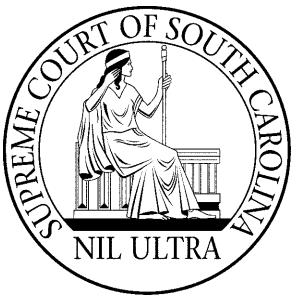

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 23

June 3, 2004

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

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2004-UP-347-Leo Gefre and Ellen Gefre v. Donald Skelton and Robert Skelton d/b/a Creative Candles v. Travelers Property and Casualty Insurance Company and Charter Oak Fire Insurance Company
(Georgetown, Judge Paula H. Thomas)

2004-UP-348-Centura Bank v. Norma J. Cox
(Florence, Judge B. Hicks Harwell, Jr.)

2004-UP-349-Mary Catherine R. Furtick v. Colby W. Furtick
(Orangeburg, Special Referee F. Lee Prickett, Jr.)

2004-UP-350-Receivable Recovery Services v. Dona Sloan Coates
(Lexington, Judge Rodney A. Peeples)

2004-UP-351-The State v. Keyarda Pierre Riley
(Richland, Judge G. Thomas Cooper, Jr.)

2004-UP-352-The State v. Peter L. Middleton
(Lee, Judge William P. Keesley)

2004-UP-353-The State v. Desmond Jay Southerland
(Greenville, Special Circuit Court Judge Charles B. Simmons, Jr.)

PETITIONS FOR REHEARING

3724-State v. Pagan	Pending
3776-Boyd v. Southern Bell	Pending
3778-Hunting v. Elders	Pending
3779-Home Port v. Moore	Pending
3780-Pope v. Gordon	Pending
3781-Nationwide Mutual v. Prioleau	Pending
3784-State v. Miller	Pending
3786-Hardin v. SCDOT	Pending

3787-State v. Horton	Pending
3789-Upchurch v. Upchurch	Pending
3790-State v. Reese	Pending
2003-UP-292-Classic Stair v. Ellison	Pending
2003-UP-481-Branch v. Island Sub-Division	Pending
2004-UP-261-Zahn v. Allen	Pending
2004-UP-270-Anderson v. Buonforte	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-276-Washington v. Miller	Pending
2004-UP-289-E. Hathaway Const. v. Eli	Pending
2004-UP-295-State v. Corbitt	Pending
2004-UP-306-State v. Lopez	Pending
2004-UP-330-In the matter of Williams, A.	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3596-Collins Ent. v. Coats & Coats et al.	Pending
3602-State v. Al-Amin	Pending
3610-Wooten v. Wooten	Pending
3635-State v. Davis	Pending
3639-Fender v. Heirs at Law of Smashum	Pending
3642-Hartley v. John Wesley United	Pending
3645-Hancock v. Wal-Mart Stores	Pending

3647-State v. Tufts	Pending
3653-State v. Baum	Pending
3654-Miles v. Miles	Pending
3655-Daves v. Cleary	Pending
3656-State v. Gill	Pending
3658-Swindler v. Swindler	Pending
3661-Neely v. Thomasson	Pending
3663-State v. Rudd	Pending
3667-Overcash v. SCE&G	Pending
3669-Pittman v. Lowther	Pending
3674-Auto-Owners v. Horne et al.	Pending
3676-Avant v. Willowglen Academy	Pending
3677-The Housing Authority v. Cornerstone	Pending
3678-Coon v. Coon	Pending
3679-The Vestry v. Orkin Exterminating	Pending
3680-Townsend v. Townsend	Pending
3681-Yates v. Yates	Pending
3683-Cox v. BellSouth	Pending
3684-State v. Sanders	Pending
3685-Wooten v. Wooten	Pending
3686-Slack v. James	Pending

3690-State v. Bryant	Pending
3691-Perry v. Heirs of Charles Gadsden	Pending
3693-Evening Post v. City of N. Charleston	Pending
3703-Sims v. Hall	Pending
3706-Thornton v. Trident Medical	Pending
3707-Williamsburg Rural v. Williamsburg Cty.	Pending
3708-State v. Blalock	Pending
3709-Kirkman v. First Union	Pending
3710-Barnes v. Cohen Dry Wall	Pending
3711-G & P Trucking v. Parks Auto Sales	Pending
3712-United Services Auto Ass'n v. Litchfield	Pending
3714-State v. Burgess	Pending
3716-Smith v. Doe	Pending
3718-McDowell v. Travelers Property	Pending
3717-Palmetto Homes v. Bradley et al.	Pending
3719-Schmidt v. Courtney (Kemper Sports)	Pending
3720-Quigley et al. v. Rider et al.	Pending
3721-State v. Abdullah	Pending
3722-Hinton v. SCDPPPS	Pending
3728-State v. Rayfield	Pending
3729-Vogt v. Murraywood Swim	Pending

3733-Smith v. Rucker	Pending
3737-West et al. v. Newberry Electric	Pending
3739-Trivelas v. SCDOT	Pending
3740-Tillotson v. Keith Smith Builders	Pending
3742-State v. McCluney	Pending
3743-Kennedy v. Griffin	Pending
3757-All Saints v. Protestant Episcopal Church	Pending
3759-QZO, Inc. v. Moyer	Pending
3765-InMed Diagnostic v. MedQuest Assoc.	Pending
2003-UP-009-Belcher v. Davis	Pending
2003-UP-060-State v. Goins	Pending
2003-UP-111-State v. Long	Pending
2003-UP-135-State v. Frierson	Pending
2003-UP-205-State v. Bohannan	Pending
2003-UP-277-Jordan v. Holt	Pending
2003-UP-316-State v. Nickel	Pending
2003-UP-324-McIntire v. Cola. HCA Trident	Pending
2003-UP-336-Tripp v. Price et al.	Pending
2003-UP-360-Market at Shaw v. Hoge	Pending
2003-UP-396-Coaxum v. Washington et al.	Pending
2003-UP-416-Sloan v. SCDOT	Pending

2003-UP-444-State v. Roberts	Pending
2003-UP-453-Waye v. Three Rivers Apt.	Pending
2003-UP-462-State v. Green	Pending
2003-UP-467-SCDSS v. Averette	Pending
2003-UP-468-Jones v. Providence Hospital	Pending
2003-UP-470-BIFS Technologies Corp. v. Knabb	Pending
2003-UP-473-Seaside Dev. Corp. v. Chisholm	Pending
2003-UP-475-In the matter of Newsome	Pending
2003-UP-478-DeBordieu Colony Assoc. v. Wingate	Pending
2003-UP-480-Smalls v. Fuji Photo Film	Pending
2003-UP-483-Lamar Advertising v. Li'l Cricket	Pending
2003-UP-489-Willis v. City of Aiken	Pending
2003-UP-490-Town of Olanta v. Epps	Pending
2003-UP-491-Springob v. Springob	Pending
2003-UP-494-McGee v. Sovran Const. Co.	Pending
2003-UP-503-Shell v. Richland County	Pending
2003-UP-515-State v. Glenn	Pending
2003-UP-521-Green v. Frigidaire	Pending
2003-UP-522-Canty v. Richland Sch. Dt.2	Pending
2003-UP-527-McNair v. SCLEOA	Pending
2003-UP-533-Buist v. Huggins et al.	Pending

2003-UP-535-Sauer v. Wright	Pending
2003-UP-539-Boozer v. Meetze	Pending
2003-UP-549-State v. Stukins	Pending
2003-UP-550-Collins Ent. v. Gardner	Pending
2003-UP-556-Thomas v. Orrel	Pending
2003-UP-565-Lancaster v. Benn	Pending
2003-UP-566-Lancaster v. Benn	Pending
2003-UP-588-State v. Brooks	Pending
2003-UP-592-Gamble v. Parker	Pending
2003-UP-593-State v. Holston	Pending
2003-UP-633-State v. Means	Pending
2003-UP-635-Yates v. Yates	Pending
2003-UP-638-Dawsey v. New South Inc.	Pending
2003-UP-640-State v. Brown #1	Pending
2003-UP-659-Smith v. City of Columbia	Pending
2003-UP-662-Zimmerman v. Marsh	Pending
2003-UP-669-State v. Owens	Pending
2003-UP-672-Addy v. Attorney General	Pending
2003-UP-678-SCDSS v. Jones	Pending
2003-UP-688-Johnston v. SCDLLR	Pending
2003-UP-689-Burrows v. Poston’s Auto Service	Pending

2003-UP-703-Beaufort County v. Town of Port Royal	Pending
2003-UP-705-State v. Floyd	Pending
2003-UP-706-Brown v. Taylor	Pending
2003-UP-711-Cincinnati Ins. Co. v. Allstate Ins.	Pending
2003-UP-715-Antia-Obong v. Tivener	Pending
2003-UP-716-State v. Perkins	Pending
2003-UP-718-Sellers v. C.D. Walters	Pending
2003-UP-719-SCDSS v. Holden	Pending
2003-UP-723-Derrick v. Holiday Kamper et al.	Pending
2003-UP-735-Svetlik Construction v. Zimmerman	Pending
2003-UP-751-Samuel v. Brown	Pending
2003-UP-755-Abbott Sign Co. v. SCDOT #2	Pending
2003-UP-757-State v. Johnson	Pending
2003-UP-758-Ward v. Ward	Pending
2003-UP-766-Hitachi Electronic v. Platinum Tech.	Pending
2004-UP-001-Shuman v. Charleston Lincoln Mercury	Pending
2004-UP-011-Baird Pacific West v. Blue Water	Pending
2004-UP-012-Meredith v. Stoudemayer et al.	Pending
2004-UP-019-Real Estate Unlimited v. Rainbow Living	Pending
2004-UP-029-City of Myrtle Beach v. SCDOT	Pending
2004-UP-038-State v. Toney	Pending

2004-UP-050-Lindsey v. Spartan Roofing	Pending
2004-UP-055-Spartanburg Cty. v. Lancaster	Pending
2004-UP-061-SCDHEC v. Paris Mt.(Hiller)	Pending
2004-UP-098-Smoak v. McCullough	Pending
2004-UP-110-Page v. Page	Pending
2004-UP-119-Williams v. Pioneer Machinery	Pending
2004-UP-142-State v. Morman	Pending
2004-UP-149-Hook v. Bishop	Pending
2004-UP-153-Walters v.Walters	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Larry S. Drayton, Respondent.

Opinion No. 25830
Submitted May 3, 2004 - Filed June 1, 2004

INDEFINITE SUSPENSION

Henry B. Richardson, Jr., and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

Larry S. Drayton, pro se, of Ridgeland.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the sanctions provided by Rule 7, RLDE, Rule 413, SCACR. We accept the agreement and indefinitely suspend respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

FACTS

I.

In September 2001, Complainant A retained respondent for the purposes of filing a Chapter 13 bankruptcy petition. Respondent

was retained for a fee of $1,600 and, over time, Complainant A made payments of approximately $1200 towards the retainer.

On April 8, 2002, respondent was suspended from the practice of law for a period of ninety (90) days. In the Matter of Drayton, 349 S.C. 60, 562 S.E.2d 319 (2002). Respondent's suspension occurred before Complainant A's meeting with her creditors; respondent did not complete the bankruptcy.

Respondent originally represented to ODC that he would refund $1200 to Complainant A. In June 2002, the United States Bankruptcy Court ordered respondent to repay the attorneys' fees to Complainant A. Respondent did not refund the unearned fee to Complainant A.

II.

On November 1, 2002, respondent was placed on interim suspension after being charged with possession of crack cocaine. In the Matter of Drayton, 352 S.C. 39, 572 S.E.2d 291 (2002). On November 19, 2002, respondent filed a pleading with the circuit court. Thereafter, he filed a second pleading in which he stated he was in good standing with the South Carolina Bar at the time he filed the original pleading. Respondent made this representation to the circuit court with full knowledge that he had been placed on interim suspension nineteen (19) days before he filed the original pleading.[1]

III.

Respondent admits that, after his interim suspension, he did not timely file the affidavit of compliance required by Rule 30(g), RLDE, Rule 413, SCACR. Additionally, he admits he did not timely

[1]Although the charge of possession of crack cocaine was nol prossed on February 24, 2004, respondent never moved to have the interim suspension lifted.

move to withdraw from representation of clients before the United States Bankruptcy Court as required by Rule 30(c), RLDE, Rule 413, SCACR.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing clients); Rule 1.4 (lawyer shall keep clients informed); Rule 1.5 (lawyer shall not charge excessive fee); Rule 1.15 **(**lawyer shall promptly deliver to client any funds or other property to which client is entitled); Rule 1.16(a)(1) (lawyer shall not represent client if representation violates Rules of Professional Conduct or other laws); Rule 3.4(c) (lawyer shall not knowingly disobey an obligation under the rules of a tribunal); Rule 5.5(a) (lawyer shall not engage in unauthorized practice of law); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law), and Rule 7(a)(6) (lawyer shall not violate the oath of office taken upon admission to practice law in this state). Finally, respondent admits he has violated Rule 30, RLDE, Rule 413, SCACR (requirements for lawyer upon suspension).

CONCLUSION

We accept the Agreement for Discipline by Consent and indefinitely suspend respondent from the practice of law. The suspension shall be retroactive to the date respondent was placed on

interim suspension. Within fifteen days of the date of this opinion, respondent shall surrender his certificate of admission to practice law in this state to the Clerk of Court and shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

INDEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John Plyler Mann, Jr., Respondent.

Opinion No. 25831
Submitted April 26, 2004 - filed June 1, 2004

INDEFINITE SUSPENSION

Henry B. Richardson, Jr., and Assistant Deputy Attorney General Robert E. Bogan, both of Columbia, for the Office of Disciplinary Counsel.

John Plyler Mann, Jr., pro se, of Greenville.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to any sanction provided by Rule 7, RLDE, Rule 413, SCACR. We accept the agreement and indefinitely suspend respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

FACTS

On May 3, 2003, respondent entered a female residence hall on the University of South Carolina (USC) campus in Columbia without authorization. He went upstairs to the ninth floor where he peered around a shower curtain at a female student taking a shower.

On the sixth floor, he made an unauthorized entry into the dormitory room of a female student on the pretense of looking for an individual named "Elizabeth" and, thereafter, attempted to engaged the student in conversation. Respondent entered the ladies restroom on the second floor of the residence hall.

While attempting to leave the residence hall, respondent was arrested by campus police and charged with second degree burglary, peeping tom, and disorderly conduct. In his written statement to the USC police, respondent states he "came to USC to interview law students, arrived early – toured campus – went in a dormitory – used the restroom – was arrested when I left." On July 17, 2003, the Richland County Grand Jury indicted respondent on charges of second degree burglary and peeping tom.

ODC received notice of the indictments on October 20, 2003. On October 24, 2003, respondent was placed on interim suspension; he has remained on interim suspension since that time. In the Matter of Mann, 356 S.C. 237, 588 S.E.2d 588 (2003).

On October 24, 2003, respondent asked to meet with ODC. During the meeting, respondent represented that during the evening of May 1, 2003, and early morning of May 2, 2003, he had been drinking heavily with friends for several hours at more than one establishment in Greenville. When he returned home, he found the screen door to his house had been locked from the inside by his wife. Previously, respondent's wife had strenuously objected to respondent's alcohol consumption.

Respondent stated he had scheduled interviews at the USC School of Law beginning at 11:30 a.m. on May 2, 2003, and decided to leave his residence and drive to Columbia. On the way to Columbia, respondent purchased beer and consumed some while driving.

Respondent represented he checked into a motel in West Columbia around 4:00 a.m. and continued to drink beer. Believing his marriage was over and that he was "single for the first time in twenty

years," respondent was despondent. Respondent left the motel and traveled to a USC fraternity house around 6:00 a.m. The house was not locked and respondent entered and walked around.

Thereafter, respondent drove to the married student housing facility and went to the apartment he believed he and his wife had shared many years earlier. Respondent knocked on the door and was granted access by an unaccompanied female. Respondent spoke with this woman for approximately thirty minutes.

Respondent then traveled to a residence hall where he had lived while attending USC. Respondent attempted to enter the building but was denied access by a security guard.

Respondent did not know why he thereafter walked to the female residence hall, but acknowledges he was "drunk and wanting to talk to girls, the bars were closed, and he was free for the first time in twenty years." During the approximately two hours that respondent was inside the residence hall, he spoke with many females and, therefore, cannot recall specific conversations; he does recall entering at least one bathroom where he looked into a shower occupied by a female after moving the shower curtain which obscured his view. The female screamed.

Respondent's daughter's first name is Elizabeth. She does not attend USC.

In his response to the Notice of Full Investigation, respondent admitted he had no legitimate reason for entering the women's dormitory. As mitigation, he claimed he had an alcohol problem that affected his family but not his law practice, that his behavior on May 2, 2003, was influenced by alcohol, and that he began attending Alcoholics Anonymous on November 3, 2003.

On February 4, 2004, respondent pled guilty to second degree burglary and was sentenced to five years imprisonment,

suspended upon two years probation. The peeping tom and disorderly conduct charges will not be prosecuted.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(b) (lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(c) (lawyer shall not engage in conduct involving moral turpitude); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7(a)(4) (lawyer shall not be convicted of a crime of moral turpitude or a serious crime), and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and indefinitely suspend respondent from the practice of law. Respondent's request that the suspension be made retroactive to the date of his interim suspension is denied. Within fifteen days of the date of this opinion, respondent shall surrender his certificate of admission to practice law in this state to the Clerk of Court and shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

INDEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Andreas Fernanders, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Spartanburg County
Gary E. Clary, Post-Conviction Relief Judge

Opinion No. 25832
Submitted April 21, 2004 - Filed June 1, 2004

REVERSED

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald Zelenka, Assistant Deputy Attorney General Allen Bullard, and Assistant Attorney General Douglas E. Leadbitter, all of Columbia, for petitioner.

Assistant Appellate Defender Eleanor Duffy Cleary, of the South Carolina Office of Appellate Defense, of Columbia, for respondent.

JUSTICE MOORE: We granted certiorari to determine whether the post-conviction relief (PCR) court erred by granting respondent relief on three charges of possession of a pistol by a person convicted of a crime of violence. We reverse.

FACTS

Respondent pled guilty to second offense trafficking in crack cocaine, possession of a weapon during the commission of a violent crime, two counts of third offense possession with intent to distribute (PWID) marijuana, three counts of possession of a pistol by a person convicted of a crime of violence, third offense PWID crack cocaine, third offense simple possession of marijuana, and third offense PWID cocaine.[1] Respondent's direct appeal was dismissed by the Court of Appeals after an Anders review. State v. Fernanders, Op. No. 2000-UP-304 (S.C. Ct. App. filed April 25, 2000).

Following a PCR hearing, the PCR court granted respondent's application in part and denied it in part. Only the State's petition for a writ of certiorari was granted.

ISSUE

> Did the PCR court err by granting respondent relief on three charges of possession of a pistol by a person convicted of a crime of violence?

DISCUSSION

Respondent pled guilty to three counts of possession of a pistol by a

[1]Respondent was sentenced to imprisonment for thirty years for trafficking in crack cocaine and to concurrent imprisonment terms for the remaining charges. He received concurrent five year imprisonment terms for each charge of possession of a pistol by a person convicted of a crime of violence.

person convicted of a crime of violence pursuant to S.C. Code Ann. § 16-23-30(e) (2003). The prior violent crime on which these charges were based was a strong arm robbery[2] conviction from 1997.

The PCR court found the prior strong arm robbery was not a crime of violence. Accordingly, he found counsel was ineffective because there was no factual basis for the plea, and he vacated the sentences on the three charges of possession of a pistol by a person convicted of a crime of violence.

South Carolina Code Ann. § 16-1-60 (2003) lists crimes classified as violent "[f]or purposes of definition under South Carolina law." Section 16-1-60 indicates that only those offenses specifically enumerated are considered violent offenses. Strong arm robbery is not listed as a violent offense in § 16-1-60. However, under S.C. Code Ann. § 16-23-10(c) (2003), robbery is listed in the definition of a crime of violence. Section 16-23-10 indicates the definitions are for terms "used in this article."

In State v. Rogers, 338 S.C. 435, 527 S.E.2d 101 (2000), we held that by providing a list of crimes defined as violent in § 16-1-60, the legislature intended to have a uniform definition of violent crimes throughout the Code. We stated, "We do not believe the legislature intended there to be situations where the courts would treat offenses defined as 'violent crimes' under one section and not treat these same offenses as 'crimes involving the use of violence' under another section of the same title." *Id.* at 439, 527 S.E.2d at 104.

Rogers indicates that, pursuant to § 16-1-60, the legislature intends to have a uniform definition of what is and what is not a violent crime. However, the instant case differs from Rogers in that the definition of a crime of violence in § 16-23-10 is in another section of Title 16, which specifically states that it is the definition to be used under the article in which it is

[2]Robbery 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. State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996).

contained. Respondent pled guilty to the charges under § 16-23-30, which is contained in Article 1 of Chapter 23. Section 16-23-10 indicates that its definitions apply in Article 1. Accordingly, the definition of a crime of violence contained in § 16-23-10(c) governs what constitutes a violent crime for purposes of a conviction under § 16-23-30. *See* State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980) (although penal statutes are to be construed strictly against the State, where there is conflict between general statute and specific statute, the specific prevails).

Because strong arm robbery is a crime of violence for purposes of a conviction under § 16-23-30, the PCR court erred by vacating respondent's pistol possession convictions. Therefore, the decision of the PCR court is **REVERSED.**

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Donney S. Council, Respondent,

v.

William D. Catoe,
Commissioner, South Carolina
Department of Corrections, and
Henry Dargan McMaster, S. C.
Attorney General, Petitioners.

On Writ of Certiorari

Appeal from Aiken County
Henry F. Floyd, Circuit Court Judge
James R. Barber, Post-Conviction Judge

Opinion No. 25833
Submitted November 19, 2003 - Filed June 1, 2004

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, for Petitioner.

Teresa L. Norris, of the Center for Capital Litigation, and Theresa Lee Clement, of Clement Law Office, both of Columbia, for Respondent.

John F. Hardaway, of Columbia, for Guardian Ad Litem.

CHIEF JUSTICE TOAL: This Court granted the State's petition for certiorari to review whether the post-conviction relief (PCR) judge erroneously granted Donney Council's (respondent) motion to stay the PCR proceedings until he was deemed competent. We reverse the PCR judge's imposition of an indefinite stay and adopt a new approach for determining whether a petitioner's PCR hearing should go forward when he claims incompetence.

FACTUAL/PROCEDURAL BACKGROUND

Respondent was convicted of murder, administering poison, burglary, larceny, grand larceny of a motor vehicle, kidnapping, and criminal sexual assault in the first degree. The jury sentenced him to death for murder and gave him various concurrent and consecutive sentences for the other offenses. This Court affirmed the convictions and sentences. *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999).

Following the denial of certiorari on his direct appeal, respondent filed an application for PCR. Subsequently, he filed a motion *pro se* to waive further PCR proceedings and be executed. On January 19, 2000, this Court issued an order staying respondent's execution, allowing him to file an application for PCR. After the PCR judge appointed counsel for respondent, respondent filed an amended PCR petition and motion to indefinitely stay the PCR proceedings. A hearing was held on December 8, 2000, to review respondent's request to waive PCR and be executed. Respondent's testimony

clearly indicated that he was mentally unstable,[1] and therefore the PCR judge ordered that the Department of Mental Health (DMH) conduct a competency evaluation.

The DMH doctors diagnosed respondent with Schizophrenia, Undifferentiated type. The PCR judge found respondent to be incompetent and granted respondent's motion to indefinitely stay the PCR proceedings until respondent regained his competency.

This Court granted the State's petition for writ of certiorari to review the following question:

> Did the PCR judge err in indefinitely staying respondent's PCR proceedings until respondent became mentally competent?

LAW/ANALYSIS

The State asserts that the PCR court abused its discretion in granting respondent's motion to stay the PCR proceedings until respondent was deemed competent.

The issue of whether a prisoner must be competent to collaterally challenge his conviction is a question of first impression in this state. While the State cannot execute an incompetent death-sentenced inmate, *Singleton v. State*, 313 S.C. 75, 437 S.E.2d 53 (1993),[2] and the law prohibits a criminal

---

[1] Respondent testified that he believed the murder victim was still alive and that he was part of a cult responsible for keeping the earth spinning on its axis.

[2] *Singleton* enunciated the two-part test for determining pre-execution incompetency: the first prong examines whether the petitioner understands the nature of the proceedings and the reasons for and nature of his punishment; and the second prong assesses whether the petitioner can assist counsel in his defense. *Id.* at 79-80, 437 S.E.2d at 55.

trial of an incompetent defendant, *Pate v. Robinson*, 383 U.S. 375, 378, 86 S. Ct. 836, 838, 15 L. Ed. 2d 815 (1966); *State v. Bell*, 293 S.C. 391, 395-396, 360 S.E.2d 706 (1987), neither this Court nor the General Assembly has determined whether a mentally incompetent prisoner may seek an indefinite stay for his PCR proceedings.

ORDER FROM THE PCR COURT

In his Order, the PCR judge set forth six reasons for his grant of an indefinite stay. First, this case is a capital case, thus, respondent will remain incarcerated for the remainder of his life, regardless of the outcome of the PCR proceeding. Second, the issues that respondent presented in his PCR petition are extremely fact intensive, which will ultimately require respondent's assistance. Third, even if the court continued the proceedings and allowed respondent to submit successive PCRs,[3] federal law would prohibit respondent from filing successive habeas corpus petitions in the event a habeas issue is later discovered. 28 U.S.C. § 2244(b) (West Supp. 2003). Fourth, the State's interests are "minimally impaired" if the court stays the proceedings, while respondent's interest in effectively presenting his collateral challenge would be "severely impaired." Fifth, an indefinite stay permits the court to retain jurisdiction so that it may regularly evaluate respondent's mental health and efforts to regain mental competence. Sixth, if the court refused to grant the indefinite stay, piecemeal litigation would likely ensue once respondent regained his mental competency.

We find that the trial judge erred in staying the proceedings because (1) a PCR proceeding is civil, not criminal; (2) the judge incorrectly concluded that, based on two opinions from this Court, this Court would rule that incompetent prisoners must regain competence before a PCR proceeding is held; and (3) respondent's grounds for relief are not "all extraordinarily fact intensive" and do not warrant the assistance of a mentally competent

[3] Normally, state law procedurally prohibits this course of action. *See* S.C. Code Ann. § 17-27-90, *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991).

petitioner. We adopt the analysis employed in other jurisdictions that allows for PCR proceedings of mentally incompetent petitioners to go forward.

CIVIL ACTION

A PCR action is a civil action. *See Wade v. State*, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002) (citing 17 S.C. Jur. § 2 (1993) ("State post-conviction relief is a civil action by which a person convicted of, or sentenced for, a crime, and who is either detained or faces a possibility of detention, institutes a proceeding to challenge a court's conviction or sentence on constitutional grounds.")). Therefore, the constitutional protections that forbid a criminal trial of a mentally incompetent defendant do not apply. *See Pate*, 383 U.S. at 378, 86 S. Ct. at 838; *Bell*, 293 S.C. at 395-396, 360 S.E.2d at 708.

MISINTERPRETATION OF TWO S.C. SUPREME COURT OPINIONS

Respondent's brief and the PCR judge's Order incorrectly presume that this Court has impliedly held that PCR proceedings for a mentally incompetent petitioner must be stayed. Respondent argues that in *Norris v. State*, 335 S.C. 30, 515 S.E.2d 523 (1999), this Court approved the trial judge's finding that a PCR hearing could not proceed until the prisoner regained his metal competency. We disagree. The *Norris* Court held that the State is estopped from asserting the statute of limitations defense to a subsequent PCR application after it had previously consented to a dismissal of the original PCR application and agreed that the petitioner could re-file his application. *Id*. at 33, 515 S.E.2d at 525. The Court specifically stated that since the case could be resolved based on principles of equitable estoppel, it would not address tolling the statute of limitations for PCR applications because of petitioner's mental incompetency. *Id.*

Respondent also relies on an unpublished opinion to support the proposition that his PCR proceedings should be indefinitely stayed. *Locklair v. State,* No. 2000-MO-138 (S.C. Nov. 17, 2000). In *Locklair*, this Court held, in an unpublished opinion, that the State should provide funds for a competency evaluation of an indigent petitioner. The Court also held that if

the petitioner was deemed competent, the PCR hearing would proceed, and if not, the PCR application would be dismissed without prejudice to petitioner's right to re-file once his competency is restored. *Id.*

In our view, this opinion does not impliedly resolve the issue before us today. In *Locklair*, the petitioner's counsel moved to have his client evaluated because in the weeks leading up to the PCR proceeding, petitioner was unable to assist counsel because he was taking drugs that were causing memory deficiencies. When petitioner's counsel moved to have a state-funded mental evaluation of his client prior to the PCR hearing, the PCR court ordered that the state would not provide funds for the evaluation and gave petitioner's counsel only two options: (1) proceed with the PCR hearing without the evaluation or (2) agree to dismiss the petition without prejudice subject to the condition that petitioner obtain a competency evaluation at his own expense.

We hold that our resolution of *Locklair* does not stand for the proposition that PCR petitioners must be competent in order to proceed with a PCR hearing; rather, we merely held that the PCR judge could not deny the petitioner's right to a state-funded competency evaluation prior to his PCR hearing. Further, as an unpublished opinion, *Locklair* has no precedential value. Rule 220(a), SCACR.

NOT FACT INTENSIVE

We find that the trial judge erred in finding that the issues respondent presented in his PCR application were "all extraordinarily fact intensive"[4]

[4] Respondent petitioned for the following grounds for relief in his PCR application:

> 9(a) Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law because counsel requested mitochondrial DNA testing prior to trial but failed to retain their own expert to assist counsel, which resulted

that required respondent's assistance, which he was unable to provide given his incompetent state.

The first issue, involving the mitochondrial DNA evidence, does not require respondent's assistance. In his well-written analysis in *Council*, Justice Burnett addressed respondent's challenge to the submission of the mitochondrial DNA evidence, applying the common law factors and South Carolina Rules of Evidence for determining the admissibility of scientific evidence and found that the evidence was properly admitted. 335 S.C. at 17-22, 515 S.E.2d at 516-519; *see also State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979) (providing the standard for the admissibility of scientific evidence prior to 1990); *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990) (setting forth the factors for determining the admissibility of scientific evidence under the *Jones* standard).

Respondent's collateral attack on the admission of the mitochondrial DNA evidence in the guilt phase of his trial would be based exclusively on

---

> in admission of this type of evidence for the first time in a South Carolina court without sufficient guarantee that the underlying science was reliable.
>
> 9(b) Applicant was denied the effective assistance of counsel during voir dire and jury selection in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.
>
> 9(c) Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.
>
> 9(d) Applicant may not be executed consistent with the Eighth and Fourteenth Amendments to the United States Constitution and South Carolina law because he is incompetent.

the law of evidence and the trial record. Therefore, respondent's assistance would not be required on this issue. Furthermore, because the prosecution presented an overwhelming amount of evidence of respondent's guilt, we find that the admission of the DNA evidence did not prejudicially influence the trial's outcome. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The issues of quality and type of mitigation evidence are the only issues of merit that respondent raised in his PCR application. While it might be theoretically argued that the defendant needs to assist his counsel in providing evidence of social history and mental competency at the PCR hearing, this form of testimony generally comes from family and social history records, from mental health records, and from experts qualified to opine that respondent is mentally ill[5] -- the very type of expert testimony that *was* presented at the hearing below.

The other two collateral challenges, *voir dire* and incompetency, do not require respondent's assistance. A *voir dire* challenge requires a review of trial counsel's conduct during *voir dire*, which can be found in the trial record, coupled with a presentation of legal argument about any racial bias issues that should have been raised. These two components of the collateral attack of trial counsel's conduct during *voir dire* do not require respondent's assistance.

As for the incompetency issue, respondent relied not on his own assistance to his PCR counsel, but on expert testimony that he is mentally incompetent based upon a diagnosis of Schizophrenia, Undifferentiated type.

THE WISCONSIN APPROACH

Finally, given that South Carolina law does not provide an approach for determining whether an incompetent petitioner's PCR hearing should proceed, we look to other jurisdictions for guidance. The procedure adopted

[5] *See Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

by the Wisconsin Supreme Court allows the PCR proceedings of an incompetent petitioner to go forward but permits the petitioner to revisit a fact-based collateral attack in a future proceeding:

> Pending the determination of competency and even after a determination of incompetency, defense counsel should initiate or continue [PCR] relief on a defendant's behalf when any issues rest on the circuit court record, do not necessitate the defendant's assistance or decisionmaking, and involve no risk to the defendant. We agree with the parties that requiring defense counsel to go forward with [PCR] relief to the extent feasible ensures that an alleged incompetent or incompetent defendant will not suffer from the delay of meritorious claims . . .
>
> [I]f defense counsel cannot initiate or continue [PCR] relief on the defendant's behalf because issues necessitate defendant's assistance or decisionmaking, defense counsel may request a continuance or enlargement of time for filing the necessary notices or motions for [PCR] relief . . .
>
> Defendants who are incompetent at the time they seek [PCR] relief should, after regaining competency, be allowed to raise issues at a later proceeding that could not have been raised earlier because of incompetency.

State v. Debra A.E., 523 N.W.2d 727, 735-736 (Wis. 1994). The Pennsylvania Supreme Court agreed with the Wisconsin analysis, finding that an incompetent petitioner who is represented by counsel and a guardian ad litem would benefit by pursuing meritorious PCR claims while they are fresh. *Commonwealth v. Haag*, 809 A.2d 271 (Pa. 2002).

We adopt the Wisconsin approach because we agree that a petitioner's mental incompetency does not impede his ability to assert his meritorious PCR claims. Therefore, we hold that a petitioner cannot delay his collateral review of his trial proceedings due to his incompetency. If, at a future date, the petitioner regains his competency and discovers that at his original PCR

hearing, his incompetency prevented his ability to assist his counsel on a fact-based claim of ineffective assistance of counsel, he may then raise that claim in a subsequent proceeding.

CONCLUSION

Based on the foregoing, we adopt the Wisconsin approach. Under this new approach, the default rule is that PCR hearings must proceed even though a petitioner is incompetent. For issues requiring the petitioner's competence to assist his PCR counsel, such as a fact-based challenge to his defense counsel's conduct at trial, the PCR judge may grant a continuance, staying the review of those issues until petitioner regains his competence. All other PCR claims will not be subject to a continuance based on a petitioner's incompetence.

In the case at hand, we find that respondent's incompetency will not inhibit his PCR challenge, as none of the issues presented for review require his competency to assist his counsel. Therefore, we **REVERSE** the PCR court's imposition of an indefinite stay of respondent's PCR proceedings and require respondent to proceed with his meritorious challenges at a PCR hearing.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Chad E. Smith, Appellant.

Appeal From Horry County
Paula H. Thomas, Circuit Court Judge

Opinion No. 3804
Submitted April 6, 2004 – Filed June 1, 2004

AFFIRMED

Henry Morris Anderson, Jr., of Florence, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Asst. Deputy Attorney General Charles H. Richardson, Asst. Attorney General W. Rutledge Martin, all of Columbia; and Solicitor John Gregory Hembree, of Conway, for Respondent.

HUFF, J.: Appellant Chad Smith appeals from his convictions for homicide by child abuse and aiding and abetting homicide by child abuse. He asserts the trial judge erred in denying his motion for directed verdict and in denying his motion to sever his trial from that of his co-defendant. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Smith was convicted for his actions surrounding the death of Jordyn Durant, the daughter of Smith's co-defendant, Celeste Durant. In December 1999, Celeste separated from her husband, Brad Durant, with whom she had two daughters, twenty month-old Jordyn and Taylor, who was five years old at the time of the trial. Celeste became involved with Smith at some point, and Smith moved in with Celeste in February 2000. During the separation, Celeste and Brad shared custody of the children, with Celeste having them during the week and Brad having them every weekend. On Friday afternoon, July 14, 2000, Celeste phoned Brad and told him she and Smith were taking the children on a trip to the beach. The following Sunday night, Brad learned that Jordyn had been injured. Celeste told Brad they did not know what had happened to Jordyn. On Monday, July 17, 2000, Jordyn Durant died shortly after she was taken off life support.

The testimony at trial reveals that late in the evening of July 14, Smith, Celeste, Taylor, and Jordyn checked into room 408 at the Days Inn Motel in Myrtle Beach. Celeste told investigators that the children awoke the next morning and watched cartoons for a little while, and then they all dressed to go down to the beach. After spending some time on the beach, they went to the pool area. Celeste noticed Jordyn had been acting strangely that morning, and the child fell asleep in a float in the pool. At that point, she took Jordyn up to the room and attempted to feed her, but she would not eat. She gave Jordyn a bath and put her down for a nap around 12:30. When Jordyn woke up around 3:00 p.m., she was unsteady on her feet, could not walk, and fell "flat on her face." Celeste called her pediatrician in Florence, who told her to take Jordyn to the local emergency room.

Smith and Celeste took Jordyn and Taylor to Grand Strand Memorial Hospital, where Jordyn was examined by doctors. Celeste told investigators Jordyn was running a fever and the doctor was not sure what was wrong with her. After an x-ray, they found Jordyn had a skull fracture, but they believed it was an old fracture. After leaving the hospital, they went to a pharmacy to get Jordyn some Dramamine, as prescribed by the doctor. They then went to get some pizza, but Jordyn again would not eat. They went back to the motel room and fell asleep. They woke up the next morning around 8:00, and found Jordyn was difficult to wake up and was still unsteady on her feet. They checked out of their room around 10:30 that morning and went to Broadway at the Beach and Ripley's Aquarium and had lunch. Jordyn stayed in her stroller the whole time, mostly sleeping, and would not eat lunch. They went to one more place after lunch, and then headed back to Florence. Celeste indicated Jordyn slept the whole trip back, and she put the child in her bed when they got home around 4:00 or 5:00 that afternoon. When Celeste went to check on Jordyn, she found blood coming from her mouth. She called out to Smith, who began to perform CPR on the child until EMS responded. Celeste told investigators Jordyn was never out of her sight while they were in Myrtle Beach and she was never left alone with Smith or anyone else.

Smith similarly told an investigator that the four arrived at the motel around 11:30 that Friday evening and checked into room 408. He indicated, they went down on the beach around 10:30 the next morning, staying there for close to an hour before they went to the pool. Jordyn fell asleep in her float in the pool and they went upstairs, where Jordyn took a nap. After Jordyn woke up from her nap around 2:00 p.m., Smith took her out of bed and stood her up, but when she took a step, she lost her balance and fell forward on her face. He attempted to stand her up again, but she could not walk. Smith told the investigator Jordyn experienced projectile vomiting, which was dark in color. Smith used the word "we" when talking about their activities that day, and never indicated a time when he and Celeste were not together during the weekend trip.

Aside from the time they stated Jordyn fell "flat on her face" when she attempted to walk, both Celeste and Smith told investigators that Jordyn had not fallen, she had not hit her head, and nothing had happened to her.

Dr. Orion Colfer treated Jordyn on July 15, 2000 when she came to the emergency room at Grand Strand Memorial Hospital. The child arrived at the emergency room at 4:45 vomiting and having difficulty walking. In the initial interview, Celeste did not mention an accident or fall. Dr. Colfer ordered a CAT scan, and the radiologist reported Jordyn appeared to have an old skull fracture that did not show evidence of acute injury to either the brain or the soft tissue at the site of the fracture. Upon re-interview of Celeste, she told Dr. Colfer that Jordyn had fallen at daycare at some point in the past. There were no signs of bruising or swelling to indicate a traumatic injury. Dr. Colfer asked a pediatrician to examine Jordyn, and it was the pediatrician's opinion the child was suffering from a viral infection, possibly an ear infection and vertigo, that was causing her difficulty walking and her fever.

When Jordyn was transported to Carolinas Hospital System the evening of July 16, Dr. Carl John Chelen, a pediatric intensivist, was paged. At the time she arrived at the hospital, Jordyn was comatose, but was still breathing and had a normal heart rate. By the time Dr. Chelan arrived fifteen to twenty minutes later, her condition had deteriorated to the point that she was having difficulty breathing, and the emergency room physician had to put a breathing tube in Jordyn. Dr. Chelen accompanied Jordyn while another CAT scan was performed. About halfway thorough the scan, he observed evidence of significant bleeding in Jordyn's brain. Dr. Chelen began treating Jordyn for swelling in her brain and made immediate arrangements to transfer her to McLeod Medical Center. He testified there was a major difference between the CAT scan taken the day before and the one taken that evening, in that the swelling of the brain and bleeding into the brain were not evident in the CAT scan taken at Grand Strand Memorial Hospital. He further stated the difference in the two scans helped determine when the injury occurred, because with a head injury, if there is going to be internal bleeding, it normally occurs within twenty-four to forty-eight hours, with more severe injuries showing bleeding earlier. Based on the onset of symptoms as well as

the fact that there was a skull fracture with no bleeding or brain swelling at the first CAT scan, he believed the injury had occurred within several hours of the first scan.

On Monday morning, July 17, 2000, Dr. Gerald Atwood, the pediatric intensive care unit director at McLeod, assumed responsibility for Jordyn. Dr. Atwood testified Jordyn had sustained severe neurological deficit. Her CAT scans revealed she had a very large fracture in the back of her head, and there was evidence of bleeding into the brain near the fracture site as well as on the opposite side of the fracture. Her brain was markedly swollen and appeared to not be getting adequate blood supply. At that point, Jordyn had very severe brain damage. The fracture left Jordyn with a free-floating piece of bone in her skull, and the brain was so swollen that it was pushing that piece of bone out, and part of her brain was pushed out through the fracture site. Dr. Atwood stated the swelling of her brain was caused by some trauma she had sustained and it was suspected Jordyn was also shaken, as evidenced by hemorrhaging of the blood vessels in her eyes that is only seen in shaken baby syndrome. He further testified the fracture was located at the hardest part of the skull, it would take tremendous force to cause that area to fracture, and because there were no external signs of a laceration, indentation or bruising, something broad and flat, as opposed to sharp or thin, would have caused this injury. He stated that the reason the initial CAT scan did not show evidence of bleeding and swelling in the brain even though the fracture was there was that Jordyn's brain was in a period of blood flow shutdown at that time. He thus determined the injury to Jordyn had to occur within a few hours of the CAT scan taken in Myrtle Beach. Dr. Atwood opined there was no way Jordyn or her sister could have caused the injury to Jordyn, noting it was not just a skull fracture, but there was also an injury from shaking, and the shaking injury alone could have caused her to be brain dead. He testified that this was "unquestionably . . . [a case of] child abuse, this child was shaken and this child received trauma to her head."

When Dr. Atwood met with Celeste and Brad and explained their child would probably be declared brain dead, Celeste asked him how old the skull fracture was. Dr. Atwood told her that it could not be more than a few days old and in his opinion it occurred at the same time as the traumatic injury to

the brain occurred, probably on that Saturday. He emphasized to Celeste that the time of injury was not the most important issue at that moment. Celeste asked Dr. Atwood for a second opinion. Dr. Atwood thought she was referring to the issue of Jordyn possibly being brain dead, but Celeste clarified she wanted a second opinion as to the timing of the injury. Two other doctors concurred with Dr. Atwood. Celeste told Dr. Atwood she opposed an autopsy of Jordyn, but he informed her that was not her decision to make.

Because it was a suspicious or unnatural death, Dr. Clay Nichols performed an autopsy on Jordyn. Dr. Nichols found a depressed skull fracture, where part of the bone pressed into Jordyn's brain. He also found another fracture on the left side of Jordyn's skull. The brain was very swollen due to the injury. Dr. Nichols testified the skull fracture could not have been caused by a fall on the floor or by another young child pushing Jordyn, and that her injuries were the end result of a severe beating with intentional force applied to the back of her head. Additionally, Dr. Nichols testified the degree and severity of the injury to Jordyn would cause immediate neurological problems which would be fairly obvious to an observer who had been around the child. He stated she died as a result of blows to her head as opposed to a single blow, and "[t]here were two fracture sites, plus also the pattern of the bleeding . . . to the right side of the head . . . the back, the neck, the shoulders, and the left side."

Margo Grant, the Days Inn housekeeper who was responsible for cleaning room 408 at the time Smith and Celeste stayed there, testified the occupants of that room did not want their room cleaned during their stay. She further testified that one particular morning when they were having a lot of checkouts, her supervisor, Priscilla Flowers, noticed there were no linens in room 408 and questioned her about it. Ms. Grant had not stripped the room. When she went into the room, Ms. Grant found there were no sheets or towels or bedspreads in the room. Ms. Flowers likewise testified that on July 16, 2000, she went to room 408 to strip it for Ms. Grant, but discovered all linens except a spread and one sheet were missing. She stated all the towels, the other sheets, and the trash were gone from the room.

During the course of his investigation, Sergeant Hancock went over to the home of Celeste and Smith. When he went into Jordyn's room, he discovered the child's flat sheet was missing from the bed, as well as the pillowcase from an apparently blood stained pillow. When he inquired about the pillowcase, Celeste went into another bedroom and returned to state she could not find it. When Hancock informed her it was important that they find it, Celeste went over and whispered some communication with Smith. Smith then walked into the bedroom and came right back with the pillowcase. Hancock also testified that when he arrived at the hospital to investigate, he visually inspected and photographed several bruises on Jordyn including some on her collarbone, neck, shoulder, forearm and trunk. The nurse indicated these would not have been caused by medical treatment.

At the start of the trial, a motion was made to sever Celeste's trial from Smith's. The trial court initially granted the motion because Celeste had been charged under an additional indictment to the homicide by child abuse and aiding and abetting, while Smith had not. In response to this ruling, the State dismissed the additional count against Celeste. Because the additional charge was no longer a concern, the trial court reversed its earlier ruling and denied the motion to sever. The trial of Smith and Celeste then proceeded jointly.

At the close of the State's case, both Smith and Celeste moved for directed verdicts. After some deliberation over the matter, the trial judge denied the motions. In doing so, she noted the evidence showed the victim was with the defendants during the time frame the serious injury occurred, the defendants were the only responsible adults dealing with the child at that time, the evidence showed it was not an accident but was intentional, the injury could not have been caused by another child, who was the only other person present, and could not have been caused by the victim herself. The judge further noted that Smith, in particular, knew the victim had experienced projectile vomiting, but this information was not relayed to medical personnel. She also found the missing linens were some evidence of an attempted cover-up of what happened to Jordyn, and neither defendant told the medical personnel about the serious injury that was inflicted on Jordyn even though they had an opportunity to do so.

After a five-day trial, the jury convicted both Smith and Celeste of homicide by child abuse and aiding and abetting homicide by child abuse. On October 10, 2001, the trial court sentenced Smith to twenty years on each count. This appeal follows.

ISSUES

I. Did the trial court err in denying Appellant's motion to sever?

II. Did the trial court err in denying Appellant's motion for directed verdict?

LAW/ANALYSIS

I. Separate Trials

Smith argues the trial court abused its discretion in failing to sever his trial from that of Celeste. Specifically, he contends he was prejudiced by evidence presented by Celeste at trial through the testimony of Dr. Susan Van Epps and Gail Mercuri, which put him in the position of having to defend himself from both the State and Celeste. We find no error.

Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right. State v. Nichols, 325 S.C. 111, 122, 481 S.E.2d 118, 124 (1997). A motion for severance is addressed to the discretion of the trial court and the court's ruling should not be disturbed on appeal absent an abuse of that discretion. Id. Further, "[t]he general rule allowing joint trials applies with equal force when a defendant's severance motion is based upon the likelihood he and a codefendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime." State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999). To successfully challenge the trial court's exercise of discretion in denying a motion to sever, the defendant must demonstrate some prejudice resulting

from the joint trial. State v. Thompson, 279 S.C. 405, 408, 308 S.E.2d 364, 366 (1983).

We first note, although it is clear that a motion for severance was made by Celeste's attorney, the record does not show that the motion was joined in or individually made by Smith. Further, even if Smith did move for severance, there is no evidence he requested severance based on the issue he now raises on appeal. Finally, the issues presented in the record by Celeste's attorney were that of the additional indictment of Celeste and the possible inconsistency of statements. Because the record does not reflect that the issue raised by Smith on appeal was raised to the court below, it is questionable whether this issue is properly before us on appeal. See State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997) (issue may not be raised for first time on appeal, but must have been raised to trial judge to be preserved for appellate review).

At any rate, Smith's argument fails for two reasons. First, the general rule allowing joint trials is not impugned simply because the codefendants may present evidence accusing each other of the crime. Dennis, 337 S.C. at 281, 523 S.E.2d at 176. Second, Smith failed to include the testimony of the two witnesses of which he complains in the record on appeal. Thus, this Court is unable to discern any prejudice. See State v. Mitchell, 330 S.C. 189, 194, 498 S.E.2d 642, 645 (1998) (the burden is on appellant to provide a sufficient record for review); Thompson, 279 S.C. at 408, 308 S.E.2d at 366 (for reversal, a defendant tried jointly must show prejudice). Accordingly, we find no error in the trial court's refusal to sever the trials.

II. Directed Verdict

Smith also asserts the trial court erred in denying his motion for directed verdict as the evidence was insufficient to support his convictions. He contends there was insufficient substantial circumstantial evidence presented by the State to allow the case to go to the jury, and his mere presence at the scene was insufficient to prove his guilt as a principal or as an aider or abettor. We disagree.

In reviewing the denial of a motion for a directed verdict, this court must view the evidence in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find that the case was properly submitted to the jury. State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). In ruling on a directed verdict motion, the trial court is concerned with the existence of evidence, not its weight. Id. If the State presents any evidence which reasonably tends to prove the defendant's guilt or from which his guilt could be fairly and logically deduced, the trial court must send the case to the jury. State v. Jarrell, 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct. App. 2002). This court may reverse the trial court's denial of a motion for a directed verdict only if there is no evidence to support the trial court's ruling. State v. Lindsey, 355 S.C. 15, 20, 583 S.E.2d 740, 742 (2003).

The State charged Smith with homicide by child abuse and aiding and abetting homicide by child abuse. These crimes are codified as follows:

> A person is guilty of homicide by child abuse if the person:
>
> > (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or
> >
> > (2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.

S.C. Code Ann. § 16-3-85(A) (2003). "Child abuse or neglect" is defined under the statute as "an **act or omission** by any person which causes harm to the child's physical health or welfare." S.C. Code Ann. § 16-3-85(B)(1) (2003) (emphasis added). Further, the statute provides that one causes harm to a child's physical health or welfare when one "**inflicts or allows to be inflicted** upon the child physical injury, including injuries sustained as a result of excessive corporal punishment." S.C. Code Ann. § 16-3-85(B)(2)(a) (2003) (emphasis added). "Aid and abet" has been defined as "[h]elp, assist,

or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about, or encourage, counsel, or incite as to its commission." Black's Law Dictionary 68 (6th ed. 1990). "It comprehends all assistance rendered by words, acts, encouragement, support, or presence, actual or constructive, to render assistance if necessary." Id.

The evidence adduced at trial indicated Jordyn sustained her devastating injury on Saturday, July 15, and that it had to have occurred within several hours of her first CAT scan at Grand Strand Memorial Hospital. During this time period, Smith and Celeste were the only two persons with Jordyn who could have possibly caused her injury. Celeste told investigators she was with Jordyn the whole time and, in his statement to investigators, Smith referred to all of their actions that day as "we," never indicating a time when he and Celeste were not together during that weekend.

The medical testimony also revealed that Jordyn did not suffer from a single skull fracture, but that she had two distinct fracture sites, and she suffered from more than one blow to her head. Further, there was evidence that Jordyn also suffered from shaken baby syndrome, which alone was enough to cause her to become brain dead. There was evidence presented that the injury to Jordyn was severe and would cause immediate neurological problems which would have been fairly obvious to Smith and Celeste. More importantly, Dr. Nichols stated her injuries were the end result of a severe beating with intentional force applied to the back of her head, and Dr. Atwood testified that the injury was unquestionably the result of child abuse.

The statute makes clear that child abuse may be committed by either **an act or an omission** which causes harm to a child's physical health. S.C. Code Ann. § 16-3-85(B)(1). Additionally, harm to a child's health occurs when a person either **inflicts, or allows to be inflicted** physical injury upon a child. S.C. Code Ann. § 16-3-85(B)(2)(a). Given the evidence on the severity and number of injuries to Jordyn, the fact that both Smith and Celeste were the only adults with Jordyn during the time frame that she received her injuries and were the only people who could have possibly caused her injuries, the evidence that her impairment should have been obvious to these two adults, along with the evidence of possible cover-up, we

find there was sufficient evidence of an act or omission by Smith wherein he inflicted or allowed to be inflicted physical harm to Jordyn resulting in Jordyn's death. Accordingly, there was substantial circumstantial evidence reasonably tending to prove the guilt of Smith such that the charges were properly submitted to the jury.

For the foregoing reasons, Smith's convictions are

AFFIRMED.

STILWELL, J. and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

WDI Meredith & Company, Appellant,

v.

American Telesis, Inc., d/b/a
American Telesis, Respondent.

Appeal From Beaufort County
Thomas Kemmerlin, Master-In-Equity

Opinion No. 3805
Heard April 7, 2004 – Filed June 1, 2004

AFFIRMED IN PART; REVERSED IN PART;
AND REMANDED

Jack Meredith, for Appellant.

S. Jahue Moore and M. Ronald McMahan, Jr., both of West Columbia, for Respondent.

STILWELL, J.: In this breach of contract action, WDI Meredith & Company asserts the trial court erred in ruling American Telesis was not bound to an agreement signed by the company's vice president. We affirm in part, reverse in part, and remand.

BACKGROUND

Husband and wife Steven and Monica Hesling each owned half the shares of American Telesis, a wholesale telecommunications firm. Monica was the company's president and treasurer and Steven served as secretary and vice president of marketing. While Steven and Monica were in the midst of a "tough separation," they agreed she would spend very little or no time at the office, and he would be at the office running the business. During this time, Steven met with Jack Meredith, the sole proprietor of WDI, a company in the business of "[i]dentifying, structuring, and negotiating mergers and acquisitions of middle market companies." On numerous occasions the two discussed the process of selling American Telesis.

At Meredith's request, Steven signed a document entitled "Exclusive Investment Banking and Consulting Agreement." In the agreement, American Telesis retained WDI to provide consulting services for a variety of business endeavors including finding a purchaser for the company. In return for WDI's services, American Telesis agreed to pay WDI a monthly fee of $1500 as well as a $1500 retainer. Additionally, if an entity located by WDI purchased American Telesis, the agreement entitled WDI to a scaled percentage of the total consideration. The agreement also established a minimum fee: "In any event, the total fee to be paid to Consultant at closing shall not be less than $100,000.00." The agreement also provided WDI would be entitled to half of any back-out penalty received by American Telesis if a potential purchaser backed out of a deal:

> Any back-out penalty, settlement or other similar termination consideration paid to Client by a third party shall be divided equally between Client and Consultant. Such amount shall not exceed Consultants [sic] minimum fee.

According to Meredith, WDI began working under the agreement's terms immediately after Steven signed the document. This included mailing letters to several potential buyers. WDI received a number of positive responses from the mailing, including a response from Atlantic Tele-Network (ATN).

At the time the agreement was entered into, Meredith knew Steven was keeping his plans to sell the corporation a secret from his estranged wife. Monica first learned of the agreement later when she and Steven attempted to reconcile. Before Monica learned of the agreement, WDI received some of the monthly consulting fees. Although Steven testified three American Telesis checks were delivered to WDI, Meredith contends he received only two $1500 payments. Steven testified he was able to make the payments without Monica's knowledge because both he and Monica had signature authority on corporate checks. After seeing the agreement, Monica indicated neither she nor the corporation agreed to its terms. However, according to the testimony of both Meredith and Monica, Meredith consulted with Monica and Monica assisted Meredith in providing financial information to a prospective purchaser.

Thereafter, on September 8, 1998, Monica wrote a letter to WDI stating American Telesis was terminating the agreement and instructing WDI to discontinue any work being done on behalf of American Telesis. Shortly after Monica sent the letter to WDI, Monica, Steven, and their transactional attorney began working on the structure and agreement for the sale of the business to ATN. On November 13, 1998, the two companies signed a letter of intent to sell the assets of American Telesis to ATN. The letter of intent contained no provision denominated a back-out penalty or termination fee. When ATN later refused to complete the transaction, American Telesis filed suit. The lawsuit was eventually settled with ATN paying $42,500 to American Telesis.

WDI then brought this action against American Telesis for breach of contract, asserting it was entitled to unpaid monthly consulting fees and half of the settlement from ATN**.** The case was referred to a master, who dismissed the complaint after a hearing, concluding Steven's signature did not bind American Telesis to the agreement.

LAW/ANALYSIS

WDI contends the trial court erred in determining Steven lacked authority to bind American Telesis to the agreement with WDI. We agree.

Agency may be implied or inferred and may be circumstantially proven by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal. Fernander v. Thigpen, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982). Under the doctrine of apparent authority, a principal is bound by its agent's acts "when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption." Id. at 143, 293 S.E.2d at 426 (1982). A principal creates apparent authority as to a third person by the principal's written or spoken words or any other conduct which, "reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." Muller v. Myrtle Beach Golf & Yacht Club, 303 S.C. 137, 142, 399 S.E.2d 430, 433 (Ct. App. 1990), overruled on other grounds by Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000). Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief. An agency may not, however, be established solely by the declarations and conduct of an alleged agent. Id. at 142-43, 399 S.E.2d at 433.

American Telesis correctly notes Steven could not have bound the corporation to a sale of its assets. S.C. Code Ann. § 33-12-102 (1990). However, the agreement executed by Steven is not for the sale of the corporation's assets. It is essentially a contract for the purchase of consulting and marketing services designed, if successful, to result in a contract for the sale of the corporation or its assets. American Telesis endowed Steven with the title of vice president of marketing, a position calculated to lead people of ordinary prudence with reasonable knowledge of business usages to conclude that he had the authority to enter into such contracts on behalf of the corporation. Additionally, Steven's authority on such regular business

matters would be a natural consequence of the corporation's size: American Telesis had only two shareholders, two officers, and two members of the board of directors. In organizations of this size, officers routinely have the authority to enter into day-to-day transactions. Indeed, Steven had signing authority on checks written on corporate accounts and, at the time of the signing of the agreement, Steven was the sole individual managing the affairs of the corporation, with Monica spending little or no time at the office. It is reasonable for a business person to believe that the individual in charge of the day-to-day operations of a corporation, in the absence and to the exclusion of other principals, is vested with authority to bind the corporation to the contract in question. Accordingly, American Telesis is bound by the contract Steven signed with WDI.

We now turn to the relief WDI seeks. As to monthly fees, we conclude WDI is entitled to payments for the period between mid-April, when the agreement was signed, and mid-November 1998, when the letter of intent was entered into with ATN. However, because the testimony at trial conflicted as to whether two or three payments had been made, we remand for the trial court to determine what amount American Telesis actually paid to WDI and thus the monthly fees still due WDI.

WDI also claims it is entitled to half the amount recovered from ATN based on its withdrawal from the transaction. We disagree.

As the plaintiff, WDI had the burden of establishing its entitlement to a portion of the settlement American Telesis reached with ATN. Although the agreement provided WDI was to receive half of any "back-out penalty, settlement or other similar termination consideration" paid to American Telesis, it did not define the term back-out penalty. No South Carolina case or statutory provision has been cited to us which defines the term, nor have we been successful in locating a definition in South Carolina jurisprudence. As the drafter of the contract, WDI was in the best position to prevent confusion in the contract's construction and should be the party to suffer from its shortcomings. See Williams v. Teran, Inc., 266 S.C. 55, 60, 221 S.E.2d 526, 529 (1976) (noting an ambiguity in an agreement must be resolved against its drafter). Additionally, although the provision states WDI

is entitled to half of any settlement, we conclude it envisioned a voluntary settlement as a natural consequence of any buyer's decision to walk away from a planned deal. However, the letter of intent between ATN and American Telesis did not provide for any back-out penalty and rather than a natural event of a failed purchase, the settlement came only after American Telesis filed suit. Because the agreement between WDI and American Telesis does not define back-out penalty, and the testimony in the record is that the letter of intent which was the subject of the lawsuit did not contain a provision for a back-out penalty or termination fee, WDI has not met its burden of proof of showing that a settlement of a lawsuit constitutes a back-out penalty within the contemplation of the parties at the time the agreement was entered into.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Aaron Mathis, **Appellant.**

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

Opinion No. 3806
Heard May 12, 2004 – Filed June 1, 2004

AFFIRMED

Acting Chief Attorney Joseph L. Savitz, III, and Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Assistant Attorney General W. Rutledge Martin, all of Columbia; and Solicitor Warren B. Giese, of Columbia, for Respondent.

ANDERSON, J.: Aaron Mathis was convicted of attempted criminal sexual conduct in the second degree with a minor and incest. The trial judge sentenced him to life imprisonment without parole for the criminal sexual conduct charge and ten years, concurrent, for the incest charge. Mathis appeals his convictions, contending: (1) his prosecution was barred by the Double Jeopardy Clause of the United States and South Carolina Constitutions; (2) the trial judge erred by admitting evidence of Mathis's prior bad acts; and (3) the trial judge erred by admitting certain DNA evidence. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

This action arises out of allegations that Mathis sexually abused his fourteen-year-old niece (the victim). In September of 2000, the victim and her mother traveled from their home in Durham, North Carolina, to spend the Labor Day weekend at the victim's grandmother's house in Columbia. On Labor Day afternoon, they had a cookout for family and friends in the area. Mathis arrived at the house later in the evening.

The victim testified Mathis made several inappropriate advances on her that night. On one occasion, shortly after Mathis arrived, he grabbed the victim and propositioned her for sex. He offered her money, saying "I'm going to give you the money for those boots [you want]." Mathis assured the victim that she had "nothing to worry about" because he had a condom, so he would not get her pregnant. This advance was forestalled, however, when one of the victim's aunts entered the room where Mathis had approached the victim.

Later that evening, the victim fell asleep while she was watching television alone in one of the bedrooms. The victim declared Mathis assaulted her while she was sleeping: "I woke up because I felt [Mathis] was in the room. He was in the room, and I felt him trying to insert his penis in me, so I woke up. . . . [I]t hurt real bad." Mathis left the house around 4:00 a.m. The victim returned to North Carolina without telling anyone in her family what occurred.

In January, the victim discovered she was pregnant. When her mother asked how it happened, the victim told her about the September 2000 incident with Mathis. The victim and her mother immediately traveled to Columbia and reported the conduct to the Richland County Sheriff's Department. Mathis was subsequently arrested and charged with incest and attempted criminal sexual conduct in the second degree with a minor.

Serological and DNA Evidence Collected

After reporting the conduct to the Sheriff's Department, the victim and her mother traveled to Atlanta, Georgia, to have an abortion performed. As is required procedure in cases of alleged rape, an investigator employed by the Sheriff's Department was present at the abortion clinic to take fetal tissue samples and blood samples for use as evidence in the investigation. The Sheriff's Department investigator testified he received the fetal tissue and two vials of blood. The investigator was not present when the blood was drawn, but he was informed by the clinic staff that one vial contained the victim's blood and the other vial contained blood drawn from the umbilical cord. The investigator further stated he packaged the fetal tissue and blood samples and delivered them to an evidence technician at the State Law Enforcement Division (SLED) headquarters in Columbia.

Thereafter, Special Agent Steve Lambert, a DNA analyst and serologist assigned to the forensic laboratory at SLED, transferred Mathis's blood from its vial to sterile cotton cloth so that it could be properly frozen and stored for later analysis. Lambert subsequently packaged the victim's blood sample, Mathis's blood sample, and the fetal tissue in separate heat-sealed pouches and placed them in a Styrofoam container. He sent the package by Federal Express to a laboratory in Dallas, Texas, for DNA analysis.

Amber Moss, a forensic scientist at the Dallas laboratory, professed she received an unopened, sealed package from Steve

Lambert at SLED containing blood samples from the victim and Mathis and the fetal tissue. Moss reported:

> My results were that Aaron Mathis could not be excluded as the biological father of the fetal sample. The probability of paternity is ninety-nine point ninety-nine percent, as compared to an untested random number of the . . . North American population. . . . Aaron Mathis is 1,252,078 times more likely to be the father of the fetal sample as a random tested individual.

At trial, the State introduced evidence of the DNA test results. The Solicitor, however, was unable to show a complete chain of custody for the blood samples taken from the victim at the Atlanta abortion clinic because no witness could testify regarding who actually drew the blood samples. Mathis moved for a mistrial, which the trial court granted. The case was retried the following month over Mathis's objection that retrial was barred under the Double Jeopardy Clause of the United States and South Carolina Constitutions. At the second trial, the State presented evidence of the identity of the person who drew the victim's blood at the abortion clinic, thus curing the defect that resulted in the initial mistrial.

Prior Attempted Sexual Conduct

The victim testified that Labor Day 2000 was not the first time Mathis attempted to sexually assault her. She claimed it happened on three previous occasions. The first incident occurred in November of 1999 after a Thanksgiving family gathering at her aunt's home in Mauldin, South Carolina. According to the victim, Mathis began rubbing the back of her thighs while she was watching television. He continued harassing the victim after the rest of the family went to bed—including trying to unbutton her pants, grabbing her hand and trying to put it into his pants, and continuing to rub her inappropriately. The victim declared Mathis attempted to cajole her acquiescence to his advances by offering to pay for a pair of boots she wanted for Christmas.

The second incident occurred on approximately January 16, 2000, again at the home of the victim's aunt in Mauldin. The victim stated she was lying on a bed alone in her cousin's bedroom. Mathis physically approached the victim and "started grinding on [her] from behind, like rubbing his penis up against [her] butt." As before, Mathis promised to give the victim money to purchase boots she wanted and offered her some jewelry he was wearing.

The third incident occurred around Easter weekend in April of 2000, at a family cookout at the victim's great-grandmother's home in Greenwood, South Carolina. Similar to the two prior incidents, the victim claimed Mathis grabbed her and started "grinding" on her and touched her inappropriately. According to the victim, Mathis's advances became more severe than before:

> He came and he got on top of me, and he was like touching me and stuff. And he was trying to pull my pants down again, but I grabbed them . . . . And he started like touching me with his finger. . . . In my vagina. And he was like, "Well, I've got to get me some of this." And he said, "You let other boys have some. Why can't I have some, too?" And he was like touching me, and he pulled his pants down. And he was like trying to have sex with me, but my pants, they were like around my – they were at my knees, so he couldn't get close enough to me.

The victim was ultimately able to push Mathis away before anything further happened. This incident in April of 2000 was the last time the victim saw Mathis before the conduct on Labor Day of 2000, which is the basis of the current proceeding.

At trial, Mathis objected to the admission of the testimony regarding the allegations of these uncharged prior bad acts as being unfairly prejudicial and prohibited under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and Rule 404(b), SCRE, which prohibits the admission of evidence of prior bad acts to prove the character of a person in order to show action in conformity therewith. The trial court

allowed the testimony under the exception to that rule for evidence of prior bad acts that tends to establish a common scheme or plan.

LAW/ANALYSIS

I. Double Jeopardy

Mathis argues the Circuit Court erred when it allowed the second trial to proceed because the State's failure at the first trial to present a witness to establish the chain of custody for the victim's blood samples was intended to provoke the defense into moving for a mistrial, and therefore, the second trial was barred by the Double Jeopardy Clause. We disagree.

The Double Jeopardy Clauses of the United States and South Carolina Constitutions protect citizens from being placed twice in jeopardy of life or liberty. See U.S. Const. amend. V ("No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . ."); S.C. Const. art. I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . ."); see also State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 47 (Ct. App. 2003) ("Both the United States Constitution and the South Carolina Constitution protect against double jeopardy."). The guarantee against double jeopardy has been said to consist of three separate constitutional protections. Cuccia, 353 S.C. at 434, 578 S.E.2d at 47. Under the Double Jeopardy Clause, a defendant is protected from (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple prosecution for the same offense after an improvidently granted mistrial. State v. Gordon, 356 S.C. 143, 588 S.E.2d 105 (2003); State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977); see also United States v. Dinitz, 424 U.S. 600, 606 (1976) ("The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense.") (footnote omitted). Generally, jeopardy attaches when the jury is sworn and impaneled, unless the defendant consents to the jury's discharge before it reaches a verdict or legal necessity mandates the jury's discharge. State v. Baum, 355 S.C.

209, 584 S.E.2d 419 (Ct. App. 2003), petition for cert. filed; State v. Rowlands, 343 S.C. 454, 539 S.E.2d 717 (Ct. App. 2000).

Mathis cites State v. Rowlands and State v. Baum in regard to the applicability of the Double Jeopardy Clause after an improvidently granted mistrial. Rowlands and Baum are factually and legally inapposite to the case sub judice. The gravamen of Rowlands and Baum is the improvident grant of a mistrial; whereas, here, the court justifiably granted a mistrial on motion emanating from the defendant.

Mathis claims that, although a defendant's motion for mistrial ordinarily removes any barrier to a retrial, the Solicitor's conduct in the present case falls within the exception defined by the United States Supreme Court in Oregon v. Kennedy, 456 U.S. 667 (1982). In Kennedy, the defendant in a state court criminal case moved for and received a mistrial because of improper prosecutorial questioning of an expert witness. Id. at 669. When the State attempted to retry him, the defendant moved to dismiss the charges on double jeopardy grounds. The trial court found as a fact that "'it was not the intention of the prosecutor in this case to cause a mistrial.'" Id. On the basis of this finding, the trial court held that double jeopardy principles did not bar retrial, and Kennedy was then tried and convicted. Id. at 670.

The Oregon Court of Appeals decided the Double Jeopardy Clause barred Kennedy's retrial after his first trial ended in a mistrial granted on his own motion. Id. at 669. The Court of Appeals concluded that retrial was barred because the prosecutorial misconduct that occasioned the mistrial in the first instance amounted to "'overreaching.'" Id. The United States Supreme Court reversed, declaring that prosecutorial misconduct or harassment adequate to warrant a mistrial on defendant's motion is not by itself sufficient to raise the bar of double jeopardy. Id. at 675-76.

The Supreme Court inculcated:

> Our cases . . . have indicated that even where the defendant moves for a mistrial, there is a narrow exception to the rule that the Double Jeopardy Clause is no bar to retrial. . . . .
>
> Since one of the principal threads making up the protection embodied in the Double Jeopardy Clause is the right of the defendant to have his trial completed before the first jury impaneled to try him, it may be wondered as a matter of original inquiry why the defendant's election to terminate the first trial by his own motion should not be deemed a renunciation of that right for all purposes. We have recognized, however, that there would be great difficulty in applying such a rule where the prosecutor's actions giving rise to the motion for mistrial were done "in order to goad the [defendant] into requesting a mistrial." . . . In United States v. Dinitz, [424 U.S.] at 611, 96 S.Ct. 1075, 47 L.Ed.2d 267 [(1976)], we said:
>
> > "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions."
> >
> > . . . .
>
> Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. A defendant's motion for a mistrial constitutes "a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact."

> Where prosecutorial error even of a degree sufficient to warrant a mistrial has occurred, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.
>
> . . . .
>
> We do not by this opinion lay down a flat rule that where a defendant in a criminal trial successfully moves for a mistrial, he may not thereafter invoke the bar of double jeopardy against a second trial. But we do hold that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.

Id. at 673-79 (citations omitted and footnote omitted).

Thus, the Kennedy Court adopted a rule providing that a defendant who has moved for and been granted a mistrial may successfully invoke the Double Jeopardy Clause to prevent a second prosecution only when the prosecutor's conduct giving rise to the mistrial was intended to "goad" or provoke him into moving for the mistrial. Id. at 673. Under this standard, the determination depends upon whether prosecutorial misconduct was undertaken with the specific intent "to subvert the protections afforded by the Double Jeopardy Clause." Id. at 676; see also Gilliam v. Foster, 75 F.3d 881 (4th Cir. 1996) (stating that when defendant seeks or consents to grant of mistrial, there is no bar to his later retrial; this proposition is subject to an exception when defendant establishes his request for mistrial was

motivated by prosecutorial or judicial misconduct that was intended to provoke defendant into moving for a mistrial).

"Kennedy emphasized that intent to provoke a mistrial, rather than mere prosecutorial overreaching, is necessary to render meaningless a defendant's motion for a mistrial." United States v. Johnson, 55 F.3d 976, 978 (4th Cir. 1995). A "court's finding concerning the prosecutor's intent is . . . a factual one which we must accept unless it is clearly erroneous." United States v. Borromeo, 954 F.2d 245, 247 (4th Cir. 1992); see also United States v. Council, 973 F.2d 251, 254 (4th Cir. 1992) ("Deference should be given to the trial court in determining whether such an intent existed."); United States v. Wentz, 800 F.2d 1325, 1327 (4th Cir. 1986) (noting the question of prosecutorial provocation is one of fact on which the findings of the trial court may not be set aside unless clearly erroneous).

Under the rule outlined in Kennedy, the instant case implicates no double jeopardy concerns. This Court does NOT condone in any way the Solicitor's failure to diligently prepare the State's case against the accused by reviewing the evidence in advance of trial to ensure a proper foundation was laid for all the evidence it planned to present. This Court has concernment in regard to the sloppy preparation by the State in reference to the chain of custody rule. We admonish Solicitors in South Carolina to respond with vivacity in the preparation and presentation of the State's case. We are not happy with the factual scenario encapsulated in this case involving the conduct of the litigation by the Solicitor.

The Solicitor's neglect did NOT rise to the level of "goading" or "provoking" Mathis to move for a mistrial. The evidentiary record does NOT reveal any specific intent on the part of the Solicitor "to subvert the protections afforded by the Double Jeopardy Clause." The trial judge ruled: "I've pondered this from the standpoint of trying to determine whether or not this would be prosecutorial misconduct. I don't think it rises to that level. . . . [I]t was nothing intentional on their part." The record is devoid of any evidence of intent by the State to withhold evidence establishing the chain of custody or otherwise

prompt the mistrial. Accordingly, although the Solicitor failed to properly prepare the case by establishing a complete chain of custody for the blood evidence, the trial court correctly ruled the retrial was not barred.

II. Evidence of Prior Misconduct

Mathis maintains the trial court erred in admitting evidence of uncharged sexual misconduct allegedly committed by Mathis on the victim three times prior to the Labor Day 2000 incident for which he was tried. He asserts the evidence does not fall within any of the exceptions to the general ban on evidence of an accused's other bad acts. We disagree.

Generally, South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged. State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App 2004); see also State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000) (finding that evidence of prior crimes or bad acts is inadmissible to prove bad character of defendant or that he acted in conformity therewith). Such evidence is admissible, however, when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the proof of the other; or (5) the identity of the person charged with the present crime. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); see also Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003) (explaining that Rule 404, the modern expression of the Lyle rule, excludes evidence of other crimes, wrongs, or acts offered to prove character of person in order to show action in conformity therewith; the rule creates an exception when testimony is offered to show motive, identity, existence of common scheme or plan, absence of mistake or accident, or intent).

If not the subject of a conviction, a prior bad act must first be established by clear and convincing evidence. Beck, 342 S.C. at 135, 536 S.E.2d at 683. The record must support a logical relevance

between the prior bad act and the crime for which the defendant is accused. State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001). The decision to admit contested evidence is entrusted to the sound discretion of the trial judge. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). "If there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal." Id. at 6, 545 S.E.2d at 829.

In the present case, the trial judge admitted the evidence of Mathis's prior alleged sexual misconduct under the common scheme or plan exception to Rule 404(b), SCRE, and Lyle. "A close degree of similarity or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception." State v. Cheeseboro, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001). The connection between the prior bad act and the crime must be more than just a general similarity. State v. Timmons, 327 S.C. 48, 488 S.E.2d 323 (1997). "A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary." Id. at 52, 488 S.E.2d at 325; see also State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999) (stating that the common scheme or plan exception requires not just similarity of the other acts to the crime charged, but also a close relationship between the crimes); State v. Moultrie, 316 S.C. 547, 554, 451 S.E.2d 34, 39 (Ct. App. 1994) ("Clear and convincing evidence of prior crimes or bad acts that is logically relevant is . . . admissible to prove . . . a common scheme or plan that embraces several previous crimes so closely related to each other that proof of one tends to establish the other.").

In deciding whether to admit evidence of prior bad acts, courts must weigh the probative value of evidence of prior bad acts against its prejudicial effect. State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984). Where the evidence of the bad acts is so similar to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh its prejudicial effect, it is admissible. State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). However, even if the evidence is clear and convincing and falls within

a Lyle exception, the trial judge must exclude it if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Id. Thus, "[s]uch evidence is inadmissible 'unless the close similarity of the charged offense and the previous act[s] enhances the probative value of the evidence so as to overrule the prejudicial effect.'" McClellan, 283 S.C. at 392, 323 S.E.2d at 774.

In State v. Weaverling, this Court applied the common scheme or plan exception in a case involving allegations of criminal sexual conduct. Id. at 471, 523 S.E.2d 792-93. In that case, the Court found "[t]he common scheme or plan exception 'is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged in the indictment is held admissible as tending to show continued illicit intercourse between the same parties.'" Id. at 469, 523 S.E.2d at 791 (quoting State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955)) (emphasis added). In Weaverling, the defendant allegedly sexually abused the same victim in the same manner almost every time the two were together for a period of five or six years. The victim testified that he had been assaulted by the defendant in excess of one hundred times. We held the defendant's pattern of continuous sexual abuse satisfied the common scheme or plan exception. Id. at 471, 523 S.E.2d at 792-93.

State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003), explicates that cases involving criminal sexual conduct often entail the admission of past conduct evidence to show a common scheme or plan:

> We interpret [State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999) and State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984)] to suggest that common scheme or plan evidence in criminal sexual conduct cases will be admitted on a generalized basis only where there is a pattern of continuous illicit conduct. Sex crimes may be unique in this respect because they commonly involve the same victims engaged in repeated incidents occurring under very similar circumstances. The reason for the general admissibility of such evidence under these circumstances is

> self evident—where there is a pattern of continuous conduct shown, that pattern clearly supports the inference of the existence of a common scheme or plan, thus bolstering the probability that the charged act occurred in a similar fashion.

Id. at 328, 580 S.E.2d at 191.

In the present case, the evidence of the alleged prior bad acts reveals a close degree of similarity to the facts of the crime charged. The evidence demonstrates by clear and convincing proof the occurrence of the prior bad acts. The three earlier assaults on the victim were all attempted in the same manner and under similar circumstances. On each occasion, Mathis approached the victim while she was alone at family gatherings. He would touch her in largely the same suggestive, inappropriate manner each time, and he would then attempt to entice her to have sex with him. During at least two of the three prior incidents, Mathis accompanied his improper advances with offers of gifts—just as he did during the incident for which he was charged. Overall, the three prior incidents of sexual misconduct by Mathis show the same illicit conduct with the victim over the course of the nine months prior to September 2000. Concomitantly, we conclude the probative value of the evidence regarding Mathis's prior bad acts clearly outweighs the prejudicial effect of admitting the evidence.

III. Admissibility of DNA Evidence

Mathis contends the trial court erred by admitting evidence of the DNA test results prepared by the testing laboratory in Dallas, Texas, because the chain of custody for the blood samples and fetal tissue was not properly established. Specifically, Mathis argues the chain is incomplete because the whereabouts of the vial of blood taken from the umbilical cord are unknown. Amber Moss, a forensic scientist at the Dallas laboratory, testified she received only the fetal tissue and blood stains from the victim and Mathis.

Our Supreme Court addressed the chain of custody rule in State v. Carter, 344 S.C. 419, 544 S.E.2d 835 (2001). In that case, blood and saliva samples were collected from the defendant for testing. The samples were placed in a sealed container. After being handled by several people, the container was opened by a SLED agent, who found the saliva sample was missing. The defendant objected that the chain of custody for his blood sample, which provided the necessary evidence for the DNA match, was defective. He claimed the fact that the kit did not contain a saliva sample when it was broken open by the SLED agent indicated a break in the chain of custody. The trial judge found there was nothing to indicate the integrity of the blood samples themselves had been compromised and admitted the evidence.

The Supreme Court articulated:

> The State must prove a chain of custody for a blood sample from the time it is drawn until it is tested. State v. Smith, 326 S.C. 39, 482 S.E.2d 777 (1997). A complete chain of evidence must be established as far as practicable, tracing possession from the time the specimen is taken from the human body to the final custodian by whom it is analyzed. State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992); Raino v. Goodyear Tire and Rubber Co., 309 S.C. 255, 422 S.E.2d 98 (1992); State v. Kahan, 268 S.C. 240, 233 S.E.2d 293 (1977) (citing Benton v. Pellum, 232 S.C. 26, 100 S.E.2d 534 (1957)). Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete. State v. Williams, 301 S.C. 369, 392 S.E.2d 181 (1990).

Id. at 424, 544 S.E.2d at 837. The Court discussed the application of the chain of custody rule:

> In applying this rule, we have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the blood was not established at least as far as practicable. **On**

> **the other hand, where the identity of persons handling the specimen is established, we have found evidence regarding its care goes only to the weight of the specimen as credible evidence. In other words, where there is a weak link in the chain of custody, as opposed to a missing link, the question is only one of credibility and not admissibility.**

Id. at 424, 544 S.E.2d at 837 (emphasis added and citations omitted).

The Carter Court found no missing link in the chain of custody. The Court concluded "the evidence of a discrepancy in the contents of the kit does not render the blood sample inadmissible but goes only to its weight as credible evidence." Id. at 425, 544 S.E.2d at 838.

In the retrial of the case at bar, the identity of all persons handling the blood samples was clearly established. As in Carter, the State proved a continuous chain of custody through the testimony of all people who had control and possession of the evidence. The persons who handled the evidence testified at trial.

There is no missing link in the chain of custody. The discrepancy in this case only involves a weak link and raises a question of credibility, not admissibility. The trial judge did not err in admitting evidence of the DNA test results.

CONCLUSION

We hold Mathis's second trial was not barred under the principle of double jeopardy. Evidence of Mathis's prior bad acts and the DNA evidence were properly admitted. The rulings of the Circuit Court are

AFFIRMED.

HUFF and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RoTec Services, Inc., Respondent,

v.

Encompass Services, Inc., Appellant.

Appeal From York County
John Buford Grier, Circuit Court Judge

Opinion No. 3807
Submitted April 6, 2004 – Filed June 1, 2004

AFFIRMED

John E. Peterson, of Rock Hill, for Appellant.

Lucy London McDow, of Rock Hill, for Respondent.

HEARN, C.J.: Rotec Services, Inc., brought this action against Encompass Services, Inc., asserting causes of action for breach of contract as well as tortious interference with existing and prospective contracts. Encompass counterclaimed, alleging breach of contract, breach of contract accompanied by a fraudulent act, and breach of the implied covenant of good faith and fair dealing. On Rotec's motion for partial summary judgment, the trial court dismissed Encompass's

claims for breach of contract accompanied by a fraudulent act and breach of the implied covenant of good faith and fair dealing. The court also dismissed Encompass's defense of privilege. Encompass now appeals. We affirm.

FACTS

Encompass is a specialized provider of welding services and equipment. In April 2000, Encompass and Rotec entered into a written contract under which Rotec agreed to be Encompass's independent sales representative in the Southeast. Encompass terminated the contract in December 2000.

Rotec brought this action in April 2001, claiming the parties had orally modified the contract to include payment of commissions on the revenues from leases and repairs of welding equipment. It alleged that Encompass had failed to pay any of the agreed-upon commissions.

Encompass's counterclaim alleged Rotec failed to perform under the contract and that Rotec's principal, Richard Repaire, made continuous fraudulent misrepresentations before and after the contract was executed. Specifically, Encompass alleged that Rotec falsely represented it had the necessary knowledge and experience to successfully market Encompass's welding services and equipment. Encompass claimed Rotec's performance was wholly contrary to those assurances. Encompass further alleged that Rotec had promised to cease its representation of one of Encompass's competitors, Turbine Consultants, Inc., and that Rotec had breached that promise while the contract was in effect.

STANDARD OF REVIEW

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

entitled to a judgment as a matter of law." Rule 56(c), SCRCP; see also Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997); Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998). In reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998).

LAW/ANALYSIS

I. Breach of Contract Accompanied by a Fraudulent Act

Encompass first argues the trial court erred by dismissing its claim for breach of contract accompanied by a fraudulent act. We disagree.

To maintain an action for breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: "(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." Conner v. City of Forest Acres, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002). "Fraudulent act" is broadly defined as "any act characterized by dishonesty in fact or unfair dealing." Id. at 466, 560 S.E.2d at 612. Here, Encompass has failed to allege any facts which would tend to prove Rotec committed a fraudulent act accompanying its alleged breach of contract.

Encompass alleges that, prior to the execution of the contract, Rotec promised it would not represent Encompass's competitor, Turbine Consultants. Rotec acknowledged that it continued to represent Turbine Consultants during the time its contract with Encompass was in force, but denied ever promising Encompass that it would cease representing Turbine Consultants. Encompass

argues that it was "inferable" from Rotec's alleged promise that it intentionally concealed its continued representation of Turbine Consultants throughout the duration of its contract with Encompass.

Even when viewing the evidence in the light most favorable to Encompass, as we must, more is required than mere speculation. See Strother, 332 S.C. at 61, 504 S.E.2d at 121. Encompass has failed to raise any genuine issue of material fact to show that Rotec ever did anything to deny or hide its continuing work for Turbine Consultants. Indeed, the evidence contained in the record before us is to the contrary. Encompass's president, Richard Bryant, testified that the matter of Rotec's representation of Turbine Consultants was never discussed after the parties entered into the contract, and that he did not follow up on or ask Repaire to confirm that he had left Turbine Consultants. Encompass's sales manager, Richard Riley, testified that he never knew whether Rotec represented Turbine Consultant and Encompass at the same time.

Accordingly, we find there was no genuine issue of material fact as to whether Rotec's alleged breach of contract was accompanied by a fraudulent act. The trial court's dismissal of that claim was appropriate.

II. Breach of Implied Covenant of Good Faith and Fair Dealing

Encompass next argues the trial court erred by granting summary judgment in favor of Rotec on its claim for breach of the implied covenant of good faith and fair dealing. Rotec asserts there is no separate cause of action for breach of this implied covenant because it is subsumed under the claim for breach of contract. We agree with Rotec.

Our courts have not addressed this precise question of whether an independent cause of action may be maintained for breach of the implied covenant of good faith and fair dealing. Our sister court in Georgia, however, has recently confronted this issue. In Stuart Enters. Int'l, Inc. v. Peykan, Inc., 555 S.E.2d 881 (Ga. Ct. App. 2001),

the buyer of a business sued the seller, asserting separate causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing. The Georgia Court of Appeals ruled that separate claims were not proper, opining that "[t]he implied covenant of good faith modifies, and becomes part of, the provisions of the contract itself. As such, the covenant is not independent of the contract." Id. at 884. The holding of the Georgia Court of Appeals is in accord with the law of other jurisdictions that have addressed this question. See Baxter Healthcare Corp. v. O.R. Concepts, Inc., 69 F.3d 785, 792 (7th Cir. 1995) (holding "under Illinois law the covenant of good faith and fair dealing is not an independent source of duties for the parties to a contract"); Cambee's Furniture, Inc. v. Doughboy Recreational, Inc., 825 F.2d 167, 175 (8th Cir. 1987) (holding the implied covenant of good faith and fair dealing does not state a claim distinct from the breach of contract claim); Designers N. Carpet, Inc. v. Mohawk Indus., Inc., 153 F.Supp.2d 193, 196 (E.D.N.Y. 2001) ("A claim for breach of an implied covenant of good faith and fair dealing does not provide a cause of action that is separate and different from a breach of contract claim. Rather, breach of that duty is merely a breach of the underlying contract." (internal citation omitted)).

Though South Carolina courts have not directly addressed this exact question, we do have precedent strongly suggesting there is no separate cause of action for the implied covenant of good faith and fair dealing. This court, in Boddie-Noell Props., Inc. v. 42 Magnolia P'ship, 344 S.C. 474, 485, 544 S.E.2d 279, 285 (Ct. App. 2000), affirmed the trial court's decision to send the breach of contract claim to the jury, in part, for breaching the implied covenant of good faith and fair dealing. When appealed to the supreme court, the supreme court also treated the implied covenant of good faith as merely another term of the contract at issue, concluding that "[the defendant] breached the express provisions of the purchase agreement as well as the implied covenant of good faith and fair dealing." Boddie-Noell Props., Inc. v. 42 Magnolia P'ship, 352 S.C. 437, 444, 574 S.E.2d 726, 730 (2002). Similarly, in Parker v. Byrd, 309 S.C. 189, 194, 420 S.E.2d 850, 853 (1992), the supreme court found that the parties' express agreement to

act in good faith was merely a restatement of the covenant of good faith implied in every contract.

Therefore, we conclude that the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract. Accordingly, we find no error in the trial court's dismissal of this claim.

III. Dismissal of the Privilege Defense

Encompass next argues the trial court erred in striking its defense of privilege as insufficiently pled. We disagree.

Rule 8(b), SCRCP, requires that a defendant provide a statement "in short and plain terms [of] the facts constituting his defenses to each cause of action asserted." The Rule further mandates that a pleading contain "ultimate facts" rather than "evidentiary facts" to state a cause of action. Watts v. Metro Sec. Agency, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct. App. 2001). "Ultimate facts fall somewhere between the verbosity of evidentiary facts and the sparsity of 'legal conclusions.'" Id. The trial court's decision to strike a defense as insufficiently pled will not be disturbed absent an abuse of discretion. Slack v. James, 356 S.C. 479, 482, 589 S.E.2d 772, 774 (Ct. App. 2003).

In asserting the defense of privilege, Encompass's allegation in its answer reads in its entirety: "Defendant pleads the affirmative defense of privilege." This statement alone is purely a legal conclusion and clearly falls below the standard mandated by Rule 8. Therefore, we find no abuse of discretion in the trial court's striking this defense.[1]

[1] Though Rotec's motion was styled as one for "Partial Judgment on the Pleadings and for Partial Summary Judgment," the trial court dismissed all of the claims at issue in this appeal on grant of summary judgment alone. This discrepancy does not affect our analysis as insufficient pleading was also the only argument raised by Rotec on the

CONCLUSION

We find no error with the trial court's order granting summary judgment in favor of Rotec on Encompass's claims for breach of contract accompanied by a fraudulent act and breach of the implied covenant of good faith and fair dealing. Nor do we find the trial court abused its discretion in striking Encompass's defense of privilege. The trial court's order is therefore

AFFIRMED.

ANDERSON and BEATTY, JJ., concur.

---

privilege issue in its memorandum in support of the motion. It can be readily inferred, therefore, that the trial court ruled on this issue based on the arguments raised before it.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David A. Wynn, Appellant,

v.

Harriet D. Wynn, Respondent,

v.

James L. Wynn, Cross-Defendant.

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

Opinion No. 3808
Submitted April 6, 2004 – Filed June 1, 2004

AFFIRMED AS MODIFIED

C. Dixon Lee, III, of Columbia, for Appellant.

W. D. Yarborough, Jr., of Greenville, for Respondent.

HEARN, C.J.: David Wynn appeals from the family court's equitable division award and its decision to award attorney's fees to Harriet Wynn. We affirm as modified below.

FACTS

Husband and Wife were married on November 5, 1983, separated on January 22, 1999, and divorced on March 28, 2002. At trial, Wife sought an equitable division of Husband's family-owned heating and air conditioning business, J.L. Wynn & Sons, Inc. The business was sold back to Husband's father prior to the initiation of this action in exchange for $4,902.76 and cancellation of a note owed by the business to the father. Upon learning of this sale, Wife joined the father as a party to determine ownership of the business. In a separate proceeding, the family court determined that the father was currently the sole owner of the business and that eighty-seven percent of the business value at the time of sale was marital property (Order of Judge Timothy Brown, dated July 12, 2001). Husband and Wife claimed substantially different values for the business, and the family court adopted Wife's marital interest valuation of $145,000. In dividing the marital estate, the family court credited to Husband the $145,000 of marital interest in the business even though he only received $4,902.76 in cash for the sale. Including that credit for the business, Husband's portion of the marital estate totaled $215,775. Wife received assets totaling $152,648.50. Finally, the family court awarded Wife $30,000 for attorney's fees.

Husband asserts that the family court's valuation of the business was excessive, which resulted in an inequitable distribution of the marital estate. Husband's second argument is that the family court erred in excluding from the marital estate debt from a jointly held credit card. Building on these two claims of error, Husband also seeks reversal of the attorney's fees award.

The Family Business

At the time of the marriage, Husband owned a portion of J.L. Wynn & Sons, Inc. along with his father and his three siblings. Husband's father, James Wynn, owned fifty-one percent of the company shares. Husband and his two brothers each owned thirteen percent of the company and Husband's sister owned ten percent.

In December 1993, the shareholders decided to turn over full ownership of the company to Husband. To accomplish this, Husband's father and his sibling shareholders entered into a stock purchase agreement with the company. Under the agreement, the company was obliged to purchase all of the outstanding shares of stock not held by Husband, leaving Husband as the sole shareholder of the business. The four exiting shareholders were paid for their shares with interest-bearing promissory notes payable in monthly installments. For example, the company issued Husband's father a note promising to pay him $190,418.70 for his fifty-one percent interest in the business.

The exiting shareholders, however, did not entirely relinquish their rights to ownership. Under the terms of the agreement, the selling shareholders were granted a security interest in the shares they had redeemed allowing them to retake ownership and possession of the stock in the event of default or non-performance by the company. The agreement also provided that the selling shareholders could resume ownership of their shares in the event Husband voluntarily or involuntarily sold, pledged, transferred, or alienated his shares in the company.

Following the consummation of the stock purchase agreement in late 1993, Husband took control of the business. He handled all operations of the company and ensured the payments on the notes to the former shareholders were kept current. This arrangement continued without incident until early 1999. Shortly after Husband separated from Wife in January of that year but before bringing this divorce action, Husband sold the business back to his father.

Wife learned of this conveyance during the course of the divorce proceedings. By way of cross-complaint, she later joined the father as a party to the action to determine what ownership interest the father might have in the company, which Wife asserted was marital property. Husband's father answered Wife's cross-complaint by denying the company was marital property subject to equitable distribution.

The case was bifurcated so that Wife's action to determine ownership of the company could be heard separately. After declaring the company to be the sole property of Husband's father, the family court also found that eighty-seven percent of the business was marital property. In its July 2001 order, the family court stated:

> The total number of shares owned by the corporation is 1,000 of which 130 were owned by the husband prior to marriage. The husband acquired ownership of the entire corporation by acquiring the remaining 870 shares during the marriage. Therefore, 87% of the corporation is marital property. Whatever value should be given that 87% is reserved for the trial judge.

In its determination of equitable distribution in the final divorce decree entered in March 2002, the family court strictly adhered to the finding entered by the previous judge regarding the treatment of the company as marital property: "With regard to the value of eighty-seven percent (87%) of J.L. Wynn & Son's Inc., this Court is following the determination by the Order of Judge Brown . . . in which Judge Brown found this portion of the corporation to be marital property." The family court considered the reports and testimony of experts for Husband and Wife regarding the value of the marital interest in the company. Husband claimed the value was merely $4,902.76, which was the amount paid by his father in the repurchase. The court found Wife's valuation was supported by sound data and methodology while Husband's valuation was not. Accordingly, the family court adopted Wife's suggested valuation of $145,000 for the marital interest in the company. The family court assessed the marital estate at $368,423.52, of which Husband should receive fifty-five percent. In addition to receiving credit for the marital interest in the company, Husband was credited for a previous $50,000 loan repayment by the company that was marital property for which Husband could not account. Likewise, Husband was credited for $3,000 of marital funds that he removed from

the children's savings account. Wife received the marital home and other assets valued at $152,648.50.

Disputed Credit Card Debt

At the final hearing, Husband argued that an outstanding balance of $3,526 accrued on a Visa credit card should be included in the marital estate for equitable division. In support of his claim, Husband introduced into evidence a copy of the credit card account statement dated August 6, 1999, as well as credit card receipts bearing Wife's signature for several purchases made prior to the parties' separation.

In its final order, the family court omitted any mention of the credit card debt. Husband timely filed a Rule 59(e) motion, specifically requesting that the court rule on whether the credit card balance should be included as a marital asset for equitable distribution. The court denied the motion, but, again, did not address the credit card debt in its order. Husband now appeals the family court's implicit exclusion of this debt from the estate.

STANDARD OF REVIEW

In appeals from the family court, this court has authority to find the facts in accordance with our own view of the preponderance of the evidence. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). This broad scope of review, however, does not require us to disregard the findings of the trial court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). We are mindful that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. McAlister v. Patterson, 278 S.C. 481, 483, 299 S.E.2d 322, 323 (1982).

The family court has broad discretion in determining how marital property is to be valued and distributed. Murphy v. Murphy, 319 S.C. 324, 329, 461 S.E.2d 39, 41 (1995). The family court may use

"any reasonable means to divide the property equitably," and its judgment will only be disturbed where abuse of discretion is found. Id. at 329, 461 S.E.2d at 41-42.

LAW/ANALYSIS

I. Valuation of the Family Business

Husband argues the family court erred in valuing the 87 percent marital interest in J.L. Wynn & Sons, Inc., at $145,000. We disagree.

Husband does not contest the family court's first order which determined that eighty-seven percent of the value of the company should be included in the marital estate. Husband's appeal only takes issue with the value assigned to that portion by the family court in its final order.

Husband asserts the value of the company should be $4,902.76, the amount he received when he sold the company back to his father in January 1999. The reason, Husband argues, is that he was "legally obligated" and "forced" to sell the company for this amount under the terms of the 1993 stock purchase agreement. In support of this position, Husband relies on our decision in McElveen v. McElveen, 332 S.C. 583, 506 S.E.2d 1 (Ct. App. 1998). In that case, the court found a stock purchase agreement was "the most probative evidence of the value of [Appellant's] interest" in a medical practice that was considered a marital asset. Id. at 594, 506 S.E.2d at 6. However, the court justified its reliance on the fact that the appellant was strictly bound by the terms of the stock purchase agreement at the time the marital litigation commenced. Id. Importantly, we also note that the McElveen court explicitly opined that "[o]ur holding as to the determinative nature of the stock purchase agreement in this case should be viewed as limited to the facts presently before us." Id.

In the present case, Husband's ability to market his interest in the company was not restricted by the stock purchase agreement.

The shareholders who sold their stock under the 1993 agreement retained the right to retake their shares in the event Husband voluntarily or involuntarily sold, pledged, transferred, or alienated his shares in the company. This provision of the agreement did not, however, completely foreclose Husband's ability to market and sell his interest in the company to a third party in an arms-length transaction. He could do so, provided the debt owed to the exiting shareholders was fully paid.

The family court specifically questioned Wife's expert on this point at the final hearing, asking the witness:

> So that if [Husband] were to sell [his interest in the company], it automatically triggers the alienation; in other words, for him to sell the corporation, he has to first pay off the debt of the $145,000? . . . [M]eaning that a purchaser would have to pay an unsecured $145,000.00 in anticipation of being able to then buy the corporation.

Wife's expert agreed with the judge's assessment of the effect of the alienation restriction. The judge then queried: "Under those unique circumstances, would that discount the value of the corporation?" Wife's expert replied that he had taken into account the effect of the restriction in arriving at his valuation, responding:

> I do believe that does. That it does impact our thirty percent marketability under capitalized cash flow. Um – as far as whether it would affect the market method from the company stock – method, which is what I'm using, we still subtracted that $145,000.00 owed from that method as well.
>
> Um – I don't – I don't think that would affect the marketability using the market methods, but

> I think that it definitely impacts our marketability discount for capitalized cash flow.
>
> I believe the thirty percent [marketability discount] takes that into account though.

This colloquy between the court and Wife's expert, in conjunction with the supporting valuation report contained in the record, demonstrates that the family court gave due consideration to the agreement's restrictions on Husband's ability to sell his interest in the company.

We find the family court's valuation is supported by a preponderance of the evidence, and therefore, find no error.

II. Exclusion of Credit Card Debt

Husband next argues the family court erred by failing to include the $3,526 Visa credit card debt in the marital estate. We agree.

For purposes of equitable distribution, marital property is defined in South Carolina Code section 20-7-473 (Supp. 2003) as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . ." Under this statutory provision, there is a "[rebuttable] presumption that a debt of either spouse incurred prior to marital litigation is a marital debt and must be factored in the totality of equitable apportionment." Wooten v. Wooten, 358 S.C. 54, ___, 594 S.E.2d 854, 857 (2003) (quoting Hardy v. Hardy, 311 S.C. 433, 436, 429 S.E.2d 811, 813 (Ct. App. 1993) (alteration in original)).

Wife claims the credit card debt was properly excluded because there is no evidence in the record which reflects the amount of the debt as of March 16, 1999, the date the marital litigation was commenced. Specifically, she argues the August 6, 1999 credit card

statement Husband introduced into evidence—the only independent, third-party verification of the amount of debt—should not be considered by the court because it was prepared almost five months after the marital litigation commenced.

However, this statement is not the only evidence before us. In his March 6, 2002 financial declaration filed with the family court, Husband included an entry for the "Nations Bank Visa" listing the precise balance as $3,526. Further, Wife admitted in her testimony that she used the credit card for business and personal purchases during the marriage. The credit card statement also lists both Husband and Wife as cardholders. Finally, as noted above, Husband submitted several credit card receipts for charges incurred prior to the litigation which bear Wife's signature.

Based on our review of the totality of the facts before us, we find a preponderance of the evidence warrants inclusion of the credit card debt as marital property in the amount reflected on Husband's financial declaration. We therefore modify the family court's final order to include the credit card debt in the marital estate for distribution between the parties according to the terms of that order. Those proportions are fifty-five percent to Husband and forty-five percent to Wife.

III. Attorney's Fees

Husband next argues the family court erred by awarding Wife $30,000 in attorney's fees and costs, claiming the award was excessive in light of the results of the case. We disagree.

"An award of attorney's fees will not be overturned absent an abuse of discretion." Bowers v. Bowers, 349 S.C. 85, 99, 561 S.E.2d 610, 617 (Ct. App. 2002). When determining the amount of fees to award, the court must consider the nature, extent, and difficulty of the services rendered, the time necessarily devoted to the case, counsel's professional standing, the contingency of compensation, the beneficial results obtained, and the customary legal fees for similar

services. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

In this case, the family court detailed the rationale for its award in its final order, addressing the applicable Glasscock factors. Though we modify the family court's final order in favor of Husband by including the credit card debt as marital property, we find this change does not significantly alter the beneficial result obtained by Wife in the case as a whole. The litigation in this case continued for over two years and included disputed issues of child support and alimony in addition to the extensive questions involving the valuation and apportionment of marital property. Accordingly, we conclude the family court did not abuse its discretion in its award of attorney's fees.

CONCLUSION

For the above reasons, we affirm the family court's valuation of the marital interest of J.L. Wynn & Sons, Inc., modify the court's final order to include the outstanding credit card debt as marital property for purposes of equitable distribution, and affirm the award of attorney's fees.

AFFIRMED AS MODIFIED.

ANDERSON and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Elaine P. Belviso, Respondent.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 3809
Heard May 12, 2004 – Filed June 1, 2004

REVERSED AND REMANDED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh and Assistant Attorney General Deborah R. J. Shupe, all of Columbia; and Solicitor Thomas E. Pope, of York, for Appellant.

Christopher A. Wellborn, of Rock Hill, for Respondent.

KITTREDGE, J.: We are asked to determine whether the circuit court, in its appellate capacity, has jurisdiction to hear an appeal from a magistrate court's pre-trial ruling that precludes or significantly impairs the prosecution of a criminal case. We hold the circuit court has jurisdiction over such an appeal. The contrary decision of the circuit court is reversed, and the matter is remanded.

FACTS

Elaine P. Belviso was arrested and charged with driving with an unlawful alcohol concentration and violating the open container law. The magistrate, relying on State v. Jackson, 302 S.C. 313, 396 S.E.2d 101 (1990), dismissed the open container charge because the State did not preserve the container or the alcoholic beverage. The magistrate also suppressed critical evidence relating to the charge of driving with an unlawful alcohol concentration.[1]

The State appealed the magistrate's rulings and moved for a stay of further magistrate court proceedings pending resolution of the appeal. The magistrate's rulings effectively precluded prosecution of the State's case. The circuit court granted the motion for a stay.

The circuit court, relying exclusively on section 18-3-10 of the South Carolina Code of Laws, held it did not have jurisdiction to hear an interlocutory appeal from a magistrate's court. The circuit court dismissed the appeal. The State appeals.

DISCUSSION

We agree with the State that the circuit court has jurisdiction to entertain the State's appeal from the magistrate's pre-trial rulings that would

[1] Belviso makes no challenge to critical nature of the evidence encompassed in the magistrate's pre-trial rulings.

preclude prosecution of the open container charge[2] and significantly impair the State's ability to proceed with the prosecution of the unlawful driving charge.[3]

The circuit court relied exclusively on section 18-3-10 of the South Carolina Code of Laws (Supp. 2003) in ruling the circuit court did not have jurisdiction to hear the State's appeal. Section 18-3-10 provides: "Every person convicted before a magistrate of any offense whatever and sentenced may appeal from the sentence to the Court of Common Pleas for the county." The circuit court reasoned that because section 18-3-10 only permits appeals by those convicted and sentenced in magistrate's court, the circuit court has no authority to hear an appeal from magistrate's court prior to conviction and

---

[2] The open container charge was dismissed pre-trial on the legal ground of a purported violation of the holding in State v. Jackson, 302 S.C. 313, 396 S.E.2d 101 (1990). Therefore, the dismissal of the charge is appealable. See State v. Rowlands, 343 S.C. 454, 539 S.E.2d 717 (Ct. App. 2000) (addressing merits of State's appeal where magistrate dismissed charge on a legal ground); State v. Dasher, 278 S.C. 395, 400, 297 S.E.2d 414, 417 (1982) (noting that "[i]t is undisputed that the State may appeal where the verdict is set aside wholly upon an error of law"); State v. Ridge, 269 S.C. 61, 236 S.E.2d 401 (1977) (allowing appeal of trial court's dismissal of indictments on legal grounds); but cf. State v. McWaters, 246 S.C. 534, 144 S.E.2d 718 (1965) (stating there is no right of appeal from a trial court's dismissal of a charge at the directed verdict stage based upon insufficiency of evidence); State v Ludlam, 189 S.C. 69, 200 S.E. 361 (1938) (noting that the trial court's dismissal of a charge following receipt of evidence based on insufficiency of the evidence is not appealable).

[3] The issue presented is one of subject matter jurisdiction, for we are confronted with a challenge to the circuit court's "power to hear and determine" appeals from the magistrate courts and municipal courts dismissing charges and pre-trial rulings suppressing evidence which significantly impair the prosecution of a criminal case. Dove v. Gold Kist, Inc., 314 S.C. 235, 237, 442 S.E.2d 598, 600 (1994); see also State v. Brown, Op. No. 25802 (S.C. Sup.Ct. filed April 12, 2004) (Shearouse Adv. Sh. No. 14 at 42).

sentence.

The circuit court's narrow reliance on this statutory provision is misplaced, for in South Carolina, the State's right to appeal is defined by our judicial decisions, not statutory law. State v. McKnight, 353 S.C. 238, 238, 577 S.E.2d 456, 457 (2003). Because the State's right to appeal in criminal cases is a judicially created right, we turn to our judicial decisions, which uniformly support the circuit court's jurisdiction to hear the State's appeal in this matter. We begin with the settled principle that "[a] pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable under S.C. Code Ann. § 14-3-330(2)(a) (1976)." State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985). Under McKnight, the State has the right to immediately appeal a trial court's suppression of evidence which significantly impairs the prosecution of the case. There is additional precedent refuting Belviso's position, adopted by the circuit court, that no appeal may be taken from a magistrate's court until a defendant is convicted and sentenced. In State v. Jansen, 305 S.C. 320, 408 S.E.2d 235 (1991), the magistrate suppressed evidence relating to a driving under the influence (DUI) charge. The State appealed to the circuit court and the circuit court affirmed. Id. at 321, 408 S.E.2d at 236. Although the appeal was interlocutory, the circuit court and the supreme court heard the appeal. State v. Whetstone, 333 S.C. 376, 510 S.E.2d 225 (Ct. App. 1998) also supports the circuit court's exercise of jurisdiction over the State's appeal from the magistrate's pre-trial rulings. The circuit court in Whetstone, as well as this court, heard the State's appeal from the magistrate court's dismissal of a charge. Id. at 377, 510 S.E.2d at 225-26. Similarly, in State v. Rowlands, 343 S.C. 454, 456, 539 S.E.2d 717, 718 (Ct. App. 2000), the circuit court and this court exercised jurisdiction over the State's appeal from the magistrate court's dismissal of a DUI charge. This authority provides ample support for the circuit court's ability to hear the State's appeal from the magistrate court's pre-trial rulings dismissing the open container charge and suppressing critical evidence in connection with the charge of driving with an unlawful alcohol concentration.

We further conclude this result is consistent with the intent of the Legislature, especially when our statutory law is considered in its entirety.

Section 18-3-10 cannot properly be read in isolation. Chapter 1 of Title 18 of the South Carolina Code of Laws provides general guidelines for appeals in civil and criminal actions. For example, section 18-1-30 provides that "[a]ny party aggrieved may appeal in the cases prescribed in this Title." Section 18-1-130 authorizes appeals from "any intermediate order involving the merits and necessarily affecting the judgment." Chapters 3 and 5 of Title 14 of our code of laws contain further confirmation of the circuit court's power to hear the State's appeal. Section 14-3-330, as held in McKnight, 287 S.C. at 168, 337 S.E.2d at 209, permits an interlocutory appeal when the order "in effect determines the action . . . or discontinues the action." Section 14-5-340 expressly authorizes the circuit court to "hear appeals from magistrates' courts and municipal courts . . . . " The foregoing sampling of statutes repudiates the nonsensical view of legislative intent urged by Belviso. Belviso's myopic view of section 18-3-10 would require us to ignore other pertinent statutes and lead to a rule foreclosing *any* possibility of review of intermediate orders from magistrates' courts and municipal courts. That would be "a result so plainly absurd that it could not possibly have been intended by the Legislature . . . ." Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). In construing the statutory scheme as a whole, we "escape the absurdity" and give efficacy to the manifest intention of the General Assembly. Id. In doing so, our judicial decisions addressing the "right of appeal" are in accord with legislative intent.

CONCLUSION

The circuit court, in its appellate capacity, has jurisdiction to entertain the State's appeal from the magistrate's pre-trial rulings dismissing the open container charge and suppressing evidence which significantly impairs the prosecution of the unlawful driving charge. The decision of the circuit court is **REVERSED** and the matter is **REMANDED** for further proceedings.

ANDERSON and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lee Bowers, As Guardian Ad Litem For Jessica May Jones, A Minor Under The Age Of (18), — Plaintiff,

v.

South Carolina Department Of Transportation, — Respondent,

and Viola Bryan Byson, — Appellant.

Larry Jones and Charlotte Marie Jones, — Respondents,

v.

South Carolina Department Of Transportation, — Respondent,

and Viola Bryan Byson, — Appellant.

Tiffany Miranda Jones, — Plaintiff,

v.

South Carolina Department Of Transportation, — Respondent,

and Viola Bryan Byson, — Appellant.

and Larry Jones and Charlotte Marie Jones, Appellants

v.

South Carolina Department of Transportation and Viola Bryan Byson, Respondents.

Consolidated Appeals From Beaufort County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 3810
Heard May 12, 2004 – Filed June 1, 2004

AFFIRMED

James H. Moss, of Beaufort, for Appellant Viola Bryan Byson.

Darrell Thomas Johnson, Jr. and Mills Lane Morrison, Jr., of Hardeeville, for Appellants Larry Jones and Charlotte Marie Jones.

Marshall H. Waldron, Jr., of Bluffton, for Respondent South Carolina Department of Transportation.

KITTREDGE, J.: These actions arise from an automobile accident involving Viola Bryan Byson and the minor daughter of Larry

and Charlotte Jones. The Joneses and Byson settled their property damage and personal injury actions and each executed a release of all other claims arising from the accident. Each later raised separate claims against the South Carolina Department of Transportation (SCDOT), asserting the department's negligence contributed to the accident. In both cases, the circuit court granted summary judgment in favor of SCDOT on the grounds the action was barred by the releases. We consolidate these appeals pursuant to Rule 214, SCACR, and affirm.

FACTS/PROCEDURAL HISTORY

In December 1998, Appellant Viola Byson was driving on Highway 21 in Beaufort County. At the same time, Appellant Charlotte Jones was traveling in the family pickup truck driven by her daughter, Tiffany Jones. The Joneses drove out of a parking lot along the highway into the path of Byson's car. The two vehicles collided causing serious injuries to all parties.

Byson later filed suit against Tiffany Jones, alleging her negligence caused the accident. In March 2000, Byson and Tiffany Jones settled the case. Byson accepted $9,000 from Tiffany Jones' insurance company and signed a release. From the same carrier, Larry and Charlotte Jones accepted insurance payments for their property damage and personal injuries, and they too signed a release. The Joneses and Byson were represented by counsel.

The releases executed by Byson and the Joneses are identical, except for the signatures and amount of consideration. In pertinent part, they provide:

> [T]he undersigned hereby releases and forever discharges [the tort-feasor] and all other persons, firms or corporations liable or, who might be claimed to be liable . . . from any and all claims, demands, damages, actions, causes

> of action or suits of any kind or nature whatsoever, and particularly on account of all injuries, known and unknown, both to person and property, which have resulted or may in the future develop from an accident which occurred on or about the 23 day of December, 1998 at or near Beaufort, S.C. . . . . Undersigned hereby declares that the terms of this settlement have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final compromise adjustment and settlement of any and all claims, disputed or otherwise, on account of the injuries and damages above mentioned, and for the express purpose of precluding forever any further or additional claims arising out of the aforesaid accident.

Shortly after signing the releases, the Joneses and Byson asserted separate claims against the SCDOT, alleging its negligence contributed to the accident. Specifically, they claimed SCDOT breached its duty to properly keep the roadway clear of bushes and brush thereby obstructing Tiffany Jones' view of the roadway and preventing her from safely entering traffic on Highway 21. On SCDOT's motion for summary judgment, the circuit court dismissed both claims, finding the suits were barred by the "clear and unequivocal" terms of the releases.[1] The Joneses and Byson appeal.

STANDARD OF REVIEW

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions

[1] SCDOT moved for summary judgment on multiple grounds. The circuit court granted summary judgment only as to the releases. The balance of the motion was denied due to disputed "factual issues."

on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; see also Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997); Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998). However, the circuit court may properly consider only "such facts as would be admissible in evidence." Rule 56(e), SCRCP; Hall v. Fedor, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) (stating "materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence"). In reviewing a grant of summary judgment, this court applies the same standard that governs the circuit court: summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991).

DISCUSSION

Appellants argue the circuit court erred by finding their claims against SCDOT were barred by the releases they signed (collectively, the "Release"). We disagree.

The Release is a contract. See Hyman v. Ford Motor Co., 142 F.Supp.2d 735 (D.S.C. 2001) (applying South Carolina law, contract principles invoked to determine validity of a release); Lowery v. Callahan, 210 S.C. 300, 300, 42 S.E.2d 457, 458 (1947) (noting that the "same principles of adequacy of consideration which apply to other contracts, govern as to releases"); 18 S.C. Jur. Release § 2 (2003) ("Because a release is a contract, principles of law applicable to contracts generally are also applicable to releases."). "In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the parties." C.A.N. Enterprises, Inc. v. South Carolina Health & Human Services Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). Since the Release unambiguously sets forth the contracting parties' intent, we are bound

by that clearly expressed intent without resort to extrinsic evidence. "Extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible." Id. at 377-78, 373 S.E.2d at 586. Accordingly, the circuit court applied the proper summary judgment standard and correctly determined Appellants' unmistakable intent from the terms of the Release without resort to affidavits and deposition excerpts. Hall, 349 s.c. at 175, 561 S.E.2d at 657.

In Bartholomew v. McCartha, 255 S.C. 489, 179 S.E.2d 912 (1971), our supreme court stated that "the release of one tort-feasor does not release others who wrongfully contributed to plaintiff's injuries unless this was the intention of the parties, or unless plaintiff has, in fact, received full compensation amounting to a satisfaction." Id. at 491, 179 S.E.2d at 913. The circuit court based its determination on both prongs of Bartholomew, concluding that, under the terms of the Release, the parties received full compensation and intended that all claims for injuries would be relinquished. We agree.

The terms of the Release do not evince an intent to limit its scope to any specifically identified parties. Rather, the Release is general and all encompassing in its scope. It clearly states that the Appellants released the tort-feasor "and all other persons, firms or corporations liable, or who might be claimed to be liable." This language is a clear, explicit, and unequivocal indication of the parties' intent that all claims arising from the accident – now and in the future –
are barred under the terms of the Release. Had Appellants intended a contrary result and desired to limit the operation of the Release to named persons only, the terms of the Release could have been easily tailored to that end. We are constrained by the plain, unambiguous language of the Release to find that Appellants' claims against SCDOT fall within the terms of the Release.

This result is also compelled under the second prong of Bartholomew. The Release clearly and unequivocally contemplates that the respective settlement payments to Appellants constituted a "full compensation amounting to a satisfaction."

Appellants, however, argue that "damages to be awarded for injury and resulting pain and suffering cannot be determined with mathematical precision" and this determination is, therefore, always "an issue of fact." They essentially argue that full compensation is always a function of the jury's discretion, rendering summary judgment unavailable. While we agree that damages, especially non-pecuniary damages, in a personal injury claim are difficult to ascertain in light of the broad discretion accorded the trier of fact, Appellants misconstrue the precise issue before us. The issue is not determining the exact amount (assuming liability) a jury would award. Instead, the issue is "full compensation amounting to a satisfaction." Id. at 491, 179 S.E.2d at 913. (emphasis added)

A "satisfaction" is generally defined as "[t]he discharge of an obligation by paying a party what is due to him" or "[t]he performance of a substituted obligation in return for the discharge of the original obligation." Black's Law Dictionary 1342 (6th ed. 1990). In cases involving a disputed or liquidated claim arising in contract or tort, the parties will reach an "accord" whereby one of the parties agrees to accept as "satisfaction" of the disputed claim some performance or undertaking different from that which he considers himself entitled. See South Carolina Farm Bureau Mut. Ins. Co. v. Kelly, 345 S.C. 232, 239, 547 S.E.2d 871, 875 (Ct. App. 2001) (noting that "[a]n accord and satisfaction occurs when there is (1) an agreement to accept in discharge of an obligation something different from that which the creditor is claiming or is entitled to receive; and (2) payment of the consideration expressed in the new agreement.") (quoting Tremont Constr. Co. v. Dunlap, 310 S.C. 180, 182, 425 S.E.2d 792, 793 (Ct. App. 1992); Mercury Marine Div. v. Costas, 288 S.C. 383, 386, 342 S.E.2d 632, 633 (Ct. App. 1986)). Indeed, parties regularly reach compromise settlements for a variety of reasons, including the vagaries and unpredictability of litigation and the desire for finality. Where, as here, a party accepts "a full and final compromise adjustment and settlement of any and all claims," such amounts to a Bartholomew satisfaction, thereby extending the preclusive effect of the release to nonparties to the instrument.

We reject the suggestion that Bartholomew v. McCartha has been overruled by the Uniform Contribution Among Tortfeasors Act (UCATA). S.C. Code Ann. §§ 15-38-10 to 70 (Supp. 2003). In our judgment, UCATA mirrors the rule in Bartholomew. Section 15-38-50 provides in part that a release "does not discharge any of the other tortfeasors from liability . . . unless its terms so provide . . . ." (emphasis added). In any event, UCATA "shall not apply to governmental entities . . . [and the] South Carolina Tort Claims Act is the exclusive and sole remedy for any tort committed by an employee of a governmental entity . . . ." S.C. Code Ann. § 15-38-65 (Supp. 1999). UCATA, thus, does not apply to SCDOT.

CONCLUSION

The terms of the Release here are clear and unambiguous: Appellants released "all other persons, firms or corporations liable or, who might be claimed to be liable" and the settlement was accepted as a "full and final compromise . . . precluding forever any further or additional claims arising out of the aforesaid accident." The Release, by its unmistakable terms, establishes Appellants' intent as a matter of law, and forecloses the need for any further inquiry regarding both its scope and the presence of "full compensation amounting to a satisfaction." The explicit, plain language of the Release permits no other finding. We therefore find the Release bars Appellants' actions against SCDOT. The circuit court's grant of summary judgment in favor of Respondent is

AFFIRMED.

ANDERSON and HUFF, JJ., concur.