlled by some error of law. See Grant v. Grant Textiles, 361 S.C. 188, 603 S.E.2d 858 (Ct. App. 2004); Gibson, 338 S.C. at 517, 526 S.E.2d at 728-29; see also Dukes v. Rural Metro Corp, 356 S.C. 107, 109, 587 S.E.2d 687, 688 (2003) ("This Court will not overturn a decision by the Workers' Compensation Commission unless the determination is unsupported by substantial evidence."); Lyles v. Quantum Chem. Co. (Emery), 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993) (noting that in reviewing decision of workers' compensation commission, court of appeals will not set aside its findings unless they are not supported by substantial evidence or they are controlled by error of law).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003); Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002); Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999). The appellate panel is the ultimate fact finder in workers' compensation cases and is not bound by the single commissioner's findings of fact. Gibson, 338 S.C. at 517, 526 S.E.2d at 729; Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel." Frame, 357 S.C. at 528, 593 S.E.2d at 495 (citing Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000)); Parsons v. Georgetown Steel, 318 S.C. 63, 456 S.E.2d 366 (1995); Gibson, 338 S.C. at 517, 526 S.E.2d at 729). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Dukes, 356 S.C. 107, 587 S.E.2d 687; Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); Durant v. South Carolina Dep't of Health & Envtl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004); Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002); Muir, 336 S.C. at 282, 519 S.E.2d at 591. Where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive. Hargrove at 290, 599 S.E.2d at 611; Etheredge, 349 S.C. at 455, 562 S.E.2d at 681.

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d 526 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999); Frame at 528, 593 S.E.2d at 495. It is not within our province to reverse findings of the appellate panel which are supported by substantial evidence. Pratt, 357 S.C. at 274-75, 594 S.E.2d at 622; Broughton, 336 S.C. at 496, 520 S.E.2d at 637. The appellate court is prohibited from overturning findings of fact of the appellate panel, unless there is no reasonable probability the facts could be as related by the

witness upon whose testimony the finding was based. Hargrove at 290, 599 S.E.2d at 611; Etheredge, 349 S.C. at 455-56, 562 S.E.2d at 681.

LAW/ANALYSIS

I. Principles of Statutory Construction

The cardinal rule of statutory interpretation is to ascertain the intent of the legislature. State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002); Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 579 S.E.2d 334 (Ct. App. 2003); see also Gordon v. Phillips Utils. Inc., Op. No. 25930 (S.C. filed January 24, 2005) (Shearouse Adv. Sh. No. 4 at 44) ("The primary purpose in construing a statute is to ascertain legislative intent."); Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 205, 544 S.E.2d 38, 44 (Ct. App. 2001) ("The quintessence of statutory construction is legislative intent."). A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. Davis v. NationsCredit Fin. Servs. Corp., 326 S.C. 83, 484 S.E.2d 471 (1997); Daisy Outdoor Adver. Co. v. South Carolina Dep't of Transp., 352 S.C. 113, 120, 572 S.E.2d 462, 466 (Ct. App. 2002); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. McClanahan v. Richland County Council, 350 S.C. 433, 567 S.E.2d 240 (2002); Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998); State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002); State v. Hudson, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999). The determination of legislative intent is a matter of law. Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995); South Carolina Uninsured Employer's Fund v. House, 360 S.C. 468, 602 S.E.2d 81 (Ct. App. 2004); Olson, 344 S.C. at 207, 544 S.E.2d at 45.

The legislature's intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Stephen, 324 S.C.

at 339, 478 S.E.2d at 77. The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose. Mun. Ass'n of South Carolina v. AT & T Communications of S. States, Inc., 361 S.C. 576, 606 S.E.2d 468 (2004); Hitachi Data Sys. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Hudson, 336 S.C. at 246, 519 S.E.2d at 582. The court's primary function in interpreting a statute is to ascertain the intent of the General Assembly. Smith, 350 S.C. at 87, 564 S.E.2d at 361. A statute must receive a practical and reasonable interpretation consistent with the "design" of the legislature. Id. "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning. Branch v. City of Myrtle Beach, 340 S.C. 405, 532 S.E.2d 289 (2000); Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998); Hudson, 336 S.C. at 246, 519 S.E.2d at 581; see also Santee Cooper Resort v. South Carolina Pub. Serv. Comm'n, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989) ("Words used in a statute should be taken in their ordinary and popular significance unless there is something in the statute requiring a different interpretation."). "The terms must be construed in context and their meaning determined by looking at the other terms used in the statute." Hinton v. S.C. Dep't of Prob., Parole and Pardon Servs., 357 S.C. 327, 332-33, 592 S.E.2d 335, 338 (Ct. App. 2004), cert. granted (Jan. 7, 2005) (citing S. Mut. Church Ins. Co. v. South Carolina Windstorm & Hail Underwriting Ass'n, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991)); Dupree, 354 S.C. at 693, 583 S.E.2d at 446).

Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. Whitner v. State, 328 S.C. 1, 16, 492 S.E.2d 777, 779 (1997); see also State v. Gordon, 356 S.C. 143, 152, 588 S.E.2d 105, 110 (2003) ("[T]he court should not consider the particular clause being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the

law."); Stephen at 340, 478 S.E.2d at 77 (finding statutory provisions should be given reasonable and practical construction consistent with purpose and policy of entire act). Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and given effect, if it can be done by any reasonable construction. Tillotson v. Keith Smith Builders, 357 S.C. 554, 593 S.E.2d 621 (Ct. App. 2004); Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992). Dictionaries can be helpful tools during the initial stages of legal research for the purpose of defining statutory terms. Heilker v. Zoning Bd. of Appeals for City of Beaufort, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001).

If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. Tilley v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (2003); Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995); Cowan v. Allstate Ins. Co., 351 S.C. 626, 631, 571 S.E.2d 715, 717 (Ct. App. 2002); see also City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language."). When the terms of a statute are clear, the court must apply those terms according to their literal meaning. Patterson v. State, 359 S.C. 115, 592 S.E.2d 150 (2004); Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994); Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Wigfall v. Tideland Utils, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. AT & T Communications, 361 S.C. 576, 606 S.E.2d 468; Durham v. United Cos. Fin. Corp., 331 S.C. 600, 503 S.E.2d 465 (1998); Worsley Cos. v. South Carolina Dep't of Health & Envtl. Control, 351 S.C. 97, 102, 567 S.E.2d 907, 910 (Ct. App. 2002); see also Timmons v. South Carolina Tricentennial Comm'n, 254 S.C. 378, 175 S.E.2d 805 (1970) (providing that where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language.).

Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Vaughn v. Bernhardt, 345 S.C. 196, 547 S.E.2d 869 (2001); Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000); Bayle, 344 S.C. at 122, 542 S.E.2d at 739.

If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. Morgan, 352 S.C. at 367, 574 S.E.2d at 207; see also Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) ("[W]here a statute is ambiguous, the Court must construe the terms of the statute."). An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. Hudson, 336 S.C. at 247, 519 S.E.2d at 582; Brassell, 326 S.C. at 561, 486 S.E.2d at 495; City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck, 330 S.C. 371, 498 S.E.2d 894 (Ct. App. 1998). In construing a statute, the court looks to the language as a whole in light of its manifest purpose. State v. Dawkins, 352 S.C. 162, 573 S.E.2d 783 (2002); Adams v. Texfi Indus., 320 S.C. 213, 464 S.E.2d 109 (1995); Burgess v. Nationwide Mut. Ins. Co., 361 S.C. 196, 603 S.E.2d 861 (Ct. App. 2004).

II. Interpretation of Section 42-9-400

The instant case requires this Court to determine the scope and reach of section 42-9-400 of the South Carolina Code (1985). Specifically, the issue is whether the statute permits Liberty to recover compensation payments from the Fund when the injury for which reimbursement is sought was not affected by the preexisting impairment.

Section 42-7-310 of the South Carolina Code (1985) establishes the Second Injury Fund. The purpose of the Fund is to "encourage the employment of disabled or handicapped persons without penalizing an employer with greater liability if the employee is injured because of his preexisting condition." South Carolina Second Injury Fund v. Liberty Mut. Ins. Co., 353 S.C. 117, 122, 576 S.E.2d 199, 202 (Ct. App. 2003) (quoting Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 318 S.C. 516, 518, 458 S.E.2d 550, 551 (1995)). The Fund accomplishes this goal by absorbing some of the risk that such a worker will become injured in the

workplace. Its creation allows the employer, or his insurance carrier, to seek compensation from the Fund when an employee with a prior permanent physical impairment incurs a subsequent disability in the workplace. See S.C. Code Ann. § 42-9-400 (a) (1985).

Section 42-9-400 (a) provides:

> If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, for disability that is substantially greater, by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment, than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall in the first instance pay all awards of compensation and medical benefits provided by this Title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund as created by § 42-7-310 for compensation and medical benefits in the following manner:
>
> (1) Reimbursement of all compensation benefit payments payable subsequent to those payable for the first seventy-eight weeks following the injury.
>
> (2) Reimbursement of fifty percent of medical payments in excess of three thousand dollars during the first seventy-eight weeks following the injury and then reimbursement of all medical benefit payments payable subsequent to the first seventy-eight weeks following the injury; provided, however, in order to obtain reimbursement for medical expense during the first seventy-eight weeks following the subsequent injury, an employer or carrier must establish that his liability for medical payments is substantially greater, by reason of the combined effects of the preexisting impairment and subsequent injury or by

reason of the aggravation of the preexisting impairment, than that which would have resulted from the subsequent injury alone.

S.C. Code Ann. (1985).

Liberty argues the appellate panel correctly determined this section clearly and unambiguously sets forth the requirements, which, when met, trigger the right of reimbursement. Specifically, Liberty claims that a plain reading of section 9-42-400(a)(1) gives it the right to reimbursement for <u>all</u> compensation benefit payments without regard to whether a nexus exists between the payments and the preexisting impairment. However, an examination of the law and its application to these facts reveals that the circuit court properly rejected this reading of the statute.

This is an issue of first impression in South Carolina. After carefully considering the facts of this case; the nature of the injury; the existing case law, which allows reimbursement to be limited to either compensation or medical liability when factually supported; and the purpose of the Fund, this Court concludes as a matter of law Liberty can only be reimbursed for the liability proximately owed to the prior disability.

Claimant, who suffered from diabetes, was working when the steel I-beam fell and crushed his legs. At the time the I-beam fell onto his right leg, it essentially traumatically amputated the right leg above the knee. In addition, the I-beam crushed and fractured his left leg. The preexisting diabetes acted to exacerbate the condition of his left leg and contributed to increased medical expenses, but the diabetes had no impact on the amputation of his right leg or the disability rating given to Claimant because of the loss of his right leg. Therefore, the preexisting diabetes had no impact on the portion of the award paid for the injury to the right leg.

In <u>Liberty Mutual Insurance Company v. South Carolina Second Injury Fund</u>, 318 S.C. 516, 518, 458 S.E.2d 550, 551-52 (1995), the supreme court ruled a carrier was entitled to reimbursement for medical costs but not disability payments. The court noted that while diabetes exacerbated the workplace injury and ultimately required a double amputation, the workplace accident alone was enough to cause the claimant to become permanently and totally disabled. <u>Id.</u> at 517, 458 S.E.2d at 551. Importantly, the court recognized the accident was sufficient to trigger permanent and total

disability payments. The court approved the circuit court's interpretation of section 42-9-400(a) that "if a carrier incurs greater liability for compensation and/or medical payments, he is entitled to reimbursement of those." Id. at 519, 458 S.E.2d at 551. Liberty had incurred greater medical payments because of the claimant's diabetes; however, Liberty "did not incur greater compensation payments as the accident rendered [the claimant] totally disabled and [the claimant]'s diabetes did not increase these payments." Id. at 519, 458 S.E.2d at 551-52. Thus, the insurer could not recover reimbursement for the compensation payments, but the court allowed reimbursement for the medical expenses which were attributable to the diabetes.

Liberty Mutual stands for the proposition that medical and compensation reimbursement do not necessarily follow from each other, but are, instead, fact dependant. Following the logic of Liberty Mutual, it is appropriate to consider the injuries to the right and left legs separately. The diabetes did not exacerbate the injury to the right leg and did not add to the medical expenses. The statutory scheme of scheduling the loss of each individual member buttresses our conclusion. See, e.g., S.C. Code Ann. § 42-9-30 (15) (1985) (providing the amount of compensation and the period of disability for the loss of a leg).

We are compelled toward this result by the rules of statutory interpretation discussed in Liberty Mutual. There, the court stated the "primary function in interpreting a statute is to ascertain the intent of the legislature" and "[t]he real purpose of the legislature will prevail over the literal import of the words." Liberty Mutual, 318 S.C. at 519, 458 S.E.2d at 551 (citations omitted). The court explained the intent and purpose of the Fund "is to encourage the employment of disabled or handicapped persons without penalizing an employer with greater liability if the employee is injured because of his preexisiting condition." Id. The interpretation of section 42-9-400 proffered by Liberty in the case sub judice does not advance the purpose of the Fund as explicated by the Liberty Mutual court. Instead, Liberty's reading of the statute would provide the insurer with a windfall unrelated to Claimant's preexisting condition.

CONCLUSION

For the reasons discussed above, the circuit court's interpretation of section 42-9-400, providing for reimbursement for the left leg, but not the right, is

AFFIRMED.

BEATTY and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,	**Respondent,**
v.	
Melissa Passmore,	**Appellant.**

Appeal From Greenville County
Amy C. Sutherland, Family Court Judge
Stephen S. Bartlett, Family Court Judge

Opinion No. 3950
Submitted February 1, 2005 – Filed February 22, 2005

AFFIRMED

Assistant Appellate Defender Tara S. Taggart, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

ANDERSON, J.: A family court judge found Melissa Passmore (Appellant) in willful contempt of a prior order and sentenced her to one year in prison. Appellant contends her sentence violates the United States Constitution. We agree but affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

In 1996 the family court issued a written order requiring Appellant and her husband to ensure that their eight-year-old daughter "regularly attend school and see to it that the minor(s) does/do so attend school for the remainder of this school year and future school years, under penalty of law." In February of 2002, when their daughter was fourteen years old, Appellant and her husband were summoned to a rule to show cause hearing to answer allegations of educational neglect in connection with their daughter. The family court continued the hearing so that the Passmores could obtain counsel. The proceeding resumed in April of 2002, and the family court judge found Appellant and her husband in willful contempt of the 1996 order. The judge sentenced both of them to one year in prison, and she took emergency protective custody of the Passmores' minor daughter. Appellant contends the sentence violated her federal constitutional right to a trial by jury in serious criminal cases.

LAW/ANALYSIS

I. The Constitutional Limitation on the Contempt Power

"The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice." Curlee v. Howle, 277 S.C.

---

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

377, 382, 287 S.E.2d 915, 917 (1982) (citing McLeod v. Hite, 272 S.C. 303, 251 S.E.2d 746 (1979); State v. Goff, 228 S.C. 17, 88 S.E.2d 788 (1955)). The determination of contempt ordinarily resides in the sound discretion of the trial judge. State v. Bevilacqua, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994).

Contempt results from the willful disobedience of an order of the court, and before a court may hold a person in contempt, the record must clearly and specifically demonstrate the acts or conduct upon which such finding is based. Curlee at 382, 287 S.E.2d at 918; accord Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 606, 567 S.E.2d 514, 519 (Ct. App. 2002). A willful act is "one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law." Bevilacqua, 316 S.C. at 129, 447 S.E.2d at 217 (internal quotation marks and citation omitted). Intent for purposes of criminal contempt is subjective, not objective, and must necessarily be ascertained from all the acts, words, and circumstances surrounding the occurrence. Id. (citing State v. Bowers, 270 S.C. 124, 241 S.E.2d 409 (1978)).

Although the contempt power is inherent and essential to the preservation of orderly proceedings, it is not unbounded; the power of contempt is checked by the sacrosanct right to be tried by a jury of one's peers. Article III, Section 2, of the United States Constitution provides: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." The right to a jury trial is amplified by the Sixth Amendment, which reads, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

Currently, these provisions require a contemnor to be allowed a jury trial when facing a serious sentence—i.e., one of greater than six months in prison. Bloom v. Illinois, 391 U.S. 194 (1968). However, contemnors have not always been afforded the right to a jury trial, even in serious cases. As late as 1964, the United States Supreme Court held that there was no right to

a jury trial in a criminal contempt case. See U.S. v. Barnett, 376 U.S. 681 (1964). Cheff v. Schnackenberg, 384 U.S. 373 (1966) tempered the longstanding rule expressed in Barnett. In Cheff, the Court upheld a criminal contempt sentence of six months imposed without the benefit of a jury trial. Yet, the Court distinguished the conviction as involving a petty offense and concluded: "sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof." Id. at 380.

With Duncan v. Louisiana, 391 U.S. 145 (1968), the Court declared the provisions of the Sixth Amendment were applicable to state governments via the Fourteenth Amendment:

> Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in federal court—would come within the Sixth Amendment's guarantee.

Id. at 149 (footnote omitted). The Court further established that "in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." Id. at 157-58. However, the Court was careful to note: "we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial." Id. at 158 (footnotes omitted).

A pivotal companion case, Bloom v. Illinois, 391 U.S. 194 (1968), presented the question whether a state court could sentence a criminal contemnor to two years imprisonment without a jury trial. The Bloom court began by observing that the Court had "consistently upheld the constitutional power of the state and federal courts to punish any criminal contempt without a jury trial." Id. at 195-96 (emphasis added). The Court acknowledged the holding of Cheff that contempt was not an intrinsically serious offense and that punishment of six months in prison did not render an offense serious. Justice White, writing for the Bloom majority, then explained:

> Our deliberations have convinced us, however, that serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States, and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial.
>
> . . . .
>
> Given that criminal contempt is a crime in every fundamental respect, the question is whether it is a crime to which the jury trial provisions of the Constitution apply. We hold that it is, primarily because in terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes. Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power.

Bloom at 198-202.

Thus, Duncan established that a jury trial must be afforded to a defendant facing a serious offense, and Bloom held that Duncan applies in the criminal contempt context. Baldwin v. New York, 399 U.S. 66 (1970), then presented the Court with the task of defining the line between petty and serious offenses. The Court cogently explained:

> In deciding whether an offense is 'petty,' we have sought objective criteria reflecting the seriousness with which society regards the offense, . . . and we have found the most relevant such criteria in the severity of the maximum authorized penalty. . . . [W]e have held that a possible six-month penalty is short enough to permit classification of the offense as 'petty,' . . . but that a two-year maximum is sufficiently 'serious' to require an

> opportunity for jury trial . . . . The question in this case is whether the possibility of a one-year sentence is enough in itself to require the opportunity for a jury trial. We hold that it is. More specifically, we have concluded that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized.

Id. at 68-69 (footnote and citations omitted).

In 1974, the Court issued two opinions treating the right to a jury trial as affected by multiple contempt sentences of six months or less. In Codispoti v. Pennsylvania, 418 U.S. 506 (1974), Codispoti was tried before a judge on contempt charges stemming from a prior criminal proceeding in which Codispoti was a defendant. His demand for a jury trial in the contempt case was denied. Id. at 507-08. The judge found he had committed seven contemptuous acts and sentenced him to six months in prison for each of six contempts and three months in prison for the seventh, the sentences to run consecutively. Id. at 509. Therefore, Codispoti was sentenced to three years and three months for his contemptuous acts. Id. at 516. His co-defendant was similarly sentenced. Id. at 517.

In reversing Codispoti's conviction, the Court reviewed the historical and cultural importance the notion of the jury trial holds in the United States:

> The jury-trial guarantee reflects a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. The Sixth Amendment represents a deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement. Moreover, criminal contempt is a crime in every fundamental respect. . . . (I)n terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes. Indeed, in contempt cases an even more compelling argument can be made

> for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court.

Id. at 515-16 (internal quotation marks and citations omitted). Bloom had lucidly established a right to a jury trial where a contemnor was sentenced to more than six months in prison; the issue for the Codispoti court was whether the defendants "were entitled to jury trials because the prison sentences imposed after post-trial convictions for contemptuous acts during trial were to be served consecutively and, although each was no more than six months, aggregated more than six months in jail." Id. at 512-13 (footnote omitted). Because "the contempts against each petitioner [were] tried seriatim in one proceeding, and . . . the individual sentences were to run consecutively rather than concurrently," the Court held: "In terms of the sentence imposed, . . . each contemnor was tried for what was equivalent to a serious offense and was entitled to a jury trial." Id. at 516-17.

In contrast, Taylor v. Hayes, 418 U.S. 488 (1974), involved a contemptuous attorney whose sentences totaled almost four and one half years in the aggregate, but ran concurrently and were "equivalent to a single sentence of six months." Id. at 495. The Court found the contempts were petty offenses and trial by jury was not required. Id. at 496.

Shortly after Codispoti and Taylor, the Court recapitulated the evolution of the right to trial by jury as follows:

> Green v. United States, 356 U.S. 165, 78 S.Ct. 632, 2 L.Ed.2d 672 (1958), reaffirmed the historic rule that state and federal courts have the constitutional power to punish any criminal contempt without a jury trial. United States v. Barnett, 376 U.S. 681, 84 S.Ct. 984, 12 L.Ed.2d 23 (1964), and Cheff v.

> Schnackenberg, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966), presaged a change in this rule. The constitutional doctrine which emerged from later decisions such as Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); Frank v. United States, 395 U.S. 147, 89 S.Ct. 1503, 23 L.Ed.2d 162 (1969); Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970); Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974), and Codispoti v. Pennsylvania, 418 U.S. 506, 94 S.Ct. 2687, 41 L.Ed.2d 912 (1974), may be capsuled as follows: (1) Like other minor crimes, 'petty' contempts may be tried without a jury, but contemnors in serious contempt cases in the federal system have a Sixth Amendment right to a jury trial; (2) criminal contempt, in and of itself and without regard to the punishment imposed, is not a serious offense absent legislative declaration to the contrary; (3) lacking legislative authorization of more serious punishment, a sentence of as much as six months in prison, plus normal periods of probation, may be imposed without a jury trial; (4) but imprisonment for longer than six months is constitutionally impermissible unless the contemnor has been given the opportunity for a jury trial.

Muniz v. Hoffman, 422 U.S. 454, 475-76 (1975).

Approximately half of the states have acknowledged Bloom's prescription. The Supreme Court of Alaska, in State v. Browder, 486 P.2d 925 (Alaska 1971), recognized the change in the law brought about by Bloom in a case where a contemnor was sentenced to six months in prison for bringing a shotgun into a courtroom. Id. at 926-27. However, the Browder court concluded that the Alaska Constitution did entitle the contemnor to a jury trial for a six-month term of imprisonment. Id. at 935-36.

Bloom was addressed by the California Court of Appeal in a case where a contemnor was sentenced to 210 days in jail based on forty-two violations of a court order. In re Kreitman, 47 Cal.Rptr.2d 595 (Cal. Ct. App. 1995). There, the contemnor was not afforded a jury trial; consequently, the

court of appeal ordered "a writ of habeas corpus issue directing the trial court to resentence petitioner to a sentence of no more than 180 days." Id. at 599.

People v. Kriho, 996 P.2d 158 (Colo. Ct. App. 1999) sanctioned Bloom, but found the contemnor there was not impermissibly denied a right to a jury trial because "[b]efore Kriho was tried for contempt, the People filed a document entitled 'Notice of Maximum Sentence Not to Exceed Six Months,' which established that the People would not seek a jail sentence exceeding six months." Id. at 177.

Similarly, the Delaware Supreme Court, after reviewing the development of the right to a jury trial in criminal contempt cases, found that a contemnor was not entitled to a trial by jury where he was sentenced to only eighty days for contempt. Thomas v. State, 331 A.2d 147 (Del. 1975).

In Aaron v. State, 284 So.2d 673 (Ala. 1973), the Florida Supreme Court deduced that, due to Bloom and its line of cases, a "judge's denial of a pre-trial motion for trial by jury will mean that he cannot impose a sentence of six months' imprisonment, or greater, should there be a finding of guilt." Id. at 676.

Dutton v. District Court of Third Judicial District, 518 P.2d 1182 (Idaho 1974), is another case which endorsed Bloom, but avoided its application because "petitioner was found guilty of a misdemeanor. Therefore, he enjoyed no right to a jury trial." Id. at 1186.

In McLean County v. Kickapoo Creek, Inc., 282 N.E.2d 720 (Ill. 1972), the Supreme Court of Illinois reversed the sentence of Lewis, the president of the named defendant corporation. Lewis had been sentenced to one year in prison and fined $10,000. Lewis planned a rock festival to take place on a farm for Memorial Day weekend, 1970. Although he was under a court order not to proceed with the festival, Lewis put on the concert and was found in contempt. In reversing Lewis's year sentence, the court found that the facts did not establish that Lewis "knowingly or expressly waived the right to a jury trial by remaining silent during the proceedings." Id. at 723. Accordingly, his conviction was reversed and remanded for a new trial. Id.

Sarich v. Havercamp involved a contempt sentence for violation of an injunction against practicing dentistry without a license. 203 N.W.2d 260 (Iowa 1972). Therein, the Iowa Supreme Court held that Bloom, Baldwin, and Duncan necessitated the contemnor be given a jury trial where he was "exposed to a fine of $14,000 maximum or imprisonment for a maximum of 14 years." Id. at 268.

Miller v. Vettiner, 481 S.W.2d 32 (Ky. Ct. App. 1972), recognized Bloom's provision that "the Sixth Amendment right to a jury trial applies to criminal contempt proceedings in which the offense has been equated with a 'serious' crime by virtue of the extent of punishment authorized by statute." Id. at 35. However, the $500 fine at issue there was "not enough to equate the offense with a 'serious' crime." Id.

In Louisiana State Board of Medical Examiners v. Bates, 249 So.2d 127 (La. 1971), the Louisiana Supreme Court undertook a thorough review of the applicable Supreme Court precedent, and vacated a contemnor's conviction where, by statute, he could have been fined up to $1,000 or sentenced to up to twelve months in prison.

In Hinton v. State, 222 So.2d 690, 692 (Miss. 1969), the Supreme Court of Mississippi concluded, based on Bloom, "where the confinement is not more than six months and the fine not more than $500, that the offense is a petty one and the accused is not entitled to a jury trial under the Sixth Amendment to the Constitution of the United States." Id. at 692.

Ryan v. Moreland, 653 S.W.2d 244 (Mo. Ct. App. 1983), recognized Bloom and Codispoti, but found Ryan distinguishable because "the contempts here did not grow out of a unitary course of conduct, i.e., continuing statements of disrespect for and villification [sic] of a judge during the course of a trial." Id. at 249. Thus, although the separate contempt sentences amounted to more than six months in prison, they were upheld.

The Court of Appeals of New York, in Rankin v. Shanker, 242 N.E.2d 802 (N.Y. 1968) noted Bloom is "plainly limited in its application to 'serious' crimes in contradistinction to 'petty' offenses." Id. at 807.

In re Davis, 602 N.E.2d 270 (Ohio App. 1991) recognized a criminal contemnor "must be afforded a jury trial for 'serious' contempts" and cited Bloom. Davis at 278.

In Commonwealth v. Mayberry, 255 A.2d 548 (Pa. 1969), the Pennsylvania Supreme Court recognized the rule in Bloom, but based on DeStefano v. Woods, 392 U.S. 631 (1968), held that Bloom need not be applied retroactively. Therefore, appellant's sentences totaling five years imprisonment for various contemptuous acts were affirmed.

State v. Dusina, 764 S.W.2d 766 (Tenn. 1989) cited Bloom and stated: "the United States Supreme Court has held that there is no right to a trial by jury under the federal constitution" in cases where a jail sentence of not more than six months may be imposed. Id. at 768.

State v. Hobble, 892 P.2d 85 (Wash. 1995) subscribed to Bloom, explaining: "Where incarceration is the punishment, a jury trial is required only in the case of a jail term in excess of 6 months; this principle applies in the case of criminal contempt." Id. at 94.

In Hendershot v. Hendershot, 263 S.E.2d 90 (W. Va. 1980), the West Virginia Supreme Court observed the "federal constitutional right to a jury trial in cases where the potential punishment involves imprisonment for more than six months." Id. at 91.

In State ex rel. Groppi v. Leslie, 171 N.W.2d 192 (Wis. 1969), Groppi was found in contempt by the Assembly of the Wisconsin Legislature. The Assembly "ordered his imprisonment for the duration of the 1969 regular session of the Wisconsin legislature, or for six months, whichever occurred earlier." Id. at 194. In upholding the sentence, the Wisconsin Supreme Court explained:

> We are not overlooking [Bloom], wherein the Supreme Court after some years of staving off an insistent attack on the summary power of the courts in judicial contempt held in one sweep of the sword that in matters involving imprisonment of over six months in direct judicial contempts, the contemnor was entitled to a jury trial.

Id. at 199. The court distinguished Groppi's imprisonment from Bloom: "We do not consider this case controlling legislative contempts because as pointed out in this opinion the confinement for legislative contempt is inherently not punishment and is different from either judicial contempt imprisonment or imprisonment for a crime." Id. See also Morrow v. Roberts, 467 S.W.2d 393 (Ark. 1971) (recognizing the efficacy of the constitutional pronouncement in Bloom); Ashford v. State, 750 A.2d 35 (Md. 2000) (same); Spalter v. Kaufman, 192 N.W.2d 347 (Mich. App. 1971) (same); State v. Smith, 672 P.2d 631 (Nev. 1983) (same); Ex parte Williams, 799 S.W.2d 304 (Tex. Cr. App. 1990) (same); Skinner v. State, 838 P.2d 715 (Wyo. 1992) (same).

South Carolina courts have recognized the Bloom mandate as well. In Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915 (1982), our supreme court observed:

> In Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), the Supreme Court held that prosecutions for serious criminal contempts are subject to the jury provisions of Art. III, Section 2 of the Constitution, and of the Sixth Amendment, which is made binding upon the states by virtue of the due process clause of the Fourteenth Amendment. In Codispoti v. Pennsylvania, 418 U.S. 506, . . . (1974) the court held that defendants in state criminal trials who are committed to imprisonment of more than 6 months are entitled to a jury trial.

Id. at 383, 287 S.E.2d at 918; see also Poston v. Poston, 331 S.C. 106, 113, 502 S.E.2d 86, 89 (1998) ("The United States Supreme Court has held a defendant charged with a serious as opposed to a petty criminal contempt is entitled to a jury trial."); State v. Buchanan, 279 S.C. 194, 304 S.E.2d 819

(1983) (finding that defendant's sentence of six months in prison did not entitle him to a jury trial and citing Codispoti).

Here, Appellant was sentenced to one year in prison, but was not afforded a right to a jury trial. This constitutes a violation of Article III, Section 2, and the Sixth Amendment, as interpreted by Bloom v. Illinois.

II. Mootness

The State contends that even if Appellant's sentence was unconstitutional, we should affirm because she has served the sentence, rendering the case moot. We disagree.

A case becomes moot when a judgment, if rendered, would have no practical legal effect upon the existing controversy, thus making it impossible for the reviewing court to grant effectual relief. Byrd v. Irmo High School, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996); Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 603, 567 S.E.2d 514, 517 (Ct. App. 2002). In Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), we stated the law of mootness with exactitude:

> In general, this court may only consider cases where a justiciable controversy exists. A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute. Moot appeals differ from unripe appeals in that moot appeals result when intervening events render a case nonjusticiable. This Court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. . . . The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation. Accordingly, cases or issues which have become moot or academic in nature are not a proper subject of review.

Id. at 552, 590 S.E.2d at 349 (internal quotation marks and citations omitted).

The mootness doctrine is subject to several exceptions, however. In Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001), our supreme court enunciated the three primary exceptions to the doctrine:

> First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Finally, if a decision by the trial court may affect future events, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.

Id. at 568, 549 S.E.2d at 596 (citations omitted).

We find the first and third exceptions applicable, and, thus, refuse to dismiss Appellant's appeal as moot.

First, Appellant's infelicitous experience is capable of repetition, yet evades review. In Byrd v. Irmo High School, 321 S.C. 426, 568 S.E.2d 861 (1996), the South Carolina Supreme Court clarified the capable of repetition but evading review principle, noting an inconsistency in our courts' decisions on the subject.

> Some cases have held that under the exception, a court can take jurisdiction only if (1) the challenged action in its duration was too short to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subjected to the action again.
>
> Other cases have taken a less restrictive approach in defining the exception, holding that a court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. In effect, this latter approach differs from the

> former in that it does not require a reasonable expectation that the same complaining party be subjected to the action again.

Id. at 431, 568 S.E.2d at 864 (internal quotation marks and citations omitted). The court clarified the inconsistency with the pronouncement: "this less restrictive approach is the appropriate standard in determining the applicability of the evading review exception of the mootness doctrine." Id. at 432, 568 S.E.2d at 864.

In the instant case, the State concedes in its brief: "the sentence was in fact too brief to be fully litigated through appeal prior to its expiration . . . ." The issue, then, is whether the constitutional violation suffered by Appellant could be inflicted on a contemnor in the future. That the unconstitutional sentence was imposed here is evidence enough a judge could make the same error in the future. Concomitantly, we find it necessary to remind the bench of the constitutional limitation on a judge's power of contempt.

Additionally, Appellant's case is not moot because the unconstitutional sentence could continue to affect her through collateral consequences. Although Appellant's time has been served, she may yet experience the repercussions of having been sentenced to a year in prison for contempt of court. For example, she might be obliged to indicate jail time served on an employment application. Thus, the sentence could affect her ability to obtain future employment. Likewise, she could be required to disclose the conviction on a credit application, thereby hindering her chances of securing credit. Further, drivers' license applications, voter registration applications, and other documents may mandate the divulgence of prior convictions. Hence, Appellant's unconstitutional conviction will continue to stigmatize and prejudice her. These significant collateral consequences are enough to surmount the mootness doctrine.

III. Issue Preservation

The State argues that even if we do not find this case moot, we should affirm because the issue was not preserved.

The general rule of issue preservation states that if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 862 (2003); State v. Lee, 350 S.C. 125, 564 S.E.2d 372 (Ct. App. 2002). Our courts have "consistently refused to apply the plain error rule." Jackson v. Speed, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997) (citations omitted). Instead, we have held: "it is the responsibility of counsel to preserve issues for appellate review." Id.

Our supreme court, in I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000), explained the rationale behind this longstanding rule:

> Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.

Id. at 422, 526 S.E.2d at 724 (citations omitted); see also Ellie, Inc. v. Micchichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004) ("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error.").

The issue preservation requirement applies to assertions of constitutional violations as well. For example, in Bakala v. Bakala, 352 S.C. 612, 576 S.E.2d 156 (2003), the court held that "[a] due process claim raised for the first time on appeal is not preserved." Id. at 625, 576 S.E.2d at 163 (citing Grant v. South Carolina Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995)); accord Durlach v. Durlach, 359 S.C. 64, 596 S.E.2d 908 (2004). And in State v. McWee 322 S.C. 387, 472 S.E.2d 235 (1996), where appellant asserted violations of due process and his Eighth Amendment rights, the court stated: "this issue is not preserved for review because at trial,

appellant never cited any constitutional basis for his request to give a parole eligibility charge." Id. at 391, 472 S.E.2d at 238 (citations omitted).

Nevertheless, the rule that an unpreserved issue will not be considered on appeal does have its exceptions. Foremost is the axiomatic principle of law that lack of subject matter jurisdiction may be raised at anytime, including for the first time on appeal. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998); State v. Richburg, 304 S.C. 162, 403 S.E.2d 315 (1991). Additionally, our courts have developed the doctrine of futility, which recognizes that in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused. See State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (finding "[a]s to counsel's failure to raise an objection, the tone and tenor of the trial judge's remarks concerning her gender and conduct were such that any objection would have been futile."); State v. Higgenbottom, 344 S.C. 11, 542 S.E.2d 718 (2001) (employing futility doctrine).

Further, an exception exists where the interests of minors or incompetents are involved. See Shake v. Darlington county Dep't of Soc. Servs., 306 S.C. 216, 219 n.2, 410 S.E.2d 923, 924 n.2 (Ct. App. 1991) (noting, in a termination of parental rights action, that "[a]lthough it is questionable whether Mrs. Shake properly raised each of [the] grounds for termination at trial, we nevertheless address them all."); Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000) (approving the court of appeals' conclusion that procedural rules are subservient to the court's duty to zealously guard the rights of minors); Caughman v. Caughman, 247 S.C. 104, 109, 146 S.E.2d 93, 95 (1965) (holding that "the duty to protect the rights of incompetents has precedence over procedural rules otherwise limiting the scope of review.").

Appellant cites State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999), as providing her an exception to the general rule of issue preservation. In Johnston, the defendant was sentenced to ten years in prison for conspiracy. She did not object at trial, but on appeal, she contended the trial court lacked the authority to impose a sentence of ten years for her conspiracy conviction. Furthermore, she argued the issue was one of subject matter jurisdiction and

could be raised for the first time on appeal. The supreme court observed "this Court has consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." Id. at 462, 510 S.E.2d at 425. The court rejected Johnston's argument that the trial court lacked subject matter jurisdiction, stating: "South Carolina courts have continued to recognize a distinction between a trial court's sentencing authority and its subject matter jurisdiction." Id. at 463, 510 S.E.2d 423. However, the court acknowledged that

> if this Court unyieldingly enforces PCR as the only avenue of relief in this case, there is the real threat that Defendant will remain incarcerated beyond the legal sentence due to the additional time it will take to pursue such a remedy. Under these exceptional circumstances, we hold this case should be remanded for resentencing.

Id. at 463-64, 510 S.E.2d at 425. We find the exceptional circumstance carefully carved out by the Johnston court is not present here. Appellant has already served the duration of her sentence; therefore, she does not face the threat of continuing incarceration beyond the legal sentence. Johnston does not control.

We find none of these exceptions to the general rule requiring issue preservation applicable. Having written to the point of expiation, we come to the ineluctable conclusion that we are constrained by the preservation barrier. Appellant will be forced to seek redress through the avenue of post-conviction relief. See Toal, Vafai, and Muckenfuss, Appellate Practice in South Carolina at 62 (2d ed. 2002) ("In criminal cases, although the failure of an attorney to preserve an issue at trial will preclude appellate review of that issue, it may nonetheless be a ground in a civil action for post-conviction relief as a claim of ineffective assistance of counsel.") (citing Fossick v. State, 317 S.C. 375, 453 S.E.2d 899 (1995)).

CONCLUSION

Regrettably, Appellant has suffered a violation of her right to a jury trial in this case. However, because she failed to raise an objection at trial, we are compelled to let the unconstitutional sentence stand. Accordingly, the decision of the family court is

AFFIRMED.

BEATTY and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Brenda Jones, Appellant,

v.

Lake W. Daley, Respondent.

Appeal From Jasper County
Stephen Bennett, Special Referee

Opinion No. 3951
Heard January 11, 2005 – Filed February 22, 2005

REVERSED AND REMANDED

David S. Mathews, of Ridgeland, for Appellant.

R. Thayer Rivers, of Ridgeland, for Respondent.

WILLIAMS, J.: Brenda Jones appeals a special referee's decision that her use of Lake Daley's property for ingress and egress to her own property did not create an easement by prescription. We reverse and remand.

FACTS

In 1939, Thomas Washington acquired title to fifty acres of property in Jasper County. This property was divided and sold to unrelated parties in 1963, except for a five-acre parcel Thomas gave to his daughter, Jamie Washington. Ms. Washington granted her niece, Brenda Jones, a one-half interest in this parcel in 1982. In 1993, Jones was granted the remaining half interest, giving her full title to the five-acre property ("the Jones Parcel").

Throughout the Washington family's ownership of the Jones Parcel and the larger fifty-acre tract, the only access to the property was by use of a trail that followed the northern and eastern boundary of a two hundred acre parcel ("the Daley Parcel") situated between it and the nearest public road. This trail, the use of which is at issue in this case, followed the Daley Parcel's outer borders, but was situated entirely within the parcel's boundaries. Union Camp owned the Daley Parcel until 1987, when it was sold to Delta Plantation. In the late 1990s, Lake Daley purchased the two hundred acres from Delta Plantation.

Jones's three uncles, who worked the Jones Parcel with their father, original owner Thomas Washington, all testified the family actively farmed the property from at least the early 1950s until 1959. At some point in the early 1950s, Union Camp plowed the preexisting access trail for the purpose of creating a firebreak. Following Union Camp's plowing, the Washingtons worked the plowed path with shovels, leveling out the newly cleared trail to make the path more suitable for ingress and egress to their property. Union Camp periodically plowed the firebreak, and each time the Washingtons reworked the trail to smooth it down for better travel. The Washingtons never requested permission to use the trail because they believed, since the trail was the only access to their property, they had a valid legal right to maintain and use it for ingress and egress. Union Camp, the Daley Parcel's owner for most of the time period at issue, was aware of the Washingtons' use and maintenance of the trail and fully condoned it for over thirty-five years.

Because the Washingtons ceased farming the Jones Parcel around 1959, their use of the trail became less frequent in the decades that followed. They did, however, continue to periodically visit the property and maintain the trail following Union Camp's plowing. A nearby resident since the 1960s testified that the trail's use to reach "buried" property was common community knowledge. Jones, age 46, testified the trail was used by her family to access the parcel "as far back as [she] remembered," and she specifically recalls using the access herself since the 70s or 80s. Because Jones is not a South Carolina resident, however, her visits to the property, though many, were sporadic.

In the mid-1990s, Delta Plantation, then owner of the Daley Parcel, decided to close a road used by several other "buried" landowners that crossed directly over the two hundred acre property. To satisfy landowners who possessed recorded easements over the closed road, the access trail used by the Washington family was expanded into a full-sized road. An employee for Delta Plantation, who worked on the trail expansion, testified as to the state of the trail when they decided to build the new road. He stated he had maintained and expanded the firebreak since the beginning of his employment in 1987. Nevertheless, when asked if the new road was built over an existing road, he stated, "No . . . there was a fireline, but just barely." He testified that by the mid-90s the trail was nothing more than a "deer trail." The employee conceded, however, that the path was about eight feet wide in places and would be traversable by a small tractor.

Following the trail's expansion into a fully accessible road, all landowners with recorded easements over the closed road were granted written easements over the newly created one. Because Jones did not have a recorded easement to use the closed road, she was not granted a written easement to use the road built over her parcel's only access.[1] Despite a survey her uncle commissioned in 1989 of the Jones Parcel which recommended a written easement be obtained from Daley, Jones maintained the belief that she had a right to use the newly created road.

---

[1] The road closed by Delta Plantation in the mid-1990s did not connect to the Jones Parcel.

In 2001, Jones attempted to haul timber from her parcel over the Daley Parcel's road. Daley objected to this activity. In 2002, Jones brought an action against Daley to declare an easement by prescription for ingress and egress over the road. The appointed special referee found no easement by prescription was created by Jones and her predecessors' prior use. This appeal followed.

STANDARD OF REVIEW

Establishing the existence of an easement is a question of fact in a law action. Jowers v. Hornsby, 292 S.C. 549, 551, 357 S.E.2d 710, 711 (1987); Hartley v. John Wesley United Methodist Church of Johns Island, 355 S.C. 145, 148, 584 S.E.2d 386, 387 (Ct. App. 2003). The present matter was consensually referred to a special referee. Accordingly, our scope of review is limited to the correction of errors of law, and we will not disturb the referee's factual findings that have some evidentiary support. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 85-86, 221 S.E.2d 733, 775 (1976); Hartley, 355 S.C. at 148, 584 S.E.2d at 387.

LAW / ANALYSIS

As a preliminary matter, we address Daley's assertions that the issues Jones raises on appeal are not preserved for our review. It is Daley's position that because Jones pled she "owns a right to use the easement of ingress and egress by prescription for continuous open hostile and adverse possession," she may not now assert a prescriptive easement under a claim of right on appeal. We disagree.

"It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). In the present case, the special referee opened trial by stating to the parties and their lawyers there would not be opening or closing arguments in the case. Instead, the referee stated he would give both parties "ten days to submit me a letter in the way of a

closing argument summarizing what they think that their witnesses said and what their position is as to what the ruling . . . that I make should be." Jones, unlike Daley, availed herself of this opportunity, clearly and cogently raising Jones' satisfaction of the claim of right element to establishing the easement by prescription. The special referee, after ten months of consideration, addressed the claim of right issue in his final order, but dismissed Jones's arguments, finding no easement was established. Because these issues were raised to and ruled upon by the special referee, we conclude they are preserved for our review. Having addressed the issues' preservation for appellate review, we move now to the merits of the referee's legal conclusions.

I. The Requisite Elements of Establishing a Prescriptive Easement

Jones argues the referee erred in concluding a prescriptive easement can only be established by use that is both adverse and under a claim of right. We agree.

Relying on the case of Nelums v. Cousins, 304 S.C. 306, 308, 403 S.E.2d 681, 682 (Ct. App. 1991), the referee incorrectly stated the elements of establishing a prescriptive easement as twenty years of use which is "adverse, exclusive, continuous, and uninterrupted and occurred under claim of right and with the knowledge or acquiescence of [the] owner of [the] servient estate or predecessors in title." Applying these elements, he concluded Jones failed to establish an easement because "there is no exclusive use of the premises nor was the use by the Plaintiff's predecessors in title hostile or adverse to that of the owner of the property in question."

Since Nelums, South Carolina courts have simplified the elements of establishing a prescriptive easement. In order to establish an easement by prescription, a party must only show: (1) the continued and uninterrupted use or enjoyment of a right for a full period of twenty years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right. Horry County v. Lachur, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993); Loftis v. South Carolina Elec. & Gas, 361 S.C. 434, 604 S.E.2d 714, 716 (Ct. App. 2004). The source of the referee's understandable

confusion on this matter was discussed and resolved in this court's case of Revis v. Barrett, 321 S.C. 206, 209 n.1, 467 S.E.2d 460, 462 n. 1 (Ct. App. 1996). To establish an easement by prescription, one need only establish either a justifiable claim of right or adverse and hostile use. Id.

In the present case, there is an abundance of testimony in the record reflecting Jones and her predecessor's claim of right to the easement. Jones testified she believed she had a right to use the access because her family had used it to get to and from the parcel for "as long as she can remember." All three of her uncles testified they openly asserted their perceived right to use the pre-existing path with the full knowledge and acquiescence of Union Camp, owner of the Daley parcel for over thirty-five years. We find Jones adequately demonstrated a substantial belief that she had the right to use the property in a manner consistent with the alleged easement, originating from her family's prior use of the access. See Loftis, 361 S.C. at __, 604 S.E.2d at 717; Hartley, 355 S.C. at 151, 584 S.E.2d at 389 ("[I]n order for a party to earn a prescriptive easement under claim of right he must demonstrate a substantial belief that he had the right to use the parcel or road based upon the totality of circumstances surrounding his use."); Revis, 321 S.C. at 209-210, 467 S.E.2d at 462 (finding a prescriptive easement flowed from a party's claim of right when she was justifiably under the impression she had a right to use the road). Considering only the undisputed facts presented to the special referee, Jones satisfied the third element of establishing a prescriptive easement.

Similarly, the referee erred in basing his decision so largely on the fact that, because the Daley Parcel owners also used the trail as a firebreak, Jones's use was not exclusive. As reflected in the enumerated elements above, there is no requirement of exclusivity of use to establish a prescriptive easement. An easement is the legal assertion that one has a valid right to share in the use of another's property for a specific purpose. See 25 Am. Jur. 2d Easements and Licenses § 1 (1996). By the very nature of easements, requiring that one's use be truly exclusive to establish a prescriptive easement would essentially render it impossible to establish. Accordingly, even when our courts have applied a requirement of exclusivity, it has been interpreted narrowly as merely the requirement that one's claim be asserted

independently of other users. See Nelums, 304 S.C. at 308, 403 S.E.2d at 682. Again, the referee's confusion on this matter is understandable considering the language employed by this court in the second section of Nelums and the subtle, yet crucial, differences between establishing a prescriptive easement and establishing ownership through adverse possession.

II. Continued and Uninterrupted Use

As stated in the previous section, the primary foundation of the referee's decision was an erroneous application of South Carolina law. The referee continued, however, to state that Jones's use "does not appear to have been continuous and uninterrupted." It is undisputed that since Union Camp's acquiescence to the Washingtons' use, no overt actions were taken by the owners of the Daley Parcel to prevent use of the right of way prior to the actions that gave rise to this action. Jones's use, therefore, has satisfied the "uninterrupted" requirement. We are left, however, with the vague finding that the use of Jones and her predecessors "does not appear to have been . . . continued." The referee's firm decision to deny the easement's establishment on the ground of exclusivity left this element largely unexplored.

As the special referee is the ultimate finder of fact in this action, we remand the case for more specific findings on the issue of continued use. We note, however, that under long established principles of South Carolina law, once a right of way by prescription has been established by twenty years of continuous use, a later diminishment in the frequency of that use does not necessarily nullify the established right by prescription. Cuthbert v. Lawton, 3 McCord 194, 14 S.C.L. 194 (Ct. App. 1825). Furthermore, in order to satisfy the continual use requirement, the use must only be of a reasonable frequency as determined from the nature and needs of the claimant. See 25 Am. Jur. 2d Easements and Licenses § 68 (1996) ("[The element of continued use] does not require the use thereof every day for the statutory period or even on a weekly or monthly basis; but simply the exercise of the right more or less frequently according to the nature of the use and the needs of the claimant.").

For the foregoing reasons, the special referee’s decision is

REVERSED AND REMANDED.

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