The Supreme Court of South Carolina

RE: Lawyers Suspended by the South Carolina Bar

The South Carolina Bar has furnished the attached list of lawyers who have been administratively suspended from the practice of law pursuant to Rule 419(c), SCACR. This list is being published pursuant to Rule 419(d), SCACR. If these lawyers are not reinstated by the South Carolina Bar by April 1, 2006, they will be suspended by order of the Supreme Court and will be required to surrender their certificates to practice law in South Carolina. Rule 419(c), SCACR.

Columbia, South Carolina
March 6, 2006

Suspensions
South Carolina Bar
2006 License Fees
As of March 1, 2006

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The Supreme Court of South Carolina

RE: Lawyers Suspended by the Commission on Continuing Legal Education and Specialization

The Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who have been administratively suspended from the practice of law pursuant to Rule 419(c), SCACR. This list is being published pursuant to Rule 419(d), SCACR. If these lawyers are not reinstated by the Commission on April 1, 2006, they will be suspended by order of the Supreme Court and will be required to surrender their certificates to practice law in South Carolina. Rule 419(c), SCACR.

Columbia, South Carolina
March 6, 2006

SUSPENSIONS-
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2005 REPORT OF COMPLIANCE
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OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 10

March 6, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Strategic Resources Company, Gerald D. Peterson, Continental Assurance Company, Continental Casualty Company, and CNA Group Life Insurance Company, Respondents,

v.

BCS Life Insurance Company, BCS Insurance Company, and American Arbitration Association, Inc., Defendants,

of whom BCS Life Insurance Company and BCS Insurance Company are Appellants.

ORDER

Respondents filed a petition for rehearing and Appellants filed a return in opposition. We deny the petition for rehearing, withdraw the former opinion, and substitute the attached opinion in its place.

IT IS SO ORDERED.

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

s/ John H. Waller, Jr., J.

s/ E. C. Burnett, III, J.

s/ Costa M. Pleicones, J.

s/ J. Cordell Maddox, A.J.

Columbia, South Carolina

March 6, 2006

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Strategic Resources Company, Gerald D. Peterson, Continental Assurance Company, Continental Casualty Company, and CNA Group Life Insurance Company, Respondents,

v.

BCS Life Insurance Company, BCS Insurance Company, and American Arbitration Association, Inc., Defendants,

of whom BCS Life Insurance Company and BCS Insurance Company are Appellants.

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

Opinion No. 26022
Heard April 20, 2005 – Refiled March 6, 2006

REVERSED

Charles E. Carpenter, Jr., and S. Elizabeth Brosnan, of Richardson, Plowden, Carpenter & Robinson, P.A., of Columbia; D. Clay Robinson, of Robinson, McFadden & Moore, P.C., of Columbia; and Mark E. Wilson, of Kerns, Pitrof, Frost & Pearlman, L.L.C., of Chicago, Illinois; for appellants.

C. Mitchell Brown and Kevin A. Hall, of Nelson Mullins Riley & Scarborough, L.L.P., of Columbia; Gray T. Culbreath and Eric Fosmire, of Collins & Lacy, of Columbia; J. Edward Bradley, of Moore, Taylor &Thomas, P.A., of West Columbia; Michael L. McCluggage, R. John Street, and Michael A. Kaeding, of Wildman, Harrold, Allen & Dixon LLP, of Chicago, Illinois; for respondents.

ACTING CHIEF JUSTICE MOORE: This case involves a dispute over how the American Arbitration Association (AAA) administered the selection of an arbitrator.

FACTUAL/PROCEDURAL BACKGROUND

BCS Life Insurance Company and BCS Insurance Company (appellants) brought a lawsuit in an Illinois state court against Strategic Resources, Gerald D. Peterson, Continental Assurance Company, Continental Casualty Company, and CNA Group Life Insurance Company (respondents) after a business deal went astray. The Illinois court compelled the parties to arbitrate pursuant to the parties' prior written agreement.

The agreement provided that any dispute would be submitted to a panel of three arbitrators, two to be selected by the parties (party arbitrators) and a third (neutral arbitrator) to be selected by the party arbitrators. The party arbitrators were selected but were unable to agree on who would serve as the neutral arbitrator. Appellants then declared that the party arbitrators had

reached an impasse and sought assistance from the AAA to make the selection.[1]

Once respondents became aware that appellants sought the AAA's assistance, a disagreement ensued as to which set of AAA rules was applicable. Appellants argued that the AAA's Supplementary Rules for the Resolution of Intra-Industry United States Reinsurance and Insurance Disputes (Supplementary Rules) applied. However, respondents contended that the AAA's Commercial Rules applied.[2] The AAA issued a list of proposed arbitrators according to the Supplementary Rules and required the parties to "strike and rank" those candidates listed by July 18, 2003.

Respondents objected to the list provided by the AAA and the parties were unable to compromise. On July 17, 2003, one day before the "strike and rank" deadline, respondents initiated these proceedings.

The trial court found that appellants had engaged in a variety of wrongful conduct, including, but not limited to, manipulating the AAA, violating the rules of the AAA, improperly communicating with the AAA, and making inconsistent statements to the trial court at hearings and in documents filed with the court. As a result, the trial court enjoined the AAA from following the Supplementary Rules and directed the AAA to devise a list of arbitrators according to the Commercial Rules. Appellants appealed.

---

[1]The trial court found that appellants unilaterally made this request in an attempt to obtain an unfair advantage by having the neutral arbitrator selected from a favorable list of arbitrators.

[2]We assume the parties wanted what they perceived to be the most favorable list of arbitrators. The Supplementary Rules, which generally apply to disputes involving insurance claims and coverage, would yield a list of arbitrators who are not lawyers, and who have significant experience as officers of life or health insurance companies. On the other hand, the Commercial Rules would yield a list of arbitrators who are lawyers experienced in complex contract disputes.

This case was certified from the Court of Appeals pursuant to Rule 204(b), SCACR.

ISSUE

Did the trial court err by enjoining the AAA?

DISCUSSION

An order granting or denying an injunction is reviewed for abuse of discretion. County of Richland v. Simpkins, 348 S.C. 664, 560 S.E.2d 902 (Ct. App. 2002). An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law. *Id*.

The power of the court to grant an injunction is in equity. Doe v. South Carolina Med. Malpractice Liability Joint Underwriting Ass'n, 347 S.C. 642, 557 S.E.2d 670 (2001). The court will reserve its equitable powers for situations when there is no adequate remedy at law. Santee Cooper Resort, Inc. v. South Carolina Pub. Serv. Comm'n, 298 S.C. 179, 379 S.E.2d 119 (1989). The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction. Calcutt v. Calcutt, 282 S.C. 565, 320 S.E.2d 55 (Ct. App. 1984). The remedy of an injunction is a drastic one and ought to be applied with caution. Forest Land Co. v. Black, 216 S.C. 255, 57 S.E.2d 420 (1950). In deciding whether to grant an injunction, the court must balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant, and grant an injunction which seems most consistent with justice and equity under the circumstances of the case. *Id.*

For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) the party seeking injunction will likely succeed in the litigation; and (3) there is an inadequate remedy at law. Scratch Golf Co. v. Dunes West Residential Golf Props., Inc., 361 S.C. 117, 603 S.E.2d 905 (2004).

In its order granting the injunction, the trial court held that respondents should not be required to wait until the arbitration has concluded before

challenging the proceedings, because it would be wasteful to arbitrate pursuant to inapplicable rules and with an improperly selected neutral arbitrator.

Appellants argue the trial court erred by granting injunctive relief because respondents have an adequate remedy at law according to South Carolina common law.[3] We agree.

Respondents are not entitled to an injunction because they have the right to appeal the results of the arbitration, which is an adequate remedy at law.[4] *Cf.* Scratch Golf Co., *supra* (injunction inappropriate where golf course failed to establish that it lacked adequate remedy at law to collect damages in breach of contract and negligence suit against developer); Riverwoods, LLC, v. County of Charleston, 349 S.C. 378, 563 S.E.2d 651 (2002) (injunction inappropriate where adequate remedy at law exists). The right to appeal provides respondents with an adequate remedy at law, a protection of their rights, and an opportunity to repair any prejudice caused by the alleged improper selection of the neutral arbitrator. Accordingly, we hold that the trial court erred by granting the injunction.

CONCLUSION

[3]Respondents contend that, despite South Carolina common law, Section 5 of the Federal Arbitration Act grants the trial court the authority to enjoin the AAA upon parties reaching an impasse in deciding on an arbitrator. We disagree. The statute specifically limits the scope of the court's authority to appoint an arbitrator upon parties reaching an impasse. We need not decide whether the parties ever reached an impasse. Even upon an impasse, the injunction was beyond the scope of authority granted to the trial court by the FAA.

[4]*See* 9 U.S.C. §§ 10, 11, and 12 (sections of the Federal Arbitration Act, which provide that a party in arbitration has the right to appeal at the conclusion of arbitration).

We reverse the lower court and hold that an injunction was an improper remedy because respondents had an adequate remedy at law. Therefore, the trial court's ruling is
REVERSED.

WALLER, BURNETT, JJ., and Acting Justice J. Cordell Maddox, concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE PLEICONES: After litigation was commenced in Illinois between most parties to this suit, the Illinois courts granted requests to submit the dispute to arbitration and dismissed those actions. When the respondents became dissatisfied with the actions of the appellants and feared the American Arbitration Association (AAA) would utilize a set of rules they felt did not favor them to select the third arbitrator, they filed this matter in South Carolina seeking to enjoin the AAA to utilize their preferred methodology. In response, the appellants filed a request for emergency relief in Illinois. The Illinois court required the AAA to determine the procedure to be used in this matter, and stated, "After the AAA makes such a ruling, the arbitration shall proceed consistent with the AAA's ruling. The Court retains jurisdiction over the parties and this dispute." The South Carolina circuit court then issued a permanent injunction requiring the AAA to use respondents' preferred rules. This appeal follows.

I concurred in the result reached by the majority when this opinion first issued, and I concur in the decision now to reverse the injunction. I write separately, however, because of my concern that the majority's opinion may be read to hold that the ability to appeal from final judgment is always an adequate remedy at law such that an injunction will never lie. I do not agree. Further, the posture of this case has a South Carolina circuit court injecting itself into an arbitration proceeding which is under the jurisdiction of the courts of Illinois. As a matter of comity and public policy, I would vacate the injunction and remand with instructions that this case be dismissed.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Carolyn Farnsworth, Appellant/Respondent,

v.

Davis Heating & Air Conditioning, Inc., Respondent/Appellant.

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

Opinion No. 26120
Heard January 18, 2006 – Filed March 6, 2006

AFFIRMED IN PART; REVERSED IN PART

Charles J. Hodge and John G. Reckenbeil, both of Hodge Law Firm, of Spartanburg, for Appellant/Respondent.

D. Ryan McCabe, R. Bryan Barnes, and Robert J. Thomas, all of Rogers, Townsend & Thomas, of Columbia, for Respondent/Appellant.

JUSTICE PLEICONES: The circuit court ordered Appellant/Respondent Carolyn Farnsworth (Farnsworth) to comply with a settlement agreement between herself and Respondent/Appellant Davis

Heating & Air Conditioning, Inc. (Davis). Farnsworth appealed, and Davis cross-appealed.[1] We certified the case from the Court of Appeals pursuant to Rule 204(b), SCACR. We reverse on Farnsworth's appeal, and affirm on Davis's appeal.

FACTS

Farnsworth brought an action against Davis for breach of contract and negligence. During discovery, Farnsworth's attorney sent a letter to Davis's attorney indicating that Farnsworth would release Davis of all liability if Davis were to pay $22,000 to Farnsworth. There is no dispute that Farnsworth authorized her attorney to offer this settlement.

Davis's attorney accepted the offer by signing the letter. Soon thereafter, Farnsworth decided that she wanted a trial. She notified Davis that she was rescinding the agreement. Davis thereafter filed a motion to compel Farnsworth to comply with the agreement. The circuit court granted the motion, holding that Rule 43(k), SCRCP, governed the enforcement of agreement, and that the requirements of the rule had been satisfied.

ISSUES

I. Whether Rule 43(k), SCRCP, was satisfied.

II. Whether Rule 43(k) applies.

ANALYSIS

"Rule 43(k) is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation." Ashfort Corp. v. Palmetto Constr. Group, Inc., 318 S.C. 492, 493-94, 458 S.E.2d 533, 534 (1995). The rule provides, in pertinent part:

[1] The cross-appeal is the product of this case's unusual procedural path, which we need not address to resolve the issues before us. Both appeals involve the two issues addressed below.

> No agreement *between counsel* affecting the proceedings in an action shall be binding unless reduced to the form of a *consent order* or *written stipulation* signed by counsel and *entered in the record*, or unless made in open court and noted upon the record.

Rule 43(k), SCRCP (emphasis added).[2]

I. SATISFACTION OF RULE 43(K)

Prior to filing its motion to compel, Davis admittedly received actual notice that Farnsworth was withdrawing her assent. It was for this reason that Davis filed the motion. Rule 43(k) provides that "[n]o agreement ... shall be binding unless" one of the three conditions listed above is met. In other words, an agreement is non-binding until a condition is satisfied. Until a party is bound, she is entitled to withdraw her assent.

Here, Farnsworth rescinded the agreement before Davis filed the motion to compel. As soon as Davis received notice of rescission, the letter signed by counsel ceased representing an agreement. The circuit court, therefore, ordered Farnsworth to comply with an agreement that did not exist.

II. APPLICABILITY OF RULE 43(K)

Davis claims that compliance with Rule 43(k) is not required in this scenario, because Rule 43(k) does not apply to a written settlement agreement that the parties admit was duly executed. We disagree.

We have held in the past that Rule 43(k) applies to settlement agreements. Ashfort Corp., 318 S.C. at 494, 458 S.E.2d at 534. Davis argues

[2] The rule was amended in 2003, with a sentence added at the end: "Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP." This amendment is irrelevant to the issues before us.

that the rule does not apply here because this agreement is an "admitted" agreement. Davis relies on dictum of this Court and holdings of the Court of Appeals that Rule 43(k) "does not apply where the agreement is admitted or has been carried into effect." Ashfort Corp., 318 S.C. at 494, 458 S.E.2d at 534 n.1 (citing Ex parte Pearson, 79 S.C. 302, 309, 60 S.E. 706, 708 (1908), in which the Court held that Circuit Court Rule 14, the predecessor to Rule 43(k), did not apply to agreements that had been admitted or carried into effect);[3] see also Widewater Square Assocs. v. Opening Break of Am., Inc., 319 S.C. 243, 245, 460 S.E.2d 396, 397 (1995) (referring to the Ashfort dictum); Reed v. Associated Inv. of Edisto Island, Inc., 339 S.C. 148, 152, 528 S.E.2d 94, 96-97 (Ct. App. 2000) (citing the Ashfort dictum as a rule of law); Galloway v. Regis Corp., 325 S.C. 541, 546, 481 S.E.2d 714, 716 (Ct. App. 1997) (same). The Ashfort dictum does not comport with the language of Rule 43(k).

The rule is plainly worded: "No agreement ... shall be binding unless" one of the three requirements is met. "Under our general rules of construction, the words of a statute must be given their plain and ordinary

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[3] Circuit Court Rule 14 provided:

> No agreement or consent between parties, or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order by consent and entered; or unless the evidence shall be in writing, subscribed by the party against whom shall be alleged, or by his attorney or counsel; or unless made in open court and noted by the presiding judge or the stenographer on his minutes by the direction of the presiding judge.

Under this rule, Davis and Farnsworth's agreement would be enforceable simply because it is in writing. Unlike Rule 43(k), Circuit Court Rule did not contain the additional requirement that written agreements be entered into the record.

meaning without resort to subtle or forced construction to limit or expand the statute's operation." State v. Muldrow, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2003). "In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes." Maxwell v. Genez, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003). Because Rule 43(k) plainly applies to all settlement agreements signed by counsel, we find no merit in Davis's argument that the rule does not apply in this case.

CONCLUSION

On Farnsworth's appeal, we reverse. On Davis's appeal, we affirm. The case is remanded to the circuit court for trial.

AFFIRMED IN PART; REVERSED IN PART.

TOAL, C.J., MOORE, J., and Acting Justices Clyde N. Davis, Jr., and Donna S. Strom, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Johnell Porter, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal from Chester County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 26121
Submitted October 19, 2005 – Filed March 6, 2006

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Molly R. Crum, all of Columbia, for Petitioner.

Assistant Appellate Defender Aileen P. Claire, South Carolina Office of Appellate Defense, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: The post-conviction relief (PCR) court granted Johnell Porter (Porter) a new trial after finding that counsel was ineffective for failing to file a *Brady* motion, failing to investigate the validity of a photographic identification, and failing to interview a witness. This Court granted the State's petition to review the PCR court's decision. We reverse.

FACTUAL / PROCEDURAL BACKGROUND

Porter was indicted in 1980 for the armed robbery of Morris Jewelers. Porter pled guilty and was sentenced to twelve years confinement, consecutive to any sentence imposed by other jurisdictions.[1] Porter did not appeal his guilty plea or sentence.

Porter applied for PCR in 1984. The PCR petition was dismissed without prejudice, with leave to re-file when Porter returned to South Carolina to serve his sentence. Porter refiled his petition for PCR in 1997, after being returned to South Carolina. This petition was also dismissed. Porter subsequently moved for a new PCR hearing, which was granted. At the hearing, Porter argued that his trial counsel was ineffective for failing to file a *Brady* motion, failing to investigate the validity of a photographic identification, and failing to interview a witness. The PCR judge agreed with Porter and granted Porter a new trial.

The State appealed, raising the following issues for review:

I. Did the PCR court err in finding Porter's trial counsel ineffective for failing to file a *Brady* motion?

II. Did the PCR court err in finding Porter's trial counsel ineffective for failing to investigate the validity of the photographic identification?

[1] At the time of the plea, Porter was incarcerated in North Carolina.

III. Did the PCR court err in finding Porter's trial counsel ineffective for failing to interview a witness?

STANDARD OF REVIEW

This Court gives great deference to the PCR court's findings of fact and conclusions of law. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000) (citing *McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995)). On review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). If no probative evidence exists to support the findings, this Court will reverse. *Pierce v. State*, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000) (citing *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996)).

LAW / ANALYSIS

I. *Brady* Motion

The State contends that the PCR court erred in finding that Porter's trial counsel was ineffective for failing to file a *Brady* motion. We agree.

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An applicant may attack the voluntary and intelligent character of a guilty plea entered on the advice of counsel only by demonstrating that counsel's representation was below an objective standard of reasonableness. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). Further, the applicant must show that there is a reasonable probability that he would have insisted on proceeding to trial on the matter instead of pleading guilty. *Id.* Additionally, the applicant has the burden of proving the allegations of the PCR petition. *Bannister v. State*, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998).

The *Brady* disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. *State v. Kennerly*, 331 S.C. 442, 452, 503 S.E.2d 214, 220 (Ct. App. 1998) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). Favorable evidence includes both exculpatory evidence and evidence which may be used for impeachment. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, (1985). Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. *Kennerly*, 331 S.C. at 453, 503 S.E.2d at 220. "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Bagley*, 473 U.S. at 678, 105 S.Ct. at 3381. Furthermore, the prosecution has the duty to disclose such evidence even in the absence of a request by the accused. *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392,(1976).

In the instant case, the prosecution did not possess any material evidence which was not disclosed to Porter's trial counsel. The evidence Porter claims his trial counsel failed to obtain through a *Brady* motion consists of the fact that the witness did not identify Porter at the crime scene. This information was immaterial in light of the subsequent identification of Porter in a photographic line-up. Further, Porter has failed to provide any evidence of probative value that would indicate the outcome of the proceeding would have been different. Stated otherwise, the confidence of the proceeding has not been undermined. Regardless of the witness' inability to identify Porter at the scene of the crime, the fact remains that Porter was positively identified by the witness in a photographic line-up. Moreover, Porter's co-defendant also indicated a willingness to identify Porter as one of the perpetrators. In addition, Porter's trial counsel testified that he informed Porter that the solicitor would request a life sentence if Porter went to trial and was found guilty. Accordingly, we find that the alleged nondisclosure was not material exculpatory evidence.

While the materiality of the evidence is important, the dispositive issue in this case is whether trial counsel rendered reasonably effective

assistance under prevailing professional norms. The United States Supreme Court has held that, although not required to do so by law, if a prosecutor adopts an "open file policy" where the defense is allowed to review the prosecution file in satisfaction of the prosecution's discovery obligations and the duty to disclose material exculpatory evidence as a matter of the due process clause, defense counsel may reasonably rely on that file to contain all materials the state is obligated to disclose.[2] *Strickler v. Greene*, 527 U.S. 263, 283 n.23, 119 S.Ct. 1936, 1949 n.23 (1999).

Porter's trial counsel testified at the PCR hearing that he did not file a formal *Brady* motion because the solicitor had an open file policy. Porter's trial counsel was allowed to review all the evidence in the solicitor's file. Under *Strickler*, Porter's trial counsel's failure to file the *Brady* motion was reasonable in light of the open file policy.

For these reasons, we find that Porter's trial counsel's failure to file a *Brady* motion did not constitute ineffective assistance of counsel.

II. Photographic Line-up

The State contends that the PCR court erred in finding that Porter's trial counsel was ineffective for failing to investigate the validity of the photographic identification. We agree.

Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998).

[2] It is important to note that we do not find that the prosecution is presumed to comply with *Brady* simply by instituting an open file policy. The duty to disclose under *Brady* applies to the prosecution regardless of the manner in which the prosecution chooses to do so.

Porter's trial counsel testified that he had the opportunity to examine the photographic line-up from which Porter was identified. Counsel further testified that the line-up was reasonable. The photographic line-up formed the basis upon which the arrest warrant for Porter was issued. No probative evidence was presented at the PCR hearing to show that the statement in the arrest warrant was false, [3] or that the witness's identification of Porter from the photographic line-up was false or unreasonable. Additionally, no evidence was presented at the PCR hearing showing that further investigation would have lead to a different result. Accordingly, we hold that Porter's trial counsel's failure to further investigate the identification was neither deficient nor prejudicial, and thus did not rise to the level of ineffective assistance of counsel.

III. Witness Interview

The State argues that the PCR court erred in finding that Porter's trial counsel was ineffective for failing to interview a witness. We agree.

Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR. *Bannister*, 333 S.C. at 303, 509 S.E.2d at 809.

Porter's trial counsel testified that he did not interview the witness because he believed the information that was given to him by the solicitor and the chief of police was true. Despite the improvidence of counsel's reliance on these statements alone, Porter has not presented any evidence showing that an interview of the witness would have yielded a result different from that which Porter's trial counsel believed at the time of the plea. Porter pled guilty in light of the complete information that was available at that

[3] The Chief of Police made the sworn statement in the arrest warrant that the "[d]efendant was identified as one of the suspects involved in the armed robbery of Morris Jewelers in Great Falls, SC. [A witness] identified the defendant in a photo-line up [sic]."

time. Therefore, we hold that Porter's trial counsel's failure to interview a witness did not amount to ineffective assistance of counsel.

Because we find that trial counsel's performance was not deficient, Porter has not satisfied the first prong of *Strickland*. Accordingly, a finding of prejudice is not required.[4]

CONCLUSION

For the foregoing reasons, we reverse the PCR court's ruling and reinstate Porter's conviction and sentence.

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

[4] The dissent would find trial counsel's performance deficient and that Porter was prejudiced thereby. In doing so, the dissent misconstrues *Jackson v. State*. 342 S.C. 95, 535 S.E.2d 926 (2002). In *Jackson*, this court held that where the only evidence of prejudice is the PCR applicant's own testimony, this evidence is sufficient, but only in the absence of evidence that rebuts the testimony. *Id*. at 97, 535 S.E.2d at 927. In other words, the PCR applicant's statement is only sufficient where there is no other probative evidence that contradicts the statement. *Id*. In the instant case, the record contains probative evidence in contradiction to Porter's statement, including statements by his trial counsel concerning the co-defendant's willingness to identify Porter, Porter's knowledge of a positive photographic identification, and the solicitor's intention to request a life sentence at trial. Therefore, even if counsel's performance was deficient, Porter would not satisfy the prejudice requirement of *Strickland* because *Jackson* is not applicable to the instant case.

JUSTICE PLEICONES: I respectfully dissent and would affirm the post-conviction relief (PCR) judge's order because I find there is some evidence of probative value in the record to support his findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The PCR judge found trial counsel was ineffective in failing to file a Brady motion. Had such a motion been made, the State presumably would have revealed the fact that the witness who identified Porter in a photo line-up had been unable to identify him at the scene, a fact which would have had impeachment value had the witness testified at trial.

The first question is not whether the PCR court erred in finding counsel's performance deficient in failing to make a Brady request, but rather there is any evidentiary support in the record for the finding.[1] Cherry, *supra*. While I may not have reached the same conclusion as the PCR judge regarding counsel's performance, I cannot say it lacks evidentiary support especially in light of trial counsel's testimony that he did no independent investigation but instead relied solely on information supplied by law enforcement and by the solicitor's office.

The second question is whether the record contains any evidence of probative value to support the PCR judge's finding that Porter established the prejudice as the result of this deficient performance, that is, evidence that but for counsel's deficient performance Porter would not have pled guilty but would have insisted on going to trial. In my opinion, Porter's testimony that he would not have pled had he had all relevant information is sufficient to uphold the PCR judge's prejudice finding. E.g., Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994) (great appellate deference to PCR judge's

[1] Certainly had the PCR found counsel's performance not deficient because he reasonably relied upon the solicitor's open file policy, that finding would be upheld under Cherry. Nothing in Strickler v. Greene, 527 U.S. 263 (1999), however, precludes a finding that such reliance was not reasonable. This is especially so where, as here, the undisclosed evidence is not a document or other physical item, but rather something intangible, a witness's non-identification.

credibility findings required Court to uphold judge's determination even where testimony at PCR hearing flatly contradicted by trial record).

In Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000), the Court held that where an applicant's testimony that he would not have pled guilty but for counsel's deficient performance was the only evidence of prejudice in the record, the PCR judge could not, in the absence of other evidence, merely discount that evidence as incredible and thereby deny relief. The Court reversed the PCR judge's finding that Jackson had failed to present evidence of prejudice, citing Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991) where we also reversed the denial of PCR because there was no evidence in the record other than the applicant's claim of prejudice. Further, in Jackson the Court specifically overruled Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996) "to the extent [it] can be read to hold that petitioner's statement is insufficient evidence to satisfy the prejudice prong . . . ." In other words, the testimony of the PCR applicant is to be viewed as that of any other witness.

In my opinion, the majority misreads Jackson as permitting this Court to weigh the evidence of prejudice in the record on certiorari when the finding rests on the applicant's testimony. Jackson and Alexander were reversed on certiorari because the PCR judges had erroneously denied relief where the only evidence in the record supported the applicant's claim. Here we have a record with conflicting evidence on the question of prejudice, and the issue before us is whether there is any evidence in the record to support the prejudice finding. Porter's testimony is such evidence, Jackson, *supra*; Solomon, *supra*, and the finding should therefore be upheld. Cherry, *supra*.

While I may not have made the same findings as did the PCR judge on the failure to file a Brady motion claim, or on the failure to interview a witness issue, under our limited scope of review these findings should be upheld. Cherry, *supra*. I therefore respectfully dissent and would affirm the grant of PCR to Porter.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lorraine S. Wilson, Joseph Pinckney, Jr., Michael Lisbon, Judy Spradley, Clifford Middletown and Arthur Meeks, on behalf of themselves and others similarly situated, Appellants,

v.

Style Crest Products, Inc, Tie Down Engineering, Minute Man Products, Champion Home Builders Co., CMH Manufacturing, Inc. d/b/a Clayton Homes, Inc., Fleetwood Enterprises, Inc., Fleetwood Homes of Georgia, Inc., Horton Homes d/b/a Dynasty Homes, Inc., and d/b/a H&S Homes, HBOS Manufacturing, Limited Partnership a/k/a HBOS Manufacturing, LP successor in interest of Schult Homes Corporation, successor in interest of Homes by Fisher, Inc. and Southern Energy Homes,
Defendants,

of whom Style Crest Products, Inc., Tie Down Engineering, Minute Man Products,

Champion Home Builders Co., CMH Manufacturing Inc. d/b/a Clayton Homes, Inc., Fleetwood Enterprises, Inc., Fleetwood Homes of Georgia, Inc., Horton Homes d/b/a Dynasty Homes, Inc. and d/b/a H&S Homes and Southern Energy Homes are the

Respondents.

Appeal From Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 26122
Heard October 4, 2005 – Filed March 6, 2006

AFFIRMED

Christopher McG. Holmes, of Mount Pleasant, and Paul J. Doolittle, of Motley Rice, of Mount Pleasant, for Appellants.

Albert A. Lacour, III, of Clawson & Staubes, Inc., and Michael A. Scardato, of McNair Law Firm, PA, both of Charleston, and Robert L. Widener, of McNair Law Firm, of Columbia, for Respondent Minute Man Products, Inc.; Charles E. Carpenter, Jr., Steven J. Pugh, and Drew Hamilton Butler, all of Richardson, Plowden, Carpenter & Robinson, PA, of Columbia; and John K. Blincow, Jr., and Sean A. O'Connor, both of Turner, Padget, Graham & Laney,

PA, of Charleston, for Respondent Style Crest Products, Inc.; Benjamin D. McCoy, Andrew E. Haselden, and Rowland P. Alston, III, all of Howser, Newman & Besley, LLC, of Columbia, for Respondent CMH Manufacturing; C. Tyson Nettles, of Robertson & Hollingsworth, of Charleston; J. Boone Aiken, of Aiken, Bridges, Nunn, Elliott & Taylor, PA, of Florence, for Respondent Horton Homes; Morgan S. Templeton, of Elmore & Wall, PA, of Charleston, and W. Scott Simpson, of Batchelor & Simpson, of Birmingham, for Respondent Southern Energy Homes; R. Michael Ethridge and N. Keith Emge, Jr., both of Carlock, Copeland, Semler & Stair, LLP, Robert T. Lyles, Jr., of Lyles & Lyles, LLC, all of Charleston, and Cari Hicks, of Leatherwood, Walker Todd & Mann, of Greenville, for Respondent Tie Down Engineering; S. Keith Hutto, C. Mitchell Brown, and William H. Latham, of Nelson, Mullins, Riley & Scarborough, LLP, of Columbia, for Respondents Fleetwood Enterprises, Inc., Fleetwood Homes of Georgia, and Champion Enterprises.

JUSTICE WALLER: This is a class action in which the circuit court granted the defendants summary judgment. We affirm.

FACTS

The Appellants (hereinafter referred to as "Homeowners") own mobile homes in South Carolina which were manufactured by several of the respondents (hereinafter referred to as "Home Defendants"). The homes are secured by a soil anchor tie down system with component parts which were manufactured and sold by the respondents Style Crest Products, Tie Down Engineering, and Minute Man Products (hereinafter referred to as "Anchor Defendants"). The Homeowners allege all the Defendants are liable for the failure of the anchor system to adequately secure their homes in high winds. They allege the anchor systems do not meet applicable United States Department of Housing and Urban Development (HUD) and the South Carolina Manufactured Housing Board codes. The Homeowners are seeking to recover the cost of the anchor systems, approximately $1,000-$1,200 each,

the cost to upgrade the anchor system to one which is effective, or the cost of a permanent foundation, approximately $2,500-$7,000 each.

In their complaint, the Homeowners allege: 1) negligence; 2) negligence per se; 3) breach of express warranty; 4) breach of implied warranty of workmanlike service; 5) breach of implied warranty of merchantability; 6) fraud and misrepresentation; 7) negligent misrepresentation; and 8) fraudulent concealment. In two separate orders, the circuit court granted the Defendants' summary judgment motions primarily on the ground that the Homeowners have not suffered any actual damages. The Homeowners appeal only the grant of summary judgment as to: Count 3 (breach of express warranty) against only the Home Defendants; and Counts 4, 5, and 8 (breaches of implied warranty of workmanlike service and merchantability and fraudulent concealment) against both Defendants. The Homeowners do not appeal the grant of summary judgment as to the other claims, i.e negligence/tort claims.

DISCUSSION

Standard of Review

Summary judgment is proper only when it is clear that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. Hamilton v. Miller, 301 S.C. 45, 47, 389 S.E.2d 652, 653 (1990). Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Id.

Damages

The Homeowners concede that they have not suffered any personal injuries or physical damage to their homes. However, they contend they have

suffered an economic loss by purchasing a defective product.[1] They allege they purchased a faulty anchor system which does not adequately secure their homes. The pivotal issue in this case is whether the Homeowners must prove an actual injury to person or property to bring their warranty and fraudulent concealment claims.[2]

Arguably, a few cases support the Homeowners' position that the loss of the benefit of the bargain is sufficient damage in a warranty action. Coghlan v. Wellcraft Marine Corp., 240 F.3d 449 (5th Cir.2001) (holding damage was loss of "benefit of the bargain"); Microsoft Corp. v. Manning, 914 S.W.2d 602 (Tex. App. 1995) (holding buyer of defective software program has warranty action even if he never suffers data loss as a result of the defect because buyer did not get what he bargained for). However, the no-injury approach to product litigation has been rejected in most decisions. See, e.g. Briehl v. General Motors Corp., 172 F.3d 623 (8th Cir. 1999). In Briehl, the plaintiffs brought a class action fraud lawsuit based on an allegedly defective anti-lock brake system (ABS) in vehicles manufactured by General Motors. The plaintiffs did not allege that the brake system had ever malfunctioned or failed. The Eighth Circuit Court of Appeals held that "[t]he Plaintiff's conclusory assertions that they, as a class, have experienced damages . . . are simply too speculative to allow this case to go forward. The Plaintiffs' assertions that their ABS-equipped vehicles are defective and that they have suffered a loss in resale value as a result of the defect is insufficient as a matter of law to plead a claim under any theory the plaintiffs have advanced." Id. at 629. See also e.g. Jarman v. United Industries Corp., 98 F.Supp.2d 757 (S.D. Miss. 2000) (dismissing fraud, warranty, and various statutory claims for purchase of allegedly ineffective pesticide where there is

[1]A defective product causes a purely economic loss when the product causes no personal injuries and damages no property other than the "product itself." East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 870 (1986).

[2]The Homeowners contend the circuit court misconstrued their claims as alleging products liability claims rather than claims for breaches of warranties. We disagree. The circuit court judge specifically noted that under either a tort or products liability theory, the Homeowners must establish an actual injury citing Small v. Pioneer Machinery, Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997).

no allegation of actual product failure); Weaver v. Chrysler Corp., 172 F.R.D. 96 (S.D.N.Y.1997)(dismissing class-action fraud and warranty lawsuit for allegedly defective integrated child seats where there is no allegation that the product has malfunctioned or the defect manifested itself); Yost v. General Motors Corp., 651 F.Supp. 656 (D.N.J. 1986)(dismissing fraud and warranty claims for alleged engine defect where engine has not malfunctioned and plaintiff alleges diminished value only).

In most of these cases, the defective products the plaintiffs had purchased had performed satisfactorily and, therefore, the courts found that the plaintiffs had reaped the benefit of their bargain and could not bring a warranty action. "That is simply another way of saying that the products were, in fact, merchantable, and therefore there was no breach of warranty." In re Bridgestone/Firestone, Inc. v. Tires Products Liability Litigation, 155 F.Supp.2d 1069, 1100 (S.D.Ind. 2001). Likewise, here, the anchors are merchantable. The evidence here is that the plaintiffs have received what they bargained for – an anchor system which has been effective in high winds. There is no evidence that the anchor systems have not, to date, been exactly what the Homeowners bargained for. In fact, here, several Homeowners testified at their depositions that their mobile homes have weathered hurricanes without any damage.[3]

Additionally, a few jurisdictions have concluded that the "diminution in value" of a product alone is enough to succeed on a common-law fraud claim. Miller v. William Chevrolet/GEO, Inc., 762 N.E.2d 1 (Ill. App. 2001). However, without an injury or a defect, there has been no diminution in value to support the Homeowner's fraudulent concealment claim.

We hold the Homeowners need to show that the product delivered was not, in fact, what was promised and they have not shown that. Accordingly, the circuit court's grant of summary judgment is

[3]The Homeowners rely on studies conducted over the past twenty-five years which they contend establishes that the anchor systems are flawed and do not adequately secure mobile homes. Many of these studies were conducted by HUD. As the Homeowners contend, the studies have "questioned the effectiveness of the soil anchor system."

AFFIRMED.

TOAL, C.J., MOORE and BURNETT, JJ., concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE PLEICONES: I concur in part and respectfully dissent in part. Although my reasoning differs from the majority's, I agree that the grant of summary judgment to the Home Defendants should be affirmed with respect to all of Homeowners' breach-of-warranty claims. Also, but for different reasons, I concur in the majority's affirmance of the grant of summary judgment to the Anchor Defendants with respect to Homeowners' claim for breach of the implied warranty of workmanlike service. I dissent from the majority's affirming the grant of summary judgment to the Anchor Defendants with respect to Homeowners' claim for breach of the implied warranty of merchantability, and from its affirmance of the grant of summary judgment to both defendants on the fraudulent-concealment claim.

FACTS

The Home Defendants manufactured and sold the mobile homes at issue to retailers, which in turn sold them to Homeowners. In an effort to comply with regulations promulgated pursuant to the National Manufactured Housing Construction Safety Standard Act of 1974,[1] the Home Defendants provided with each home a manual suggesting that the anchor system was a device suitable for stabilizing the home. See 24 C.F.R. § 3280.306(b) (2004). As required by the regulation, the manual included drawings and specifications of the anchor system, as well as installation instructions. The manual's contents were certified as complying with HUD standards by a Design Approval Primary Inspection Agency (DAPIA), which is a "State agency or private organization that has been approved by the Secretary [of HUD] to evaluate and either approve or disapprove manufactured home designs and quality control procedures." 42 U.S.C.A. § 5402(18) (2003).

Homeowners' claims against the Home Defendants relate to the information about the anchor system provided in the installation manual. Homeowners' claims against the Anchor Defendants relate to the quality of

[1] 42 U.S.C.A. §§ 5401-5426 (2003).

the anchor system itself.[2] Homeowners have presented evidence of studies, including studies conducted by HUD, indicating that the anchor system does not meet HUD standards and is inadequate under certain wind conditions. Homeowners concede that the anchor system has caused no damage to any person or property, but they argue that they are entitled to damages because they did not receive the benefit of their bargain.

ANALYSIS

I disagree with the majority that Homeowners must allege and prove physical injury to person or property in order to pursue their breach-of-warranty and fraudulent-concealment claims. This disagreement requires me to address issues not reached in the majority opinion.

I. IMPLIED WARRANT OF MERCHANTABILITY

I cannot concur in the majority opinion's holding that without a claim of physical injury to person or property, a plaintiff may not successfully pursue a breach-of-warranty claim. While the term "products liability" generally brings to mind liability in tort – negligence and strict liability – the third theory of products liability, breach of warranty, is a contract theory. See James J. White, Reverberations from the Collision of Tort and Warranty, 53 S.C. L. Rev. 1067 (2002) (discussing the prevalent and unfortunate misunderstanding of the difference between tort and contract claims in the field of products liability). If the plaintiff asserts that the defendant is liable in tort for a defective product, then of course the plaintiff must prove physical injury to person or property. There is no doubt, however, that a plaintiff who asserts breach of warranty must prove only that his contractual expectations were not fulfilled. See S.C. Code Ann. § 36-2-714 (2003) (titled, "Buyer's damages for breach in regard to accepted goods"); Gasque v. Eagle Mach. Co., 270 S.C. 499, 502-03, 243 S.E.2d 831, 831-32 (1978) (in a product-liability action involving a claim of breach of warranty under article 2 of the

[2] The Home Defendants did not sell the anchor system at issue. The Anchor Defendants did. HUD does not require that home manufacturers provide the stabilizing device. 24 C.F.R. § 3280.306(a)(2) (2004).

Uniform Commercial Code (U.C.C.), explaining that a buyer need prove only that the goods delivered by the seller were not as promised).

In the alternative, the majority opinion finds that even if contract law were applicable, Homeowners in fact received the benefit of their bargain because the anchor system was in fact merchantable. Yet, this finding of merchantability is based on the very fact that the anchor system has caused no physical injury. The majority opinion thereby derogates the principle that goods either conform to the contract upon delivery or they do not. Goods do not become non-conforming only upon causing injury.

In my opinion, it must be properly determined in the circuit court whether the anchor system sold by the Anchor Defendants was merchantable under South Carolina Code section 36-2-314.[3] If it was not, then Homeowners are entitled to relief under section 36-2-714. I would reverse the grant of summary judgment to the Anchor Defendants on the merchantability claim.

Conversely, the grant of summary judgment to the Home Defendants on the merchantability claim should be affirmed, but not for the reasons cited by the circuit court. First, as stated above, I disagree that Homeowners must prove physical injury to pursue this claim. Second, I disagree with the circuit court that the Home Defendants cannot be liable for breach of warranty because they did not sell the anchor system.[4] Homeowners' claim against the Home Defendants is not that the *anchor system* was unmerchantable, but

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[3] S.C. Code Ann. § 36-2-314 (2003).

[4] Only a "seller" makes a warranty under article 2 of the U.C.C. See S.C. Code Ann. §§ 36-2-313 (express warranty), -314 (implied warranty of merchantability), and -315 (implied warranty of fitness for a particular purpose) (2003); see also S.C. Code Ann. § 36-2-318 (2003) (effectively abolishing the common-law rule of privity with respect to a "seller's warranty").

rather that the *mobile homes* sold by the Home Defendants[5] were unmerchantable because of the allegedly flawed anchor system. Homeowners emphasize that under HUD regulation 3280.306(b), the Home Defendants could not sell their mobile homes without providing the installation manual discussed above. According to Homeowners, if the anchor system recommended in the manual failed to meet HUD standards, then the mobile home was unmerchantable.

In my opinion, Homeowners improperly focus on the manual's recommendation of this particular stabilizing device. Regardless whether the anchor system fails to meet HUD regulations, is unmerchantable, or both, the important question is whether the *mobile homes* are fit for *their* ordinary purpose ... to serve as a dwelling. See S.C. Code Ann. § 36-2-314(2)(c). There is no evidence in the record, and Homeowners do not actually allege, that the mobile homes are unfit for that purpose.

The only reason that the mobile homes could be unmerchantable on account of the manual would be lack of HUD certification. A HUD approved manual is necessary for any mobile home to be "adequately ... labeled as the agreement may require." S.C. Code Ann. § 36-2-314(2)(e) (another test for merchantability). As mentioned above, the Home Defendants' manual was certified by a DAPIA on behalf of HUD.

For these reasons, I concur in the majority's affirming the grant of summary judgment to the Home Defendants on the merchantability claim.

[5] Homeowners purchased their respective mobile homes from third-party dealers, not the Home Defendants. That is unimportant to Homeowners' breach-of-warranty claims, however, for lack of privity is no defense to an article 2 breach-of-warranty claim. See S.C. Code Ann. § 36-2-318 (2003).

II. EXPRESS WARRANTY

I also concur in the majority's affirming the grant of summary judgment on Homeowners' express-warranty claim against the Home Defendants. Homeowners have failed to preserve their express-warranty claim against the Home Defendants for appellate review. The discussion of express warranty in the circuit court's order pertains only to installation of the anchor system, which is not the subject of Homeowners' claim. Homeowners' claim is that in the installation manual the Home Defendants expressly warranted the compatability of the mobile homes and the anchor system. Because the circuit court's order does not address this issue, Homeowners needed to file a motion pursuant to Rule 59(e), SCRCP, asking the circuit court to rule on it. Homeowners failed to file such a motion; therefore, the express-warranty issue is not preserved for review. See United Student Aid Funds, Inc. v. S.C. Dep't of Health and Envtl. Control, 356 S.C. 266, 273, 588 S.E.2d 599, 602 (2003) (applying the rule that "where a trial court does not explicitly rule on an argument raised and appellant makes no Rule 59 motion to obtain a ruling, the appellate court may not address the issue") (from parenthetical to omitted citation).

III. IMPLIED WARRANTY OF WORKMANLIKE SERVICE

I also agree with the majority that the circuit court did not err in granting summary judgment to both defendants on Homeowners' workmanlike-service claims. The implied warranty of workmanlike service is a service warranty created at common law. See Parkway Co. v. Woodruff, 901 S.W.2d 434, 438 (Tex. 1995). Here, the asserted liability of both defendants relates to their being sellers of goods. Assuming that one or both defendants provided some service, it was incidental to the sale of goods. Any breach-of-warranty claim in this case therefore falls within the specific warranty provisions in article 2 of the U.C.C. See Plantation Shutter Co. v. Ezell, 328 S.C. 475, 478-80, 492 S.E.2d 404, 406-07 (Ct. App. 1997) (discussing and applying the "predominant factor" test for determining whether the U.C.C. or the common law of contracts governs); see also Hitachi Elec. Devices (USA), Inc. v. Platinum Tech., Inc., 366 S.C. 163, ___,

621 S.E.2d 38, 41 (2005) (discussing and applying displacement of the common law when the U.C.C. "comprehensively addresses" a particular subject).

IV. FRAUDULENT CONCEALMENT

Unlike the majority, I would hold that the grant of summary judgment to both defendants on the fraudulent-concealment claim should be reversed.

On one hand, the majority holds that a plaintiff must prove physical injury to person or property in order to successfully pursue a fraudulent-concealment claim. It has long been the rule, however, that the "measure of general damages in [a fraudulent-concealment] case, according to the 'benefit of the bargain' rule, is the difference between the actual value of [the property] at the time of the sale and the value that it would have had if the concealed defect had not existed." Lawson v. Citizens and S. Nat'l Bank of S.C., 255 S.C. 517, 521, 180 S.E.2d 206, 209 (1971); see also Starkey v. Bell, 281 S.C. 308, 313, 315 S.E.2d 153, 156 (Ct. App. 1984) (explaining that South Carolina "follows the majority 'benefit of the bargain' rule" in "an action for fraud and deceit").

On the other hand, the majority holds that "without an injury or a defect, there has been no diminution in value to support Homeowner's [sic] fraudulent concealment claim." In so holding, the majority suggests that a buyer receives the benefit of his bargain as long as the item purchased has not yet caused physical injury. This suggestion deviates from traditional analysis. As explained above, physical injury has nothing to do with whether a buyer has received the benefit of his bargain. See Gasque, 270 S.C. at 503, 243 S.E.2d at 832.

Whether Homeowners can prove the elements of their fraudulent-concealment claim has not been determined in the circuit court. The grant of summary judgment on this claim was based solely on the absence of asserted physical injury. The circuit court erred in this regard, and I would reverse the grant of summary judgment to both defendants on this claim.

CONCLUSION

I concur in the majority's affirming the grant of summary judgment to the Home Defendants on the following claims: breach of the implied warranty of merchantability; breach of express warranty; and breach of the implied warranty of workmanlike service. I also concur in the majority's affirming the grant of summary judgment to the Anchor Defendants on the claim for breach of the implied warranty of workmanlike service.

I disagree with the majority's affirmance of the grant of summary judgment to both defendants on the fraudulent-concealment claim, and to the Anchor Defendants on the claim for breach of the implied warranty of merchantability. I would therefore reverse the grants of summary judgment on these claims.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Michael James Laney, Appellant.

Appeal From Greenville County
Henry F. Floyd, Circuit Court Judge

Opinion No. 26123
Heard January 5, 2006 – Filed March 6, 2006

REVERSED AND REMANDED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

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

JUSTICE BURNETT: Michael James Laney (Appellant) was charged with two counts of murder; two counts of possession of a weapon during the commission of or attempted commission of a violent crime; arson to a dwelling; criminal sexual conduct, first degree; and kidnapping. He was

found guilty on all counts and sentenced to death. We reverse and remand for a new sentencing proceeding.

FACTUAL/PROCEDURAL BACKGROUND

On September 25, 2000, Dorothy Hancock and Thelma Godfrey were murdered in Hancock's home in Greenville County. The victims were neighbors and both in their eighties. Around 9:15 p.m. that night, John Gillard, another neighbor, heard a loud noise. Upon investigation, he saw smoke coming from Hancock's house and observed Hancock's garage door had been smashed and her car was missing. He entered the garage and saw Hancock's body on the floor. Gillard's wife reported the incident to 911. Responding to the call, a firefighter found Godfrey's body in a bedroom; her body was tied to a chair with a telephone cord and was covered with tape, a sheet, and a cloth.

Dr. Michael Ward, the Greenville County Medical Examiner, performed autopsies on both victims and testified as an expert in forensic pathology. He testified Hancock had several broken ribs, a broken sternum, and had been sexually assaulted. He testified Hancock received three stab wounds including a fatal stab cutting her throat from side to side. Hancock's cause of death was multiple blunt and sharp forced injuries.

Ward testified Godfrey had stab and incise wounds to the neck which included a cut trachea. He determined the incise wounds caused Godfrey's death.

David Tafaoa of the South Carolina Law Enforcement Division (SLED) testified as an expert in arson investigation. He opined the fire in Hancock's house was intentionally set by someone pouring an ignitable liquid in four different areas of the house. Alex Layton of SLED testified several swatches of carpet from Hancock's house tested positive for the accelerant gasoline.

On September 26, 2000, Appellant was arrested in North Carolina as a suspect in the double homicide. Officers testified the coveralls

Appellant was wearing at the time of his arrest smelled of gasoline. Hancock's blood was found on the coveralls and on Appellant's underwear. Appellant's blood was under Hancock's fingernails and his semen was on her body. Appellant's fingerprints were on a phone base and an end section of cut tape collected from under the bedspread in the room where Godfrey was found.

During the sentencing phase of his trial, Appellant presented mitigating evidence regarding his mental ability and health. Two doctors testified Appellant was not mentally retarded but had mental illnesses. Another doctor testified Appellant's IQ was between borderline intellectual functioning and mild mental retardation. The State sought the death penalty based on the following statutory aggravating circumstances: (1) the murder was committed while in the commission of a criminal sexual conduct in the first degree; (2) the murder was committed while in the commission of a kidnapping; and (3) two or more persons were murdered by Appellant by one act or pursuant to one scheme or course of conduct.

As part of the jury charges during the sentencing proceeding, the trial judge charged the jury to consider the above-referenced statutory aggravating circumstances and the following statutory mitigating circumstances: (1) whether Appellant was under the influence of a mental or emotional disturbance; (2) whether Appellant was mentally retarded; (3) whether Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired; and (4) Appellant's age or mentality. S.C. Code Ann. § 16-3-20(C)(a) &(b) (2003 & Supp. 2004). After finding Appellant guilty as charged, a jury recommended the death penalty. Appellant was sentenced to death for each of the murders, thirty years imprisonment for criminal sexual conduct, and twenty years imprisonment for arson, to be served consecutively. Appellant was not sentenced for the kidnapping and weapon convictions. S.C. Code Ann. §§ 16-3-910 & 16-23-490 (2003). This appeal follows and Appellant seeks a new sentencing proceeding.

ISSUES

I. Did the trial court err by not charging the jury that a life imprisonment sentence meant life without parole because the State offered evidence of Appellant's future dangerousness?

II. Do the cases of Atkins v. Virginia and Ring v. Arizona, decided by the United States Supreme Court after Appellant's trial, require Appellant's case to be remanded for a new sentencing proceeding before a jury?

III. Did the trial court lack subject matter jurisdiction to sentence Appellant to death because the murder indictments did not identify any statutory aggravating circumstances necessary to expose Appellant to a punishment of death?

STANDARD OF REVIEW

In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

LAW/ANALYSIS

I. Jury Charge

Appellant argues the trial judge erred by failing to charge the jury that a life imprisonment sentence meant life without parole. We agree.

Appellant contends a jury charge that life imprisonment meant life without parole was required under Simmons v. South Carolina, 512 U.S.

154, 114 S.Ct. 2187 (1994); Shafer v. South Carolina, 532 U.S. 36, 121 S.Ct. 1263 (2001); and Kelly v. South Carolina, 534 U.S. 246, 122 S.Ct. 726 (2002), because the State offered evidence of Appellant's future dangerousness. The State concedes it submitted evidence supporting Appellant's future dangerousness during the sentencing phase of the trial.[1] The State further concedes due process required Appellant be given an opportunity to inform the jury of parole ineligibility, but contends the issue is procedurally barred from review. In the alternative, the State argues due process was not violated because Appellant's counsel told the jury that life imprisonment meant life without parole.

After reviewing the entire record, we find the issue sufficiently preserved for review on appeal. Further we find it unnecessary to address the State's due process argument to resolve this issue.

In Shafer and Kelly, the United States Supreme Court held that where a defendant's future dangerousness is at issue in a capital sentencing proceeding, and the only sentencing alternative to death available to the jury is life imprisonment without parole, due process entitles the defendant to inform the jury of his parole ineligibility.[2] The Kelly Court specifically noted counsel's arguments in Shafer that the defendant "would die in prison" or would "spend his natural life there" and the trial judge's instructions that "life imprisonment means until the death of the defendant" were insufficient to convey a clear understanding to the jury of Shafer's parole ineligibility. 534

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[1] The State concedes the following evidence was submitted to support Appellant's future dangerousness: (1) detention officers forcibly restrained Appellant after a struggle with him; (2) Appellant threatened to kill a detention officer and blow up his house; and (3) detention official testified Appellant had dug around the vents and walls in his cell. See, *e.g.*, Kelly, 534 U.S. at 253, 122 S.Ct. at 731 ("evidence of violent behavior in prison can raise a strong implication of 'generalized. . .future dangerousness'").

[2] See also Simmons, 512 U.S. at 178, 114 S.Ct. at 2201 (under South Carolina's capital sentencing scheme prior to January 1, 1996, due process entitled the defendant to inform the jury of his parole ineligibility where a defendant's future dangerousness was at issue).

U.S. at 257, 122 S.Ct. at 733-34; see also State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002) (reversing and remanding for a new sentencing proceeding where the State submitted evidence of Stone's future dangerousness but trial court failed to instruct jury after request by defense counsel that Stone would be ineligible for parole if sentenced to life imprisonment and finding statements by counsel and the court to the jury that Stone would spend the rest of his life in prison did not convey to the jury that Stone would be ineligible for parole as required by Kelly).

In State v. Shafer, 352 S.C. 191, 202, 573 S.E.2d 796, 801-02 (2002), we stated, "given the United States Supreme Court's decision in Kelly, the better practice is for trial judges to give the capital sentencing jury a parole eligibility charge whether it is requested or not."[3] Today we conclude where a defendant's future dangerousness is at issue in a capital sentencing proceeding, and the only sentencing alternative to death available to the jury is life imprisonment without parole, the trial judge *shall* charge the jury, whether requested or not, that life imprisonment means until the death of the defendant without the possibility of parole. The trial judge erred in failing to charge the jury that life imprisonment meant until the death of Appellant without the possibility of parole because the State placed Appellant's future dangerousness in issue during the capital sentencing proceeding.

II. New Sentencing Proceeding under Atkins v. Virginia and Ring v. Arizona

Appellant argues the intervening cases of Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002), require his case be remanded for a new sentencing proceeding. We disagree.

[3] Under current statutory law, when requested by the State or the defendant, the judge must charge the jury that life imprisonment means until the death of the defendant without the possibility of parole. S.C. Code Ann. § 16-3-20(A) (2003 & Supp. 2004) (effective May 28, 2002).

Appellant's trial began on October 8, 2001, and he was sentenced to death on October 19, 2001. The United States Supreme Court issued its decision in Atkins on June 20, 2002, which held the execution of a mentally retarded person is cruel and unusual punishment prohibited by the Eighth Amendment of the United States Constitution. The Supreme Court left to the states the task of developing methods to enforce this constitutional restriction upon the execution of sentences. In Ring, issued on June 24, 2002, the United States Supreme Court held an Arizona statute, which allowed the trial judge to determine the presence or absence of the aggravating factors required by Arizona law for the imposition of the death penalty, violated the Sixth Amendment right to a jury trial in capital prosecutions.

We issued Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003), on November 3, 2003. In Franklin, we addressed the following issues: (1) the definition of mental retardation; (2) the procedure for making the mental retardation determination in post-Atkins cases; and (3) the procedure for making the mental retardation determination in cases where the defendant was sentenced to death prior to Atkins. For the definition of mental retardation, we referred to the definition established by the legislature in S.C. Code Ann. § 16-3-20(C)(b)(10). Under § 16-3-20(C)(b)(10) mental retardation is a statutory mitigating circumstance and is defined as: "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period."

In Franklin, we concluded that in post-Atkins cases the mental retardation determination is a two-step process. First, the trial judge shall make the mental retardation determination in a pretrial hearing, if so requested by the defendant or the prosecution, after hearing evidence, including expert testimony, from both the defendant and the State. The defendant shall have the burden of proving his mental retardation by a preponderance of the evidence. If, in the pretrial hearing, the trial judge concludes, by a preponderance of the evidence, the defendant to be mentally retarded, the defendant will not be eligible for the death penalty. If, however, the trial judge concludes the defendant is not mentally retarded and the jury finds the defendant guilty of the capital charge, the defendant is not precluded from presenting mitigating evidence of mental retardation existing at the time

of the crime. See S.C. Code Ann. § 16-3- 20(C)(b)(10). If the jury finds this mitigating circumstance, then a death sentence may not be imposed due to the mandate of Atkins.[4] Franklin, 356 S.C. at 278-79, 588 S.E.2d at 605.

Also in Franklin, we found where the defendant was sentenced to death prior to Atkins, statutory procedures were already in place. Under S.C. Code Ann. §§ 17-27-20(a) and -160 (2003), a death row inmate who claims he is mentally retarded and, as a result, not subject to the death penalty, may institute post-conviction relief (PCR) proceedings because his sentence is in violation of the Constitution and exceeds the maximum authorized by law. The PCR applicant must show, by a preponderance of the evidence, he is mentally retarded, and if mental retardation is proven, the PCR court will vacate the death sentence and impose a life sentence.

Appellant argues this Court should modify the procedure set forth in Franklin for post-Atkins cases because mental retardation is a factual issue which must be determined prior to imposing the death penalty, similar to an aggravating circumstance, and under Ring that fact must be found by a jury. In Ring, the Supreme Court stated that "[c]apital defendants . . . are entitled to a jury determination of any fact *on which the legislature conditions an increase in their maximum punishment.*" 536 U.S. at 589, 122 S.Ct. at 2432 (emphasis added). The Supreme Court noted that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact . . . must be found by a jury beyond a reasonable doubt." *Id.* at 602, 122 S.Ct. at 2439; see also Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

Appellant has confused the issues of eligibility for the death penalty and a fact on which the legislature conditions an increase in a

[4] The constitutionality of the designation of mental retardation in Section 16-3-20(C)(b)(10) as merely a mitigating circumstance in light of Atkins is not before us and we express no opinion on that issue. What constitutes a mitigating circumstance is a matter for the Legislature.

defendant's maximum punishment. The General Assembly has not conditioned an increase in a defendant's maximum punishment on the fact the defendant is *not* mentally retarded. The fact a defendant is not mentally retarded is not an aggravating circumstance that increases a defendant's punishment; rather, the issue is one of eligibility for the sentence imposed by a jury. See People v. Smith, 751 N.Y.S.2d 356 (N.Y. Sup. Ct. 2002) (rejecting argument prosecution is required by Atkins and Ring to affirmatively prove defendant is not mentally retarded at sentencing phase of capital murder trial); State v. Williams, 831 So.2d 835, 860 n.35 (La. 2002) ("The Supreme Court would unquestionably look askance at a suggestion that in Atkins it had acted as a super legislature imposing on all of the states with capital punishment the requirement that they prove as an aggravating circumstance that the defendant has normal intelligence and adaptive function. Atkins explicitly addressed mental retardation as an exemption from capital punishment, not as a fact the *absence* of which operates 'as the functional equivalent of an element of a greater offense.'"); Head v. Hill, 587 S.E.2d 613, 620 (Ga. 2003) ("[T]he absence of mental retardation is not the functional equivalent of an element of an offense such that determining its absence or presence requires a jury trial under Ring."); Howell v. State, 151 S.W.3d 450, 464-65 (Tenn. 2004) (absence of mental retardation not an element of the offense and not required to be proven by the State nor found by a jury).[5]

[5] In Schriro v. Smith, 126 S.Ct. 7, 2005 WL 2614879 (Oct. 17, 2005), the United States Supreme Court held the Ninth Circuit Court of Appeals exceeded its limited authority on habeas review by commanding Arizona courts to conduct a jury trial to resolve a habeas petitioner's mental retardation claim. The Supreme Court found the "Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim." *Id.* at 9. The Court further stated, "States, including Arizona, have responded to [Atkins] by adopting their own measures for adjudicating claims of mental retardation. While those measures might, in their application, be subject to constitutional challenge, Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit preemptively imposed its jury trial condition." *Id.* Schriro is not dispositive of Appellant's issue.

Prior to and during Appellant's trial, mental retardation was a mitigating circumstance. In Atkins, the Supreme Court determined that mental retardation should be considered apart from mitigating circumstances. We conclude in post-Atkins cases, mental retardation is a threshold issue, decided by the trial judge as a matter of law in a pretrial hearing, that determines whether a defendant is eligible for capital punishment at all, and if not found as a threshold issue, mental retardation continues to be a mitigating circumstance under statutory law.

III. Subject Matter Jurisdiction

Appellant contends the circuit court lacked subject matter jurisdiction to sentence him to death because the indictments for murder did not allege any aggravating circumstance which exposed him to the death penalty. Appellant asserts the Sixth Amendment of United States Constitution; Ring; Apprendi; and Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215 (1999), require indictments in state capital murder cases to allege aggravating circumstances. We disagree.

Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong. State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005). Issues related to subject matter jurisdiction may be raised at any time. The indictment is a notice document, and a challenge to the indictment on the ground of insufficiency must be made before the jury is sworn. *Id.* at 102, 610 S.E.2d at 500.

We note the State, as required by statute, timely notified Appellant of its intention to seek the death penalty and identified the aggravating circumstances and related evidence the State intended to use at trial. See S.C. Code Ann. §§ 16-3-20(B) and 16-3-26 (2003 & Supp. 2004) (Notice of intention to seek the death penalty must be given at least thirty days prior to trial.).

This Court has recently addressed the issue of whether aggravating circumstances are elements of the offense of murder. In State v.

Downs, 361 S.C. 141, 147-48, 604 S.E.2d 377, 380-81 (2004), this Court stated:

> The [Supreme] Court expressly noted in both Apprendi and Ring that the cases did not involve challenges to state indictments. . . . More important, the Fourteenth Amendment has not been construed to incorporate the Fifth Amendment's Presentment or Indictment Clause. . . . State law governs indictments for state-law crimes. Under South Carolina law, aggravating circumstances need not be alleged in an indictment for murder. S.C. Code Ann. § 17-19-30 (2003). . . .The aggravating circumstances listed in S.C. Code Ann. § 16-3-20(C)(a) (2003) are sentencing factors, not elements of murder.

(internal citations omitted). See also State v. Crisp, 362 S.C. 412, 419-20, 608 S.E.2d 429, 433-34 (2005) (under South Carolina law, aggravating circumstances need not be alleged in murder indictment); State v. Wood, 362 S.C. 135, 144, 607 S.E.2d 57, 61 (2004), *cert. denied*, __ U.S. __, 125 S.Ct. 2942 (2005) (same). Accordingly, the trial court had subject matter jurisdiction in Appellant's case.

CONCLUSION

Based on the above reasoning, we reverse Appellant's death sentence and remand this matter to the circuit court for a new sentencing proceeding consistent with this opinion.

REVERSED AND REMANDED.

TOAL, C.J., MOORE, J., and Acting Justice Ralph King Anderson, Jr., concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I concur, but write separately, because while I agree that the circuit court had subject-matter jurisdiction, and while I further agree that Appellant is entitled to a new sentencing proceeding because of the erroneous jury charge, I would not reach the issue of entitlement to a new sentencing under Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). I nonetheless wish to elucidate my understanding of Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003), to the extent that it differs from that expressed by the majority.

As the majority observes, if on remand Appellant argues that he was mentally retarded at the time of the crime, then the circuit court will be required to follow the procedure set forth in Franklin for determining mental retardation in post-Atkins cases.[1] The judge will determine whether Appellant is mentally retarded as a preliminary matter. If the judge determines that Appellant is mentally retarded, then Appellant cannot be sentenced to death. If the judge determines that Appellant is not mentally retarded, then the issue will remain for the jury after the parties present their cases. If the jury determines, in the first instance, that Appellant is mentally retarded, then the death penalty cannot be imposed. Franklin, 356 S.C. at 279, 588 S.E.2d at 606. If the jury determines that Appellant is not mentally retarded, then it will proceed as in any death-penalty case, determining whether aggravating and/or mitigating circumstances exist, and if aggravating circumstances are found, whether to recommend death. See S.C. Code Ann. § 16-3-20 (2003).

My understanding of Franklin is the jury, post-Atkins, does not consider mental retardation as a "mitigating circumstance." See Franklin, 356 S.C. at 279, 588 S.E.2d at 606 (holding that "[i]f the jury finds this *mitigating circumstance* [mental retardation], then a death sentence will not be imposed") (emphasis added). Technically, the jury's consideration of mental retardation is a threshold matter, as is the trial judge's consideration of the issue. If the jury finds that the defendant is mentally retarded, then the

[1] While Appellant's first sentencing was pre-Atkins, his new sentencing will be post-Atkins.

jury's role ends. It does not then consider aggravating and mitigating circumstances, for it has effectively determined that the state cannot seek the death penalty. See § 16-3-20(B). In such a case, the judge must determine whether the defendant should be sentenced to life imprisonment or to a thirty-year-minimum term. See § 16-3-20(A).

Only when the jury determines that the defendant is not mentally retarded does it consider aggravating and mitigating circumstances. Then, the jury must consider the state of the defendant's *mental health* and determine whether it constitutes a "mitigating circumstance." See § 16-3-20(C)(b)(2), (6), and (7). Logically, however, the jury cannot consider the defendant's *mental retardation* as a mitigating circumstance under section 16-3-20(C)(b)(10), since, as explained above, if the jury believes that the defendant is *mentally retarded*, then the jury never even reaches issues of aggravation and mitigation.

In sum, I concur in the majority opinion in all substantive respects. I disagree only with the use of the term "mitigating circumstance" with respect to a jury's determination in a post-Atkins case whether the defendant is mentally retarded.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charleston County Department
of Social Services, Respondent,

v.

Priscilla Jackson, Bryan Houpe,
Lamont Coles, Sr., John Doe
and Stephen Doe representing
the unknown biological father
or fathers of Jazmyn Jackson
and Lamont Coles, Defendants,

AND Jazmyn Jackson, a child,
D/O/B 6/26/90, Lamont Coles,
a child, 10/15/95, of whom
Lamont Coles, Sr. is Appellant.

Appeal From Charleston County
Paul W. Garfinkel, Family Court Judge

Opinion No. 4090
Heard January 18, 2006 – Filed March 6, 2006

REVERSED

Cherie W Blackburn, Stephanie E. Lewis and Susan S. Quist, all of Charleston, for Appellant.

Frampton Durban, Jr., of North Charleston, for Respondent.

James C. Bradley and Michael F. Bowler, III, both of Charleston, for Guardian Ad Litem.

HEARN, C.J.: The Charleston County Department of Social Services (the Department) brought this termination of parental rights (TPR) action against Lamont Coles, Sr. (Father). The family court terminated Father's parental rights to Lamont Coles, Jr. (Child), and Father appeals. We reverse.

FACTS

The origins of this case began more than ten years ago, in February of 1995, when Father met Priscilla Jackson (Mother) in Long Island, New York. At that time, Mother had a four-year-old daughter named Jazmyn. In June 1995, Father was arrested for first-degree assault and robbery. After pleading guilty, he was imprisoned, and has been incarcerated in a New York State prison ever since. He is not eligible for parole until 2007.[1]

Three months after Father's arrest in 1995, Mother gave birth to Child. Shortly thereafter, Father affirmatively sought to establish paternity of Child, and in May 1996, a New York family court determined Father was Child's biological father. A month after this determination, Father tried to send Child his limited inmate earnings. He also attempted to arrange a life insurance

[1] Father was also eligible for parole in July 2005, but at the time of oral argument in January of 2006, Father was still incarcerated.

policy that benefited Child. His attempts were in vain, however, because in November 1996, Mother, Jazmyn, and Child disappeared.[2]

From that moment onward, Father engaged in an exhaustive letter-writing campaign to learn the whereabouts of Child. Father wrote hundreds of letters to numerous agencies, associations, centers, organizations, and government officials. Father's effort was so intense, the Department's counsel stipulated at trial that Father "has done more than anybody I've ever seen to try to find his son and to maintain contact with the agencies that had his son." The family court took judicial notice of the fact that Father "did everything, most probably more than anyone would ever expect anyone to ever do in the history of this court" to locate his son.

While trying to locate his son, Father expressed concern about losing his parental rights. In May 1997, for example, he wrote a New York family court to ask for assistance of counsel to protect his legal rights in the event his legal connection with Child was in jeopardy because of his inability to locate Child. Father wrote that same court almost a year later to notify it that despite his best efforts he could not locate Child. He told the family court he had contacted multiple investigators, non-profit corporations, bar associations, as well as the Ohio Departments of Social Security and Vital Statistics, which he contacted because Mother was from Ohio.

Meanwhile, in South Carolina, Mother and Child's life together was unraveling. In August 1997, the Department took Child into emergency protective custody based on allegations Mother's boyfriend sexually abused Jazmyn. In September 1997, the family court found this abuse constituted a threat of harm to Child. The family court issued a restraining order against Mother's boyfriend and approved a treatment plan requiring Mother to attend individual counseling, parent effectiveness training classes, and a substance abuse treatment program. It is unclear from the record what efforts, if any, the Department made to notify or contact Father.

[2] Apparently, the trio moved to South Carolina without telling Father.

In January 1998, the family court ordered Mother to establish and maintain stable housing and an appropriate income to support her children. Again, the Department's efforts to notify or contact Father were either non-existent or are unknown. In February 1999, Mother disappeared,[3] and during her absence, the family court established a permanent plan of TPR and adoption. This action occurred in July 1999, and once again, Father was never notified, though he was still doing everything he could to locate Child.

In February 2000, Father learned from the National Missing Children's Locate Center in Portland, Oregon that Mother resided in South Carolina. He immediately wrote Mother, but his letter was returned with an indication that she had moved. Father then began writing South Carolina agencies, courts, and legal services. Finally, on August 22, 2000, culminating nearly four years of searching, the South Carolina Department of Social Services wrote Father, informing him Child was in foster care in the custody of the Department. The Department also advised him it could not proceed with his case until after his release from prison.

Within days, on August 28, 2000, Father began to write the Department. Although he did not receive a response from his initial letters, he soon discovered Sue Christopher was Child's caseworker, and he began writing to her on October 9, 2000.[4] In this letter, Father apprised the Department of his extensive search to find Child and his wish to establish "a positive line of communication" with the Department. He also notified the Department he did not want his parental rights terminated, he needed legal representation, and he had a five-year-old file of correspondence the Department could review. Despite the fact that Father had been searching for information about Child for four years, the Department did not respond.

On October 23, 2000, Father again wrote the Department. Father expressed his wish to connect with Child and asked the Department about his options. The Department sent him a required form letter inviting him to a

[3] The Department did not locate her until September 2001.

[4] This is the first time the Department acknowledges contact with Father.

Foster Care Review Board (the Board) meeting, but did not otherwise respond. On October 30, 2000, Father informed the Department he had received the Board invitation but could not attend because he was incarcerated in New York. He also expressed his frustration that he had not received any information from the Department other than the invitation, and that he felt as though the Department was discouraging him from making contact with Child. The Department did not respond.

On November 1, 2000, Father again wrote the Department. This time, he asked for Child's address so he could write Child. He also reiterated he did not want his parental rights terminated. On the same day, Father wrote the Department's legal counsel with the same request. Neither the Department nor the Department's legal counsel responded. On November 29, 2000, Father again wrote the Department. He alerted the Department it had not responded to any of his letters, and he wanted to know his options as well as the results of the Board meeting. The Department did not respond. On January 4, 2001, Father again wrote the Department. He expressed his utter distress that the Department had not responded to any of his letters.

Finally, on January 9, 2001, the Department responded to Father. Department caseworker Christopher informed Father of the July 1999 permanence planning order directing TPR and adoption, and assured him the Department would ask the court to appoint him a Guardian ad Litem (GAL) and legal counsel to protect his rights. On January 10, 2001, Department director Odessa Williams informed Father the Department had not yet commenced a TPR action against him and requested that Father furnish the Department with a list of "adoptive resources" for Child. This January 2001 communication is the first time the Department responded to Father's letters, which began in October 2000, and the first time it contacted him since it took Child into emergency protective custody in August 1997.

On February 5, 2001, Father asked the Department multiple questions, including whether he could contact Child. He received no reply, so Father wrote three additional letters on March 8, March 19, and April 16. In these letters, he asked the Department to answer his inquiries and also requested a photograph of his son. The Department did not reply to any of these letters.

On August 6, 2001, Father wrote Department caseworker Christopher the following:

> I believe [the Department] is supposed to unify families with problems, help them. My son has been in foster care since [August 1997]. [To] this date I think that [is] over four years. . . What can be done so I don't have to lose [or] give up my parental rights and forever lose my only child[?] Can you, being the head of my son's case, the only one who can provide answers, can you give me his social security number [so] at least if I die I can give [or] leave him something [?]

Christopher did not respond to this letter. On August 8, 2001, the Department filed a TPR action against Father. This action was taken twenty-five months after the family court's July 1999 order establishing a permanent plan of TPR and adoption and approximately twelve months after Father learned Child's whereabouts.

After multiple continuances, this case was tried on July 17, 2003; December 11, 2003; and June 16 and 17, 2004. On August 27, 2004, the family court terminated Father's parental rights to Child. The court found Father willfully failed to visit and support Child because it took Father "over a year and a half to provide the identity of the persons who could assume some of his parental duties." The court referred to the fact that Father did not provide the names of adoptive resources that Department director Williams requested in January 2001 until July 2002. The court also found Child had been in foster care for fifteen out of the last twenty-two months. Finally, the family court found TPR would be in the best interest of Child, noting Child's GAL recommended it. Father appealed this order.

STANDARD OF REVIEW

In a TPR case, the best interest of the child is the paramount consideration. Doe v. Baby Boy Roe, 353 S.C. 576, 579, 578 S.E.2d 733, 735 (Ct. App. 2003). Before parental rights can be forever terminated, the alleged grounds for the termination must be proven by clear and convincing evidence. Richberg v. Dawson, 278 S.C. 356, 357, 296 S.E.2d 338, 339 (1982); S.C. Dep't of Soc. Servs. v. Parker, 336 S.C. 248, 254, 519 S.E.2d 351, 354 (Ct. App. 1999). On appeal, this court may review the record and make its own determination whether the grounds for termination are supported by clear and convincing evidence. S.C. Dep't of Soc. Servs. v. Cummings, 345 S.C. 288, 293, 547 S.E.2d 506, 509 (Ct. App. 2001). Despite this broad scope of review, however, we should not necessarily disregard the findings of the family court because the family court is in a better position to evaluate the credibility of the witnesses and assign weight to their testimony. Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996).

LAW/ANALYSIS

Father argues the family court erred in terminating his parental rights because (1) Father did not willfully fail to visit or support Child; (2) under the circumstances, Child's presence in foster care for fifteen of the most recent twenty-two months alone is not sufficient to support TPR; (3) TPR is not in the best interest of Child; and (4) TPR violated Father's right to due process under the Fourteenth Amendment to the United States Constitution. We agree that Father did not willfully fail to visit or support child, and find that termination of Father's rights is not in Child's best interest.

Under the United States Constitution, natural parents are entitled to fundamentally fair procedures when the State seeks to sever the relationship they have with their child. U.S. Const. amend. XIV, § 1.; Santosky v. Kramer, 455 U.S. 745, 753-54 (1982). In Santosky, the United States Supreme Court announced:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life . . . . When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

455 U.S. at 753. The Santosky Court also noted that at the fact-finding stage, "the State cannot presume that a child and his parents are adversaries" because "the child and his parents share a vital interest in preventing erroneous termination of their natural relationship" until the State proves parental unfitness. Id. at 761.

In South Carolina, the procedures for TPR are governed by statute. See S.C. Code Ann. §§ 20-7-1560 to -1582 (Supp. 2005). The purpose of the TPR statute is:

> [T]o establish procedures for the reasonable and compassionate termination of parental rights where children are abused, neglected, or abandoned in order to protect the health and welfare of these children and make them eligible for adoption by persons who will provide a suitable home environment and the love and care necessary for a happy, healthful, and productive life.

S.C. Code Ann. § 20-7-1560 (Supp. 2005). The TPR statute "must be liberally construed in order to ensure prompt judicial procedures for freeing minor children from the custody and control of their parents by terminating the parent-child relationship." S.C. Code Ann. § 20-7-1578 (Supp. 2005); Joiner v. Rivas, 342 S.C. 102, 108, 536 S.E.2d 372, 375 (2000). The family

court may order TPR if it makes the twofold finding that plaintiff has proved by clear and convincing evidence the existence of at least one statutory ground enumerated in section 20-7-1572 and TPR would be in the best interest of the child. S.C. Code Ann. § 20-7-1572 (Supp. 2005).

I. Failure to Visit or Support Child

Father argues the family court erred in finding he willfully failed to visit or support Child. We agree.

The family court can terminate parental rights when TPR is in the best interest of the child and the "child has lived outside the home of either parent for a period of six months," and during that time the parent has either "wilfully failed to visit the child" or "wilfully failed to support the child." S.C. Code Ann. § 20-7-1572(3) and (4) (Supp. 2005). Willful conduct is conduct that "evinces a settled purpose to forego parental duties . . . because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent." S.C. Dep't of Soc. Servs. v. Broome, 307 S.C. 48, 53, 413 S.E.2d 835, 838 (1992). Whether a parent has willfully failed to visit or support his or her child is a "question of intent to be determined from the facts and circumstances of each individual case." S.C. Dep't of Soc. Servs. v. Headden, 354 S.C. 602, 610, 582 S.E.2d 419, 423 (2003); Stinecipher v. Ballington, 366 S.C. 92, 98, 620 S.E.2d 93, 96 (Ct. App. 2005). The family court has wide discretion to make this determination, but the element of willfulness must be established by clear and convincing evidence. Broome, 307 S.C. at 52, 413 S.E.2d at 838. "The court may consider all relevant circumstances in determining whether or not the parent has wilfully failed to support the child, including . . . the ability of the parent to provide support." S.C. Code Ann. § 20-7-1572.

Incarceration alone is insufficient to justify TPR. S.C. Dep't of Soc. Servs. v. Wilson, 344 S.C. 332, 337, 543 S.E.2d 580, 583 (Ct. App. 2001). In Wilson, the father was incarcerated after the birth of his three children. Two years after his incarceration, the Department took his children into emergency protective custody. A year later, the Department brought a TPR action against the father for willful failure to visit his children. The family court

ordered TPR, even though the father requested an opportunity to visit his children at each review hearing. We reversed the family court, holding that "[t]erminating the parental rights of an incarcerated parent requires consideration of all of the surrounding facts and circumstances in the determination of wilfulness." Id. at 340, 543 S.E.2d at 584. We noted the record was replete with evidence of not only the father's repeated requests to the Department to visit his children, but also the Department's active role in thwarting the father's attempts to visit his children. Id. at 338, 543 S.E.2d at 583.[5]

In this case, the record demonstrates the Department's blatant indifference to Father's plight. The Department took Child into emergency custody in August 1997. The Department should have contacted Father at this time. Instead, it appears the Department conducted the case as if Father did not exist. In September 1997, the Department recommended, and the family court adopted, a treatment plan requiring Mother to attend individual counseling, parent effectiveness training classes, and a substance abuse treatment program. The Department did not recommend a treatment plan for Father even though, by Department caseworker Christopher's own admission, one could have been recommended. When Mother eventually failed to complete her treatment plan, the family court established a permanent plan of TPR and adoption. Again, the Department did not contact Father, even though he risked losing his parental rights to Child.

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[5] Compare Wilson to South Carolina Department of Social Services v. Ledford, 357 S.C. 371, 376, 593 S.E.2d 175, 177 (Ct. App. 2004), where we upheld the essential holding of Wilson that incarceration alone is insufficient to justify TPR. In Ledford, the father was incarcerated in Georgia. He only attempted to contact his child twice, and was unsuccessful on both occasions. After a SCDSS caseworker found him via an internet search of the Georgia Department of Corrections, the father made no effort to contact the caseworker or any other SCDSS employee. After SCDSS brought a TPR action against the father, he still made no effort to contact SCDSS. The family court terminated his parental rights and we affirmed.

For reasons even the Department was unable to explain, the Department took more than two years to file a complaint seeking to terminate Father's parental rights to Child. During this interim, Father discovered, after four years of searching, that the Department had custody of Child. On October 9, 2000, he wrote Christopher a letter explaining his circumstances and hoping to establish a "positive line of communication" with the Department. Thus, it took the Department over three years to make contact with Father, and even then, the communication occurred only because Father contacted the Department as a result of his extraordinary efforts to locate Child. It then took Christopher three months to respond. Father continued to write. He indicated he wanted to communicate with Child; he asked for Child's picture, address, and social security number. He also asked to visit, or at the very least, to write Child. Despite Father's multiple requests, Christopher did not respond until seven months later, on March 18, 2002.[6] By the time Father received this letter, the Department had already brought a TPR action against him.

Christopher did not assist in connecting Child with his natural father. She did not provide Father with any information that would help him communicate with Child, nor did she send him a picture of Child as Father requested. At trial, Christopher testified she could not provide Father with the information he requested because a Department-hired therapist, Karen Tarpey, recommended Child not communicate with Father because it would not be in Child's best interest.[7] However, Christopher never told Father this was the reason she continued to deny him access to any information regarding contact with Child. Instead, she simply did not respond to him.

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[6] This is only the second response Father received from Christopher, his son's caseworker at the Department, since his initial letter of October 9, 2000.

[7] Karen Tarpey is a licensed independent social worker, with a master's degree in social work, who accepts referrals from the Department. There is no indication in the record that Ms. Tarpey ever contacted Father prior to making this recommendation.

Even assuming Christopher had told Father about Tarpey's recommendation, there is not much Father could have done about it. The fact remained Father could not communicate with Child because the Department would not allow him to contact Child. Therefore, even if Father had been provided an address to write Child letters, or send him birthday cards, Child would not have received them. The Department would not have allowed Father's correspondence to reach Child because Tarpey opined Child's exposure to Father would be detrimental.

The Department can certainly rely on the opinion of a therapeutic expert in determining what is in the best interest of a child in its custody; however, if the expert recommends the child not have parental contact without even contacting the parent herself, it is disingenuous for the Department to initiate a TPR action against the parent for not contacting child. Consequently, even assuming therapist Tarpey's recommendation is correct, the mere fact that it may be detrimental to Child for Father to contact Child does not mean Father's parental rights should be automatically terminated.

Based on the record, we find the Department did not demonstrate Father was so indifferent to the right of Child to receive his support and consortium that Father willfully failed to visit and support him. To the contrary, the record reflects Father actively sought to visit and support Child, and, if anything, was prevented from exercising his parental duties because the Department was indifferent to his parental rights. Father could not communicate with Child, let alone visit him, because the Department forbade him from doing so based on Tarpey's recommendation. Father was not able to send money to Child despite his attempts to do so because the Department never provided him with an address of where to send a check.

The family court emphasized the fact that after Father received a response from the Department in January 2001, he did not furnish a list of adoptive resources until July 2002. To the extent such a list is relevant, let alone dispositive, in determining whether Father's parental rights should be terminated, we find Father's delay in providing the Department with a list of

adoptive resources does not show a settled purpose to forego his parental duties. Because Father grew up in foster care, he recommended his foster mother and foster sister as adoptive resources. Although his foster mother testified she was no longer interested in adopting Child, his foster sister said she was still interested. This recommendation, while not perfect, was nevertheless viable. Moreover, if the Department had made an effort to contact Father when it initially took Child into emergency protective custody in August 1997, Father would have had more options than he does now. In 1997, for example, Father's foster mother, biological father, and biological brother were all possibilities. As Father testified at trial, with the passing years, "a lot of things started happening that no one [could] control." Finally, the mere fact that Father was unable to find a suitable adoptive resource, does not necessarily mean Father willfully failed to visit or support Child.

After considering all relevant facts and circumstances, we hold the Department did not establish by clear and convincing evidence that Father willfully failed to visit or support Child. Accordingly, the family court erred in terminating Father's parental rights based on his willful failure to visit and support Child.

II. Child in Foster Care

Father argues that, under the circumstances, Child's presence in foster care for fifteen of the most recent twenty-two months alone is not sufficient to support TPR. We disagree.

The family court can terminate parental rights when it is in the best interest of the child and the "child has been in foster care under the responsibility of the State for fifteen of the most recent twenty-two months." S.C. Code Ann. § 1572(8). "A finding pursuant to section 20-7-1572(8) alone is sufficient to support a termination of parental rights." S.C. Dep't of Soc. Servs. v. Sims, 359 S.C. 601, 608, 598 S.E.2d 303, 307 (Ct. App. 2004); see also Doe v. Baby Boy Roe, 353 S.C. 576, 581, 578 S.E.2d 733, 736 (Ct. App. 2003).

Father points out that he had only been made aware of Child's presence in foster care twelve months prior to the filing of the TPR action. However, the purpose of the statutory ground allowing for termination if a child has been in foster care for fifteen of the last twenty-two months is to ensure children do not languish in foster care when termination of parental rights would be in their best interests. Doe, 353 S.C. at 581, 578 S.E.2d at 736 ("TPR statutes must be liberally construed in order to ensure prompt judicial procedures for freeing minor children from the custody and control of their parents by terminating the parent-child relationship."). Thus, it is the child's perspective, and not the parent's, that we are concerned with when determining whether this statutory ground has been met. Here, the letter of the law was met once Child resided in foster care for fifteen of the last twenty-two months regardless of Father's knowledge of Child's whereabouts.[8]

III. Best Interest of Child

Father argues TPR is not in Child's best interest. We agree.

In TPR cases, the best interest of the child is the paramount consideration. S.C. Dep't of Soc. Servs. v. Vanderhorst, 287 S.C. 554, 561, 340 S.E.2d 149, 153 (1986). "The interests of the child shall prevail if the child's interest and the parental rights conflict." S.C. Code Ann. § 20-7-1578 (Supp. 2005).

[8] We note that although the letter of the law was met in this particular case, especially considering Father's incarceration will continue to necessitate foster care for Child, there may be some instances where this statutory ground would not support termination of parental rights despite the passage of a fifteen month stay in foster care. See S.C. Dep't of Soc. Servs. v. Cochran, 356 S.C. 413, 420, 589 S.E.2d 753, 756 (2003) (Pleicones, J., concurring) ("I am not willing to sever the parent-child relationship solely on the basis that the child has spent fifteen of twenty-two months in foster care where the appellant presented substantial evidence that much of the delay in the processing of this case is attributable to the acts of others.").

Child currently resides in a therapeutic foster home with his sister Jazmyn. Both children have special needs. Child has some learning disabilities. Because the two children support each other, all parties, including Father, agree they should remain together.[9] However, there is no assurance the children will remain together, or even at the same foster home. Child's current foster parents wish to remain as foster parents and, as of the TPR hearing, have not expressed an interest in adopting him. Thus, terminating Father's parental rights will not ensure future stability for Child. Moreover, keeping Father's parental rights intact will not disrupt Child's current living situation. Father does not gain custody of Child simply because the Department failed to terminate his parental rights at this time. Rather, by not terminating Father's parental rights, Father merely maintains his right to connect with Child as well as his obligation to support Child, emotionally, financially, or otherwise. The Department should, in the best interest of Child, facilitate this connection and accompanying obligation.

The family court noted that Child's guardian ad litem, William Jordan, recommended TPR would be in the best interest of Child. However, Jordan testified that he did not know if Child would be harmed by contact with Father. Jordan could not opine on the matter because he never spoke with Father and never talked to Child about Father. Jordan also admitted he never responded to any of Father's correspondence, but said he let his counsel know about it. Accordingly, Child's GAL recommended terminating Father's parental rights without talking to Child about Father's existence and without talking to Father at all.[10] Under these circumstances, we do not

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[9] The two children were not placed together in the same foster home until three years after the Department obtained custody of them.

[10] Jordan submitted his report on July 16, 2003. Accordingly, pursuant to section 20-7-1549 of the South Carolina Code (Supp. 2005), which became effective on January 15, 2003, Jordan had a duty and obligation to conduct an "independent, balanced, and impartial investigation to determine the facts relevant to the situation of the child and the family," including a mandatory interview of Child's parents. See S.C. Code Ann. § 20-7-1549(A)(2)(iv).

understand how Child's GAL can recommend TPR without any investigation into the situation between Child and his natural father.[11]

Father's tireless efforts to connect with Child demonstrate a sincere concern for Child's well-being. Again, when Father learned of Child's birth, he immediately established paternity. When Child disappeared, Father wrote hundreds of letters to try to locate Child. After Father found Child, he wrote hundreds more to try to contact him, or even just to have a photograph of him. In addition to expressing a desire to emotionally support Child, Father's letters expressed a desire to financially support Child with what little resources Father had. As the Department stipulated, Father "has done more than anybody [the Department's attorney had] ever seen to try to find his son and to maintain contact with the agencies that had his son." Unless long-term incarceration alone is enough to terminate parental rights, which is not the case in South Carolina,[12] we cannot discern any evidence from the record

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[11] We also do not understand how Child's therapist, Karen Tarpey, can recommend Father not contact Child without ever talking to Child about Father, and without talking to Father at all.

[12] If the South Carolina General Assembly intended long-term incarceration alone to justify termination of parental rights, it would have made such a provision in the statute. In many states, incarceration is a ground for termination, though even then, the best interests of the child are considered. See, e.g., Ala. Code § 26-18-7; Alaska Stat. § 47.10.080; Ariz. Rev. Stat. § 8-533(B)(4); Ark. Code Ann. § 9-27-341(3)(B)(viii); Cal. Welf. & Inst. Code § 361(b)(12); Colo. Rev. Stat. § 19-3-604(1)(b)(III); Del. Code Ann. tit. 13 § 1103; Fla. Stat. Ann. § 39.806; Ga. Code. Ann. § 15-11-94(4)(b)(iii); Idaho Code § 16-2005(1)(e); 750 Ill. Comp. Stat. 50/1(D)(r); Kan. Stat. Ann. § 38-1583(b)(5); La. Children's Code Ann. art. 1015(6); Mich. Comp. Laws § 712A.19b(3)(h); Mont. Code Ann. § 41-3-609(2)(d); N.H. Rev. Stat. Ann. § 170-C:5(VI); Ohio Rev. Code Ann. § 2151.414(E)(12); Okla. Stat. tit. 10 § 7006-1.1(A)(12); Or. Rev. Stat. § 419B.504(6); R.I. Gen. Laws § 15-7-7(a)(2)(i); S.D. Codified Law § 26-8A-26.1(4); Tenn. Code Ann. § 36-1-

before us indicating termination would be in Child's best interests. Child's foster parents are not willing to adopt him, Father's efforts to maintain a relationship with Child have been extraordinary, and the social worker who advised against communication between Father and Child had neither spoken with Father nor spoken to Child about Father.

Father's connection with Child may be faint, but it is nevertheless existent. It is also a fundamental liberty interest protected by the United States Constitution. Santosky, 455 U.S. at 753. Such an interest cannot be severed where, as here, the Department failed to present any reason why termination of parental rights would be in Child's best interest. Accordingly, the family court erred in terminating Father's parental rights.

IV. Due Process Violation

Father argues TPR violates his right to due process under the Fourteenth Amendment to the United States Constitution. However, this issue was not raised to or ruled upon by the family court, and therefore it is not preserved for review. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("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."); Jones v. Daley, 363 S.C. 310, 315, 609 S.E.2d 597, 599 (Ct. App. 2005).

CONCLUSION

Based on the foregoing reasoning, the family court order terminating Father's parental rights is

REVERSED.

ANDERSON and KITTREDGE, JJ., concur.

113(g)(6); Tex. Fam. Code Ann. § 161.001(Q); Utah Code Ann. § 78-3a-408(2)(e); Wyo. Stat. Ann. § 14-2-309(a)(iv).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charles West, Respondent,

v.

Alliance Capital and Frontier Insurance Company, Appellants.

Appeal From York County
S. Jackson Kimball, III, Master - In - Equity

Opinion No. 4091
Heard January 11, 2006 – Filed March 6, 2006

AFFIRMED

Donald L. Van Riper, Suzanne C. Boulware, of Columbia, for Appellants.

William P. Walker, Jr., of Lexington, for Respondent.

KITTREDGE, J.: In this workers' compensation case, an explosion at work injured Charles West while he performed repairs on his own truck during working hours and using his employer's equipment. The Workers' Compensation Commission adopted the order of the single commissioner and found that the injury arose out of and in the course of West's employment. The circuit court affirmed. We now affirm.

FACTS

Alliance Capital employed West and leased his services to Meylan Enterprises. Frontier Insurance Company provided workers' compensation insurance to Alliance Capital and Meylan. Meylan conducts business in many states and is primarily involved in heavy industrial cleaning at nuclear power plants and manufacturing facilities. West's supervisor, Tex Williams, described West as a "foreman . . . [who] overs[aw] the shop activities and all the mechanic work that goes on." The injury here occurred at Meylan's Rock Hill, South Carolina facility.

Meylan required its employees to come to work, clock in and, in the absence of an off-site job assignment, remain on the premises for their eight-hour shift. West and his fellow employees had to be present at the shop (or on a job assignment) to get paid. Because the actual work was sporadic, employees at the Rock Hill facility were to await calls at the shop and do various tasks in preparation for upcoming job assignments. While awaiting job assignments, employees could use their free time as they chose, provided they remained on site. Meylan employees generally spent about half of their time at the shop preparing for a project or on standby and the other half of their time working at job sites.

The single commissioner found that a custom and practice existed at Meylan's shops of allowing employees, during working hours, to work on their own vehicles in the shop, using shop equipment. Meylan's supervisors never prohibited or otherwise discouraged this practice. The record contains many examples of Meylan's acquiescence and approval of this practice, including an instance where Williams, the supervisor, brought his son's car into the shop for body work.

Meylan lacked a sufficient number of vehicles at the Rock Hill facility to transport people and equipment to the job sites. Williams, for example, often used his personal vehicle to take people and supplies to and from jobs. West informed Williams he had a truck that could be used to assist in transporting people and equipment. The vehicle was at that time inoperable,

and Williams authorized West to travel to West Virginia to transport the truck to Rock Hill for repairs so Meylan could use it for transportation.

Several weeks before the accident, West and another Meylan employee drove to West Virginia in a Meylan truck and trailer. Meylan paid West for the trip, including his expenses. Meylan expected to benefit from use of the truck for its operations. When delivered to Rock Hill, the truck was stored in the enclosed shop area of the Meylan facility, where it remained for "probably two or three weeks" prior to the accident.

On the date of the accident, West completed his work and waited for other Meylan employees to return from a job assignment. During this downtime, West decided to work on the truck. West and another employee removed the gas tank from the truck to clean it. After emptying the gas out of the tank, West began sandblasting the inside of the tank using Meylan equipment. The tank exploded, injuring both employees.[1] West received second-degree and third-degree burns over fifty-four percent of his body.

The single commissioner found that the injury to West arose out of and in the course of his employment, noting that the truck repair was for Meylan's benefit, on company time, in Meylan's shop, with Meylan's equipment, and with Meylan's permission. The single commissioner thus found the injury compensable and awarded benefits. On review, the Commission affirmed, adopting the order of the single commissioner. Alliance Capital appealed to the circuit court, challenging the finding that the injury arose out of and in the course of West's employment. The circuit court affirmed. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981); S.C. Code Ann. § 1-23-380 (2005). A reviewing court may reverse or modify a decision of an administrative agency if "the findings,

[1] The other employee settled his workers' compensation claim.

inferences, conclusions or decisions of that agency are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004) (quoting Bursey v. S.C. Dep't of Health and Envtl. Control, 60 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004)). 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. Frame v. Resort Servs., Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 495 (Ct. App. 2004).

LAW/ANALYSIS

The South Carolina Workers' Compensation Act requires that an injury by accident must be one "arising out of" and "in the course of employment" to be compensable. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 638 (Ct. App. 1999); see also S.C. Code Ann. § 42-1-160 (Supp. 2005). The injury must both "arise out of" and occur "in the course of employment" to allow recovery. Broughton, 336 S.C. at 496, 520 S.E.2d at 634. As presented here, the question is largely one of fact for the Commission. Id. The claimant has the burden of proving facts sufficient to allow recovery under the Act. Id.

I. Did the injury arise out of the employment?

Alliance Capital first argues that the injury did not arise out of West's employment because no causal connection existed between the working conditions and his injury. We disagree.

"The phrase 'arising out of' in the Workers' Compensation Act refers to the injury's origin and cause." Broughton, 336 S.C. at 497, 520 S.E.2d at 638. For an injury to "arise out of" employment it must proximately cause the injury. Id. There must be a causal connection between the conditions under which the work is required to be performed and the resulting injury. Osteen v. Greenville County Sch. Dist., 333 S.C. 43, 50, 508 S.E.2d 21, 25 (1998).

The requisite causal connection has been described as follows:

> [I]f the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

Douglas v. Spartan Mills, Startex Div., 245 S.C. 265, 269, 140 S.E.2d 173, 175 (1965).

Alliance Capital argues the employment did not proximately cause the injury because West's injury arose from merely permissive activities, not required duties. Alliance Capital relies on Osteen, 333 S.C. 43, 508 S.E.2d 21. In Osteen, an attendance clerk working at an elementary school injured her back filling her ice chest with ice from the school cafeteria and placing it into her car. Id. at 45-46, 508 S.E.2d at 22. The court held the activity to be permissive, and thus no causal connection existed between Osteen's employment and her injury. Id. at 50, 508 S.E.2d at 25.

In another case, the court found no causal connection when an employee was injured after leaving work to check on an ill employee.

Broughton, 336 S.C. at 497-98, 520 S.E.2d at 638. The court noted that the claimant's job requirements did not include leaving work to check on sick co-workers. Id.

In both Osteen and Broughton, however, the claimants sustained injuries during activities entirely unrelated to their work duties. Here, the record supports the finding—to the substantial evidence standard—that the truck would be utilized in Meylan's operations following repairs. A shortage of trucks existed, and West had volunteered the use of his truck once it was restored to operable condition. According to West, whose testimony the Commission deemed credible,[2] supervisor Williams "knew that I was wanting to use [the truck] for work." Williams authorized West to drive to West Virginia on company time and at company expense to bring the truck to the shop in Rock Hill, and permitted the truck to be kept at the shop. Williams knew the repairs were necessary to make the truck operational.

West's injury arose out of the employment because the truck was being repaired for Meylan's benefit, using company resources, with Meylan's consent. We conclude the record establishes the requisite causal connection between the working conditions and the injury.[3]

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[2] We decline, pursuant to our standard of review, Alliance Capital's invitation to assign credibility to Williams' contrary testimony. Fact-finding is a matter exclusively within the province of the Commission. Kennedy v. Williamsburg County, 242 S.C. 477, 480, 131 S.E.2d 512, 513 (1963).

[3] Because we find substantial evidence supports the finding that West's truck was intended for use in Meylan's operations, we need not address the alternative grounds—the personal comfort doctrine—relied on by the Commission. Osteen, 333 S.C. at 47-48, 508 S.E.2d at 23 (observing that under workers' compensation law, "the personal comfort doctrine has consistently been limited to imperative acts such as eating, drinking, smoking, seeking relief from discomfort, preparing to begin or quit work, and resting or sleeping"); see also Dukes v. Rural Metro Corp., 356 S.C. 107, 110, 587 S.E.2d 687, 689 (2003) ("The purpose of the personal comfort doctrine is to allow employees to attend to their biological personal requirements.").

II. Did the injury occur in the course of employment?

Alliance Capital next argues that the injury did not occur in the course of West's employment. We disagree.

"The phrase 'in the course of the employment' refers to the time, place, and circumstances under which the accident occurred." Broughton, 336 S.C. at 498, 520 S.E.2d at 639. "An injury occurs 'in the course of' employment within the meaning of the Workers' Compensation Act when it occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while fulfilling those duties or engaged in something incidental thereto." Id.

A key factor in determining entitlement to compensation under this prong is whether an employee's activity benefited the employer. Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 49, 515 S.E.2d 532, 533 (1999). In Hicks, the court denied compensation to an employee who was repairing a personal vehicle at the worksite. The circumstances of West's injury present an entirely different situation, for the injury in Hicks occurred on a Saturday, during non-working hours, during work for which the employee received no compensation, and the employer derived no benefit from the vehicle repair. Id. Here, the employer paid West for repairing the vehicle at the worksite, and the activity occurred during working hours, using tools furnished by his employer and for the purpose of remedying the employer's vehicle shortage at the Rock Hill site. The record sustains the finding that West's injury occurred in the course of his employment with Meylan.

CONCLUSION

We hold that the truck repair was an activity arising out of and in the course of West's employment with Meylan, and the resulting injury was compensable.

AFFIRMED.

HEARN, C.J., and STILWELL, J., concur.