Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6623

M E D I A R E L E A S E

July 10, 2012; 10 a.m.

The Judicial Merit Selection Commission is accepting applications for the judicial offices listed below:

The term of office currently held by the Honorable John D. Geathers, Judge of the Court of Appeals, Seat 3, will expire June 30, 2013.

The term of office currently held by the Honorable Paula H. Thomas, Judge of the Court of Appeals, Seat 4, will expire June 30, 2013.

The term of office currently held by the Honorable DeAndrea Gist Benjamin, Judge of the Circuit Court, Fifth Judicial Circuit, Seat 1, will expire June 30, 2013.

The term of office currently held by the Honorable J. Derham Cole, Judge of the Circuit Court, Seventh Judicial Circuit, Seat 1.

The term of office currently held by the Honorable Deadra L. Jefferson, Judge of the Circuit Court, Ninth Judicial Circuit, Seat 1, will expire June 30, 2013.

The term of office currently held by the Honorable Rivers Lawton McIntosh, Judge of the Circuit Court, Tenth Judicial Circuit, Seat 1, will expire June 30, 2013.

The newly created seat for the Judge of the Circuit Court, At-Large, Seat 14. The term will be from **July 1, 2013, until June 30, 2019.**

The newly created seat for the Judge of the Circuit Court, At-Large, Seat 15. The term will be from **July 1, 2013, until June 30, 2019.**

The newly created seat for the Judge of the Circuit Court, At-Large, Seat 16. The term will be from **July 1, 2013, until June 30, 2019.**

The term of office currently held by the Honorable Ann Gué Jones, Judge of the Family Court, First Judicial Circuit, Seat 1, will expire June 30, 2013.

The term of office currently held by the Honorable Dale Moore Gable, Judge of the Family Court, Second Judicial Circuit, Seat 2, will expire June 30, 2013.

The term of office currently held by the Honorable Angela R. Taylor, Judge of the Family Court, Third Judicial Circuit, Seat 2, will expire June 30, 2013.

The term of office currently held by the Honorable Gordon B. Jenkinson, Judge of the Family Court, Third Judicial Circuit, Seat 3, will expire June 30, 2013.

A vacancy will exist in the office currently held by the Honorable Leslie K. Riddle, Judge of the Family Court for the Fifth Judicial Circuit, Seat 2, upon Judge Riddle's retirement on or before June 30, 2013. The successor will fill the unexpired term of that office which will expire June 30, 2013, and the subsequent full term which will expire June 30, 2019.

The term of office currently held by the Honorable Dana A. Morris, Judge of the Family Court, Fifth Judicial Circuit, Seat 3, will expire June 30, 2013.

The term of office currently held by the Honorable Brian M. Gibbons, Judge of the Family Court, Sixth Judicial Circuit, Seat 1, will expire June 30, 2013.

The term of office currently held by the Honorable Phillip K. Sinclair, Judge of Family Court, Seventh Judicial Circuit, Seat 1, will expire June 30, 2013.

The term of office currently held by the Honorable James F. Fraley, Jr., Judge of the Family Court, Seventh Judicial Circuit, Seat 2, will expire June 30, 2013.

The term of office currently held by the Honorable Joseph W. McGowan, III, Judge of the Family Court, Eighth Judicial Circuit, Seat 1, will expire June 30, 2013.

The term of office currently held by the Honorable Billy A. Tunstall, Jr., Judge of the Family Court, Eighth Judicial Circuit, Seat 3, will expire June 30, 2013.

The term of office currently held by the Honorable Paul W. Garfinkel, Judge of the Family Court, Ninth Judicial Circuit, Seat 2, will expire June 30, 2013.

The term of office currently held by the Honorable Wayne M. Creech, Judge of the Family Court, Ninth Judicial Circuit, Seat 4, will expire June 30, 2013.

The term of office currently held by the Honorable Edgar H. Long, Judge of the Family Court, Tenth Judicial Circuit, Seat 1, will expire June 30, 2013.

The term of office currently held by the Honorable Tommy B. Edwards, Judge of the Family Court, Tenth Judicial Circuit, Seat 3, will expire June 30, 2013.

The term of office currently held by the Honorable Deborah Neese, Judge of the Family Court, Eleventh Judicial Circuit, Seat 2, will expire June 30, 2013.

The term of office currently held by the Honorable Timothy H. Pogue, Judge of the Twelfth Judicial Circuit, Seat 1, will expire June 30, 2013.

The term of office currently held by the Honorable A. Eugene Morehead, III, Judge of the Twelfth Judicial Circuit, Seat 2, will expire June 30, 2013.

The term of office currently held by the Honorable Rochelle Y. Conits, Judge of the Family Court, Thirteenth Judicial Circuit, Seat 1, will expire June 30, 2013.

The term of office currently held by the Honorable William Marsh Robertson, Judge of the Family Court, Thirteenth Judicial Circuit, Seat 2, will expire June 30, 2013.

The term of office currently held by the Honorable Gerald C. Smoak, Jr. Judge of the Family Court, Fourteenth Judicial Circuit, Seat 1, will expire June 30, 2013.

The term of office currently held by the Honorable Jan B. Holmes, Judge of Fifteenth Judicial Circuit, Seat 1, will expire June 30, 2013.

The term of office currently held by the Honorable David Glenn Guyton, Judge of the Family Court, Sixteenth Judicial Circuit, Seat 2, will expire June 30, 2013.

The newly created seat for the Judge of the Family Court, At-Large, Seat 1. The term will be from **July 1, 2013, until June 30, 2019.**

The newly created seat for the Judge of the Family Court, At-Large, Seat 2. The term will be from **July 1, 2013, until June 30, 2019.**

The newly created seat for the Judge of the Family Court, At-Large, Seat 3. The term will be from **July 1, 2013, until June 30, 2019.**

The newly created seat for the Judge of the Family Court, At-Large, Seat 4. The term will be from **July 1, 2013, until June 30, 2019.**

The newly created seat for the Judge of the Family Court, At-Large, Seat 5. The term will be from **July 1, 2013, until June 30, 2019.**

The newly created seat for the Judge of the Family Court, At-Large, Seat 6. The term will be from **July 1, 2013, until June 30, 2019.**

The term of office currently held by the Honorable Shirley C. Robinson, Judge of the Administrative Law Court, Seat 5, will expire June 30, 2013.

The term of office currently held by the Honorable Curtis G. Clark, Master-in-Equity of Abbeville County, will expire June 30, 2013.

The term of office currently held by the Honorable Maurice A. Griffith, Master-in-Equity of Aiken County, will expire June 30, 2013.

The term of office currently held by the Honorable Jeffrey M. Tzerman, Master-in-Equity of Kershaw Count, will expire July 31, 2013.

The term of office currently held by the Honorable Stephen B. Doby, Master-in-Equity of Lee County, will expire December 31, 2013.

A vacancy will exist in the office currently held by the Honorable O. Davie Burgdorf, Master-in-Equity of Organgeburg County, upon Judge Burgdorf's retirement on or before February 22, 2013. The successor will fill the unexpired term of that office which will expire August 14, 2015.

In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6629 (T-Th).

Or

Laurie Traywick, JMSC Administrative Assistant at (803)-212-6623

The Commission will not accept applications after 12:00 noon on Thursday, August 9, 2012.

Please note that S.C. Ann. Section 2-19-20(C) provides:
"No person may concurrently seek more than one judicial vacancy."

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at http://www.scstatehouse.gov/JudicialMeritPage/JMSCMainPage.php

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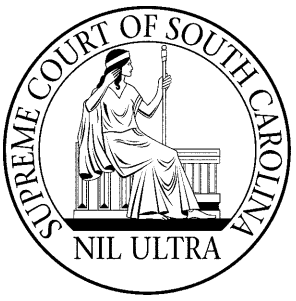

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 24
July 18, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Verdell Barr, Respondent.

Appellate Case No. 2012-211952

Opinion No. 27144
Submitted May 25, 2012 – Filed July 18, 2012

PUBLIC REPRIMAND

Disciplinary Counsel Lesley M. Coggiola and Assistant Disciplinary Counsel Ericka McCants Williams, both of Columbia, for Office of Disciplinary Counsel.

Verdell Barr, *pro se*, of Kingstree, Respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a confidential admonition or public reprimand. In addition, respondent agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of imposition of a sanction and to complete the Legal Ethics and Practice Program Ethics School within six (6) months of the imposition of a sanction. Noting respondent's prior disciplinary history, we accept the Agreement

and issue a public reprimand.[1] Further, we order respondent to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this opinion and to complete the Legal Ethics and Practice Program Ethics School within six (6) months of the date of this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Respondent represented Complainant A in a post-conviction relief (PCR) matter. On October 14, 2008, respondent notified Complainant A that his PCR application had been denied. On November 18, 2008, respondent sent Complainant A a copy of the Order of Dismissal. Complainant A wrote respondent a letter requesting he file an appeal on his behalf. Respondent admits he failed to file the appeal despite the request and asserts his failure to file the appeal was an inadvertent error. Respondent later assisted Complainant A in obtaining a belated review of the order denying Complainant A's PCR action.

Matter II

Complainant B retained respondent to probate her husband's estate. Respondent admits that he failed to diligently pursue the probate of the estate. After Complainant B released respondent from representation, respondent released Complainant B's file to Complainant B's new attorney and forwarded a check representing the entire retainer to the new attorney.

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[1] In 1997, this Court definitely suspended respondent from the practice of law for two (2) years, retroactive to August 23, 1996, the date of his temporary suspension, with conditions for reinstatement (i.e., full restitution). In the Matter of Barr, 325 S.C. 240, 481 S.E.2d 702 (1997). He was reinstated by this Court in 1999. In the Matter of Barr, 335 S.C. 550, 518 S.E.2d 39 (1999). On November 8, 2004, this Court publicly reprimanded respondent. In the Matter of Barr, 361 S.C. 399, 605 S.E.2d 536 (2004).

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); and Rule 1.4 (lawyer shall lawyer shall promptly inform client of any decision or circumstance with respect to which client's informed consent is required, reasonably consult with the client about means by which client's objectives are to be accomplished, and keep client reasonably informed about status of matter).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct, Rule 407, SCACR).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct. In addition, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this opinion and complete the Legal Ethics and Practice Program Ethics School within six (6) months of the date of this opinion. Respondent shall provide proof of his completion of the Legal Ethics and Practice Program Ethics School to the Commission no later than ten (10) days after the conclusion of the program.

PUBLIC REPRIMAND.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Aletha M. Johnson, Claimant, Respondent,
v.
Rent-A-Center, Inc., Employer and Sedgwick CMS,
Carrier, Appellants.

Appellate Case No. 2011-190666

Appeal from Richland County
Workers' Compensation Commission

Opinion No. 27145
Heard May 3, 2012 – Filed July 18, 2012

AFFIRMED

John Gabriel Coggiola of Willson Jones Carter & Baxley, of Columbia, for Appellants.

John R. Hetrick of Hetrick, Harvin & Bonds, of Walterboro, and Nelson Russell Parker, of Land Parker & Welch, of Manning, for Respondent.

CHIEF JUSTICE TOAL: Aletha M. Johnson (Employee) sustained an injury to her back while working for Rent-A-Center (Employer). Employer contends the Appellate Panel of the Workers' Compensation Commission (Appellate Panel) erred in awarding benefits to Employee. The Appellate Panel found Employee was disabled and did not constructively refuse light duty work. We affirm.

FACTS/ PROCEDURAL BACKGROUND

Employee is a single mother living with her son. Employee has a high school degree and attended two and one half years of college. Employee's employment history includes a stint as an auditor scanning boxes for UPS for approximately nine months following high school, working as a waitress for eight years and working as a correctional officer for three and one half years. She had no reported chest, neck or shoulder injuries prior to beginning employment with Employer in September 2008.

On February 22, 2008, while moving a bedroom set from the back of a truck, Employee was struck by a dresser weighing over 200 pounds. The dresser fell on Employee when a co-worker who was assisting with the move became distracted. Employee injured her neck, shoulders and chest. Following the accident, Employee received medical treatment from Dr. Paul DeHoll, an orthopaedist authorized by Employer's insurance carrier to examine Employee. Dr. DeHoll placed Employee on work restriction and instructed her not to lift more than ten pounds or push, pull, stand, climb, walk or sit for long duration. When Employee attempted to return to work, Employer's district manager informed Employee that she could not return until she received a full release with no restrictions from Dr. DeHoll. For a number of weeks, Employer paid Employee total disability benefits. During this period, Employee obtained her certification as both a licensed Certified Nurse Assistant (CNA) and a phlebotomist.[1]

On July 15, 2008, Dr. DeHoll reported that Employee was "at maximal medical improvement" and could be "released back to work with no restrictions." Dr. DeHoll further found that Employee qualified for a "5% impairment of the whole person secondary to the cervical spine," and noted that she still complained of tingling and numbness in both hands.

After being released to full duty, Employee was offered her previous position with Employer in Manning but refused the position because she would have been paired with the same co-worker whom she faulted for the accident. Employer then offered Employee a second position in Florence, which she also refused because Employer would not offer additional compensation for the extra transportation and child care costs she would incur working so far from home. Employee then resigned from her job and sought other gainful employment.

[1] A phlebotomist is a professional trained to draw blood for tests or transfusions.

Following her resignation, Employee worked as a housekeeper for Angelic Place Retirement Home in Sumter for several months. She then changed jobs and worked at Visiting Professionals, a home health care agency in Sumter, performing cooking and cleaning duties for one month. In October 2008, Employee began working as a CNA with Kershaw County Medical Center. She continued working as a CNA until her supervisors became aware of her workers' compensation award. The Kershaw County Medical Center then informed Employee that, despite her previous full duty release letter from Dr. DeHoll, she could not return to work unless she was reexamined and submitted a new letter.

On September 25, 2009, Employee and Employer entered into a consent order allowing Employee to be reexamined by Dr. DeHoll.[2] On October 20, 2009, after the examination, Dr. DeHoll noted:

> "[T]he Patient still had a small disc herniation as per her previous MRI. Essentially there is no change [,] [and] if patient's symptoms have resolved[,] I see no need for further action."

On October 28, 2009, Employee's attorney scheduled an independent medical evaluation with Dr. Don Johnson. Employee testified that the numbness and tingling in her hands, which Dr. DeHoll noted in July 2008, had increased in intensity. Based on his examination, Dr. Johnson diagnosed Employee as suffering cervical pathology with large disc herniation. Dr. Johnson opined, "I think this patient should be placed on lifting restrictions and should not return to work as a CNA [, but] . . . can work as a phlebotomist . . . ."

On May 26, 2010, Employee filed a Form 50 hearing request with the Workers' Compensation Commission. On June 3, 2010, the Single Commissioner ordered Dr. Randall G. Drye to examine Employee. On March 22, 2010, Dr. Drye stated that Employee "presents with long-standing chronic symptoms of neck pain and possible paresthesias," and ordered a repeat cervical MRI. After examining the data, Dr. Drye concluded, "I [ ] feel she should adhere to permanent lifting restrictions of no greater than 15 pounds. She should not push or pull more than 50 pounds and only then on an occasional basis." However, he agreed with Dr. Johnson that Employee was "well suited to work as a phlebotomist."

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[2] Neither the Record nor the briefs shed light on the events that took place between Employee leaving her job at Kershaw County Medical Center and Employee entering into a consent order with Employer.

After examining the medical evidence and testimony, the Single Commissioner awarded Employee temporary total disability benefits, finding the full duty release of Dr. DeHoll dated July 15, 2008, was "stale," and the medical evidence supported Dr. Johnson and Dr. Drye's conclusions. The Single Commissioner further concluded that Employer did not offer Employee work within the restrictions set forth by Dr. Johnson and Dr. Drye. Moreover, he found Employee applied to numerous phlebotomist positions, but that many of these positions combined CNA and phlebotomist responsibilities, rendering the jobs unsuitable for Employee. Employer appealed the Single Commissioner's decision to the Appellate Panel, and the Appellate Panel affirmed. Employer appealed to the court of appeals, and this Court certified the case for review pursuant to Rule 204(b), SCACR.

ISSUES

I. Whether the Appellate Panel erred in finding Employee was disabled under section 42-1-120 of the South Carolina Code.

II. Whether the Appellate Panel erred in finding Employee did not constructively refuse light duty by voluntarily resigning from her position with Employer.

STANDARD OF REVIEW

The South Carolina Administrative Procedure Act (APA) governs appeals from the decisions of an administrative agency. S.C. Code Ann. § 1-23-380 (Supp. 2011); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134–35, 276 S.E.2d 304, 306 (1981). Under the APA, an appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5). If the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," a reviewing court may reverse or modify. *Id.* Substantial evidence is not a mere scintilla of evidence, nor evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004).

ANALYSIS

I. Disability under Section 42-1-120

Employer claims that Employee is not disabled, as defined under section 42-1-120 of the South Carolina Code, and does not qualify for temporary total disability benefits. *See* S.C. Code Ann. § 42-1-120 (1976). We disagree.

Section 42-1-120 defines "disability" as "incapacity because of injury to earn wages, which the employee was receiving at the time of injury in the same or any other employment." In *Shealy v. Algernon Blair, Inc.*, 250 S.C. 106, 113, 156 S.E.2d 646, 649–50 (1967), the Court found that a worker was not disabled under section 42-1-120 because his efforts to obtain work were "intermittent and lackadaisical" and medical evidence, as well as evidence of his post-injury activities, demonstrated that he could perform his job. *Shealy* places the burden on a claimant to show that (1) the claimant "failed [to obtain employment] because of an injury produced handicap," and (2) the claimant "made reasonable efforts to obtain employment." *Id.*

Employer argues that under section 42-1-120 and *Shealy*, Employee was not disabled because she could still work as a phlebotomist. Under the first prong of *Shealy*, the test is whether Employee *failed to obtain employment* as a result of injuries she suffered at work, not that she could work as a phlebotomist in theory. While both Dr. Johnson and Dr. Drye noted that Employee could work as a phlebotomist, both doctors also placed lifting restrictions on Employee, and Dr. Johnson additionally opined that Employee could not work as a CNA because of her injuries.[3] The Single Commissioner then found that phlebotomist and CNA duties are often combined, rendering even a phlebotomist position unsuitable for Employee. The Single Commissioner found Employee's testimony concerning the overlapping nature of CNA and phlebotomist duties credible, and that, while

[3] Dr. Johnson's recommendation is supported by documents in the Record explaining the physical demands of a CNA, which could involve "turning, lifting, [and] transferring" patients. Moreover, Employee could not return to her job as a CNA at Kershaw County Medical Center because she was required to obtain a full duty release without lifting restrictions.

Employee worked at Kershaw County Medical Center as a CNA, she also performed phlebotomist work for five months. *See Pinckney v. Warren*, 344 S.C. 382, 393, 544 S.E.2d 620, 627 (2001) (Generally, a trial judge is in the best position to judge the credibility of a witness).

Employer, challenges this finding, countering that jobs with exclusively phlebotomist duties do hypothetically exist. The Record, however, does not demonstrate that these jobs are available in Employee's geographical area.[4] Consequently, we hold substantial evidence supports the Single Commissioner's findings that reasonable minds can reach the conclusion that Employee's injuries prevent her from obtaining employment as a phlebotomist because phlebotomist and CNA duties are often coterminous. *Pratt*, 357 S.C. at 622, 594 S.E.2d at 274. We stress that our opinion is a narrow one, limited to the facts of this case. Where it is demonstrated that there are phlebotomist jobs without CNA duties within a reasonable geographical area, and Employee chooses not to apply for them, the result would likely be different.

Moreover, Employee has satisfied the second prong of *Shealy*. 250 S.C. at 113, 156 S.E.2d at 649–50. Employee testified in court that she submitted applications to McLeod Medical Center, Clarendon Memorial Hospital, Colonial Life Center, Amnesty, and Providence Baptist in Columbia for phlebotomist positions, but did not receive any offers.[5] Again, the Single Commissioner found Employee's testimony credible. In addition, Employee's employment record both before and after her injuries does not demonstrate a history of malingering. To the contrary, Employer originally refused to allow Employee to return to work without a full clearance from Dr. DeHoll, necessitating her receipt of temporary total disability benefits. Rather than sit idly by, Employee returned to school and received her

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[4] If these jobs do exist, we believe it would not be enough just to show that a phlebotomist job description formally does not mention CNA or lifting duties, but Employer would need to also show that Employee is not expected to informally perform such duties.

[5] Employer complains that Employee did not "offer any evidence, including applications, rejections letters, or witnesses, to establish she was denied work as a phlebotomist . . . ." However, when Employer cross-examined Employee on this issue, Employee offered to obtain copies of her applications, but Employer never followed up on this offer.

CNA and phlebotomist certifications. After Employee resigned her position with Employer, she immediately sought and worked at three other jobs before Kershaw County Medical Center suspended her over concerns she could not perform the duties of a CNA due to her injuries. As Employee testified, "It's not the fact that I don't want to work, there's no work out there for me." Therefore, we find substantial evidence establishes that Employee exerted reasonable efforts to seek employment as a phlebotomist.

Thus, we hold Employee is disabled pursuant to section 42-1-120 of the South Carolina Code.

II. Constructive Refusal of Light Duty

Employer contends Employee constructively refused light duty work that would accommodate her physical restrictions by voluntarily resigning from her employment without giving Employer the opportunity to offer her such work. We disagree.

Employer cites no precedent in which this Court recognized that a constructive refusal of light duty could defeat a claim for temporary total disability. Assuming for the sake of analysis that such a defense is viable, we find the Record does not support Employer's argument.

It is undisputed that Employer never actually offered light duty work to Employee. Rather, Employer offered Employee her previous position where she would be paired with the co-worker whom she faulted for the accident, and alternatively, offered her a position necessitating expensive travel on Employee's part. Employee refused both offers and resigned. Employer relies on this voluntary resignation to argue Employee constructively refused light duty work. However, these facts do not support Employer's position. To begin with, Employee had a full release from Dr. DeHoll at the time she resigned so the question of light duty work was not even an issue, and Employee left for other reasons. Moreover, it is highly speculative to presume Employer would offer Employee light duty work had she remained with Employer. *See State v. Hernandez*, 382 S.C. 620, 625, 677 S.E.2d 603, 605 (2009) (finding mere speculation insufficient). The Record, in fact, points the other way. When Employee was first placed on lifting restrictions by Dr. DeHoll, rather than accommodate Employee, Employer refused to let Employee return to work at all. Employee also testified that sometime after she resigned her position in Manning, she subsequently went back to Employer to ask

for work, but rather than offer light duty work, Employer turned Employee away on the ground that there was no open position.

Thus, we hold Employer did not offer Employee light duty work, and Employee did not constructively refuse such work.

CONCLUSION

For the foregoing reasons, we find Employee qualifies as disabled under section 42-1-120 of the South Carolina Code, and she did not constructively refuse light duty work. Accordingly, we affirm the Appellate Panel.

AFFIRMED.

PLEICONES, KITTREDGE, HEARN, JJ., and Acting Justice E. C. Burnett, III, concur.

The Supreme Court of South Carolina

In the Matter of Kenneth C. Krawcheck, Respondent.

Appellate Case No. 2012-212466

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(c) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

IT IS FURTHER ORDERED that Jeffrey Gerardi, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Gerardi shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Gerardi may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Jeffrey Gerardi, Esquire, has been duly appointed by this

Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Gerardi's office.

Mr. Gerardi's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

July 13, 2012

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

The State, Respondent,

v.

Hollie McEachern, Appellant.

Appeal From Kershaw County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 4981
Heard January 12, 2012 – Filed June 6, 2012
Withdrawn, Submitted and Refiled July 18, 2012

AFFIRMED

Jack B. Swerling, of Columbia, and Katherine Carruth Goode, of Winnsboro, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant

Attorney General David Spencer, and Solicitor Daniel E. Johnson, all of Columbia, for Respondent.

HUFF, J.: Hollie McEachern was convicted of trafficking in cocaine, trafficking in crack cocaine, and possession with intent to distribute marijuana, and was sentenced to concurrent terms of twenty-five, ten and five years, respectively. McEachern appeals, asserting the trial court erred in admitting various testimony, failing to sustain her objection to certain arguments by the State which exceeded limitations placed by the trial court, denying her mistrial motion based on improper comment by the State and denying her motion for a new trial.

FACTUAL/PROCEDURAL BACKGROUND

On March 9, 2007, Hollie McEachern was arrested, along with others, after Dominic Thomas set up a drug deal for the Kershaw County Sheriff's Department, following Dominic's arrest by the Department earlier that day. Dominic testified that after he was caught in a drug transaction involving cocaine, he offered to call some people from whom he could obtain drugs. As a result, he called his friend Raheem, who kept Dominic on hold, telling him "he had to call his girl Hollie." Dominic told Raheem he wanted a "Big 8," which is four and a half ounces of powder cocaine. During this phone call, Dominic had Raheem on speaker phone, where Lieutenant Dowey could hear the conversation. Raheem indicated he was "waiting on his girl to see if she was going to do it," because they were not sure they wanted to meet with Dominic. Arrangements were ultimately made to meet in front of a nail salon beside Domino's Pizza, where the "Big 8" was to be purchased for $3,200. An officer then drove Dominic to the location in Dominic's truck. Dominic got out of his truck and got into a vehicle with Hollie, Terrence Rivera, and Theodore Shepperd, who was known as Raheem. Dominic spoke with the driver, Terrence, who Dominic knew, and then turned to Raheem and asked to see the drugs. Raheem, who was sitting in the back seat with Dominic, had the drugs handed to him from the front seat. Dominic believed it was Hollie who handed Raheem the drugs. Dominic indicated he had half of the money with him, and he told them he was going to get the other half when he got out of the truck, at which time the police then surrounded the area.

Lieutenant Dowey testified that he was standing next to Dominic when Dominic made the phone call to Raheem. When Dominic first called, Raheem said that "he didn't have that much" and he was "waiting on his girl to get there." Raheem called them back, stating that "she had gotten there" and "she had that much." Raheem declined to meet them at McDonald's as they suggested, stating, "Hollie doesn't want to drive that far . . . with that much weight." Ultimately, an agreement was made to meet at the nail salon. A police officer drove Dominic to the location in Dominic's vehicle. An SUV registered to Hollie arrived at the location, with Terrence driving, Hollie sitting in the front passenger seat, and Raheem sitting in the back, behind the driver. After hearing Dominic say the code word, the officers executed the take-down. Lieutenant Dowey stated a search of the vehicle revealed a black bag, located underneath the bench seat where Raheem and Dominic were seated, which contained cocaine, marijuana, a large quantity of crack cocaine, empty baggies and digital scales. Underneath the front seat the officers located a large quantity of cocaine in a red bag. Also found was a cigar blunt, containing marijuana, in the car's console. Terrence had, on his person, two small bags of marijuana and $1,723. Raheem had $320. Hollie had a black purse in her possession which held $2,133 and 32 grams of marijuana. After the arrest was made, Dominic informed Lieutenant Dowey that Hollie had passed the bag of drugs from the front seat to Raheem in the back.

Terrence Rivera testified that he, Hollie, and Raheem are all cousins. On the day in question, he and Hollie left the restaurant owned by Hollie's mother, where they both worked, and went to their aunt's house. Terrence drove Hollie's car because Hollie had a problem with her license. They gave Raheem a ride to a nail salon so he could pick up some money for a party Raheem was going to have. Hollie was in the passenger seat and Raheem was sitting behind her. Raheem got out and then brought Dominic back to the vehicle with him. When asked if he saw anything handed from the front seat to the back seat, Terrence stated, "Not exactly. I seen her turn around, and that was it." He later reiterated that he saw Hollie turn around in the car, but did not "see exactly what she passed or if it was anything." Terrence stated that he was on the phone at the time, and did not really see what was going on in the car. After that, Raheem said something, Dominic got out of the car, and Terrence looked up to see a gun in his face. Terrence admitted

he had a bag of marijuana and some money in his pocket, but claimed he was "not guilty of these offenses." Terrence admitted he wrote a note to Raheem stating as follows:

> Yo, Ra, just left the courthouse and gave my statement, told them everything, just need you to say that I was on the phone and couldn't hear what y'all was talking about. Told them Hollie gave you the drugs. Just remember I was on the phone and we're good.

Terrence stated he wrote the note to let Raheem know what was going on with his side of the case and that he had given a statement. On cross-examination, Terrence agreed his note told Raheem that he had informed authorities that he saw Hollie pass drugs, but testified that was not true because he did not see Hollie pass drugs. When asked on re-direct why he would lie to Raheem in that manner, Terrence stated, "At the time I was writing, my writing just got ahead of myself, and the letter was already out of my hand."

The State also presented the testimony of Raheem. According to Raheem, on March 9, 2007, he received a call from Dominic about buying some drugs. Dominic wanted a "Big 8." Raheem called his cousin Hollie to see if she could supply the drugs, and he waited on her and Terrence to come get him. With Terrence driving, Hollie in the front passenger seat, and Raheem sitting behind Terrence, they drove to the location. Hollie had pulled a plastic sandwich bag out of the black bag and handed Raheem the drugs over the seat. Dominic got in the car with them, and he told them he was waiting on his cousin to get some money. Once Dominic got out of the car, the police came. When asked why he thought he could get the drugs from Hollie, Raheem stated that he was dealing drugs and she was who he used to get his drugs from in the past, stating it was "an ongoing thing," and characterizing himself as the middle man. Raheem testified that all of the drugs found in the car that day were Hollie's, with the exception of the two bags of marijuana found on Terrence.

The marijuana found in Hollie's pocketbook weighed 32.5 grams. The other marijuana found in the common area of Hollie's automobile weighed 25 grams. The various other drugs in individual plastic bags found in the vehicle tested positive for powder cocaine, with weights of 124.73 grams, 28.77 grams, and 6.61 grams, and crack cocaine, with weights of 12.25 grams, 3.31 grams, and 13.7 grams.

Hollie took the stand in her own defense. She testified that in March 2007, she was the manager of her mother's restaurant, drawing a salary of $400 a week and earning tips on top of that. At the time the incident occurred on March 9, 2007, Hollie stated she had cashed two payroll checks in the amount of $400 each, and that money was in her pocketbook at the time she was arrested. Hollie testified that she also had about $700 cash in her pocketbook that she was supposed to use to pay for a delivery of supplies for the restaurant. About $180 in her pocketbook was a roll of "old 20's" that she collected. The rest of the money in her pocketbook was proceeds from the restaurant that she had not yet deposited into the bank. Hollie testified that none of the money found in her pocketbook was drug money.

On the night in question, she and Terrence left the restaurant to go to her aunt's house, where Raheem lived. Terrence was driving because her license had been suspended for a simple possession of marijuana charge. While there, Raheem asked for a ride to pick up some money for a party Raheem was having that night, and Hollie agreed. They drove to the nail place, where Raheem exited the car. There was a man standing outside who Hollie did not know, and this person got in the car with Raheem. The man first talked to Terrence, and then he and Raheem engaged in conversation. The man said "I'll be right back," and then the police came and arrested them. Hollie admitted she had purchased the marijuana found in her pocketbook that day for $150, maintaining it was for her personal use and explaining she had been addicted to marijuana and it was more cost efficient to purchase that amount. She denied that Raheem ever called her and asked her to bring drugs, denied ever selling crack or cocaine to anyone, and denied handing something to the back seat while Dominic was in the car. She proclaimed she did not "have anything to do with the crack and the cocaine that were found in the car that night."

The jury convicted Hollie of trafficking in cocaine, trafficking in crack cocaine, and possession with intent to distribute marijuana. This appeal follows.

ISSUES

1. Whether the trial court erred in admitting testimony concerning Hollie's civil forfeiture of money seized during her arrest, this error being compounded by the State's argument which exceeded the court's limitation on this evidence.

2. Whether the trial court erred in admitting testimony concerning post-arrest assistance Hollie provided to her cousin and co-defendant and failing to sustain her objection to the State's argument based on that evidence which exceeded limitations placed by the trial court.

3. Whether the trial court erred in denying Hollie's mistrial motion based on an improper comment by the State and allowing the State to question her about selling drugs to particular individuals without a proper foundation for such questions, and in denying her motion for a new trial after the State failed to comply with the court's ruling.

4. Whether the trial court erred in denying Hollie's motion for a new trial on the basis of the above errors, singly or cumulatively, and in consideration of multiple instances of improper argument by the State.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." Id. at 6, 545 S.E.2d at 829.

LAW/ANALYSIS

A. Civil Forfeiture of Money

The record shows that during cross-examination in relation to Hollie's direct testimony regarding the money found in her pocketbook, the solicitor began to question Hollie concerning a consent order she signed. Defense counsel objected, and the trial court sustained the objection to the admission of the document. When the solicitor inquired if he could ask Hollie if she consented to the forfeiture, without presenting the order itself, defense counsel again objected. The court ruled the document was not admissible, but concluded whether Hollie forfeited the money was relevant and could be asked. The solicitor agreed he understood that when he argued to the jury, he could not use that evidence as an admission.

When Hollie's cross-examination resumed in front of the jury, she admitted, in spite of her testimony regarding where the $2,133 came from, she agreed to forfeit the vast majority of the money to the State. Hollie went on to explain that she did so after her attorney told her it would be difficult to get the rest of the money back, because of the marijuana in her purse.

During the State's closing argument, the solicitor argued Hollie was not forthright and stated, "[S]he consented she had $2,133, she got $500 back. So she had $1633 she consented to be forfeited as drug proceeds to the State." Defense counsel objected, noting the court had limited the solicitor's argument on this matter, and moved to strike. The trial court sustained the objection and instructed the jury to "[s]trike the most recent statement," noting the only evidence was that there was a forfeiture.

On appeal, Hollie contends the trial court erred in admitting testimony concerning her forfeiture of money. She argues a judgment in a civil action cannot be introduced as evidence in a criminal action to establish the facts on which it was rendered. She asserts, like the forfeiture judgment itself, testimony concerning the forfeiture is inadmissible. Hollie further contends this evidence was not relevant, was extremely prejudicial, and the prejudice outweighed the probative value such that its admission was reversible error.

She further maintains this prejudice was heightened when the solicitor contravened the court's prior limitation on the use of the evidence and argued the fact of consent to the jury.

We need not decide whether evidence concerning a consent forfeiture order is admissible in a criminal trial, as we find Hollie opened the door to this evidence. The admission or exclusion of evidence falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. State v. Morris, 376 S.C. 189, 205, 656 S.E.2d 359, 368 (2008). An abuse of discretion occurs when the trial court's decision is based on an error of law or upon factual findings that are without evidentiary support. Id. at 206, 656 S.E.2d at 368. As well, the scope of cross-examination is within the discretion of the trial court, and the court's decision will not be reversed on appeal absent a showing of prejudice. State v. Colf, 337 S.C. 622, 625, 525 S.E.2d 246, 247-48 (2000). When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. State v. Jackson, 364 S.C. 329, 336, 613 S.E.2d 374, 377 (2005); State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 398 (1984); State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999); see also State v. Taylor, 333 S.C. 159, 174, 508 S.E.2d 870, 878 (1998) (noting an accused may be cross-examined as to all matters which he himself has brought up on direct examination). "It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." State v. Page, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008).

Here, Hollie gave lengthy testimony concerning where all the money came from that was found in her pocketbook to rebut any inference that the money was connected to the drugs. Further, Hollie specifically proclaimed none of the money found in her pocketbook was drug money. Thus, Hollie opened the door to admission of evidence that she agreed to forfeit the money in question, and we therefore find no error in the admission of this evidence. We further note that her testimony on this matter on cross-examination was limited to her acknowledgement that she forfeited the majority of the money found in her pocketbook to the State, and she was thereafter allowed to

explain that she did so on the advice of her attorney, in consideration of the marijuana found in her pocketbook. Accordingly, we do not believe she has shown prejudicial error. Finally, we note in regard to Hollie's assertion that the solicitor exceeded the trial court's limitations placed on this evidence in closing argument, the trial court sustained Hollie's objection and struck the argument as requested. See State v. Primus, 341 S.C. 592, 604, 535 S.E.2d 152, 158 (Ct. App. 2000) (holding, where a curative instruction is given and the objecting party does not contemporaneously challenge the sufficiency of the corrective charge or move for a mistrial, no issue is preserved for review), rev'd in part on other grounds, 349 S.C. 576, 564 S.E.2d 103 (2002).

B. Assistance Provided to Terrence

On direct examination Terrence testified, without objection, that his mother, cousins, and family hired his attorney for him. The solicitor then asked if Hollie was involved in hiring his lawyer. Defense counsel objected on the grounds of relevance. The trial court sustained this objection. The solicitor then asked if Hollie ever offered to pay for a lawyer for him. Defense counsel again objected and the trial court sustained this objection as well. The solicitor asserted the matter went to "the continuum of the conspiracy." Out of the presence of the jury, the trial court asked what the relevance was, and the solicitor maintained that Hollie was charged with conspiracy to traffic drugs along with Terrence and Raheem, and that the conspiracy did not end when the parties were arrested. He told the court he had been informed by Terrence that Hollie provided Terrence the financial support to retain his attorney, and this was evidence of a continuing conspiracy between the family members. Defense counsel argued the conspiracy ended once the arrests occurred, and there could be no evidence of conspiracy post-arrest. The trial court sustained defense counsel's objection, and stated "[t]he whole business of how [Terrence's attorney] got retained is not admissible." Thereafter, on redirect examination, Terrence testified Hollie had offered to provide financial assistance to him after his arrest, and this occurred just prior to Terrence retaining his latest counsel. Terrence denied there was any discussion with Hollie in regard to her financial assistance and what his version of the facts were, and was adamant that the financial assistance offer was not tied to his testimony whatsoever. Defense counsel did not object to this line of questioning on redirect.

Following Hollie's direct testimony, the solicitor sought to cross-examine her regarding her visiting Terrence's attorney. In a proffer, Hollie stated she went to the attorney's office with Terrence's mother because his mother did not have a vehicle. Hollie denied assisting Terrence's mother financially in retaining representation for Terrence, stating she only gave his mother money to put in Terrence's account at jail. Defense counsel objected to this testimony as being irrelevant. The solicitor argued it tied in with the evidence concerning the note from Terrence to Raheem regarding them coordinating their testimony and Terrence's testimony that Hollie offered him financial assistance. The trial court indicated it would allow the evidence. Defense counsel then argued the prejudicial value outweighed any probative value. The solicitor reiterated that the evidence was probative of the conspiracy, which involved the cover-up of the crime. The trial court ultimately determined it was "going to allow it, but only in a very limited sense," and instructed the solicitor to not go beyond what Hollie "just testified."

When cross-examination of Hollie resumed before the jury, the solicitor asked her if she ever sent money, either directly or through someone else, to Terrence's account in jail. Hollie responded that she had given Terrence's mother some money at one time because she had indicated Terrence was "doing really bad," and he was unable to call anyone or get any food or long johns. She also acknowledged she took Terrence's mother to obtain a lawyer for him.

During the State's closing argument, the solicitor stated, "[U]sually when you have a conspiracy case it ends when the arrest is made, but this one was interesting because we've got [Terrence] still trying to coordinate testimony, we've got [Hollie] offering financial assistance to [Terrence]…." At this point, defense counsel objected, stating he thought the trial court had "ruled in this area that that was not evidence of the ongoing conspiracy," and the solicitor was "again disregarding [the court's] ruling." The solicitor stated that he did not recall that being the court's ruling, and the trial court then stated, "Move on." Thereafter, the solicitor argued that Terrence testified he received financial assistance from Hollie right before he obtained his attorney, and Hollie admitted she gave money for Terrence's account and

went to the office of his attorney for him. No further objection was made to this argument.

On appeal, Hollie contends the trial judge erred in admitting testimony concerning her post-arrest financial assistance to Terrence, and further erred in not sustaining her objection to the State's argument, which exceeded the limitation imposed by the trial court. She argues any conspiracy which may have existed terminated upon the arrest of the three defendants. Hollie maintains her assistance in her family's efforts to hire a lawyer for her cousin and provision of incidental expenses while he was in jail was not evidence of an ongoing conspiracy, and was irrelevant to any issue in the case. Additionally, Hollie contends the solicitor "blatantly exceeded the court's limitation," as the court specifically ruled that how Terrence's attorney got retained was not admissible. She therefore asserts the court committed additional error in not striking the solicitor's argument to the jury in this regard.

Generally, all relevant evidence is admissible. Rule 402, SCRE; State v. Pittman, 373 S.C. 527, 578, 647 S.E.2d 144, 170 (2007). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The trial court has broad discretion in determining the relevancy of evidence and its decision to admit or exclude evidence will not be reversed on appeal absent an abuse of that discretion and a showing of prejudice. State v. Holder, 382 S.C. 278, 288, 676 S.E.2d 690, 696 (2009); State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).

First, it should be noted that the trial court sustained Hollie's objections to the questioning of Terrence in regard to how Terrence's attorney was retained, and no unobjected to testimony from Terrence was admitted in this regard. Thus, the only testimony admitted on this subject for which an objection is preserved for review is that of Hollie.

"Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c), SCRE (emphasis added). "Proof of bias is

almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." State v. Pipkin, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct. App. 2004) (quoting U.S. v. Abel, 469 U.S. 45, 52, 105 S.Ct. 465, 469, 83 L.Ed.2d 450 (1984)). Rule 608(c), SCRE, "preserves South Carolina precedent holding that generally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.'" State v. Jones, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001) (quoting State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976)).

We find the evidence was properly admitted to show bias.[1] Here, evidence that Hollie provided Terrence's mother transportation to assist in attaining an attorney for Terrence, as well as evidence that she provided him financial assistance by giving Terrence's mother some money to put in his account was relevant to Terrence's potential bias toward Hollie. Additionally, we note that evidence was admitted through Terrence, without objection, that Hollie had offered to provide financial assistance to him after his arrest, and this assistance occurred just prior to Terrence retaining his latest counsel. Accordingly, even assuming arguendo the admission of Hollie's testimony in this regard was error, any such error is harmless. See Holder, 382 S.C. at 289, 676 S.E.2d at 696-97 (holding the erroneous admission of evidence is harmless beyond a reasonable doubt where it is minimal in the context of the entire record and cumulative to other testimony admitted without objection); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (the admission of improper evidence is deemed harmless if it is merely cumulative to other evidence). See also State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002) (noting whether an error is harmless depends on the particular facts of each case, including: the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material

[1] We note that this court may affirm based on any ground appearing in the record. Rule 220(c), SCACR.

points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case). "'Harmless beyond a reasonable doubt' means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt." Id. 349 S.C. at 334, 563 S.E.2d at 319.

We further find no merit to Hollie's assertion that the court committed error in not striking the solicitor's argument to the jury, because the solicitor exceeded the court's limitation in its admonishment concerning the inadmissibility of how Terrence's attorney was retained. First, we do not believe the solicitor exceeded the court's admonishment. Defense counsel's objection to this argument by the solicitor was that the trial court had ruled this was not evidence of the ongoing conspiracy, and the solicitor was therefore disregarding the court's ruling. However, the record does not reflect such a ruling by the trial court. Rather, the ruling to which Hollie points on appeal is the court's initial determination that evidence of how Terrence's attorney was retained was inadmissible. The trial court never determined that the evidence objected to did not qualify as evidence of an ongoing conspiracy. As to Hollie's assertion that the trial court erred in not striking the solicitor's argument in this regard, Hollie never requested the court strike the argument. After Hollie's initial objection, the court instructed the solicitor to "move on." When the solicitor thereafter argued Terrence testified he received financial assistance from Hollie right before he obtained his attorney, and Hollie admitted she gave money for Terrence's account and went to the office of his attorney for him, defense counsel raised no further objection. See State v. Carlson, 363 S.C. 586, 606, 611 S.E.2d 283, 293 (Ct. App. 2005) (noting, where a party objects to improper comments in closing arguments and the objection is sustained, the issue is not preserved unless the party further moves to strike or requests a curative instruction). Finally, after reviewing the solicitor's argument in context of the entire record, we find no reversible error. See State v. Finklea, 388 S.C. 379, 385-86, 697 S.E.2d 543, 547 (2010) (noting the trial court is vested with broad discretion in dealing with the range and propriety of closing arguments, and ordinarily his rulings on such matters will not be disturbed; the burden is on the appellant to show that any alleged error deprived her of a fair trial; the relevant question is whether the solicitor's action so infected the trial with unfairness as to make the resulting conviction a denial of due process; and the appellate court must review the argument in the context of the entire record).

C. Selling of Drugs to Particular Individuals

During cross-examination of Hollie, the solicitor asked her if she knew "Earl Warren." When Hollie replied, "not by that name," the solicitor then asked, "You hadn't just sold him four cookies of crack that same night?" Hollie replied that she had not, and did not even know who he was. Defense counsel objected, at which point the solicitor stated, "She testified earlier that she had never sold any before, so I'm going to ask her specific names of people that we have heard that she was supplying to." Defense counsel objected again, and the trial court had the jury removed from the courtroom for counsel to further argue the matter. Defense counsel then stated his objection as follows:

> Your Honor, I recognize he is on cross-examination, but he hasn't laid any sort of foundation for this question. And then he blurted out in front of the jury, well, we have heard that she sold cookies to these people. I mean, he is testifying. I don't know how you can unring that bell. I would first request a curative instruction and ask you to ask the jury to disregard the remarks that [the solicitor] made about what they heard and that it is not evidence in this case. If not, I would have to ask for a mistrial.

The trial court found the solicitor's comment, that they had heard Hollie was supplying to specific people, was the equivalent of the solicitor testifying. The solicitor maintained he had a good faith basis to ask Hollie the question because Raheem's attorney relayed information that she was the supplier for Earl Warren and Jarminski Cook, and defense counsel had asked Hollie if she ever sold the drugs, thus making the question about previous incidents proper. Defense counsel argued that his question to Hollie did not "open the door for an improper comment by the solicitor." The trial court agreed with defense counsel on that point, and indicated it would give a curative instruction on the matter. As to the line of questioning concerning sales to other individuals, the court determined the solicitor could ask Hollie "if she had ever sold it to, blank", but he was not allowed to state "we have heard

that you have," because that would be the solicitor testifying. The court noted the solicitor may have inadvertently informed the jury that he had heard that information, but he was not "to do it anymore." It then stated as follows:

> Now, if you bring these witnesses in to contradict her, that's fine. If she denies that she sold it to X or Y or Z, you can bring those people in. One has already testified. But that is as far as I'm - - I mean, you can't bring them in through you, you have got to bring them in to prove that she is - - to impeach her and prove that she is not telling the truth.

Defense counsel inquired whether the trial court intended to give a curative instruction, and the court informed him that it did. Defense counsel then said, "And you have overruled my motion for a mistrial," to which the court stated, "At this point."

Once the jury returned to the courtroom, the trial court instructed as follows:

> All right, ladies and gentlemen of the jury, with regard to the last comment by the solicitor about, we know this or we know that, I'm going to ask you to disregard that comment. It is not evidence in this case. As I told you at the beginning of the trial, the evidence comes from the witness, not from what the solicitors may say or ask or make any comment about. This lady is all the evidence that you are hearing at this time. So I'm going to ask you to disregard that last comment and strike it from the record and strike it from your consideration in this case.

When Hollie resumed her cross-examination, the solicitor asked her if she knew Jarminski Cook and whether she supplied his drugs. Hollie testified she knew Cook, but denied supplying him drugs. The solicitor then asked if

she knew Jarvis Gibbs, and she denied knowing him. Hollie agreed that she did not know Earl Warren or Jarvis Gibbs, but she did know Jarminski Cook. The solicitor then asked, "And you deny being involved with all three of them," to which Hollie replied, "Yes, sir." No further objection was noted by defense counsel.

On appeal, McEachern argues the trial court erred in denying her motion for a mistrial based on the improper comment by the State and in allowing the State to question her about selling drugs to particular individuals without a proper foundation for such questions, and further erred in denying her motion for a new trial after the State failed to comply with the court's ruling. Hollie makes three separate arguments in this regard.

First, she contends the improper comment by the solicitor in the presence of the jury was not capable of being cured by an instruction to the jury to disregard it, such that the trial court's failure to grant a mistrial was an abuse of discretion.

Second, Hollie argues the solicitor did not have a proper foundation for asking about whether she knew or supplied drugs to these individuals. She maintains the solicitor gave no basis "whatsoever for questioning [her] about . . . Jarvis Gibbs." As to the others, she contends the State's information was "based on pure hearsay from an unnamed attorney for one of the co-defendants," and "[t]here was no representation that the information was based on that attorney's personal knowledge of the alleged facts" or that attorney had obtained the information from a reliable source. She argues the information was not from someone with first-hand knowledge of the alleged sales, such that the State did not have a good faith basis for these questions. Accordingly, she maintains, because the State failed to provide any foundation for its question concerning Jarvis Gibbs, and inasmuch as it did not provide a sufficient foundation for its questions concerning Earl Warren and Jarminski Cook, the trial court abused its discretion in allowing this line of cross-examination.

Finally, Hollie contends the trial court abused its discretion in not granting a new trial after the State failed to comply with the court's requirement that it produce the witnesses if Hollie denied she had previously

sold drugs to the three individuals. She argues the court instructed the solicitor as to this requirement, and upon the State's failure to produce the foundation witnesses as the court instructed, the trial court should have granted her motion for a new trial.

First, we find no reversible error in the trial court's denial of Hollie's motion for a mistrial based on the improper comment by the State. The decision to grant or deny a motion for a mistrial is a matter within the sound discretion of the trial judge, whose decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Council, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). A mistrial should be granted only when absolutely necessary. Id. at 13, 515 S.E.2d at 514. Further, before a defendant may receive a mistrial, he or she must show both error and resulting prejudice. Id.

Here, Hollie clearly requested a curative instruction, and in the event the trial court declined to give such an instruction, requested that the court grant her a mistrial. The trial court then instructed the jury to disregard the solicitor's comment, noting it was not evidence in the case, and the jury was told to strike it from the record and from their consideration. Accordingly, Hollie received the relief she sought and should not now be heard to complain. See State v. Parris, 387 S.C. 460, 466, 692 S.E.2d 207, 210 (Ct. App. 2010) (holding where a defendant receives the relief requested from the trial court, there is no issue for the appellate court to decide); State v. Brown, 389 S.C. 84, 95, 697 S.E.2d 622, 628 (Ct. App. 2010) (finding, where defense counsel received the relief asked for, the defendant could not complain on appeal). Hollie contends, however, that the issue is nonetheless preserved because defense counsel noted in argument to the trial court that he did not know how the court could "unring that bell," thus indicating the defense was seeking a mistrial and, following argument on the issue and learning the court intended to give a curative instruction, specifically inquired about the mistrial motion. We note, however, that defense counsel failed to object to the curative instruction as given, and did not make a mistrial motion after the giving of the instruction. "If a trial court issues a curative instruction, a party must make a contemporaneous objection to the sufficiency of the curative instruction to preserve an alleged error for review." Brown, 389 S.C. at 95, 697 S.E.2d at 628. Where an objection is sustained, the trial court has

rendered a favorable ruling to the party, and it therefore "becomes necessary that the sustained party move to cure, or move for a mistrial if such a cure is insufficient, in order to create an appealable issue." State v. Wilson, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010) (emphasis added). "Moreover, as the law assumes a curative instruction will remedy an error, . . . failure to object to the sufficiency of that charge, renders the issue waived and unpreserved for appellate review." Id. Because Hollie failed to object to the curative instruction, and additionally failed to move for a mistrial after the trial court gave its curative instruction, we find the mistrial issue is not preserved for review. Furthermore, even if this issue were properly preserved, we believe the trial court's explicit curative instruction cured any error, and that the prejudicial effect is minimal such that a mistrial was not warranted. See Brown, 389 S.C. at 95, 697 S.E.2d at 628 (noting a curative instruction is usually deemed to cure an alleged error); State v. Moyd, 321 S.C. 256, 263, 468 S.E.2d 7, 11 (Ct. App. 1996) (holding a trial court should exhaust other available methods to cure prejudice before aborting a trial, and where the prejudicial effect is minimal, a mistrial need not be granted in every case where incompetent evidence is received and later stricken and a curative instruction is given).

In regard to Hollie's argument that the solicitor failed to have a proper foundation to ask Hollie questions concerning her selling drugs to individuals because the State's information was based on hearsay from an unnamed attorney and, in the case of Jarvis Gibbs, there was no basis whatsoever for the questioning, we find no reversible error. As noted by Hollie, our courts have held that a cross-examiner must have a good faith factual basis before questioning a witness about his or her past conduct. State v. Joseph, 328 S.C. 352, 359, 491 S.E.2d 275, 278 (Ct. App. 1997). Counsel should not be permitted to go on a fishing expedition, and "[m]erely asking a question that has no basis in fact may be prejudicial." State v. McGuire, 272 S.C. 547, 550, 253 S.E.2d 103, 104 (1979). Here, however, the argument made by defense counsel in this regard was to the solicitor's question of whether Hollie sold crack to Earl Warren the night of this incident, at which point defense counsel objected because the solicitor had not "laid any sort of foundation for this question." Defense counsel also objected at that time to the improper comment by the solicitor. The solicitor then explained his basis for asking the question, and defense counsel did not thereafter contest the

basis given by the solicitor as being insufficient, but concentrated his argument instead on the solicitor's improper argument in front of the jury. It is only on appeal that Hollie contends the foundation given by the solicitor was insufficient to provide a factual basis and amounted to a fishing expedition. Accordingly, the argument made on appeal, that the solicitor's stated foundation was insufficient, was not presented to the trial court, and therefore is not preserved for our review. See State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (noting a losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred; imposing preservation requirements on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments; the purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented to or passed upon by the trial judge, such contentions will not be considered on appeal). We further note that defense counsel raised no objection whatsoever concerning any questions related to Jarvis Gibbs. Additionally, we note that the mere asking of an improper question is not necessarily prejudicial, where no evidence is introduced as a result. Brown, 389 S.C. at 93, 697 S.E.2d at 627. Here, Hollie denied even knowing Warren or Gibbs, and denied "being involved" with any of the three men. Thus, we find any error in allowing these questions was harmless.

Finally, we find no merit to Hollie's argument the trial court abused its discretion in not granting a new trial because the State failed to comply with the court's requirement that it produce the witnesses if Hollie denied she had previously sold drugs to the three individuals. First, we believe appellate counsel has misinterpreted the trial court's ruling. The court did not, as Hollie suggests, require the solicitor to produce witnesses if Hollie testified she had not previously sold drugs to these individuals. Rather, a reading of this portion of the court's ruling indicates only that the court prohibited the solicitor from testifying as to what the State "heard," but indicated the State might possibly be allowed to present those witnesses if Hollie denied selling the drugs to them. At any rate, this issue is clearly not preserved, as it was

never raised to or ruled upon by the trial court. State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (noting, in order to properly preserve an issue for appellate review, there must be a contemporaneous objection that is ruled upon by the trial court, and if a party fails to properly object, he is procedurally barred from raising the issue on appeal); State v. McKnight, 352 S.C. 635, 646-47, 576 S.E.2d 168, 174 (2003) (noting contention must be raised to and ruled upon by trial court to be preserved for appellate review).

D. Motion for New Trial based on Singular and Cumulative Errors

Lastly, Hollie argues the trial judge erred in denying her motion for a new trial based upon the above argued errors, singly or cumulatively, as well as in consideration of multiple instances of improper argument by the State. First, she contends the trial court abused its discretion in failing to grant her a new trial based upon each of the errors argued in her first three issues. Next she argues, even if no single error sufficiently prejudiced her, that the cumulative effect of the errors was so prejudicial as to deprive her of a fair trial. She maintains that if the trial court erred as to any two or three of these issues, the jury likely based its verdict on these multiple improper considerations. Finally, Hollie argues the cumulative prejudice should be evaluated in light of other improper comments and arguments by the solicitor, as to which objections were sustained. Thus, Hollie maintains, against the backdrop of these numerous prosecutorial excesses, the trial court's error with respect to any single evidentiary issue, or multiple errors in combination, was so prejudicial as to require reversal and warrant a new trial.

We find the facts of this case do not support a finding of cumulative errors warranting reversal. An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine. State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999). The errors must adversely affect her right to a fair trial to qualify for reversal on this ground. Id. In this regard, our courts have "stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one." Id. (quoting State v. Mitchell, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-48 (1998)).

First, because we have found no errors in regard to the other issues, this issue is without merit. See State v. Kornahrens, 290 S.C. 281, 290, 350 S.E.2d 180, 186 (1986) (holding where the appellate court found no errors, appellant's assertion the trial judge should have granted a new trial because of the cumulative effect of the asserted trial errors had no merit); State v. Nicholson, 366 S.C. 568, 581, 623 S.E.2d 100, 106 (Ct. App. 2005) (holding, where appellant asserted the cumulative effect of the errors he alleged warranted a new trial, because the appellate court determined that the trial judge did not err in any of the particulars alleged in the appeal, the cumulative error doctrine was inapplicable). Further, even if the court did commit any errors, we believe those errors to be harmless such that Hollie can show neither prejudice, nor that the errors affected her right to a fair trial. See Johnson, 334 S.C. at 93, 512 S.E.2d at 803 (finding the defendant failed to show he suffered prejudice warranting a new trial based on cumulative trial errors); State v. Wyatt, 317 S.C. 370, 373, 453 S.E.2d 890, 891 (1995) (error in admission of evidence is harmless where it is cumulative to other evidence which was properly admitted). As to the other sustained objections of which Hollie complains, our reading of the record does not support the prejudice she maintains in her appellate brief. Accordingly, we find Hollie failed to demonstrate cumulative errors adversely affected her right to fair trial.

For the foregoing reasons, Hollie's convictions are

AFFIRMED.

PIEPER and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Alonzo Craig Hawes, Respondent.

Appellate Case No. 2011-189167

Appeal From Greenwood County
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 5001
Heard June 4, 2012 – Filed July 18, 2012

AFFIRMED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General William M. Blitch, Jr., all of Columbia, for Appellant.

Public Defender Ernest Charles Grose, Jr., of Greenwood, and Assistant Public Defender Donna Katherine Anderson, of Laurens, for Respondent.

FEW, C.J.: Alonzo Craig Hawes pled guilty to voluntary manslaughter for the death of his wife. The State appeals the circuit court's decision to grant Hawes

early parole eligibility under section 16-25-90 of the South Carolina Code (Supp. 2011). We affirm.

I. Facts and Procedural History

Hawes and his wife were estranged in 2007 when he shot and killed her. He was indicted for murder but pled guilty to voluntary manslaughter. He also pled guilty to possession of a firearm during the commission of a violent crime. The circuit court sentenced Hawes to twenty-two years in prison for voluntary manslaughter and five years concurrent for possession of a firearm.

At the sentencing hearing, Hawes asserted section 16-25-90 applied to make him parole eligible after serving one-fourth of his voluntary manslaughter sentence. Section 16-25-90 states in part:

> [A]n inmate who was convicted of, or pled guilty . . . to, an offense against a household member is eligible for parole after serving one-fourth of his prison term when the inmate at the time he pled guilty . . . presented credible evidence of a history of criminal domestic violence, as provided in Section 16-25-20, suffered at the hands of the household member.

Hawes presented the following evidence that he suffered criminal domestic violence (CDV) at the hands of his wife:

1. A 1996 municipal court conviction in which Hawes' wife pled guilty to CDV against Hawes. Hawes was also convicted of CDV against her for the same incident.
2. A separate CDV indictment, pending at the time of the 1996 incident, in which Hawes' wife allegedly struck and kicked him.
3. A July 2006 CDV indictment stating she did "willfully or unlawfully cause or offer or attempt to cause physical harm or injury to his family or household member, to wit: Alonzo Craig Hawes, with apparent present ability under circumstances reasonably creating fear of imminent peril."
4. A November 2006 incident report stating Hawes called the police complaining about a domestic disturbance in which his wife had a

knife. When the police arrived, Hawes was gone, and his wife denied anything "other than a verbal altercation" occurred.

5. A 2007 incident in which Hawes claimed his wife stabbed his hand. Hawes sought treatment at a hospital and told the doctor his wound resulted from a dirt bike accident.
6. Recordings of voicemail messages Hawes' wife left on his cell phone and numerous arguments and conversations between them.[1]
7. The testimony of Brittany Roundtree, Hawes' stepdaughter and his wife's daughter, that Hawes and her mother argued a lot after her mother discovered him cheating on her. She said Hawes was the primary instigator of violence in the relationship and he "sometimes" "put his hand on" her mother.
8. The testimony of an expert in forensic psychiatry that Hawes described a history of mutual violence, "that he had certainly abused [his wife] in the past and she had also physically abused him in the past."

After weighing the evidence, the circuit court found Hawes satisfied the requirements of section 16-25-90 and granted him early parole eligibility.

II. The State's Issue on Appeal

We address three issues on appeal: (1) the circuit court used the wrong definition of "a history" of CDV under section 16-25-90; (2) the court erroneously determined it was required to find Hawes presented a history of CDV based solely on his wife's 1996 CDV conviction and 2006 CDV indictment; and (3) the legislature did not intend section 16-25-90 to reduce an inmate's sentence when the CDV evidence presented demonstrated mutual domestic violence in which the inmate was the aggressor and primary instigator of the domestic violence.

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[1] In the recordings, Hawes' wife threatened to kill him and his girlfriend numerous times. However, we agree with the circuit court that the recordings are not evidence of CDV because the recordings do not indicate she had "apparent present ability[,] under circumstances reasonably creating fear of imminent peril[,]" "to cause physical harm or injury" to Hawes. S.C. Code Ann. § 16-25-20(A)(2) (Supp. 2011). Nevertheless, the recordings aid in understanding the nature of the relationship between Hawes and his wife, which is relevant to determining whether section 16-25-90 should apply.

It is questionable whether these issues are properly preserved and presented to this court. At the sentencing hearing, the State made arguments related to issues one and three, and the court addressed both points in its order. As to issue two, Hawes argued that his wife's CDV conviction and indictment alone were sufficient to prove a history of CDV under section 16-25-90. The State argued in response that the statute required "a pattern of domestic violence," presumably meaning more than one or two incidents. Because they are not clearly unpreserved, we address the merits of the issues. *Cf. Atl. Coast Builders & Contractors, LLC v. Lewis*, Op. No. 27044 (S.C. Sup. Ct. filed May 16, 2012) (Shearouse Adv. Sh. No. 17 at 15, 21) ("While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved.").

As to the merits of the State's appeal, we find the State has shown no error of law. As we will explain, there is evidence in the record to support the circuit court's factual findings. Therefore, we find no abuse of discretion and affirm. *See State v. Blackwell-Selim*, 392 S.C. 1, 3, 707 S.E.2d 426, 427-28 (2011) (per curiam) (stating on appeal from an early parole eligibility determination under section 16-25-90 that an appellate court may "not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence" and is "bound by factual findings of the trial court unless an abuse of discretion is shown").

III. The Definition of "a history" Under Section 16-25-90

The State argues the circuit court used the wrong definition of the term "a history" of CDV in section 16-25-90. Because the statute does not define the term, the State asserts the definition should be determined based on legislative intent. In its brief, the State maintains the "clear legislative intent of section 16-25-90 is to provide mitigation of the sentence of someone who committed an offense against their household member after suffering domestic violence at the hands of the victim." The State argues the court did not consider the legislative intent of section 16-25-90 but rather found the requirement to prove "a history" of CDV satisfied by one or two documented CDV incidents. We disagree with the State's interpretation of the circuit court's definition of the term "a history."

The circuit court specifically provided a definition of a history in its order which the State does not argue is incorrect on appeal. The court defined a history as follows:

> For purposes of the case before me, the court interprets reference to "a history" to connote not only consideration of the number of prior instances of domestic violence, but also the relative severity of the various instances. In this way, the court may properly weigh the relative egregiousness of the conduct. Put another way, more serious or violent instances of criminal domestic violence would be entitled to substantially more consideration, even though fewer in number, than less egregious, but more frequent instances.

The State did not challenge the circuit court's definition of a history in a motion to reconsider. On appeal, the State offered no definition in its brief. At oral argument, the State argued the definition of a history under section 16-25-90 was a "circumstance in which an individual is repeatedly the victim and not repeatedly the primary instigator of a series of violence—criminal domestic violence—at the hands of the victim." While we neither adopt nor reject the definition of a history used by the circuit court, nor that proposed by the State at oral argument,[2] we disagree with the State's assertion that the circuit court failed to consider the legislative intent behind section 16-25-90 to reach its definition of a history.

We find the circuit court specifically considered the legislative intent behind section 16-25-90 both in determining the definition it used for a history of CDV and in determining whether Hawes satisfied that definition. The court stated the legislative intent behind section 16-25-90 is "to permit some middle ground for those instances where there would be insufficient evidence of abuse to maintain a defense under [Battered Spouse's Syndrome in section] 17-23-170, but where sufficient evidence of abuse may exist to mitigate somewhat the usual non-parole nature of a homicide sentence." In some future case, this court or the supreme court

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[2] We do reject the definition of a history argued by Hawes—that one incident of CDV by the victim against the defendant automatically entitles the defendant to early parole eligibility, with no discretion to be exercised by the circuit court. However, the circuit court did not employ this definition.

may be required to specifically define "a history" to resolve the controversy before the court. In this case, however, defining the term is not necessary because we find the circuit court did precisely what the State contends it failed to do—it considered the legislative intent of section 16-25-90. We find no error.

IV. Whether the Circuit Court Erred in Determining it was Required to Find Hawes Satisfied Section 16-25-90

The State argues the circuit court incorrectly determined it was compelled to find Hawes proved a history of CDV based solely on evidence of his wife's 1996 CDV conviction and 2006 CDV indictment. The State asserts this error is found in the following passage at the conclusion of the court's order:

> This court is called upon to make a ruling based solely on the evidence and the applicable law. That the victim and defendant argued and fought is not, in and of itself, sufficient to warrant application of the section. Coupled, however, with the documented convictions for CDV and the other competent evidence of a mutually violent relationship, and despite (or perhaps because of) the statute's peculiarities as explained . . . , this court *is compelled* to find that [Hawes] has met his burden.

(emphasis added). The State interprets the phrase "is compelled" to mean that once the court was presented with Hawes' wife's 1996 CDV conviction and 2006 CDV indictment, it felt it *must* find Hawes entitled to application of section 16-25-90. Therefore, the State argues the trial court abused its discretion by failing to use its discretion in applying the definition of a history of CDV to the facts of this case. We disagree with the State's interpretation of the circuit court's order.

The court discussed evidence it found weighed in favor of and against the application of section 16-25-90. The court found evidence relating to Hawes being the primary instigator and to the remote 1996 CDV cross-warrant incident weighed against application. The court also found the 1996 CDV conviction, the 2006 CDV indictment, and the psychiatrist's report were evidence that weighed in favor of application. Because the circuit court considered each factor the State contends it should have considered, we find the court did exercise its discretion in applying the statute.

The State's argument is essentially that it disagrees with the discretionary decision of the circuit court. However, in an appeal from a parole eligibility determination under section 16-25-90, we are not permitted to reverse the circuit court's factual findings when there is evidence to support them. *Blackwell-Selim*, 392 S.C. at 3, 707 S.E.2d at 427-28. We find evidence to support the circuit court's ruling that Hawes proved a history of CDV under section 16-25-90.

Additionally, we believe the State's insistence on arguing that the circuit court felt compelled to grant Hawes early parole eligibility is based upon the circuit court's incorrect citation to a prior version of section 16-25-90. Prior to 2004, section 16-25-90 provided that an inmate "*shall be* eligible" for early parole eligibility if he proves a history of CDV suffered at the hands of the victim. (emphasis added). In 2003, the statute was amended to state "*is* eligible." 2003 S.C. Acts 1546, 1552 (stating the "act takes effect January 1, 2004, and applies to all offenses occurring on or after that date") (emphasis added). The circuit court incorrectly quoted the "shall be eligible" version of the statute in its order, and emphasized the language in making its decision. The circuit court wrote "use of the word 'shall' in the statute notes mandatory, not precatory, language so that, if the court were to find a credible history of domestic violence suffered at the hands of the victim, the court is required to authorize the application of the statute."

However, neither party brought the mistake to the circuit court's attention, nor did the parties even recognize the error in their briefs to this court. We cannot discount the significance of the circuit court's use of the incorrect version of the statute. However, because the mistake was not raised to the circuit court, it was never given the opportunity to correct itself, and the error "clearly is unpreserved" for our review on appeal. *Atl. Coast Builders & Contractors, LLC*, (Shearouse Adv. Sh. No. 17 at 21).

V. Evidence of Mutual Domestic Violence

Finally, the State argues the legislature did not intend for section 16-25-90 to apply to someone like Hawes, whose evidence for application of the statute shows mutual domestic violence in which he was the aggressor as to most of the domestic violence. One witness testified that Hawes was the primary instigator of the violence. We agree that there was mutual violence between Hawes and his wife and that this evidence weighs against application of the section. However, that fact

does not automatically preclude Hawes from obtaining relief under section 16-25-90. Rather, the mutual nature of the violence is one factor the court should consider in exercising its discretion to decide whether the defendant has proven a history of CDV such that he is entitled to early parole eligibility.

The circuit court in this case did consider the mutual nature of the violence. The court specifically stated "that the statute makes no allowance or exception for cross-warrant situations in which both husband and wife are charged and convicted out of the same incident." Nevertheless, the court proceeded to "find it proper for the court to consider such circumstances in weighing the evidence presented." The court found Hawes and his wife's 1996 CDV convictions involved "a cross-warrant incident," "that there were times when both parties were primarily responsible for instigating the arguments," and "this is a close case . . . [c]ertainly, [Hawes] was also responsible for several instances of domestic violence against his wife." After weighing this evidence that the State asserts the circuit court should consider, the court found Hawes proved a history of CDV suffered at the hands of his wife by a preponderance of the evidence. We find evidence to support the circuit court's decision and no error of law.

VI. Conclusion

We find the circuit court acted within its discretion in granting early parole eligibility to Hawes pursuant to section 16-25-90.

AFFIRMED.

HUFF and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Otis Lamar Bland, Jr., Appellant.

Appellate Case No. 2010-162206

Appeal From Greenwood County
W. Thomas Sprott, Jr., Circuit Court Judge

Opinion No. 5002
Heard February 15, 2012 – Filed July 18, 2012

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Mark Reynolds Farthing, all of Columbia, and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

THOMAS, J: Otis Lamar Bland appeals his convictions for attempted armed robbery, attempted burglary, and possession of a weapon during the commission of a violent crime. We affirm.

FACTS AND PROCEDURAL HISTORY

During the late afternoon or early evening of February 23, 2009, Joan Hughes was at her mother's home in Greenwood, South Carolina. Someone knocked on the door and Hughes answered. A short, thin man whom Hughes recognized only by sight offered to rake leaves. Hughes closed the door to ask her mother if she wanted leaves raked, and her mother instructed Hughes to ask the man if he was "Otis' son." Hughes went back to the door to ask the question. From the corner of her eye, she saw another man come from behind her mother's car. The second man ran toward her, waving a gun, and Hughes shut the door. Hughes was able to give only a general description of his build and clothing. Hughes had to struggle to close the door and did not know which of the two men attempted to prevent her from doing so.

Around 8:00 p.m. that same day, Isabel Martin, upon arriving at her home, was approached by two men as she exited her car. One of them, who wore a bandanna across his face, stuck a gun to her temple and demanded her pocketbook. Martin obeyed and made eye contact with her assailant when she handed him her pocketbook. Because the streetlight was shining, Martin could see her assailant and remembered his build and eyes, as well as certain mannerisms. The other man, whom Martin described as shorter and heavier than the man who took her pocketbook, was farther away from her.

That same evening, Greenwood County Sheriff's Deputy Mitchell Mathis went to the area where the incidents took place to assist with the bloodhound team. His role was to stop and identify people entering or leaving the area on foot or by car. Although there was little foot traffic, Martin observed two individuals, later identified as Bland and James Ware, walking together. Mathis informed Detective Christopher Haden about his observation of Bland and Ware. Several neighborhood residents also reported to Haden that they had seen Bland in the area with two other persons.

Haden encountered Bland the next day, and Bland agreed to come to the Sheriff's Office to speak further. Eventually, after receiving *Miranda* warnings, Bland gave an oral tape-recorded statement and a signed written statement. In the written

statement, Bland admitted the following: he, Ware, and Kiersten Martin[1] went to the home of Hughes' mother. There, he remained in the backyard while Ware went to the door to offer to do yard work. When Hughes asked Ware if he was Otis' son, Ware unsuccessfully tried to force his way into the house, but Hughes slammed the door shut quickly enough to prevent him from doing so. Ware and Kiersten Martin then said they would "try a nother one" [sic], but he did not accompany them when they robbed Isabel Martin.

The following day, James Ware and Kiersten Martin gave statements to Haden. Based on this information, Haden obtained arrest warrants for Bland, Ware, and Kiersten Martin.

A few days after the incident, the Sheriff's Office showed Hughes a photo lineup in order to determine whether she could identify either the person at the door or the person running from behind her mother's car. Hughes could not identify either individual in the lineup because of the poor quality of the images.

In June 2009, Bland was indicted on two counts of possession of a weapon during the commission of a violent crime. During the same term, the grand jury also indicted him for armed robbery of Isabel Martin, attempted burglary of the home of Hughes' mother, and attempted armed robbery of Hughes. The indictment for attempted burglary was *nol prossed*, but was replaced by another indictment on March 26, 2010, for attempted first-degree burglary.

A jury trial on all charges took place on May 18, 2010. Both Ware and Kiersten Martin appeared as witnesses for the State. Ware testified that after he knocked on the door of the house of Hughes' mother, Bland "came around with the gun and the lady had shut the door." Ware also testified that Bland took Isabel Martin's pocketbook after pointing a gun at her. Kiersten Martin testified about the premeditated nature of the attempt to force entry into the home of Hughes' mother and corroborated Ware's testimony that Bland approached Isabel Martin with a gun and took her pocketbook.

Haden testified Hughes was shown a photo lineup and admitted the lineup was now missing from the case file. Although he did not know whether Bland's picture

[1] The record does not indicate that Kiersten Martin was related to Victim Isabel Martin.

was included in the lineup, he also testified that Hughes never said she would have been able to identify the person with the gun and could provide only a general description of him. Hughes corroborated this testimony, stating only that this person wore dark clothing, was tall and thin, and carried a large gun. On cross-examination, Hughes asserted she did not know whether any of the subjects depicted in the photo lineup could have been Bland. Martin, who was not shown a photo lineup, pointed Bland out to the jury.

At the close of the testimony, the defense made various directed verdict motions and requested to have the charges against Bland dismissed because of the missing lineup. The trial court denied these motions.

The jury convicted Bland on one count of possession of a weapon during the commission of a violent crime, attempted armed robbery, and attempted first-degree burglary. Hughes was the prosecution's main witness for these three charges. Bland was acquitted of the armed robbery charge and the remaining count of possession of a weapon during the commission of a violent crime, both of which involved Isabel Martin. The trial court sentenced Bland to concurrent terms of twenty years on the attempted armed robbery and attempted first-degree burglary charges and a consecutive five-year sentence on the weapons charge. Bland then filed this appeal.

ISSUE

Did the trial court err in refusing to dismiss the charges against Bland on the grounds that the State mishandled the photo lineup and the possibility that the lineup contained exculpatory information favorable to Bland's defense at trial?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The reviewing court is bound by the trial court's findings of fact unless they are clearly erroneous. *Id.*

LAW/ANALYSIS

Bland argues the charges against him should have been dismissed because the State's inability to produce the photo lineup amounted to a due process violation that deprived him of his right to present a complete defense. We disagree.

The South Carolina Supreme Court has stated the following on the issue of preservation of evidence:

> The State does not have an absolute duty to preserve potentially useful evidence that might exonerate a defendant. To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, *or* (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed *and* the defendant cannot obtain other evidence of comparable value by other means.

State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001) (citations omitted) (emphasis added).

Here, Bland made no attempt to argue the State destroyed the lineup in bad faith. The question before us, then, is whether Bland demonstrated (1) the lineup possessed an exculpatory value apparent before it was lost and (2) he could not obtain other evidence of comparable value by other means. Unless he satisfied both requirements of the second prong, he failed to establish a due process violation.

We agree with the State that Bland failed to establish that the lineup possessed an exculpatory value that was apparent before it was lost. At trial, Haden testified he did not know who compiled the photographs for the lineup and no one knew whose images were included.[2] More important, however, is Hughes' testimony that the poor quality of the photographs prevented her from identifying anyone in the lineup as either of the two individuals she encountered during the incident even though she had indicated she might have been able to identify the person with whom she spoke at her mother's door. She testified that in her haste to close the

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[2] At trial, Bland suggested he should not be penalized for the State's inability to verify whether or not a picture of him was included in the lineup, arguing "it wasn't his job to keep up with this evidence." We do not suggest here that a defendant seeking to show a due process violation through the State's loss of evidence should be required to present information available only from the State if the State cannot provide it. Rather, we hold that regardless of whether Bland's picture appeared in the lineup, the circumstances of this case are such that the lineup did not have exculpatory value.

door, all she noticed about the other man was his clothing, his build, and his gun. When asked by Bland if "his picture was one of those on that piece of paper," she responded that she did not know. Whether or not the missing layout included Bland's picture, when considered with Hughes' undisputed inability to make a positive identification of anyone involved in the attempted burglary either before or during trial, it was not exculpatory evidence. *Cf. Porter v. State*, 368 S.C. 378, 384, 629 S.E. 2d 353, 357 (2006) (holding the fact that a witness did not identify the defendant at the crime scene was not material exculpatory evidence in view of other evidence of his guilt); *Clark v. State*, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993) ("[E]xculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.").

The State further argues that Bland did not establish that he could not have obtained other evidence of comparable value and that any error resulting from the loss of the photographic lineup was harmless in view of other evidence presented. Because, however, our holding that Bland failed to demonstrate that the lineup had exculpatory value is sufficient to uphold his convictions, we decline to address these arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing an appellate court need not address all issues on appeal when its decision on one issue is dispositive).

AFFIRMED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Earl Phillips as Personal Representative of the Estate of Bobby Gene Barnett, Appellant,

v.

Brigitte Quick, Respondent.

Appellate Case No. 2010-168488

Appeal From Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 5003
Heard January 11, 2012 – Filed July 18, 2012

REVERSED

John Michael Turner, Sr., of Turner & Burney, PC, of Laurens, and Carey Bruce Murphy, of Anderson, for Appellant.

Stephen R.H. Lewis, of Covington, Patrick, Hagins, Stern, & Lewis, P.A., of Greenville, for Respondent.

HUFF, J.: Earl Phillips, as the personal representative of the Estate of Bobby Gene Barnett, appeals the order of the circuit court affirming the probate court's

order approving Brigitte Quick's claims pursuant to the South Carolina Uniform Gift to Minors Act (UMGA).[1] We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Bobby Gene Barnett passed away January 12, 2003. The notice to creditors of the estate ran in the Anderson News-Chronicle on February 19 and 26, 2003, and March 5, 2003. On December 8, 2003, Barnett's daughter, Quick, filed two statements of creditor's claim with the probate court. In the statements, she asserted Barnett took funds belonging to Quick under the UGMA without notifying her and failed to provide her with the funds that were being held on her behalf. She submitted copies of two cancelled checks from a UGMA account with A.G. Edwards & Sons. The checks were in the amounts of $107.29 and $41,646.27. Quick subsequently filed a petition for claim under the UGMA with the probate court. She claimed Barnett made a gift to her under the UGMA and then converted the money for his own use on two occasions. In his answer to the petition, Phillips, who was the successive personal representative of Barnett's estate, asserted, among other defenses, Quick's claim was not timely filed and was time barred.

The probate court rejected Phillips's contention that Quick's claims were barred because she failed to file her claim within the eight-month period prescribed by sections 62-3-801 and 62-3-803 of the South Carolina Probate Code (2009). The probate court noted Quick testified she had no notice or knowledge of the UGMA account until she became personal representative of Barnett's estate and learned of the account during discovery for litigation contesting Barnett's will in December, 2003. Her mother testified she had never told Quick about the account that Barnett set up pursuant to their divorce decree. The probate court applied the discovery rule and found that because Quick had no notice or knowledge of the claim prior to discovering it in December 2003, her claim was not barred by section 62-3-803. The court approved Quick's UGMA claim, but denied her request for interest. Phillips filed a motion to alter or amend, which the probate court denied. He then appealed to the circuit court, which affirmed the probate court. This appeal followed.

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[1] S.C. Code Ann. §§ 63-5-500 to -600 (2010).

STANDARD OF REVIEW

"An issue regarding statutory interpretation is a question of law." *Univ. of S. Cal. v. Moran*, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005). "Questions of law . . . may be decided with no particular deference to the lower court." *Neely v. Thomasson*, 365 S.C. 345, 350, 618 S.E.2d 884, 886 (2005).

LAW/ ANALYSIS

Phillips argues Quick's claims are barred by the time limitation set forth in sections 62-3-801(a) and 62-3-803(a) of the South Carolina Probate Code (2009) because section 62-3-803 is a nonclaim statute.[2] We agree.

Section 62-3-803(a) provides:

> All claims against a decedent's estate which arose before the death of the decedent, including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within the earlier of the following dates:
>
> (1) one year after the decedent's death; or
>
> (2) within the time provided by Section 62-3-801(b) for creditors who are given actual notice, and within the time provided in Section 62-3-801(a) for all creditors barred by publication . . . .

Section 62-3-801(a) mandates that creditors who are not given actual notice must present their claims within eight months after the date of the first publication of the notice or be forever barred.

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[2] At oral argument, both parties acknowledged this issue had been raised to the probate court. Despite the paucity of the record, we will review the issue on the merits.

This court held Section 62-3-803 is a nonclaim statute. *In re Estate of Tollison*, 320 S.C. 132, 135, 463 S.E.2d 611, 613 (Ct. App. 1995). Thus, unless the statute is complied with, the creditor's claim is barred. *Id.* The Indiana Supreme Court explained the difference between a nonclaim statute and a statute of limitations:

> [A] nonclaim statute . . . grants to every person having a claim of any kind or character against a decedent's estate, the right to file the same in the court having jurisdiction thereof and have the same adjudicated, provided such claim is filed within the time specified in the statute. Unless such claim is filed within the time so allowed by the statute, it is forever barred. The time element is a built-in condition of the said statute and is of the essence of the right of action. Unless the claim is filed within the prescribed time set out in the statute, no enforceable right of action is created.
>
> While such statutes limit the time in which a claim may be filed or an action brought, they have nothing in common with and are not to be confused with general statutes of limitation. The former creates a right of action if commenced within the time prescribed by the statute, whereas the latter creates a defense to an action brought after the expiration of the time allowed by law for the bringing of such an action.

Estate of Decker v. Farm Credit Servs. of Mid-Am., ACA, 684 N.E.2d 1137, 1138-39 (Ind. 1997) (quoting *Donnella v. Crady*, 185 N.E.2d 623, 624-25 (Ind. App. 1962)).

"While equitable principles may extend the time for commencing an action under statutes of limitation, nonclaim statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable exceptions." *Estate of Decker*, 684 N.E.2d at 1139; *see also* 51 Am. Jur. 2d *Limitation of Actions* § 3 (2011) ("The time element is a built-in condition of a nonclaim statute and is of the essence of the right of action, and unless the claim is filed within the prescribed time set out in the statute, no enforceable right of action is created.").

In the present case, the probate court relied on the discovery rule found in section 15-3-535 of the South Carolina Code (2005), which provides:

> Except as to actions initiated under Section 15-3-545, all actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.

This rule, however, does not apply to all causes of actions. *Abba Equipment, Inc. v. Thomason*, 335 S.C. 477, 484, 517 S.E.2d 235, 238-39 (Ct. App. 1999); *Matthews v. City of Greenwood*, 305 S.C. 267, 269 n.1, 407 S.E.2d 668, 669 n.1 (Ct. App. 1991).

The Washington Supreme Court declined to apply the discovery rule to a probate nonclaim statute that was silent regarding the discovery rule. *Ruth v. Dight*, 453 P.2d 631, 636 (Wash. 1969) (superseded by statute as stated in *Teeter v. Lawson*, 610 P.2d 925, 925 (Wash. Ct. App. 1980)). The court held: "The nonclaim statute is mandatory and not subject to enlargement by interpretation; and it cannot be waived." *Id.* at 637.

The Kansas Court of Appeals likewise rejected a claimant's argument the discovery rule should apply to the Kansas statute similar to our section 62-3-803, K.S.A. 59-2239. *In re Estate of Watson*, 896 P.2d 401, 404 (Kan. Ct. App. 1995). It explained:

> Because the Kansas Legislature specifically created a statutory discovery rule under the provisions of K.S.A. 60-513, the doctrine of *expressio unius est exclusio alterious* (the inclusion of one thing implies the exclusion of another) suggests that the legislature did not intend for the same discovery rule to be applicable to probate cases.

Id.

Our section 62-3-803 makes no mention of the discovery rule and no other statute specifies the rule applies to the nonclaim statute. Because we find no indication

our legislature intended for the discovery rule to apply to the nonclaim statute, we conclude this rule does not extend to section 62-3-803.[3]

Quick filed her statements of claim more than nine months after the first publication of notice. Thus, the lower courts erred in holding Quick's claims were not barred by section 62-3-803. Accordingly, the order of the circuit court affirming the probate court is

REVERSED.[4]

PIEPER and LOCKEMY, JJ., concur.

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[3] In her Respondent's brief, Quick relies on this court's opinion in *Kolb v. Cook*, 284 S.C. 598, 602, 327 S.E.2d 379, 382 (Ct. App. 1985), in which we held a tort claimant seeking to recover damages from sources other than the distributable or distributed assets of the probate estate does not need to file a verified claim or account with the personal representative of the deceased tortfeasor. Quick asserts the funds from the UGMA account were not a distributable asset of the probate estate because she has a vested title in the proceeds from account and she is entitled to a constructive trust. While we find this argument intriguing, we decline to consider it on appeal. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420 n. 9, 526 S.E.2d 716, 723 n. 9 (2000) (holding when reversing a lower court's decision it is within an appellate court's discretion as to whether to address any additional sustaining grounds).

[4] In light of our disposition herein, we decline to address Phillips's remaining argument on the admissibility of copies of checks admitted into evidence. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

State Mutual Insurance Company, Plaintiff,

v.

Gerald Ray Ard and Susan M. Ard, individually and as the natural mother, custodial parent, and natural guardian of Lauren Ashley A. and Brandon Todd A., minors under the age of fourteen (14), Defendants,

Of Whom Gerald Ray Ard is Respondent,

And Susan M. Ard is Appellant.

Appellate Case No. 2010-165848

Appeal From Florence County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 5004
Heard March 28, 2012 – Filed July 18, 2012

AFFIRMED

Louis David Nettles, of Folkens Law Firm, PA, of Florence, for Appellant Susan Ard.

Robert Norris Hill, of Newberry, and William P. Hatfield, of Hyman Law Firm, of Florence, for Respondent Gerald Ray Ard.

THOMAS, J.: State Mutual Insurance Company (State Mutual) filed this action to interplead the proceeds of a life insurance policy. Following a bench trial, the trial judge found Appellant Susan M. Ard (Wife), the former wife of Richard Todd Ard (Decedent), was entitled to the face value of the policy with interest, but awarded the balance of the death benefit to Respondent Gerald Ray Ard (Father), Decedent's father. Wife appeals. We affirm.

FACTS AND PROCEDURAL HISTORY

Wife and Decedent married on June 14, 1990. On April 17, 1991, State Mutual issued a whole life insurance policy to Decedent. Decedent was the insured and named Father as the sole beneficiary of the policy. The policy had an initial death benefit of $50,000.00, and the death benefit increased over the years.

During their marriage, Wife and Decedent had two children, born in 1996 and 1998. On December 9, 1998, Decedent attempted to change the beneficiary on the policy from Father to Wife by signing a policy service request and delivering it to the insurance agent who sold him the policy. The agent no longer represented State Mutual, but witnessed the request and faxed it to State Mutual's office in Rome, Georgia. Nineteen days after receiving the faxed request, State Mutual sent a letter to Decedent advising that an original signature on the original form was necessary to process his request to change the beneficiary. State Mutual never received a response to this letter, and Father remained the only named beneficiary on the policy.

The policy provided for an annual increase in the death benefit beginning the fifth year the policy was in effect. In addition, the policy also participated in company dividends; therefore, the death benefit would most likely exceed the $50,000.00 guaranteed benefit.

Wife and Decedent divorced in October 2006. The divorce decree incorporated a settlement agreement. Under the agreement, Wife was granted custody of the children, and Husband was to pay child support.

The agreement included two references to life insurance. The first reference was in Section VI, which covered medical insurance for the children, the children's uncovered medical expenses, and life insurance, and provided as follows:

> 3. **Life Insurance:** [Decedent] currently has life insurance in the amount of $50,000 on his life. [Decedent] shall continue such coverage naming [Wife] as beneficiary for the benefit of the minor children until such time as the youngest child reaches eighteen years of age, and shall continue to provide annual proof of said insurance to [Wife].

The second reference to life insurance in the agreement appeared in Section VII, which covered equitable division and provided as follows:

> 3. **Personal Property:** [Wife] shall have all right, title and interest in and to the Jet Skies [sic]. [Decedent] shall have all right, title and interest in and to the following personal property: boat and motor; guns, 4-wheeler (with trailer), life insurance; lawn mower, and miscellaneous tools in back shed.

Decedent died on March 14, 2008. At the time of his death, the total cash value of the policy was $85,521.30.

Father filed a claim for the proceeds of the policy. Later, Wife filed a competing claim and sent State Mutual the divorce decree and the separation agreement executed by her and Decedent. Both Father and Wife sought payment of the entire policy proceeds.

In light of the competing demands for payment on the policy, State Mutual brought this action to interplead the funds. Father and Wife each filed responsive pleadings. Father also brought a cross-claim against Wife, claiming the entire proceeds of the policy. Likewise, Wife filed a cross-claim against Father seeking a constructive trust in her favor on the entire policy proceeds.

A bench trial in the matter took place, and the trial judge issued an order finding (1) State Mutual was entitled to interpleader status; (2) the facts and circumstances of the case, including the agreement incorporated into the divorce decree, gave rise to the constructive trust for Wife's benefit; (3) the agreement did not necessarily require a change in beneficiary; (4) the agreement only required Decedent to

provide $50,000.00 in life insurance coverage until the younger child attained his majority and to name Wife the beneficiary for the minor children; (5) Wife was entitled to the face value of the policy of $50,000.00 plus interest from March 14, 2008; and (6) Father was entitled to the balance of the policy proceeds over the amount awarded to Wife.[1]

Wife moved to alter or amend the trial judge's order. After her motion was denied, she filed this appeal.

ISSUES

I. Did the trial judge erroneously interpret the provision in the divorce decree under which Decedent was to maintain life insurance for the benefit of his minor children?

II. Did equitable principles entitle Wife to be treated as the exclusive beneficiary of the policy?

STANDARD OF REVIEW

"The interpretation of [marital litigation] agreements is a matter of contract law." *Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011) (citing *Hardee v. Hardee*, 348 S.C. 84, 91-92, 558 S.E.2d 264, 267 (Ct. App. 2001)). "When an agreement is clear on its face and unambiguous, 'the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement.'" *Id.* (quoting *Smith-Cooper v. Cooper*, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001)).

An action to declare a constructive trust is an equitable matter, and an appellate court may find facts according to its own view of the evidence. *Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987). Nevertheless, this standard of review "does not require us to disregard the findings below." *Cherry v. Thomasson*, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

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[1] As of April 14, 2010, the date of the bench trial, the total cash value, including the guaranteed death benefit, had increased to $87,838.64.

LAW/ANALYSIS

I. Interpretation of the Separation Agreement

The trial judge held the agreement required only that Decedent "provide Fifty Thousand and no/100 . . . Dollars in life insurance coverage 'naming [Wife] as beneficiary for the benefit of the minor children until such time as the youngest child reaches eighteen (18) years of age.'" Wife takes issue with this interpretation, arguing the separation agreement and divorce decree identified the policy and required Decedent to "continue such coverage." We disagree with this argument.

Taylor v. Taylor, 291 S.C. 261, 263, 353 S.E.2d 156, 157 (Ct. App. 1987) involved a requirement in a separation agreement and divorce decree that the decedent "maintain and keep in force" $90,000.00 "worth" of life insurance on his life with his son as beneficiary. This court held the requirement did not warrant the imposition of a trust on the entire proceeds of a life insurance policy on which the son was not a beneficiary even though that policy was in effect when the parties negotiated their agreement. *Id*. at 264, 353 S.E.2d at 158. Because, however, the son was the named beneficiary on three other life insurance policies maintained by the decedent and had already received proceeds from those policies, this court affirmed the trial court's decision to impose a trust on the policy at issue, but only to the extent necessary to ensure the son received a total of $90,000.00 from all four policies, explaining: "The language only requires [the decedent] to maintain $90,000 'worth' of life insurance with [his son] as beneficiary. The agreement does not mention the Aetna policy or the group policy or any similar language tending to identify a particular policy." *Id.*

In the present case, the agreement mentions only that Decedent, at the time the agreement was executed, had life insurance, with the only description being the amount of coverage. There is no reference to the carrier, the policy number, or the fact that the policy was a whole life policy rather than a term life policy. Most significantly, the agreement includes no information about the increase in death benefits even though the total death benefit had reached $71,908.00 several months before the separation agreement was executed. Moreover, Wife testified that Decedent was obligated to disclose his financial condition when they negotiated their separation agreement. If, then, she intended to receive the entire proceeds of

that particular policy, specific identifying information could have been included in the agreement.

Furthermore, there was no express requirement that Wife and children be the sole beneficiaries of the policy, and the divorce decree expressly granted Decedent ownership and control of his life insurance. His right to name the beneficiaries of his life insurance policy was subject only to the requirement that Wife, as beneficiary on behalf of their children, receive the first $50,000.00 of coverage in the event that he died before the younger child reached the age of majority. Once this requirement was fulfilled, there was no restriction in either the policy or the divorce decree preventing him from naming another beneficiary to receive the balance of the proceeds. *See Glover v. Inv. Life Co. of Am.*, 312 S.C. 126, 131, 439 S.E.2d 297, 299 (Ct. App. 1993) (holding a party could agree to a requirement in a divorce decree that he purchase and maintain a life insurance policy on himself with his only child as sole beneficiary and thus contract away any existing right to change the beneficiary).

We find instructive the case of *Sparks v. Jackson*, 658 S.E.2d 456 (Ga. Ct. App. 2008). In *Sparks*, as part of a divorce settlement, the decedent agreed to "maintain his current level of life insurance on his life through his employment which at the present time [was] $220,000.00," with his first wife as the "irrevocable beneficiary for the benefit of the children." *Id.* at 458. Several years later, he designated his second wife as the beneficiary of the policy. After he died, the trial court awarded the entire proceeds of the policy to his first wife, and the second wife appealed. The Georgia Court of Appeals held the first wife "had a vested interest" in the decedent's life insurance policies by virtue of the settlement, but was "limited to the amount of insurance the [decedent] agreed to maintain at the time of the settlement agreement" and ordered that the insured's second wife receive the balance of the proceeds in excess of $220,000 plus applicable interest. *Id.* at 460. Similarly, the agreement in the present case required Decedent only to maintain a specified amount of coverage for a designated beneficiary. Proceeds not included in this specified amount were therefore properly awarded to Father, the only other named beneficiary on the policy.

II. Equitable Principles

Wife further argues she is entitled to a constructive trust on the entire proceeds of the policy because (1) if Decedent had done what he was supposed to do under the divorce decree, Wife would have been the sole beneficiary of the policy and (2)

Decedent's prior unsuccessful attempt to have Wife named as beneficiary was evidence that he believed Wife would receive the entire proceeds and intended for her to do so. We disagree.

The separation agreement and divorce decree did not require Decedent to name Wife as the sole beneficiary of any particular life insurance policy. Furthermore, these documents expressly provided that Decedent would retain ownership of his life insurance. As the owner, Decedent had the right to designate his beneficiaries, subject only to the provision that Wife was to be a beneficiary of $50,000.00 worth of coverage until his children attained their majority. Contrary to Wife's argument that Decedent's unsuccessful attempt in 1998 to make her the beneficiary of his life insurance policy evidenced his intent that she receive the entire proceeds if he predeceased her, Decedent's failure to contact State Mutual after it advised him in 1998 that an original signature was necessary to process his request for a change of beneficiary could just as easily support a finding that Decedent ultimately did not intend for Wife to become the sole beneficiary of his whole life insurance policy and wanted Father to receive any proceeds in which Wife did not have a vested interest. Under these circumstances, we hold Wife has not carried her burden to convince this court that the trial court erred in declining to hold the constructive trust imposed in her favor included the policy proceeds in excess of the face value plus any applicable interest. *See Cherry*, 276 S.C. at 525, 280 S.E.2d at 541 (stating that in an appeal of the grant of equitable relief the burden remains on the appellant to convince the appellate court that the findings of fact by the hearing tribunal are incorrect).

AFFIRMED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas C. McCain, Sr., and Joseph Curry, individually and as trustees of the Mount Canaan Baptist Church; James E. Johnson and Nathan Goodwin, individually and as deacons of the Mount Canaan Baptist Church, Respondents,

v.

G. L. Brightharp, Appellant.

Appellate Case No. 2009-146066

Appeal From Edgefield County
R. Knox McMahon, Circuit Court Judge

Opinion No. 5005
Heard December 5, 2011 – Filed July 18, 2012

AFFIRMED

Robert A. Mullins, of Mullins Law Firm, P.C., of Augusta, Georgia, for Appellant.

Herbert E. Buhl, III, of Columbia, for Respondents.

PER CURIAM: In this ecclesiastical dispute wherein church trustees and deacons of Mount Canaan Baptist Church (Respondents) sought to enjoin G.L. Brightharp from continuing to act as pastor and reinstate Respondents to their former positions, Brightharp appeals the trial court's order finding him in contempt, arguing the trial court erred in: (1) assuming subject matter jurisdiction; (2) declaring any actions taken by the church null and void, and ordering him to reinstate Respondents to their former positions as trustees and deacons; and (3) holding him in contempt of court.

FACTS

Brightharp is the pastor of Mount Canaan Baptist Church (the Church) in Trenton, South Carolina. At a joint board meeting of the Church trustees and deacons on September 11, 2007, attended by Respondents and fourteen other board members, twelve members voted to terminate Brightharp's contract as pastor and moved to have a vote by the Church conference.[1] During the meeting, Brightharp stated "he knew nothing" about discord concerning "the condition and direction of the [C]hurch." Later that same day, at a Church conference meeting attended by Respondents and forty-eight Church members, Brightharp stated he did not want to "split the Church" and would resign rather than proceed with the vote before the Church conference.[2] Respondents accepted Brightharp's resignation and prepared a written settlement agreement and release of all claims for Brightharp to sign. However, eight days later, Brightharp wrote a letter to members of the

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[1] Thomas McCain, a Church trustee, testified a church conference is a meeting of the entire Church and is open for every member of the Church to attend. He further said the conference is a business meeting of the Church and is announced in advance from the pulpit. Article IV, Section 6(a), of the Church's By-Laws provides: "Should a change be desired on the part of the Pastor or the Church, a 60-day Notice shall be given by either party. It shall require a simple majority vote of the members present at a regular business meeting to ensure this action; and at the close of the sixty day requirement, said action shall be enforced."

[2] Article IV, Section 6(b), of the Church's By-Laws provides: "Whenever there is an involuntary separation of Pastor and Church, the condition of 60 days leave can be given to the Pastor, with pay, to seek employment; or either 60 days compensation and immediate termination." Section 6(c) provides: "If a Pastor terminates voluntarily, he is expected to submit a resignation at least 60 days in advance of termination."

congregation notifying them he had chosen not to resign. Respondents informed Brightharp he could not rescind his resignation and gave him trespass notice, prohibiting him from utilizing the Church or its property.[3] Brightharp continued to use the Church's facilities, and on September 23, 2007, announced from the pulpit that a Church conference was scheduled for October 9, 2007.

On October 4, 2007, Respondents filed a complaint in the Edgefield County Court of Common Pleas, requesting the court enjoin Brightharp from continuing to act as pastor and enjoin the Church conference scheduled for October 9. However, the Church met on October 9, as scheduled. The Church also held a meeting on October 22, 2007. During the October 22 meeting, Church members voted to reinstate Brightharp as pastor, remove Thomas McCain and Joseph Curry as trustees, and silence deacons Nathan Goodwin and James Johnson. After the meeting, Brightharp informed McCain he was relieved of his duties effective immediately, and after a November 5, 2007, Church meeting, Brightharp told McCain he was silenced as a member of the Church.

Brightharp filed his answer on November 6, 2007, asserting six defenses: (1) breach of contract; (2) wrongful arrest; (3) malicious prosecution; (4) abuse of process; (5) defamation of character; and (6) intentional infliction of emotional distress.[4] Thereafter, on November 20, 2007, Respondents filed an amended complaint, alleging five causes of action: (1) injunction; (2) defamation; (3) intentional infliction of emotional distress; (4) conspiracy; and (5) breach of fiduciary duty.[5]

The Honorable Casey L. Manning held a hearing on the matter on December 13-14, 2007. Judge Manning issued his order on December 21, 2007, declining to rule on the request for a preliminary injunction to enjoin Brightharp from the Church; ordering the reinstatement of Respondents to their positions as trustees and deacons; and declaring any actions taken after September 11, 2007, to be null and

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[3] McCain testified the letter was not approved by the Church's members. At some point, Brightharp was arrested for trespassing.

[4] Brightharp asserted he was entitled to $1 million in actual damages and $1 million in punitive damages.

[5] Respondents alleged that Brightharp made false and defamatory statements about them, and they are entitled to $1 million in actual damages and $1 million in punitive damages.

void. The Honorable R. Knox McMahon held a second hearing on April 23 and 25, 2008, and he issued his order on June 5, 2008. Judge McMahon determined the board members violated the Church's By-Laws by failing to put Brightharp's resignation before a final Church vote, and Brightharp's removal of Respondents from their Church positions was also in violation of the By-Laws. Therefore, Judge McMahon ordered that Brightharp shall remain as pastor; Respondents shall be reinstated to their former positions; and joint board meetings must be held the first Sunday of every month beginning July 2008. However, on August 12, 2008, after a Church conference, Brightharp wrote to McCain, Goodwin, and Johnson, and informed them they were excluded from Church membership.

On March 9, 2009, Respondents filed a rule to show cause, seeking a finding of contempt against Brightharp for his refusal to abide by Judge McMahon's June 5, 2008 order. Judge McMahon held a hearing on April 30, 2009, and issued his order finding Brightharp in contempt on May 4, 2009. In his order, Judge McMahon found the December 21, 2007 and June 5, 2008 orders were the law of the case, and Brightharp had not followed either of the orders. Judge McMahon further found the silencing and exclusion of Respondents was unlawful and null and void because the purpose of both orders was to establish the *status quo* to September 11, 2007. Therefore, Judge McMahon found Brightharp was in violation of the two orders for failing to reinstate Respondents to their positions and refusing to allow the joint board meeting scheduled for July 6, 2008 to take place pursuant to the June 5 order. Judge McMahon also ordered the Church to hold four joint board meetings in 2009 on May 5, September 8, November 3, and December 8. Judge McMahon further fined Brightharp $1,000 for his failure to reinstate Respondents and hold four joint board meetings, and in the future, if Respondents were not allowed to fully participate in joint board meetings that Brightharp be fined $1,000 for each meeting. At a Church meeting on May 5, 2009, McCain, Curry, Goodwin, and Johnson were reinstated as members of the Church. Sometime thereafter, Respondents filed another rule to show cause seeking a finding of contempt against Brightharp for his refusal to abide by Judge McMahon's May 4, 2009 order. Judge McMahon held a hearing on October 9, 2009, and issued his order on October 14, 2009, finding Brightharp did not willfully violate the terms of the June 5, 2008 and May 4, 2009 orders. Therefore, Judge McMahon did not hold Brightharp in contempt of those orders. This appeal followed.

STANDARD OF REVIEW

This case began as an action for declaratory relief. "Whether an action for declaratory relief is legal or equitable in nature depends on the plaintiff's main purpose in bringing the action." *Williams v. Wilson*, 349 S.C. 336, 340, 563 S.E.2d 320, 322 (2002). Respondents' main purpose in bringing this action was to enjoin Brightharp from continuing to act as pastor and reinstate Respondents to their former positions in the church. Therefore, this is an action in equity, and the applicable standard of review is our own view of the preponderance of the evidence. *Id.*

LAW/ANALYSIS

I. Subject Matter Jurisdiction

Brightharp argues the trial court erred in assuming subject matter jurisdiction in this case. We disagree.

Brightharp asserts civil courts do not have jurisdiction over internal church disputes and other ecclesiastical matters; therefore, the trial court did not have jurisdiction to hear this case. He maintains that church decisions about selection, appointment, supervision, and removal of ministers and persons in positions of theological significance are ecclesiastical matters that are beyond the reach of civil courts. He further asserts the Church congregation did not remove him, did not accept his resignation, and did not vote to terminate him as pastor; therefore, the trial court lacked subject matter jurisdiction to hear the case.

Respondents assert the December 21 and June 5 orders are law of the case because Brightharp did not appeal from them; however, while it is true that Brightharp did not appeal the orders, subject matter jurisdiction can be raised at any time. "The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court." *Town of Hilton Head Island v. Godwin*, 370 S.C. 221, 223, 634 S.E.2d 59, 60-61 (Ct. App. 2006).

Subject matter jurisdiction is the power a court has to hear cases in the general class to which the proceedings in question belong. *Altman v. Griffith*, 372 S.C. 388, 396 n.2, 642 S.E.2d 619, 623 n.2 (Ct. App. 2007). Courts have limited review

of church matters, and "[c]hurch disputes may be resolved by the courts only if resolution can be made without extensive inquiry into religious law." *Williams v. Wilson*, 349 S.C. 336, 340, 563 S.E.2d 320, 322 (2002). "It is not the function of the courts to dictate procedures for a church to follow." *Id.* "Generally, a civil court has no authority to intervene in cases involving expulsion from church membership where there is no question of an invasion of a civil, property or contract right." *Bowen v. Green*, 275 S.C. 431, 434, 272 S.E.2d 433, 434 (1980). "South Carolina case law is in accord with the view that no review of the ecclesiastical decision follows absent the infringement of those rights but South Carolina authorities do not treat the specific issue of membership expulsion." *Id.* at 434, 272 S.E.2d at 434-35.

"Religious organizations are generally divided into two groups: (1) congregational churches and (2) hierarchical churches." *Seldon v. Singletary*, 284 S.C. 148, 149, 326 S.E.2d 147, 148 (1985). Our supreme court has explained the differences between the two types of churches:

> A congregational church is an independent organization, governed solely within itself, either by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government, while a hierarchical church may be defined as one organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head. . . . Under the congregational form of government . . . the local church is not subject to the control of any higher ecclesiastical judicature and is self-governing in its religious functions.

Id. at 149-50, 326 S.E.2d at 148-49. Our supreme court elaborated on how congregational churches function in *Williams v. Wilson*:

> The evidence is uncontested that Christian Churches are independent congregational churches governed by their own congregations. The congregation selects the church's trustees and the trustees are always members of that church. In a congregational church, the congregation is the highest authority.

Williams, 349 S.C. at 342, 563 S.E.2d at 323. "The law is clear that the majority controls the decisions of a congregational church." *Seldon*, 284 S.C. at 151, 326 S.E.2d at 149. In *Bowen*, our supreme court took judicial notice that, generally, Baptist churches are governed by their own congregations. *Bowen*, 275 S.C. at 435, 272 S.E.2d at 435. Therefore, "the burden [is] on the party departing from the usual Baptist convention to demonstrate by a preponderance of the evidence that its church had adopted an alternative means of church government and that it was following the procedure prescribed by that church." *Id.*

In *Morris Street Baptist Church v. Dart*, 67 S.C. 338, 343, 45 S.E.2d 753, 754 (1903), a case involving the dismissal of a pastor, our supreme court held the only questions it had the power to consider were: (1) whether the congregation met, and (2) whether the congregation disposed of the defendant as pastor. If the answers were in the affirmative, the court had no jurisdiction to hear the case. *Id.*
In *Williams v. Wilson*, 349 S.C. 336, 343, 563 S.E.2d 320, 323 (2002), the court found the church's bylaws clearly reserved to the congregation the right to dismiss the preacher. Accordingly, the court held the trustees had no authority to dismiss the preacher, and the master in equity properly ruled the dismissal was a nullity. *Id.*

In *Knotts v. Williams*, 319 S.C. 473, 479, 462 S.E.2d 288, 291 (1995), another case involving the dismissal of a pastor, our supreme court held the trial court improperly exercised jurisdiction in the matter because there had been no action by the congregation in regard to the litigation, neither the congregation nor the church was named as a party, and the congregation never approved an agreement to have the court determine the percentage vote necessary to terminate its pastor or who was eligible to vote. In *Pearson v. Church of God*, 325 S.C. 45, 53, 478 S.E.2d 849, 853 (1996), our supreme court held it was not proper for this court to "determine whether the Church acted consistently with its religious laws and doctrines, its system of discipline and administration in revoking [the minister's] ministry. . . . [because that] would be a quintessentially ecclesiastical matter over which a court could not exercise jurisdiction."

The *Bowen* court explained the reasoning behind this rule:

> The premise upon which the foregoing authority is built is that the ecclesiastical matter was decided by the duly

> constituted ecclesiastical body having jurisdiction. Obviously then, if a decision is reached by some body not having ecclesiastical jurisdiction over the matter, then the civil court would not be bound by that decision. *The appropriate remedy, therefore, would not be to impose an ecclesiastical dictate of the civil court but would rather be to restore the status quo prevailing before the unauthorized action.* Once determination is made that the proper ecclesiastical authority has acted in its duly constituted manner, no civil review of the substantive ecclesiastical matter may take place as this would be prohibited by Amendments I and XIV of the Federal Constitution and Article I, Section 2 of the State Constitution.

Id. at 434, 272 S.E.2d at 435 (emphasis added). The *Bowen* court further explained that the appellate court will not determine who shall or shall not be members of a church or dictate procedure for a church to follow. *Id.* at 435, 272 S.E.2d at 435. In these cases, *this court's function is to assure that the church itself has spoken: if it has, this court inquires no further, but if it has not, this court may restore the status quo to enable the church to act*. *Id.* (emphasis added).

Mount Canaan Baptist Church's By-Laws, Article IV, Section 6(a), titled "Termination of Pastor," provides:

> Should a change be desired on the part of the Pastor or the Church, a 60-day Notice shall be given by either party. It shall require a simple majority vote of the members present at a regular business meeting to ensure this action; and at the close of the sixty day requirement, said action shall be enforced.

McCain testified that only the Church's congregation can terminate the pastor, not the joint board, and if there is no vote of the congregation, the pastor continues in his position. Johnson, a Church deacon, also testified this was the church's procedure, and there was no vote of the congregation in this case. Here, Brightharp stated he was resigning as pastor before the Church congregation was given the chance to vote on whether they wanted to terminate him. Thereafter,

Brightharp decided not to resign, and Respondents' attempted to enforce Brightharp's resignation. Therefore, because the Church congregation did not vote to dispose of Brightharp as pastor prior to this litigation, we find the trial court had subject matter jurisdiction to restore the *status quo* to September 11 to enable the Church to act pursuant to its By-Laws.

II. Reinstatement of Trustees and Deacons

Brightharp argues the trial court erred in declaring any actions taken by the Church null and void and ordering him to reinstate Respondents to their former positions as trustees and deacons. We disagree.

Brightharp asserts the Church congregation voted to exclude Respondents from the Church; therefore, the trial court did not have subject matter jurisdiction to order reinstatement or declare the Church's actions null and void.

The Mount Canaan Baptist Church's By-Laws state the Board of Trustees is comprised of deacons and trustees. Article VI, Section 7, titled "Removal from the Trustee Board," provides:

> Any trustee who fails to discharge his duties or is found to be inefficient shall first be counseled by the Pastor and a committee of Trustees. If he fails to rectify his ways, he shall be removed from the Trustee Board by a simple majority vote of the Church members present in a regular business meeting.

McCain testified that this is the procedure established by the Church to remove and silence trustees and deacons, and he was not counseled prior to his removal. Johnson and Goodwin also testified they were not counseled. Because Respondents were removed without prior notice or counseling by the pastor and a committee of trustees, as required by the Church's By-Laws, we find the trial court properly found their dismissals were a nullity.

III. Contempt

Brightharp argues the trial court erred in holding him in contempt because the court did not have subject matter jurisdiction. Furthermore, he asserts he could not comply with the court's order because he had no ability to restore Respondents as members of the Church, as the Church congregation holds that authority.

We find the court had subject matter jurisdiction to restore the *status quo* to September 11 to enable the Church to act pursuant to its By-Laws. However, we need not address whether the court erred in holding Brightharp in contempt because he did not appeal from the order finding him in contempt of court. A decision on contempt rests within the sound discretion of the trial court. *Ex parte Cannon*, 385 S.C. 643, 660, 685 S.E.2d 814, 823 (Ct. App. 2009). A contempt order is a final order that is immediately appealable. *Id.* "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Therefore, this issue is not preserved for our review.

CONCLUSION

Accordingly, the trial court's order is

AFFIRMED.

SHORT, WILLIAMS, and GEATHERS, JJ., concur.