# 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 by April 1, 2005, 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(e), SCACR.

Columbia, South Carolina
March 7, 2005

SUSPENSIONS-
COMMISSION ON CLE AND SPECIALIZATION
2004 REPORT OF COMPLIANCE
AS OF MARCH 1, 2005

Marsha M. Banks
PO Box 382
Augusta, GA 30901

John A. Beam, III
PO Box 280240
Nashville, TN 37228

Barry W. Bellino
PMB 3037
PO Box 2430
Pensacola, FL 32513
(INTERIM SUSPENSION BY COURT)

Caroline A. Bernard
PO Box 1792
Mt. Pleasant, SC 29464

Dane A. Bonecutter
160 Olde Farm Road
Lexington, SC 29072

Allen H. Brill
132 Vinge Road
Prosperity, SC 29127

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1230 River Oaks Road
Jacksonville, FL 32207

Dawn L. Brower
618 Shadow Lane
Wagner, SC 29164

Henry H. Cabaniss
317 Seewee Circle
Mt. Pleasant, SC 29464
(INTERIM SUSPENSION BY COURT)

Peng C. Chan
150 S. Los Robles Ave., Ste 440
Pasadena, CA 91101

Damon Cook
101 Meeting St., Ste 400
Charleston, SC 29401
(INTERIM SUSPENSION BY COURT)

Cheryl W. Davis
PO Box 3265
Harrisburg, PA 17105

Helena E. Flickinger
535 N. Michigan Ave., #2205
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Robert L. Gaillard
PO Box 20307
Charleston, SC 29413
(INDEFINITE SUSPENSION BY COURT)

Scott R. Gorelick
6000 Fairview Rd., Ste 1415
Charlotte, NC 28210

Brian K. Greenwood
1311 Ocean Park Blvd., Ste 3
Santa Monica, CA 90405

Rosalyn K. Grigsby
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H. Ray Ham
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(INTERIM SUSPENSION BY COURT)

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Anderson, SC 29622

Connie M. Judge
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FPO, AP 96306

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(INTERIM SUSPENSION BY COURT)

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Spartanburg, SC 29306

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1104 Williams Street
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Chayah Yisrael
PO Box 1204
Hampton, GA 30228

Sean B. Zenner
PO Box 4486
North Myrtle Beach, SC 29597

# 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, 2005, 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(e), SCACR.

Columbia, South Carolina
March 7, 2005

**Suspensions**
**South Carolina Bar**
**2005 License Fees**
**As of March 1, 2005**

Forrest K. Abbott
989 Knox Abbott Dr., #201
Cayce, SC 29033

Julius B. Aiken
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Greenville, SC 29601

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Kraft Foods Switzerland
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Zurich, Switzerland 8032

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Brent Adams & Assoc.
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8527 Bluejacket St.
Lenexa, KS 66214-1656

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Parkersburg, WV 26101

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Univ. of Georgia School of Law
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Amy Spector Corrigan
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1171 Wisteria Dr.
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18 Fish Haul Rd.
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BB&T Trust Services
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Brinklow, MD 20862

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Spartanburg, SC 29302

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201 N. Greene St.
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Victoria T. Roach, PC
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FPO AP, 96306

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Mitchellville, MD 20721-2793

William A. Wood
11720 Hardy
Overland Park, KS 66210

Jennifer L. Young
208 W. 82nd St., Apt. 4D
New York, NY 10024-5419

# The Supreme Court of South Carolina

In the Matter of Susan Cross, Petitioner.

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ORDER

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The records in the office of the Clerk of the Supreme Court show that on May 18, 1988, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated January 30, 2005, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Susan Cross shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

March 3, 2005

# The Supreme Court of South Carolina

In the Matter of Samuel L. Perkins, Petitioner.

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ORDER

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The records in the office of the Clerk of the Supreme Court show that on November 16, 1983, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina dated December 29, 2004, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Samuel L. Perkins shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

March 3, 2005


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 11**

**March 7, 2005**

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

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|---|---|
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| 3833-Ellison v. Frigidaire Home Products | Pending |
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| 3836-State v. Gillian | Pending |
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|---|---|
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|---|---|
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| 2004-UP-219-State v. Brewer | Pending |
| 2004-UP-221-Grate v. Bone | Pending |
| 2004-UP-229-State v. Scott | Pending |
| 2004-UP-237-In the interest of B., Justin | Pending |
| 2004-UP-238-Loadholt v. Cribb et al. | Pending |
| 2004-UP-241-Richie v. Ingle | Pending |

| | |
|---|---|
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| | |
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| 2004-UP-427-State v. Rogers | Pending |
| 2004-UP-430-Johnson v. S.C. Dep't of Probation | Pending |
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| 2004-UP-460-State v. Meggs | Pending |
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| 2004-UP-496-Skinner v. Trident Medical | Pending |
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| 2004-UP-505-Calhoun v. Marlboro Cty. School | Pending |
| 2004-UP-513-BB&T v. Taylor | Pending |
| 2004-UP-517-State v. Grant | Pending |
| 2004-UP-520-Babb v. Thompson et al (5) | Pending |
| 2004-UP-521-Davis et al. v. Dacus | Pending |
| 2004-UP-537-Reliford v. Mitsubishi Motors | Pending |
| 2004-UP-542-Geathers v. 3V, Inc. | Pending |
| 2004-UP-546-Reaves v. Reaves | Pending |
| 2004-UP-550-Lee v. Bunch | Pending |
| 2004-UP-554-Fici v. Koon | Pending |
| 2004-UP-555-Rogers v. Griffith | Pending |

| | |
|---|---|
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| 2004-UP-560-State v. Garrard | Pending |
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| 2004-UP-654-State v. Chancy | Pending |

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

---

Celestino Rodriguez, Employee,
Claimant,

v.

Hector Romero, Employer, and
The Insurance Corporation of
New York (INSCORP) and
Capital City Insurance Company,
Carriers, Defendants,

of whom The Insurance
Corporation of New York
(INSCORP) is the, Appellant,

and

Capital City Insurance Company
is the, Respondent.

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Appeal From Spartanburg County
Gary E. Clary, Circuit Court Judge

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Opinion No. 25948
Heard September 21, 2004 – Filed February 28, 2005

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**AFFIRMED**

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Stephen L. Brown and Amy E. Mathisen, both of Young Clement Rivers & Tisdale, of Charleston, for Appellant.

Stanford E. Lacy and Christian Stegmaier, both of Collins & Lacy, of Columbia, for Respondent.

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**JUSTICE WALLER:** This is a workers compensation matter. At issue is which of two insurance carriers, The Insurance Corporation of New York (INSCORP) or Capital City Insurance Company (Capital), is responsible for coverage for injuries sustained by Celestino Rodriguez in a work-related accident on June 27, 2000. The single commissioner held Capital was the responsible insurance carrier; the full commission affirmed. The circuit court reversed and held INSCORP is the responsible carrier. We affirm the circuit court's ruling.

## FACTS

Rodriguez was employed performing construction-type labor for Hector Romero, a subcontractor. On June 27, 2000, while installing a new roof on a large commercial building, Rodriguez slipped and fell through a skylight opening, suffering numerous injuries. It is undisputed that Rodriguez is entitled to workers' compensation coverage. The only question is which carrier is responsible.

Romero initially purchased workers' compensation insurance from INSCORP in January 1999. The policy was cancelled in June 1999 for non-payment. In May 2000, Romero called INSCORP'S managing agent, Risk Control, to ask if his policy could be reinstated. Risk Control referred him to one of its carriers, Tad Roberts. On May 19, 2000, Romero faxed his application to Roberts, who forwarded it to Risk Control. Romero sent a partial premium of $704.00 in June 2000.

Sometime thereafter, Roberts became suspicious Romero was "leasing" his employees.[1] Risk Control investigated and determined it was likely Romero was leasing employees. On or about June 16, 2000, Risk Control advised Roberts that Romero's policy should be cancelled. Roberts relayed this information to Romero and told him to seek coverage through an "assigned risk" plan.[2] However, Romero's policy was not cancelled and, instead, INSCORP issued policy # SC0001204200RCS on June 22, 2000, with an effective date of May 19, 2000. On June 23, 2000, Risk Control sent Romero an invoice for the July premium payment.

Meanwhile, having been advised by Roberts to seek assigned risk coverage, Romero went on June 23, 2000 to Capstone Insurance Services in Greenville and applied for workers' compensation coverage. In accordance with assigned risk rules and procedures, Romero's application was sent to Capital, a designated assigned risk carrier. Romero's application for assigned risk coverage made a number of misstatements and misrepresentations, including the averment that he was a new business and had no prior workers' compensation coverage.[3] Not knowing of Romero's coverage with INSCORP, Capital issued policy # 05-WC-0004280/000, effective June 24, 2000. Three days later, on June 27, 2000, Rodriguez slipped through the roof and was injured.

Capital, still unaware of the INSCORP policy, accepted the claim and began providing benefits. It learned of the INSCORP policy on or about August 15, 2000. On August 16, 2000 Capital tendered Rodriguez' claim to INSCORP; Capital simultaneously filed a cancellation form with the National

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[1] Coverage for leased employees was excluded by INSCORP's treaty with its reinsurers.

[2] Assigned risk insurance agreements are made for the benefit of people who are entitled to insurance but who are unable to procure insurance through ordinary methods. S.C. Code Ann. § 38-73-540 (1976).

[3] INSCORP asserts there is no evidence Romero made any material misrepresentations about his "new business venture of a temporary personnel agency which specialized in insulation installation and related labor." It contends his representations were valid and correct in light of the distinctions between the coverage for which he sought the assigned risk plan (temporary personnel agency doing insulation) and the INSCORP policy (buildings-operation; by contractors- includes window cleaning, painting, maintenance). We disagree; we find substantial evidence supports the unappealed finding of the commission that Romero made material misrepresentations to gain coverage.

Council on Compensation Insurance (NCCI) asking its policy be voided on the ground that Romero was ineligible for assigned risk coverage because a) he had voluntary coverage, and b) he had made material misrepresentations in his application for coverage. On August 17, 2000, INSCORP sent a "flat cancellation" notice to Romero.

On September 6, 2000, Capital filed a motion to determine coverage. A hearing was held before the single commissioner, who ruled that because Romero had lied in his representations to obtain the policy, Capital's policy should be rescinded and declared void *ab initio*. Since INSCORP voluntarily issued its policy, the commissioner found it should be deemed the responsible carrier. However, notwithstanding these findings, the single commissioner ruled that because Capital's assigned risk policy had the most recent effective date, it was the responsible carrier pursuant to the applicable regulation, 25A S.C. Code Ann. Reg. 67-409. The full commission affirmed, with one commissioner dissenting. The circuit court reversed and found INSCORP to be the responsible carrier; it ruled that because Romero had coverage in the voluntary market, he was not eligible for assigned risk coverage such that Capital's coverage was void. The circuit court also ruled the policy was void *ab initio* due to material misrepresentations made by Romero in his application. Accordingly, the circuit court found no dual coverage such that Reg. 67-409 was inapplicable.

## ISSUE

Did the circuit court properly rule that INSCORP was the responsible carrier?

## SCOPE OF REVIEW

Review of a decision of the workers' compensation commission is governed by the Administrative Procedures Act. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Although this Court may not substitute its judgment for that of the full commission as to the weight of the evidence on questions of fact, it may reverse where the decision is affected by an error of law. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438

(2000); S.C. Code Ann. § 1-23-380(A)(6) (Supp.2002). Review is limited to deciding whether the commission's decision is unsupported by substantial evidence or is controlled by some error of law. Hendricks v. Pickens County, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct.App.1999).

## DISCUSSION

Central to resolution of this dispute is the interplay between the South Carolina Assigned Risk Plan Operating Rules and Procedures (Procedures) and the applicable regulation, 25A S.C. Code Ann. Reg. 67-409.

Pursuant to S.C. Code Ann. § 38-73-540 (1976), "[a]ssigned risk agreements may be made among insurers with respect to the equitable apportionment among them of insurance which may be afforded **applicants who are in good faith entitled to, but who are unable to procure, insurance** through ordinary methods." (emphasis supplied). In April 2000,[4] the National Council on Compensation Insurance (NCCI) filed the South Carolina Workers Compensation Assigned Risk Plan (Plan) with the Department of Insurance. Although the Plan has not been enacted by the General Assembly, it has been adopted and is followed by the DOI in implementing the assigned risk pool created by S.C. Code Ann. § 38-73-540. Carriers selected to write assigned risk coverage must accept all applications of "eligible" employees.

Capital is one of only two carriers in South Carolina who issue assigned risk policies under the South Carolina Assigned Risk Plan. The Plan provides for the equitable apportionment of employers who are in good faith entitled to workers compensation insurance but who are unable to procure such assurance in a regular manner.[5] Pursuant to the Plan, good faith is presumed in the absence of clear and convincing evidence to the contrary.

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[4] In 2000, the assigned risk market in South Carolina was privatized by the Department of Insurance (DOI). Unlike the former assigned risk pool system, which spread the risk over all carriers, the new system places the burden on only a few carriers who have requested to handle assigned risk to bear the loss.

[5] This is identical to S.C. Code Ann. § 38-73-540.

One of the requirements of eligibility is that the employer has not made any material misrepresentations in his application.[6] Paragraph 9 of the Plan, governing Cancellation of an assigned risk policy states, in pertinent part, "**any employer having voluntary coverage or an offer thereof in this state is ineligible for SCWCARP Plan coverage**. **The assigned risk coverage terminates at the effective date of the voluntary insurance.**" (emphasis added). Additionally, the Plan has a provision entitled "Cancellation for Voluntary Coverage," which states, in part, "any insurer that wishes to insure an employer as voluntary business may do so at any time. If such insurer is not the contract carrier, the contract carrier shall cancel its policy. . . and the coverage shall **automatically terminate as of the effective date of the voluntary insurer's policy**." Another paragraph of the Plan Procedures, governing the effective date of a policy, states that the **effective date shall be the latest of any of three conditions, one of which is "the date of expiration of existing coverage**."

Under the Assigned Risk Plan and Procedures outlined above, it is patent the assigned risk policy issued by Capital either a) never became effective because INSCORP's policy was not cancelled until Aug. 17, 2000, b) terminated upon the effective date of INSCORP's policy (which, although issued on June 22, 2000, was made effective May 19, 2000),[7] or c) was not effective because Romero, having misrepresented his status, was ineligible for assigned risk coverage. INSCORP asserts, however, that under Reg. 67-409, there was dual coverage such that the later policy issued by Capital is effective. We disagree.

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[6] The Plan itself states that an employer is not in good faith entitled to assigned risk insurance if "[t]he employer . . . knowingly makes a material misrepresentation on the application by omission or otherwise, including, but not limited to, the following: estimated payroll, offers of workers compensation insurance, nature of business, . . . previous insurance history."

[7] INSCORP asserts Capital was required to cancel its policy, pointing to several provisions in the Plan which allow an assigned risk carrier to cancel a policy upon learning the applicant is not eligible. The provisions cited by INSCORP are not controlling as there are more specific provisions governing **automatic** termination where the employer is insured in the voluntary market. INSCORP relies upon a Virginia case, Franklin Mortgage Corp. v. Walker, 367 S.E.2d 191 (Va. App. 1988) to support its contention. However, Franklin dealt solely with the effect of the attempted cancellation of a workers' compensation policy. It did not deal with an assigned risk policy, nor did it deal with a policy for which the employer was not eligible.

Reg. 67-409 provides, in part:

> A. When **duplicate or dual coverage exists** by reason of two different insurance carriers issuing two policies to the same employer securing the same liability, the **Commission shall presume the policy with the later effective date is in force and the earlier policy terminated on the effective date of the later policy**.

(emphasis supplied). Here, it is patent that the policy issued by Capital never became effective because the voluntary policy had not been cancelled. Accordingly, contrary to INSCORP's contention, there was no dual coverage, and Regulation 67-409 is simply inapplicable. A recent Court of Appeals' opinion is instructive.

In Avant v. Willowglen Academy, 356 S.C. 181, 588 S.E.2d 125 (Ct. App. 2003), the issue was which of two carriers, the assigned risk carrier, or a voluntary carrier, was responsible for workers' compensation coverage. Travelers had issued an assigned risk policy to Willowglen Academy. It sent a quotation to renew the policy effective August 24, 1997. Travelers was paid the premiums for this coverage in two installments on July 3, 1997 and Aug. 13, 1997. On Aug. 27 or 29, 1997, three days after the effective date of the assigned risk policy issued by Travelers, United issued an endorsement indicating its voluntary policy was effective July 1, 1997. 356 S.C. at 184-185, 588 S.E.2d at 126-127.

Avant was injured in September 1997, and Travelers (the assigned risk carrier) accepted the claim and began providing benefits. Sometime later, when Travelers learned of the dual coverage, and that the coverage with United was **voluntary**, it sought to cancel its policy effective on the date of the voluntary policy, July 1, 1997. It subsequently filed a motion with the Workers' Compensation Commission requesting a determination as to the proper carrier. The single commissioner ruled United was the proper carrier; the full commission reversed and held both parties equally liable; the circuit court reversed and held that, under Reg. 67-409, because there was dual

coverage, and because the Travelers policy had the later effective date, Travelers was responsible. 356 S.C. at 186, 588 S.E.2d at 128.

The Court of Appeals reversed. Writing for the majority, Judge Connor held the assigned risk policy issued by Travelers had, under the South Carolina Assigned Risk Plan,[8] terminated on the effective date of the voluntary policy, July 1, 1997. The Court of Appeals held that Reg. 67-409 should be read in conjunction with the Assigned Risk Plan; it found that since the Plan addressed the specific situation of cancellation of an assigned risk policy upon the effective date of a voluntary policy, and the regulation was silent on this issue, the provisions of the Assigned Risk Plan should be given effect. 356 S.C. at 189, 588 S.E.2d at 129. Accordingly, it found that through application of the Assigned Risk Plan, United was the only carrier with coverage on the date of the employee's injury. Id. We agree with the Court of Appeals' reasoning.

Under the limited factual circumstances here, we agree with Avant that the Assigned Risk Plan "should be read in conjunction with the Act and its regulations and be accorded effect under the facts of this case given the [Plan] addresses matters where the Act is silent." 356 S.C. at 189, 588 S.E.2d at 129. As noted by the Court of Appeals, without the Assigned Risk Plan and its procedures, "there would be nothing guiding assigned risk practice and its procedure." 356 S.C. at 188, 588 S.E.2d at 128.

In this case, because Romero had voluntary coverage in effect, his assigned risk policy never became effective. Accordingly, there was no dual coverage, and Reg. 67-409 is inapplicable. The circuit court's ruling finding INSCORP the responsible carrier is affirmed.

**AFFIRMED**.

**MOORE, BURNETT, PLEICONES, JJ., concur. TOAL, C.J., dissenting in a separate opinion.**

[8] The Plan is referred to in the Court of Appeals' opinion as the WCIP (Workers' Compensation Insurance Plan).

**CHIEF JUSTICE TOAL**: I respectfully dissent. In my view, the South Carolina Workers' Compensation Act and the regulations promulgated pursuant to the Act are the sole authority governing which carrier is responsible for providing coverage in the present case.[9] Therefore, I would reverse the holding of the circuit court and affirm the full commission's finding that Capital, not INSCORP, is the responsible carrier.

In my view, the majority misconstrues the law to the extent that it reads the Workers' Compensation Act in conjunction with the guidelines set forth by the National Council on Compensation Insurance (NCCI). In my opinion the guidelines the NCCI has set forth are not controlling authority because the NCCI is not a rulemaking body. For example, in NCCI's own "Basic Manual," the NCCI is described as a rating organization or advisory organization to make and file rates for workers' compensation insurance. In addition, the guidelines state that they are not intended to replace state statute. Further, the NCCI is not authorized to promulgate regulations. *See* S.C. Code Ann § 1-23-10 (1), (4) (Supp. 2002). As a result, I would rely solely on the Workers' Compensation Act and its corresponding regulations to determine coverage.

Because I would hold the Workers' Compensation Act and the regulations promulgated thereto as the sole controlling authority, Regulation 67-409(A) is applicable in determining which company should provide coverage.

Pursuant to Regulation 67-409(A), "[w]hen duplicate or dual coverage exists by reason of two different insurance carriers issuing two policies to the same employer securing the same liability, the Commission shall presume the policy with *the later effective date is in force and the earlier policy terminated on the effective date of the later policy*." 25A S.C. Code Ann. Regs. 67-409(A) (1976) (emphasis added).

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[9] The [Workers' Compensation] Commission shall promulgate all regulations relating to the administration of the workers' compensation laws of this State necessary to implement the provisions of this title and consistent therewith. S.C. Code Ann. § 42-3-30 (1976).

In the present case, INSCORP's policy has an effective date of May 19, 2000. On the other hand, Capital's policy has an effective date of June 24, 2000. Therefore, pursuant to Regulation 67-409(A), I would hold that Capital is the proper carrier because its policy has the later effective date.

Accordingly, I would affirm the full commission's finding that Capital is the responsible carrier.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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The State, Respondent,

v.

Ricky Dennis Gentry, Appellant.

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

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Opinion No. 25949
Heard May 25, 2004 – Filed March 7, 2005

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**AFFIRMED**

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John Dennis Delgado and Kathrine Haggard Hudgins, both of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Assistant Attorney General Deborah R.J. Shupe, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for respondent.

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**JUSTICE MOORE:** Appellant appeals his convictions for accessory before the fact of armed robbery and accessory before the fact of

assault and battery with intent to kill (ABIK), claiming the trial court was without subject matter jurisdiction to hear the accessory charges against him and claiming the trial court erred by failing to grant a directed verdict on the accessory charges. We affirm.

## PROCEDURAL BACKGROUND/FACTS

On March 31, 2001, Shawn Bobo was shot to death outside his home. His wife, Shanna, was shot four times, but survived her injuries. Appellant was indicted for murder, ABIK, armed robbery, accessory before the fact to murder, accessory before the fact to armed robbery, and accessory before the fact to ABIK. Appellant's accessory charges related to the robbery and shooting of Shawn. Following a trial, the jury found appellant guilty of accessory before the fact to armed robbery and accessory before the fact to ABIK. He was found not guilty of the remaining charges. Appellant was sentenced to thirty years imprisonment for accessory before the fact to armed robbery and to twenty years, concurrent, for accessory before the fact to ABIK.

The State presented evidence appellant and several others, including Tommie Smith (Tommie), discussed robbing the victim of cocaine. One of those present, Stanley Moore (known as Rico), testified appellant said he would kill the victim and then pulled out his gun of which Tommie took possession. Rico testified he, appellant, Tommie, and Michael Osbey (Osbey) all rode in the car to the victim's house. Rico testified the plan, which appellant had agreed to, was for Osbey to come in and shoot everyone. Appellant and Tommie talked to the victim and went inside the victim's house. A few minutes later, appellant ran out the front door and motioned Osbey to come inside. Appellant, Tommie, and Osbey later ran to get in the car. Tommie and Osbey had the guns and appellant had a bag of cocaine.

Shanna testified she was shot four times by Tommie and Osbey. She stated appellant was not in the kitchen during a struggle for the gun between Tommie and the victim. She further stated she stabbed at appellant behind the recliner in the living room.

In appellant's first statement to police, he indicated he was present when Tommie pulled a gun on the victim and when the victim and Tommie began struggling for the gun. Appellant stated he was stabbed by Shanna and that, as he was running out of the front door, he saw Osbey running towards the back door. In his second statement to police, appellant admitted he went to the victim's house to rob him of cocaine and that the plan was for Tommie to pull out a gun while appellant took the cocaine. After leaving the house, appellant heard shots fired when he was trying to catch up with Rico. He stated that when Osbey and Tommie got in the car, Osbey had the cocaine. They never split up the cocaine.

At the close of the State's case, appellant moved for a directed verdict on the accessory charges because the State had failed to prove appellant was not present when the crimes were committed.[1] The trial court denied the motion because there was conflicting evidence on the presence issue.

During appellant's case, Tommie testified he initiated the plan of robbing the victim and that appellant agreed to the plan and supplied the weapons. The plan was for appellant to pretend he was buying drugs. Appellant was present when Tommie pulled the gun on the victim and told the victim they were going to take the drugs. Tommie and the victim began to struggle for the gun and Shanna stabbed him. Then, Osbey came in and started shooting. Tommie testified appellant left before the shooting started. However, appellant came back inside the house after Osbey had entered and grabbed the cocaine. The three left the house together with over nine ounces of cocaine, worth approximately $9,000.

Appellant testified he agreed with Tommie to purchase cocaine from the victim and later agreed to rob the victim. After they passed the victim's

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[1]The elements which must concur to justify the conviction of one as an accessory before the fact are as follows: (1) that the defendant advised and agreed, or urged the parties or in some way aided them, to commit the offense; (2) *that the defendant was not present when the offense was committed*; and (3) that the principal committed the crime. State v. Smith, 316 S.C. 53, 447 S.E.2d 175 (1993) (emphasis added).

house, appellant testified he told the others that he did not want to rob the victim. Appellant testified he agreed to buy the drugs as long as Tommie did not try to rob the victim. Tommie assured appellant he would not, but Tommie pulled out a gun as the victim was taking out the cocaine. Tommie and the victim began to struggle and appellant hid behind a couch to stay out of the way of the gun. Shanna ran by him and cut him on his back. Appellant ran out the front door. Osbey was already getting out of the car. Rico was pulling out of the driveway and appellant waved his hand in an attempt to have Rico stop. By the time he got to the edge of the yard, which is near the street, appellant heard a series of shots. He continued down the street and heard more shots. When Osbey later entered the car, he had the cocaine.

At the close of appellant's case, appellant renewed his motion for a directed verdict. The motion was denied. The jury found appellant guilty of accessory before the fact of armed robbery and accessory before the fact of ABIK.

## ISSUES

I. Did the indictments' failure to allege the element "absence from the scene of the crime" deprive the trial court of subject matter jurisdiction to hear the accessory before the fact charges?

II. Did the trial court err by failing to direct a verdict for appellant on the charges of accessory before the fact to armed robbery and accessory before the fact to ABIK when no evidence was presented that appellant was absent from the scene of the crime?

III. Did the trial court err by failing to direct a verdict in appellant's favor on accessory before the fact to armed robbery when the alleged subject of armed robbery was a quantity of illegal narcotics?

## DISCUSSION

### I. Subject Matter Jurisdiction

Appellant argues the accessory before the fact indictments deprived the trial court of subject matter jurisdiction because the indictments did not allege the element "absence from the scene of the crime." Before addressing the specific facts of this case, we first address the confusion that has arisen in past jurisprudence between the sufficiency of the indictment and the subject matter jurisdiction of the trial court.

Recently, the United States Supreme Court, in United States v. Cotton, 535 U.S. 625 (2002), held that a defective indictment does not deprive a court of jurisdiction.[2] The Supreme Court explained that *Ex parte* Bain, 121 U.S. 1 (1887), was the progenitor of the view that a defective indictment deprived a court of its jurisdiction. Bain, however, is "the product of an era in which [the Supreme Court]'s authority to review criminal convictions was greatly circumscribed. At the time it was decided, a defendant could not obtain direct review of his criminal conviction in the Supreme Court." Cotton, 535 U.S. at 629-630. As a result, the Supreme Court's desire to correct obvious constitutional violations led to a somewhat expansive notion of jurisdiction, which was more a fiction than anything else. *Id.* at 630.

The Supreme Court further stated that Bain's elastic concept of jurisdiction is not what the term jurisdiction means today, *i.e.* the courts' statutory or constitutional power to adjudicate the case. *Id.* "This latter concept of subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised [below]." *Id.*

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[2]Cotton argued that because his federal indictment omitted the threshold levels of drug quantity that enhances the statutory maximum sentence, the trial court was without jurisdiction to impose a sentence for an offense not charged in the indictment.

The Supreme Court stated that its cases after Bain have held that a defective indictment does not affect the jurisdiction of the trial court to determine the case presented by the indictment. The Supreme Court then overruled Bain to the extent it held a defective indictment deprives a court of jurisdiction.

Turning to South Carolina jurisprudence, we note this Court has held that 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, Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000); and that issues related to subject matter jurisdiction may be raised at any time. Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001). The lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court. *Id.* However, as was done by the Supreme Court in Bain, this Court broadened the meaning of jurisdiction in State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987). Prior to Munn, the rule was that any objection to the sufficiency of the indictment, *i.e.* that the indictment was defective, had to be made before the jury was sworn. *See* State v. Young, 243 S.C. 187, 133 S.E.2d 210 (1963)[3] (challenge directed to the sufficiency of the indictment rather than to the jurisdiction of the Court to try the offense charged needed to be raised by a motion to quash before the jury was sworn). This rule was effectively altered by the Munn decision.

In Munn, citing 41 Am. Jur. 2d *Indictments and Informations*, § 299 (1968), we stated that defects in the indictment that are of such a fundamental character as to make the indictment wholly invalid are not subject to waiver by a defendant. We concluded that, subject to certain minor exceptions, the trial court lacks subject matter jurisdiction to convict a defendant for an offense when there is no indictment charging him with that offense when the jury was sworn. This language conflated the meaning of subject matter

[3]*Cert. denied*, 379 U.S. 868 (1964).

jurisdiction and mixed two separate questions, *i.e.* whether the trial court has the power to hear a case and whether the indictment is sufficient.[4]

While our broadened definition of subject matter jurisdiction occurred more recently than during the time of Bain,[5] we find the Supreme Court's comments in Cotton instructive. As noted by the Supreme Court in Cotton and the Missouri Supreme Court in State v. Parkhurst, 845 S.W.2d 31 (Mo. 1992), subject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts and the blending of these concepts serves only to confuse the issue. Circuit courts obviously have subject matter jurisdiction to try criminal matters. To end the confusion that was created by Munn, we now conclusively hold that if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards. *See* S.C. Code Ann. § 17-19-90 (2003) ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards."). However, a defendant may for the first time on appeal raise the issue of the trial court's jurisdiction to try the class of case of which the defendant was convicted.[6]

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[4]*See also* Mathis v. State, 355 S.C. 87, 584 S.E.2d 366 (2003) (in finding court lacked subject matter jurisdiction to convict petitioner of first degree burglary, this Court stated S.C. Code Ann. § 17-19-90 (2003) applies to indictment defects that do not affect the subject matter jurisdiction of the circuit court and does not limit a court's consideration of indictment defects that affect subject matter jurisdiction, no matter when such issues are raised).

[5]*But see* State v. Carroll, 30 S.C. 85, 8 S.E. 433 (1889) (implying question of jurisdiction raised where indictment missing element of the offense).

[6]We note that a presentment of an indictment or a waiver of presentment is not needed to confer subject matter jurisdiction on the circuit court. However, an indictment is needed to give notice to the defendant of the charge(s) against him. *See* S.C. Const. Art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the

As stated in State v. Faile, 43 S.C. 52, 59-60, 20 S.E. 798, 801 (1895), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (citations omitted):

> The indictment is the charge of the state against the defendant, the pleading by which he is informed of the fact, and the nature and scope of the accusation. When that indictment is presented, that accusation made, that pleading filed, the accused has two courses of procedure open to him. He may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined; or, waiving them, he may put in issue the truth of the accusation, and demand the judgment of his peers on the merits of the charge. If he omits the former, and chooses the latter, he ought not, when defeated on the latter, --when found guilty of the crime charged, --to be permitted to go back to the former, and inquire as to the manner and means by which the charge was presented.

The indictment is a notice document. A challenge to the indictment on the ground of insufficiency must be made before the jury is sworn as provided by § 17-19-90. If the objection is timely made, the circuit court should judge the sufficiency of the indictment by determining whether (1) the

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magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed . . ."); S.C. Code Ann. § 17-19-10 (2003) ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury . . . ."). A defendant must object if he is not presented with the indictment or if he has not waived his right to presentment. If the defendant does not object, he is deemed to have waived the right to presentment. *See* State v. Pollard, 255 S.C. 339, 179 S.E.2d 21 (1971) (individual may waive any provision of the Constitution intended for his benefit).

offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged. State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003); *see also* S.C. Code Ann. § 17-19-20 (2003) (sufficiency of indictment). In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances. State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981). Further, whether the indictment could be more definite or certain is irrelevant. State v. Knuckles, 354 S.C. 626, 583 S.E.2d 51 (2003).

We note that our holding today, while overruling several cases,[7] is in line with modern jurisprudence.[8]

Addressing the instant case, appellant argues the indictments' failure to allege the element "absence from the scene of the crime" deprives the trial court of subject matter jurisdiction to hear the accessory before the fact charges. Because appellant did not raise the sufficiency of the indictments before the jury was sworn, he cannot now raise this issue on appeal. The issue is not preserved for our review.

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[7]See Appendix.

[8]Few jurisdictions combine the concepts of subject matter jurisdiction of the trial court and the sufficiency of the indictment. *See, e.g.*, *Ex parte* Cole v. State, 842 So.2d 605 (Ala. 2002) (when first-degree robbery indictment fails to set forth essential element of offense of second-degree robbery, insufficiency of factual basis for guilty plea to second-degree robbery may be attacked on basis court lacked subject matter jurisdiction to accept the plea); State v. Bullock, 574 S.E.2d 17 (N.C. App. 2002) (when indictment does not allege essential elements of crime charged, trial court does not have subject matter jurisdiction); State v. Presler, 176 N.E.2d 308 (Ohio App. 1960) (court did not have subject matter jurisdiction where indictment did not state element of the offense).

## II. Absence From Scene of the Crime

Appellant argues the trial court erred by failing to direct a verdict on the accessory charges when no evidence was presented that he was absent from the scene of the crime.

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004). In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. *Id.* On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. *Id.* If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury. *Id.*

Regarding the accessory before the fact to armed robbery charge, the testimony indicates appellant was present during the time Tommie pulled a gun on the victim and informed the victim they were going to take the cocaine. Rico testified appellant left the victim's house with the cocaine indicating appellant assisted in completing the armed robbery. Further, appellant, in his first statement to police, did not mention the cocaine and, in his second statement, he stated that he was in the car with Rico when Osbey entered the car with the cocaine. Therefore, there was conflicting evidence whether appellant was present during the taking of the cocaine from the victim's possession.[9]

Regarding the crime of accessory before the fact to ABIK, Rico testified appellant motioned Osbey to enter the victim's home pursuant to the

[9]Armed robbery occurs when a person commits robbery, which is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear, while armed with a deadly weapon. Joseph v. State, 351 S.C. 551, 571 S.E.2d 280 (2002).

plan for Osbey to come in and shoot everyone. Rico also indicated appellant was present during the shooting. However, Tommie and appellant testified appellant was *not* present during the shooting.

Given the conflicting evidence on both charges, the trial court appropriately submitted the charges to the jury and properly denied the directed verdict motion. *See* State v. Curtis, *supra* (defendant not entitled to directed verdict when State has produced evidence of offense charged; if there is any direct evidence or substantial circumstantial evidence reasonably tending to prove guilt of accused, Court must find case was properly submitted to jury).

## III. Illegal Drugs as Subject of Armed Robbery

Appellant argues the trial court erred by failing to direct a verdict in his favor on accessory before the fact to armed robbery where the alleged subject of the armed robbery was a quantity of illegal narcotics. However, illegal drugs may be the subject of an armed robbery. *See, e.g.*, State v. Oliver, 434 S.E.2d 202 (N.C. 1993) (drugs may be subject of armed robbery); Guy v. State, 839 P.2d 578 (Nev. 1992), *cert. denied*, 507 U.S. 1009 (1993) (drugs can be subject of robbery).

Appellant also argues the State did not introduce any testimony regarding the value of the narcotics. However, Tommie testified the cocaine taken from the victim's home had a value of approximately $9,000. Accordingly, the State introduced evidence that something of value had been taken from the victim.

**AFFIRMED.**

**TOAL, C.J., WALLER and BURNETT, JJ., concur.**
**PLEICONES, J., dissenting in a separate opinion.**

## APPENDIX

While perhaps not a complete listing of all the cases affected by this decision, the following cases are overruled to the extent they combine the concept of the sufficiency of an indictment and the concept of subject matter jurisdiction, *i.e.* a trial court's power to hear a charge:

1. Koon v. State, 358 S.C. 359, 595 S.E.2d 456 (2004).
2. Thompson v. State, 357 S.C. 192, 593 S.E.2d 139 (2004).
3. Mathis v. State, 355 S.C. 87, 584 S.E.2d 366 (2003).
4. State v. Knuckles, 354 S.C. 626, 583 S.E.2d 51 (2003).
5. Cohen v. State, 354 S.C. 563, 582 S.E.2d 403 (2003).
6. Cutner v. State, 354 S.C. 151, 580 S.E.2d 120 (2003).
7. State v. Wilkes, 353 S.C. 462, 578 S.E.2d 717 (2003).
8. Hooks v. State, 353 S.C. 48, 577 S.E.2d 211 (2003).
9. Joseph v. State, 351 S.C. 551, 571 S.E.2d 280 (2002).
10. State v. Parker, 351 S.C. 567, 571 S.E.2d 288 (2002).
11. Odom v. State, 350 S.C. 300, 566 S.E.2d 528 (2002).
12. State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002).
13. State v. Timmons, 349 S.C. 389, 563 S.E.2d 657 (2002).
14. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001).
15. State v. Elliott, 346 S.C. 603, 552 S.E.2d 727 (2001).
16. State v. Lynch, 344 S.C. 635, 545 S.E.2d 511 (2001).
17. Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001).
18. State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000).
19. Locke v. State, 341 S.C. 54, 533 S.E.2d 324 (2000).
20. Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000).
21. Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999).
22. Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995).
23. Johnson v. State, 319 S.C. 62, 459 S.E.2d 840 (1995).
24. Hopkins v. State, 317 S.C. 7, 451 S.E.2d 389 (1994).
25. Slack v. State, 311 S.C. 415, 429 S.E.2d 801 (1993).[10]

[10] *Abrogated on other grounds by* Simpson v. State, 329 S.C. 43, 495 S.E.2d 429 (1998).

26. State v. Evans, 307 S.C. 477, 415 S.E.2d 816 (1992).
27. State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987).
28. State v. Beachum, 288 S.C. 325, 342 S.E.2d 597 (1986).
29. Summerall v. State, 278 S.C. 255, 294 S.E.2d 344 (1982).
30. State v. Langford, 223 S.C. 20, 73 S.E.2d 854 (1953).
31. State v. Hann, 196 S.C. 211, 12 S.E.2d 720 (1940).
32. State v. Lazarus, 83 S.C. 215, 65 S.E. 270 (1909).
33. State v. Campbell, 361 S.C. 529, 605 S.E.2d 576 (Ct. App. 2004).
34. State v. Walton, 361 S.C. 282, 603 S.E.2d 873 (Ct. App. 2004).
35. State v. Gonzales, 360 S.C. 263, 600 S.E.2d 122 (Ct. App. 2004).
36. State v. Perry, 358 S.C. 633, 595 S.E.2d 883 (Ct. App. 2004).
37. State v. Barnett, 358 S.C. 199, 594 S.E.2d 534 (Ct. App. 2004).
38. State v. Bryson, 357 S.C. 106, 591 S.E.2d 637 (Ct. App. 2003).
39. State v. Smalls, 354 S.C. 498, 581 S.E.2d 850 (Ct. App. 2003).
40. State v. Wright, 354 S.C. 48, 579 S.E.2d 538 (Ct. App. 2003).
41. State v. Bullard, 348 S.C. 611, 560 S.E.2d 436 (Ct. App. 2002).
42. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001).
43. *In re* Jason T., 340 S.C. 455, 531 S.E.2d 544 (Ct. App. 2000).
44. State v. Ervin, 333 S.C. 351, 510 S.E.2d 220 (Ct. App. 1998).

**JUSTICE PLEICONES:** I respectfully dissent.

I agree with the majority that the question of the sufficiency of an indictment is not a matter of subject matter jurisdiction, and that in this case the indictments, while flawed, were sufficient to confer jurisdiction. I write separately, however, because in my view the circuit court lacks subject matter jurisdiction to conduct a trial of a criminal charge where there has been no presentment of an indictment by the grand jury. See State v. Evans, 307 S.C. 477, 415 S.E.2d 816 (1992) (valid indictment or waiver of presentment prerequisite for circuit court's subject matter jurisdiction). Further, in my view, the circuit court lacks subject matter jurisdiction to accept a plea of guilty unless there has been a presentment or a written waiver of presentment. S.C. Const. art. I, § 11; State v. Lazarus, 83 S.C. 215, 65 S.E. 270 (1909); S.C. Code Ann. §§ 17-23-120 to –150 (1985); compare e.g., State v. Mitchell, 1 Bay (1 S.C.L.) 267 (1792) (S.C. Const. art. 3, §2, required serious criminal cases come before the court of general jurisdiction "through the medium of a grand jury, by indictment").

In my view, the majority misapprehends the function of an indictment when it holds that its purpose is merely to serve as notice to the defendant of the charges against him. An indictment serves multiple functions: "to enable the accused to repel or rebut the charge, to protect him from a future prosecution for the same charge,[11] and to enable the court to pronounce its judgment." State v. Halder, 2 McCord (13 S.C. L.) 377 (1823). While it may be that the first and second reasons for requiring an indictment inure solely to the defendant's benefit, and therefore may be waived by him, the third requirement is for the benefit of the circuit court, and is not subject to waiver by the defendant. Compare State v. Pollard, 255 S.C. 339, 179 S.E.2d 21 (1971) (defendant may waive constitutional provision intended for his benefit). Further, unlike the other state constitutional provisions which

[11] A claim of double jeopardy is ordinarily judged by comparing the allegations made in the second indictment with those made in the first. E.g., State v. Shirer, 20 S.C. 392 (1894).

benefit an accused,[12] Article I, § 11 contains a limitation on waiver: The last sentence of this section states "The General Assembly may provide for the waiver of an indictment by the accused." Pursuant to this grant of authority, the legislature has enacted statutory waiver provisions. S.C. Code Ann. §§ 17-23-120 through –150. In my opinion, we must honor the limitation on an accused's right to waive the requirements of this constitutional provision.[13] Finally, even if we were to find that a defendant might waive this constitutional requirement, such a waiver would be valid only if made knowingly, intelligently, and voluntarily. I am concerned about the increase in post-conviction filings that would result from our abandonment of the requirement of an indictment or a written waiver of presentment, the resulting appellate proceedings, and the inevitable grants of relief. I believe the limited resources of the judicial branch are better served by requiring compliance on the front end with this clear, unambiguous, and long-standing constitutional prerequisite to a criminal proceeding.[14]

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[12] Compare S.C. Const. art. VI, §8, permitting governor to suspend certain public officers upon indictment, "or upon the waiver of such indictment if permitted by law . . . ."

[13]It is the right to waive presentment, as provided by statute, that is the personal right of the accused and he may waive only the place of its execution, not the execution itself. State v. Evans, *supra*.

[14] The Constitutional requirement that no man be tried on serious criminal charges save upon the grand jury's presentment of a true billed indictment has its roots in the English common law. As this Court acknowledged in 1932:

> The Grand Jury is of very ancient origin in the history of England . . .it was at the time of the settlement of this country *an informing and accusing body only* . . . And in the struggles which in those times arose in England between the powers of the King and the rights of the subject, it often stood as a barrier against persecution in his name.
> (italics in original)

I also disagree with the majority's decision to affirm the denial of appellant's directed verdict motions on the charges of accessory before the fact. I take a more expansive view of what constitutes presence at the scene than does the majority. Appellant accompanied the codefendants to the scene and entered the home with prior knowledge of their plan to commit a crime. "Presence at the scene by prearrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal." State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987). It is not necessary that the person participate in the actual crime or even observe it in order to be "present at the scene" and guilty as a principal. See, e.g., State v. Gates, 269 S.C. 557, 238 S.E.2d 680 (1977) (getaway driver guilty as principal in armed robbery). In my opinion, the evidence here is susceptible only of the inference that appellant was present at the scene aiding, encouraging, and/or abetting the codefendants, and therefore the directed verdicts should have been granted. State v. Smith, 316 S.C. 53, 447 S.E.2d 175 (1993) (absence from scene is element of accessory before the fact).

For the reasons given above, I respectfully dissent.

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State v. Bramlett, 166 S.C. 323, 164 S.E. 873 (1932).
The Grand Jury exists not merely to investigate and accuse, but acts as a curb on the unbridled power of the sovereign.

# The Supreme Court of South Carolina

In the Matter of
George K. Lyall, Petitioner.

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ORDER

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In 1997, the Court suspended petitioner from the practice of law for nine (9) months. In the Matter of Lyall, 328 S.C. 121, 492 S.E.2d 99 (1997). The Committee on Character and Fitness (CCF) recommended the Court deny petitioner's 2001 Amended Petition for Reinstatement. On January 30, 2002, the Court denied petitioner's Amended Petition for Reinstatement.

Petitioner has filed the current Petition for Reinstatement pursuant to Rule 33, RLDE, Rule 413, SCACR. After a hearing, the CCF filed its Report and Recommendation with the Court. The CCF recommends petitioner be reinstated to the practice of law. No exceptions were filed.

We accept the CCF's Report and Recommendation and reinstate petitioner to the practice of law subject to the following condition:

Prior to his reinstatement, petitioner must submit proof with the Court of his compliance with continuing legal education requirements, including payment of fees, for 2004. See Rule 33(f)(9), RLDE, Rule 413, SCACR (lawyer who has been suspended for nine months or more must provide evidence of good standing with the CLE Commission equivalent to that of active attorneys during the period of the entire suspension).

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

J. Pleicones, not participating.

Columbia, South Carolina

March 2, 2005

# The Supreme Court of South Carolina

In the Matter of
K. Douglas Thornton, Petitioner.

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ORDER

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After pleading guilty to one count of willful failure to make and file a state income tax return, petitioner was placed on interim suspension. In the Matter of Thornton, 339 S.C. 22, 528 S.E.2d 657 (2000). As a result of his conviction, petitioner was thereafter suspended from the practice of law for ninety (90) days, retroactive to the date of his interim suspension.[1] In the Matter of Thornton, 340 S.C. 392, 532 S.E.2d 282 (2000).

In September 2000, petitioner was suspended from the practice of law for six months and one day for failure to pay court reporter fees. In the Matter of Thornton, 342 S.C. 440, 538 S.E.2d 4 (2000). This suspension was retroactive to the date of petitioner's

[1] Petitioner was sentenced to one year imprisonment and fined $10,000, suspended upon the payment of a $500 fine, plus assessments and a surcharge, payment of restitution, and completion of 350 hours of public service employment. The sentence included five years probation which terminated upon the completion of the payments and public service requirement.

interim suspension in the tax matter. Id. This suspension provided petitioner would not be eligible for reinstatement until completing the terms of any probation and/or incarceration imposed in the tax matter. Id.

In 2002, the Court suspended petitioner from the practice of law for nine (9) months for misconduct which included accepting a loan from a client, failing to properly submit an invoice for attorneys' fees with the Social Security Administration, and failing to properly obtain and execute a judgment. In the Matter of Thornton, 349 S.C. 55, 562 S.E.2d 316 (2002).

Petitioner filed this petition to be reinstated to the practice of law pursuant to Rule 33, Rule 413, SCACR. After a hearing, the Committee on Character & Fitness (CCF) filed its Report and Recommendation with the Court. The CCF recommends petitioner be reinstated to the practice of law upon certain conditions. No exceptions were filed.

We accept the CCF's Report and Recommendation and reinstate petitioner to the practice of law subject to the following three conditions:

1. Prior to his reinstatement, petitioner must submit proof of his compliance with continuing legal education requirements, including payment of fees, for 2003 and 2004. See Rule 33(f)(9), RLDE, Rule 413, SCACR (lawyer who has been suspended for nine months or more must provide evidence of good standing with the CLE Commission equivalent to that of active attorneys during the period of the entire suspension).

2. Subsequent to his reinstatement, petitioner shall remain under the medical care of Dr. James W. Thrasher, Jr., for a minimum of two (2) years. This care shall include anger management treatment. Petitioner shall follow all recommended treatment.

3. During the first year of petitioner's reinstatement, Dr. Thrasher must submit quarterly reports to the Office of Disciplinary Counsel (ODC). During the second year of petitioner's reinstatement, Dr. Thrasher must submit semi-annual reports to the ODC. Dr. Thrasher's submissions shall report petitioner's treatment and progress. In the event the reports are not filed or petitioner fails to make satisfactory progress with his treatment, ODC shall immediately notify this Court.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

March 2, 2005

# The Supreme Court of South Carolina

In re: Amendments to Rule 34, Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

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O R D E R

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Pursuant to Article V, § 4, of the South Carolina Constitution, and at the request of the South Carolina Bar, we hereby amend Rule 34 of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, to state that an attorney who is disbarred, suspended or transferred to incapacity inactive status in this State cannot be employed directly or indirectly by a member of the South Carolina Bar as a paralegal, investigator or in any capacity connected with the practice of law nor be employed directly or indirectly in the State as a paralegal, investigator or in any capacity connected with the practice of law by a lawyer licensed in any other jurisdiction.

This amendment shall be effective immediately. A copy of Rule 34, as amended, is attached.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
March 3, 2005

## RULE 34
## EMPLOYMENT OF DISBARRED OR SUSPENDED LAWYERS

A lawyer who is disbarred, suspended or transferred to incapacity inactive status shall not be employed directly or indirectly by a member of the South Carolina Bar as a paralegal, investigator or in any other capacity connected with the practice of law nor be employed directly or indirectly in the State of South Carolina as a paralegal, investigator or in any capacity connected with the practice of law by a lawyer licensed in any other jurisdiction. Any member of the South Carolina Bar who, with knowledge that the person is disbarred, suspended or transferred to incapacity inactive status, employs such person in a manner prohibited by this rule shall be subject to discipline under these rules. A disbarred or suspended lawyer who violates this rule shall be deemed in contempt of the Supreme Court and may be punished accordingly.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Kristopher M. Miller, Appellant.

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Appeal From Anderson County
Barry W. Knobel, Family Court Judge
J.C. Nicholson, Jr., Circuit Court Judge

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Opinion No. 3952
Submitted January 1, 2005 – Filed February 28, 2005

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**AFFIRMED**

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Assistant Appellate Defender Aileen P. Clare, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Deborah R.J. Shupe, all of Columbia; and Solicitor Druanne Dykes White, of Anderson, for Respondent.

**BEATTY, J.:** Kristopher Miller was fourteen years old at the time he was charged with the murder of his father. On appeal, he argues the circuit court was without jurisdiction to accept his guilty pleas to voluntary manslaughter and possession of a weapon during the commission of a violent crime because the family court erroneously waived jurisdiction. We affirm.[1]

## FACTS

On January 2, 2001, Miller shot his father, Steve Miller, nine times. Miller then dragged his father's body into the bedroom, covered it with blankets, and locked the bedroom door. Unable to clean the blood in the living room, Miller placed a blanket over the bloodstains. Shortly thereafter, Miller called his paternal grandfather, Dr. Lee Miller, and step-grandmother, Joann Bock, and expressed concern that his father had left the home with someone. He told them that he was frightened and did not want to be alone. Miller left a note stating that he had gone to his grandfather's home. When his grandfather arrived, Miller was standing in the yard and would not let him enter the home. According to Bock, Miller appeared "very, very normal."

At his grandfather's home, Miller played computer games while Bock prepared dinner. Before eating, Miller asked for a nailbrush so that he could scrub his nails. Some time during the evening, Miller called his father's home and left a message on the answering machine. In the message, Miller informed his father of where he was that evening and then left his grandfather's telephone number.

Because several hours passed without hearing from his son, Dr. Miller became concerned and called the South Carolina Highway Department as well as several local hospitals to determine whether his son had been in an accident. When his investigation failed to reveal any information, he filed a

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

missing person's report with the Pendleton Police Department. Around 10:30 p.m., officers arrived to start an initial report.

The next day, Miller, his grandfather, and Bock went to Miller's home. During the drive, Miller commented, "I just hope Dad's okay." When they entered the home, they found a blanket covered with bloodstains on the living room carpet. Dr. Miller followed the bloodstains down the hall to his son's locked bedroom. After knocking on the door and not receiving any answer, they then called 911.

Deputy Cris Vaughn was dispatched to the Miller residence. When Vaughn kicked open the bedroom door, he discovered Steve Miller's body under several blankets. Investigator Rusty Garrett arrived at the home shortly after Vaughn. Garrett questioned Miller about the last time he saw his father alive. Miller responded that his father had sent him to his room around 2:15 p.m. the previous day when he played with his father's computer without first asking permission. Miller then told Garrett that he called his grandfather after his father left the home with an unidentified male. After Garrett tested Miller's hands for gunshot residue, Miller told Garrett that his father had raped him and that he could not take it anymore.

Investigator Garrett then transported Miller to the law enforcement center. Miller gave a statement after being advised of his Miranda rights. In the statement, Miller claimed that his father had sexually abused him since he was ten years old. Miller stated the abuse began again when he returned to his father's home after living with his aunt and uncle from approximately January 1999 until August 2000. Miller further stated that he shot his father when his father attempted to abuse him. In an addendum to the statement, Miller explained how he shot his father and identified the type of weapon that he used.

After a sexual assault examination revealed no physical signs of abuse, Miller gave a second statement in which he admitted that his father had never sexually abused him. He also claimed that he was playing with the gun under his jacket when it accidentally discharged. In a final statement, Miller again admitted that he had lied about being sexually abused. He also stated that the

gun went off accidentally but he panicked and kept pulling the trigger. He added that he retrieved a second gun from under his father's pillow and proceeded to fire at his father until the gun was empty.

On January 4, 2001, the State filed a juvenile petition charging Miller with murder. Pursuant to section 20-7-7605[2] of the South Carolina Code of Laws, the State moved to transfer jurisdiction to the circuit court. The family court judge heard two days of testimony, which included: (1) details regarding the investigation of the murder; (2) forensic evidence of the crime scene; (3) Miller's family history; (4) Miller's academic performance; (5) Miller's mental and emotional state; (6) Miller's adjustment to the DJJ environment; and (7) the differences between a commitment to DJJ and the adult prison system.

Both sides offered a significant amount of testimony regarding Miller's mental and emotional state before and after the incident. Dr. Craig Williams, who evaluated Miller for the purposes of the waiver hearing, stated that Miller had an above average intelligence with an IQ of 113. Dr. Williams testified Miller was immature for his age, had poor interpersonal skills, and did not like to be held accountable for his actions. His evaluation also revealed that Miller exhibited depressive symptoms. He characterized

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[2] Section 20-7-7605 provides in pertinent part:

> (5) If a child fourteen or fifteen years of age is charged with an offense which, if committed by an adult, would be a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more, the court, after full investigation and hearing, may determine it contrary to the best interest of the child or of the public to retain jurisdiction. The court, acting as committing magistrate, may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offenses if committed by an adult.

S.C. Code Ann. § 20-7-7605(5) (Supp. 2004).

Miller's ability to engage in normal activities after the shooting as that of a "very bazaar [sic], confused individual." In terms of Miller's remorse for shooting his father, Dr. Williams testified that Miller "was actually more focused on himself at the time about his, his life." As to Miller's family history, Dr. Williams testified that Miller informed him that his biological mother had abandoned him when he was a year old, his father was verbally and physically abusive, and his father abused alcohol. Dr. Williams acknowledged that Miller was taken into the custody of DSS for a period of time. Dr. Williams felt that Miller could benefit from the highly structured environment in DJJ and the individual and group counseling. Based on his evaluation, Dr. Williams believed that Miller was functioning more as a child as opposed to an adult and, as a result, should be tried as a juvenile. However, he admitted that if Miller were tried as an adult he would still receive the same treatment offered to juveniles.

Dr. Julian Sharman, a clinical psychologist with DJJ, testified that Miller had adapted and done "very well" living in the "special needs wing" at DJJ. He also felt that Miller had gained social maturity and that there was a change in his depressive symptoms. He believed that Miller would benefit from the treatment available at DJJ. Based on his assessment, Dr. Sharman concluded that Miller should be tried as a juvenile. He acknowledged that if Miller were tried as an adult he would remain for a period of time in the juvenile system and would for the most part receive the same services offered in the juvenile system. He noted that if Miller were tried as an adult, he would likely be housed in a secure facility, as opposed to an "open campus," and as a result would not have "quite as many services."

Dr. Elin Berg, a forensic psychiatrist, evaluated Miller at the request of the defense. She diagnosed Miller as having a major depressive disorder, post-traumatic stress disorder, and a reading disorder. She felt Miller did not exhibit psychotic behavior and there was no evidence of an anti-social personality disorder. She assessed Miller as ten years old in terms of his maturity level. Dr. Berg also believed that Miller was amenable to rehabilitation and could receive individual and group therapy at DJJ. Based on her evaluations, Dr. Berg recommended that Miller be tried as a juvenile.

After the hearing, the family court judge ordered Miller's case to be transferred to circuit court. In his order, the judge outlined in detail the testimony of each witness as well as the substance of significant exhibits, which included a mental competency evaluation. Based on the evidence, the judge concluded, "it is unlikely this Juvenile could be successfully rehabilitated by, or within, the juvenile system, and it is in the best interests of the Juvenile and the community to transfer jurisdiction to the Court of General Sessions."

On January 15, 2002, an Anderson County grand jury indicted Miller for murder and possession of a firearm during the commission of a violent crime. Approximately a week later, Miller pled guilty to voluntary manslaughter and the related weapon charge. The circuit court sentenced Miller to thirty years imprisonment, suspended upon the service of twenty years and five years probation. The court sentenced Miller to a concurrent, five-year term of imprisonment for the weapon charge.

Miller appeals the family court judge's order transferring jurisdiction to the circuit court.

## STANDARD OF REVIEW

The appellate court will affirm a transfer order unless the family court has abused its discretion. State v. Avery, 333 S.C. 284, 292, 509 S.E.2d 476, 481 (1998). "The term 'abuse of discretion' has no opprobrious implication and may be found if the conclusions reached by the lower court are without reasonable factual support." State v. Corey D., 339 S.C. 107, 118, 529 S.E.2d 20, 26 (2000); Engle v. Engle, 343 S.C. 444, 449-50, 539 S.E.2d 712, 714 (Ct. App. 2000) (stating an abuse of discretion occurs when the court is controlled by an error of law or where the order, based upon the findings of fact, is without evidentiary support).

## DISCUSSION

Miller argues the circuit court lacked jurisdiction to accept his guilty pleas because the family court erroneously waived jurisdiction. Specifically, Miller contends the family court judge's factual conclusions are without evidentiary support. We disagree.

In reaching the decision to waive jurisdiction to the circuit court, the family court judge relied on the criteria established in Kent v. United States, 383 U.S. 541 (1966),[3] which have been "implicitly approved as appropriate

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[3] In approving these factors, our Supreme Court has stated:

> In Kent, the United States Supreme Court noted the following criteria for determining whether jurisdiction should be waived under the District of Columbia Juvenile Court Act:
>
> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
>
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner.
>
> 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if injury resulted.
>
> 4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment . . . .
>
> 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime . . . .

criteria." Corey D., 339 S.C. at 118, 529 S.E.2d at 26. In assessing whether the family court judge abused his discretion, "we consider the Kent factors and emphasize that the serious nature of the offense is a major factor in the transfer decision." Id.

As will be discussed, we find the judge sufficiently outlined the factual findings upon which he based his decision and those facts are supported by the testimony and evidence presented at the transfer hearing.

Under the first factor, the judge found that there was "no more serious offense to the community" than murder and "that if 'protection to the community' was the sole criteria, there would be no question that waiver to the Court of General Sessions would be necessary." In making this determination, the judge struggled with the testimony that Miller had no history of criminal behavior and the experts indicated that Miller could be rehabilitated within the juvenile justice system. The judge contrasted this testimony with the fact that: Miller possessed above average intelligence; he gave multiple differing accounts of the incident; and he attempted to conceal the crime and create an alibi.

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> 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
>
> 7. The record and previous [criminal or adjudicative] history of the juvenile . . . .
>
> 8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Corey D., 339 S.C. at 116 n.4, 529 S.E.2d at 25 n.4 (citing Kent, 383 U.S. at 566-67).

Miller concedes that the offense of murder is serious. There is also evidence supporting the judge's conclusion regarding the protection of the community. Although the psychological experts testified that Miller could be rehabilitated, they also acknowledged that there was no guarantee that Miller would not commit another violent crime. Several of Miller's own family members testified that they were afraid of him. Jeanette and Mark Henry, Miller's paternal aunt and uncle, with whom he stayed for approximately a year and a half preceding the shooting, testified that Miller was forced out of their home because he was suspended from school for bringing a knife and he wrote a note threatening to kill their family. Moreover, the record reflects that Miller did not appear to be remorseful after shooting his father. Dr. Williams specifically testified that Miller "was actually more focused on himself at the time about his, his life." In his statement, Miller admitted that: he attempted to conceal the shooting by cleaning the living room; he hid one of the weapons at his grandfather's home; and he wrote a note and left a voicemail message to explain his whereabouts. Bock also testified that Miller appeared normal after the incident. Investigator Garrett testified that Miller changed his statement several times and ultimately admitted that his father did not sexually abuse him, which was the reason Miller initially gave as prompting the shooting.

Regarding the second factor, the judge found the evidence established that the "crime was committed in an aggressive, violent and wilful manner; and that premeditation cannot be excluded from the scenario or sequence of events occurring on January 2, 2001." The testimony of the investigating officers and the forensic evidence supports the judge's conclusion. Dr. Woodard, the forensic pathologist, testified that the victim had nine gunshot wounds, which included three to the front of the body, one to the right side, three to the back, and two to the left side of the head. He further testified the pattern of the wounds was consistent with the victim crawling on the ground while being shot. Investigator Mike Mitchell testified the crime scene evidence indicated that the victim was lying on the floor when he was shot in the head. He further explained the evidence indicated that the shooter was "tracking" the victim. Dorothy Filiatreault, a SLED forensic chemist, testified the victim was shot a few times at close range. Miller also admitted,

and the forensic evidence corroborated, that he shot his father using two separate weapons. Additionally, one could infer premeditation from Miller's act of shooting the weapon through his jacket.

With respect to the third, fourth and fifth factors, there is no dispute that evidence supports the judge's findings. Without question, the offense of murder was committed against a person. Moreover, Miller concedes that the evidence "might sustain an indictment for murder." Miller also admits that the fifth factor is inapplicable to his case given there were no co-defendants involved in the shooting.

In terms of the sixth factor, the judge indicated that this factor "created the greatest dilemma" apparently because of the conflicting evidence presented by the defense and the State. The judge outlined this evidence and ultimately concluded, "[t]he sheer violence of the murder, and the Juvenile's elaborate efforts to create an alibi and/or conceal evidence, . . . show a degree of intellect and sophistication even beyond the age of this Juvenile."

As evidenced by the judge's order, it is clear that he considered all aspects of Miller's life in reaching this conclusion. Although, as the judge recognized, there was evidence that Miller had a difficult home life, he was assessed as immature for his age, and he was a loner, there was also evidence weighing in favor of transferring jurisdiction to the circuit court. Miller's allegations of abuse were never substantiated other than for limited testimony that Miller's father had been on occasion physically and verbally abusive and the inference from Miller's limited stay in the custody of DSS four years prior to the incident. A physical examination of Miller after the shooting did not reveal any evidence of sexual abuse. After the examination, Miller in fact admitted that he had lied about the sexual abuse. Moreover, Miller spent time away from his father when he lived with other relatives. By all accounts, Miller had a good relationship with his paternal grandfather and step-grandmother. Miller's maternal grandmother, Carol Click, also testified that Miller spent summers with her family. Miller also lived for approximately a year and a half with his paternal aunt and uncle, Jeanette and Mark Henry, until they felt he was a threat to their family. Furthermore, even though Drs. Williams, Sharman, and Berg diagnosed Miller with depression

and an anxiety disorder, they found no evidence for which to classify Miller as having a definitive anti-social disorder.

As to the seventh factor, there is no evidence that Miller had any prior criminal record or adjudicative history.

Concerning the final factor, the judge found that "if this Juvenile was to remain within the jurisdiction of the Family Court and be adjudicated delinquent and sentenced as required by law, he could not be successfully rehabilitated by any program, or by any combination of programs, presently offered by this State's juvenile system." As a result, the judge believed "that after the Juvenile completed his period of juvenile detention, there would remain a constant risk to the community that certain stressors placed on this Juvenile, even as he entered adulthood, might result in his sudden, violent response to, or against, the cause of the stress." Although there is evidence to support the judge's implicit finding that Miller would only serve a limited amount of time in DJJ if tried as a juvenile, we find there is no evidence to support his conclusion that Miller could not be successfully rehabilitated by any program offered in the juvenile system. All of the psychological experts as well as Marlene McClain, a former member of the juvenile parole board, recognized that if Miller were tried as a juvenile he may only spend thirty-six to forty-four months at DJJ. However, they all believed that Miller could benefit from treatment that he would receive at DJJ. Dr. Berg specifically testified that she believed Miller was "amenable to rehabilitation." Even Dr. Williams, who indicated that Miller may be difficult to rehabilitate, ultimately concluded that "[g]iven [Miller's] level of cognitive ability, with tutoring, therapeutic support, and a structured environment, he might perform more adequately at school and might be able to develop vocational skills." Therefore, we find the judge erred in reaching his conclusion regarding the eighth Kent factor.

## CONCLUSION

We find there is evidence to support the family court judge's ruling regarding all of the Kent factors with the exception of factor eight, which

involves Miller's potential for rehabilitation within the juvenile system. Because, however, there is evidence in the record to support the family court judge's overall decision to waive jurisdiction over Miller to the circuit court, we hold he did not abuse his discretion. Therefore, the circuit court had jurisdiction to accept Miller's guilty pleas. Accordingly, Miller's convictions and sentences are

**AFFIRMED.**

**HUFF and KITTREDGE, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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Jonathan S. McCall, Respondent,

v.

IKON, d/b/a IKON Educational Services, and CESC (Computer Services Corporation, Defendants,

of whom IKON, d/b/a IKON Educational Services is, Appellant.

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Appeal From Greenville County
Paul E. Short, Jr., Circuit Court Judge

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Opinion No. 3953
Submitted December 1, 2004 – Filed February 28, 2004

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**AFFIRMED IN PART, VACATED IN PART, AND REMANDED**

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David A. Wilson, of Greenville, for Appellant.

Duke K. McCall, Jr., and Mark M. Trapp, of Greenville, for Respondent.

**KITTREDGE, J.:** This is an appeal from the denial of relief from default judgment under Rule 60(b), SCRCP. Appellant raises two exceptions to the default judgment: (1) that the default was in error because it was never properly served with the plaintiff's summons and complaint, and (2) alternatively, even if service were proper, it was not notified of the subsequent damages hearing concerning this unliquidated claim. We join the circuit court in rejecting Appellant's first exception, finding service of process was effective, but we agree with Appellant's second argument that notice of the damages hearing was insufficient. Accordingly, we remand this matter to the circuit court for a new damages hearing.

## FACTS/PROCEDURAL HISTORY

This appeal stems from confusion over the name of the appellant corporation. Appellant was identified in the summons and complaint by the name under which it chose to conduct business in South Carolina, "IKON, d/b/a IKON Educational Services."[1] Like many larger companies, IKON operates through a corporate structure that includes various subsidiaries and business units that fall under the umbrella of a parent corporation. At the top of this corporate structure is IKON Office Solutions, Inc., which is an Ohio corporation that operates different businesses in the technology field throughout the country. Within this corporation is IKON Office Solutions' wholly owned subsidiary, IKON Office Solutions Technology Services, L.L.C. At the time this cause of action arose, both IKON Office Solutions, Inc., and IKON Office Solutions Technology Services, L.L.C., were authorized

[1] IKON conducted business as it relates to this action under the name "IKON Educational Services" or "IKON Education Services." In an attempt to bring some clarity to this admittedly confusing situation, when the IKON name will not suffice, we will generally reference IKON Education Services—the name that appears most frequently in the record and the only IKON name appearing in the underlying contract.

to do business in South Carolina. IKON Education Services, however, was not technically registered to do business in South Carolina, although IKON chose to conduct business in this state under that name.

IKON opened a computer training center in Greenville, South Carolina, under the name IKON Education Services. IKON continued to operate the Greenville facility until December 2001, when it decided to sell its entire technology education unit to Computer Educational Services Corporation (CESC).

Caught in the middle of this tangle of corporate identity was Respondent Jonathan McCall. Just one month before IKON sold its education unit to CESC, McCall entered into a contract with IKON Education Services in Greenville for a full year of computer training courses. The only parties named in the contract were McCall and IKON Education Services. There was no reference to any other IKON entity. Within a few weeks of taking over the education operation, however, CESC closed the Greenville location and cancelled the classes there.

On January 9, 2002, McCall filed the present breach of contract action, naming as defendants "IKON, d/b/a IKON Educational Services" and CESC. McCall served a copy of the summons and complaint upon CT Corporation System, the registered agent for service of process in South Carolina for IKON. However, CT Corporation System returned the summons and complaint to McCall's counsel one week later, advising by letter that it was not the agent for any entity by the name of "IKON Educational Services." The letter additionally noted that "CT Corporation System serves as Registered Agent for more than one company with 'IKON' as part of its name." Thereafter, McCall served Sonja Cantrell, the Office Operational Manager for CESC and <u>former</u> office manager for IKON, with the same summons and complaint.[2]

[2] Cantrell testified that she immediately notified her supervisors at the CESC corporate office in Florida that she had received the summons and complaint, though neither supervisor claims knowledge

McCall filed an affidavit of default in February 2002, accompanied by two affidavits of service, one addressed to Cantrell and the other to CT Corporation System. Upon scheduling of the damages hearing, McCall mailed only one notice of the hearing to CESC's Greenville office address which was also the former address for IKON Education Services.

At the damages hearing, at which neither of the defendants appeared, the circuit court granted McCall a default judgment in the amount of $58,407.19 against the defendants jointly and severally. Subsequently, IKON filed a motion for relief from judgment under Rule 60(b)(1), SCRCP, which was denied because the circuit court found service upon both defendants "was properly perfected and adequate notice was given pursuant to the Code."[3] The circuit court also denied IKON's motion to reconsider. This appeal followed.

## STANDARD OF REVIEW

A motion to vacate or set aside a default judgment is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion. Tri-County Ice and Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990). An abuse of discretion arises when the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support. Id.

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of the service.

[3] The court also denied CESC's motion to set aside default judgment. CESC did not appeal this ruling. McCall's claim against CESC has been settled.

## LAW/ANALYSIS

### I. Service of Process Was Proper

Appellant asserts that IKON Education Services—as "merely a division of IKON Office Solutions Technology Services, LLC"—was "not a legal entity capable of being sued." Instead, according to Appellant, "[t]here are several recognized corporations existing in South Carolina with IKON as part of their name," including IKON Office Solutions, Inc., and its subsidiary, IKON Office Solutions Technology Services, L.L.C. Appellant therefore argues that McCall's attempts to serve his summons and complaint upon a phantom entity named "IKON Educational Services" or simply "IKON" rather than properly naming one of the "recognized" IKON corporations "existing in South Carolina" rendered the purported service ineffective. We find service was effective, and therefore conclude the circuit court properly denied Rule 60 relief in this regard.

As this issue has been framed by Appellant, its resolution would seem to entail a technical analysis of when a corporation may be said to "exist" for purposes of our civil rules governing service of process. Our rules governing service of process do not turn on parsing strict technicalities or debating murky legal abstractions. On the contrary, our supreme court has specifically held that "[w]e have never required exacting compliance with the rules to effect service of process." Roche v. Young Bros. Inc., 318 S.C. 207, 209-10, 456 S.E.2d 897, 899 (1995) (citing Foster v. Crawford, 57 S.C. 551, 36 S.E. 5 (1900); Saunders v. Bobo, 2 Bailey 492 (1831); Miller v. Hall, 1 Speers 1 (1842)). "Rather, we inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." Roche, 318 S.C. at 210, 456 S.E.2d at 899. To establish that service has been properly effected, the plaintiff need only show compliance with the civil rules on service of process. Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 67 (Ct. App. 1996). When these rules are followed, there is a presumption of proper service. Roche, 318 S.C. at 211, 456 S.E.2d at 900.

Contrary to these principles governing service of process, IKON urges us to apply the rules in a manner that demands the strictest technical compliance. The company cleaves to the narrow view that because it is registered to do business in our state under certain "legal" names, its obligation to answer or appear in response to any civil action extends only so far as it has been correctly and precisely identified according to the roll maintained by the Secretary of State. In this case, IKON would paint itself as a hapless victim of mistaken identity, going about its business and never imagining that anyone would attempt to sue them under a name that is not officially or legally "recognized" as a corporation that "exists" in South Carolina.

Indeed, our courts have rejected similar attempts by parties to avoid service of process by seeking refuge under a highly technical interpretation of the rules:

> A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, as is the case here, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

Griffin v. Capital Cash, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (Ct. App. 1992). It has long been recognized that a corporation may be known by several names in the transaction of its general business. See Long v. Carolina Banking Co., 193 S.C. 225, 239, 8 S.E.2d 326, 332 (1939). "If a corporation has acquired a name by usage, an adjudication against it by the name so acquired is valid and binding." Id. "If [a corporation] is sued in a name under which it transacts business, the process will ordinarily be sufficient to bring it before the court." Griffin, 310 S.C. at 292, 423 S.E.2d at 146. "The misnomer of a corporation in a notice, summons, or other step in a judicial proceeding is immaterial if it appears the corporation could not have

been, or was not, misled." Id. Furthermore, use of a trade name will not invalidate the judgment if the misnomer does not cause the corporation prejudice. Long, 193 S.C. at 239, 8 S.E.2d at 332.

We find IKON was neither misled nor otherwise prejudiced by the use of the name "IKON, d/b/a IKON Educational Services" in the summons and complaint. The confusion here was created solely by IKON, for it chose the name under which it would conduct business in this state. The record unmistakably reveals that IKON Education Services (or IKON Educational Services) was the name IKON used in connection with its computer training courses offered in South Carolina. McCall signed a customer agreement entitled "IKON Education Services Public Class Enterprise Training Pass." The name "IKON Education Services" is mentioned no less than five times in the parties' contract, including the signature line which indicated the terms of the agreement were "Accepted by: IKON Education Services." In this contract, drafted entirely by IKON, no other IKON entities are named.

IKON seeks refuge in promotional literature provided to McCall and other potential purchasers of its educational services. We acknowledge that this pamphlet does contain a reference to IKON's corporate parent, but it does so obscurely in a footnote in miniscule print. To give the reader a sense of this disclosure, as best as we can reproduce, at the bottom of the third page of this eight page document, the following appears: IKON Education Services is a business unit of IKON Office Solutions Technology Services, LLC, a wholly owned subsidiary of IKON Office Solutions, Inc. Conversely, the booklet prominently and consistently refers to the company under the banner logo "IKON" and "IKON Education Services"—the very entity that entered into the contract with McCall. Additionally, these materials refer the reader to "www.ikoneducation.com" for further information. We find that this obscure and barely legible reference in the promotional literature to IKON's parent does not aid its efforts to escape default.

Because IKON prominently held itself out as IKON Education Services, it would be wholly inequitable to find McCall's attempts to serve the company under that name ineffective. The fact that IKON's

registered agent for service of process, CT Corporation, did not recognize IKON's chosen business unit—IKON Education Services—is a result of IKON's own neglect. IKON selected the name under which it would conduct business and enter into contracts in this state. IKON now looks to us to extricate it from this morass, but we are not inclined to reward IKON for its own neglect. We therefore find McCall effectively served IKON with his summons and complaint through the company's registered agent, CT Corporation System.

## II. Inadequate Notice of Damages Hearing

We turn next to IKON's claim that it did not receive adequate notice of the hearing on damages as mandated by Rule 55(b)(2), SCRCP.

In the present case, McCall attempted to provide notice of the damages hearing to IKON by way of a single letter addressed jointly to "IKON d/b/a IKON Educational Services and C.E.S.C. (Computer Educational Services Corporation)." This letter was mailed to 1001 Keys Drive in Greenville, IKON Education Services' former office location that was taken over by CESC following its purchase of the IKON education business in December 2001. IKON argues the mailing of one letter addressed to both defendants was not adequate to satisfy the notice requirements of Rule 55(b)(2). We agree.

Under Rule 55(b)(2), SCRCP, "[p]ursuant to Rule 5(a), notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail to the last known address of such party whether or not such party has appeared in the action." The service requirements of Rule 5(a), SCRCP, incorporated into Rule 55(b)(2) mandate that "[e]very order required by its terms to be served, every pleading subsequent to the original summons and complaint . . . <u>every written notice</u>, appearance, demand, offer of judgment, designation of record or case and exceptions on appeal, and similar papers shall be served upon <u>each</u> of the parties . . ." (emphasis added). The plain language of the rule therefore requires that <u>each</u> party shall be served separately. Mailing one letter addressed to both IKON and

CESC, therefore, was not sufficient to comply with Rule 55(b)(2) and Rule 5(a).

The need to properly serve each party individually does not arise from an arcane or highly technical application of the rules. Rather, this requirement serves an essential function—ensuring that notice is properly received by all entitled to it. Addressing a single notice to two distinct parties as McCall did in the present case, sharply diminishes the likelihood that both will actually receive notice, as such a method necessarily depends upon one of the parties "passing along" the notification to the other. The rules of service are designed to eliminate the need for such contingencies.

Finding notification was insufficient, therefore, we vacate the award of damages and remand this matter to the circuit court for a new damages hearing upon proper notice to IKON.

## CONCLUSION

Finding proper service of the summons and complaint upon IKON by delivery to its registered agent, we affirm the circuit court ruling denying IKON relief from default. However, we find that McCall failed to properly notify IKON of the subsequent damages hearing, so we therefore vacate the award of damages and remand this matter to the circuit court for a new hearing on damages.

**AFFIRMED IN PART, VACATED IN PART, AND REMANDED.**

**HUFF and BEATTY, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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Nationwide Mutual Insurance Co., Respondent,

v.

Kimberly Erwood, Appellant.

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

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Opinion No. 3954
Submitted December 1, 2004 – Filed February 28, 2005

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**REVERSED**

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James C. Cothran, Jr. and Thomas Barksdale Cabler, both of Spartanburg, for Appellant.

J.R. Murphy and Adam J. Neil, both of Columbia, for Respondent.

**BEATTY, J.:** Kimberly Erwood appeals the circuit court's order granting summary judgment in favor of Nationwide Mutual Insurance Company (Nationwide). She contends the court erred in holding that the applicable statute and policy provision precluded her from recovering uninsured motorist benefits. We reverse.[1]

## FACTS

The parties stipulated to the essential facts. An accident occurred while Erwood was a passenger on a motorcycle owned and operated by her husband. Erwood sustained injuries in the accident, but the motorcycle was not covered under any insurance policy. However, at the time of the accident, Erwood maintained a Nationwide insurance policy on a non-involved automobile that provided uninsured motorist (UM) coverage in the amount of $15,000 per person.

Erwood demanded coverage under the Nationwide policy. Nationwide denied the claim and asserted that UM or underinsured motorist coverage (UIM) coverage did not extend to a person involved in an accident while occupying a vehicle that did not have UM or UIM coverage. Nationwide relied on the following policy provision in denying coverage:

> 3. If a vehicle owned by you or a relative is involved in an accident where you or a relative sustains bodily injury or property damage, this policy shall:
>    a) be primary if the involved vehicle is your auto described on this policy; or
>    b) be excess if the involved vehicle is not your auto described on this policy. The amount of coverage applicable under this policy shall be the lesser of the coverage limits under the policy of the coverage limits on the vehicle involved in the accident.

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

Nationwide contended this provision only allows an insured to collect available UM or UIM benefits under a policy on a non-involved vehicle in an amount up to the UM or UIM coverage on the vehicle involved in the accident. Therefore, Nationwide sought a declaratory judgment that the insurance policy on the non-involved automobile did not provide Erwood with UM or UIM coverage for the injuries sustained in the motorcycle accident. By answer and counterclaim, Erwood sought a declaratory judgment that she was entitled to collect UM or UIM benefits under the policy on the non-involved vehicle. Thereafter, both parties moved for summary judgment. The circuit court granted summary judgment in favor of Nationwide and denied summary judgment to Erwood. Erwood appeals.

## STANDARD OF REVIEW

"When reviewing a dismissal of an action under Rule 56, SCRCP, an appellate court applies the same standard of review implemented by the trial court." Gilbert v. Miller, 356 S.C. 25, 28, 586 S.E.2d 861, 863 (Ct. App. 2003). "Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 491, 575 S.E.2d 549, 552 (2003); Rule 56(c), SCRCP ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."). "When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." WDW Props. v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000). In such cases, we are not required to defer to the trial court's legal conclusions. J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth., 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999).

## DISCUSSION

### I.

Erwood argues the circuit court erred in finding section 38-77-160 of the South Carolina Code of Laws does not require Nationwide to provide UM coverage in the basic limits under a policy maintained on a vehicle not involved in the accident. We agree.

### A.

In Burgess v. Nationwide Mutual Insurance Company, 361 S.C. 196, 603 S.E.2d 861 (Ct. App. 2004), cert. pending, this court recently addressed the proper interpretation of section 38-77-160 in relation to UIM coverage.[2] Section 38-77-160 provides in relevant part: "If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident." S.C. Code Ann. § 38-77-160 (2002).

Burgess was involved in an accident while operating his motorcycle. He collected liability benefits from the at-fault driver. Id. at 199, 603 S.E.2d at 863. Although he did not have UIM coverage on the motorcycle involved in the accident, he owned three other vehicles covered by a Nationwide policy that provided UIM coverage of $25,000. The policy contained the exact provision at issue in the instant case, which states, in pertinent part: "[t]he amount of coverage applicable under this policy shall be the lesser of the coverage limits under this policy or the coverage limits on the vehicle involved in the accident." Id. Burgess demanded payment from Nationwide. Nationwide refused to pay Burgess, arguing that Burgess had not purchased UIM coverage for the motorcycle, and the policy provision precluded coverage. Id.

[2] We note the circuit court judge did not have the benefit of this opinion at the time he issued his decision.

Burgess afforded this court the opportunity to decide the novel issue of whether section 38-77-160 permits an insured who purchases UIM benefits under a policy covering vehicles which are not involved in the accident to recover basic UIM benefits under those policies. Burgess, 361 S.C. at 202, 603 S.E.2d at 865. In Burgess, we noted that our supreme court has addressed the public policy reasons for affording UM coverage to insured individuals in the following passage:

> "[U]ninsured motorist coverage is not to provide coverage for the uninsured vehicle but to afford additional protection to the insured." Nationwide Mut. Ins. Co. v. Howard, 288 S.C. 5, 12, 339 S.E.2d 501, 504 (citing Hogan v. Home Ins. Co., 260 S.C. 157, 162, 194 S.E.2d 890, 892 (1973)). The court further clarified in Hogan that "unlike the provisions relative to liability coverage, the statute plainly affords uninsured motorist coverage to the named insured and resident relatives of his or her household at all times and without regard to the activity in which they were engaged at the time. Such coverage is nowhere limited in the statute to the use of the insured vehicle." Hogan, 260 S.C. at 162, 194 S.E.2d at 892.

Id. at 201-02, 603 S.E.2d at 864. Because UIM coverage is a variation of UM coverage, we found the legislative intent behind UM coverage was applicable to UIM coverage. Therefore, we held that section 38-77-160 does not allow the exclusion or restriction of basic UIM coverage, and UIM coverage is personal and portable. Id. at 202, 603 S.E.2d at 865. In other words, "where the coverage follows the person any person who enjoys the status of an insured under a motor vehicle policy of insurance which includes uninsured/underinsured coverage enjoys coverage protection simply by reason of having been injured by an uninsured/underinsured motorist." Id. at 202, 603 S.E.2d at 865 (citing 9 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 123:3 (3d ed. 2004)).

Given section 38-77-160 applies to both UM and UIM coverage, and the legislative intent applies to both types of coverage, we find UM coverage is personal and portable and basic UM coverage cannot be excluded or restricted. Therefore, Erwood, as an insured, is entitled to receive UM benefits in the basic limits from the Nationwide policy she maintained on the non-involved automobile.

**B.**

Erwood next argues the circuit court erred in finding that Nationwide's policy endorsement precluded her claim for UM benefits. We agree.

In Burgess, we held the policy provision limiting UIM coverage to the lesser of the coverage limits under the policy or the coverage limits on the vehicle involved in the accident exceeds the limitations allowed by section 38-77-160 and is therefore inconsistent with public policy and void. Burgess, 361 S.C. at 206, 603 S.E.2d at 867. The policy provision at issue here contains the exact language as the endorsement discussed in Burgess. In view of our finding that UM coverage, like UIM coverage, follows the person and not the vehicle, we conclude the policy provision is void and without effect. Thus, Erwood is not precluded from receiving UM benefits by the policy provision in the insurance contract.

## CONCLUSION

The circuit court erred when it found Erwood was not entitled to recover UM benefits under the policy she maintained on the non-involved vehicle. Because we find UM coverage is both personal and portable, and because Nationwide's policy provision is more restrictive than section 38-77-160, the order of the circuit court is

**REVERSED.**

**HUFF and KITTREDGE, JJ., concur.**