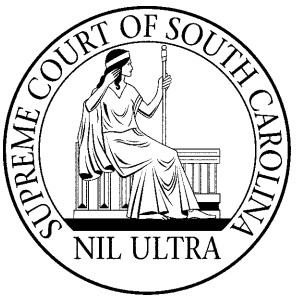

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 25
August 1, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent

v.

Abel Jacobs, Appellant.

Appeal from Richland County
J. Michelle Childs, Circuit Court Judge

Opinion No. 27015
Heard June 22, 2011 – Filed July 25, 2011

AFFIRMED

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

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Mark R. Farthing, and Solicitor Daniel E. Johnson, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Abel Jacobs (Appellant) appeals the circuit court's decision that a sentence for burglary in the first degree cannot be suspended under the language of South Carolina Code section 24-21-410. We affirm.

PROCEDURAL BACKGROUND

In January 2010, Appellant pled guilty to a variety of criminal charges, including a charge for first degree burglary. At the plea hearing, defense counsel asked the circuit judge to suspend the minimum fifteen year sentence for first degree burglary in lieu of placing Appellant under probation. Defense counsel opined that state courts have routinely suspended sentences for first degree burglary, and the State has never appealed those sentences. The circuit judge deferred sentencing Appellant for the first degree burglary conviction at the plea hearing, and requested the parties submit memoranda in support of their positions regarding the suspension issue. The circuit judge subsequently issued an order finding that a sentence for the conviction of first degree burglary is not suspendable under section 24-21-410 of the South Carolina Code. At the sentencing hearing, the circuit judge sentenced Appellant to fifteen years imprisonment for first degree burglary, along with concurrent sentences for remaining charges, crediting Appellant for time served prior to his guilty plea.

ISSUE

Whether a sentence for the conviction of first degree burglary can be suspended under section 24-21-410 of the South Carolina Code.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010). "A sentence

will not be overturned absent an abuse of discretion when the ruling is based on an error of law . . . ." *In re M.B.H*, 387 S.C. 323, 326, 692 S.E.2d 541, 541 (2010).

ANALYSIS

Appellant argues the circuit court erred in concluding that a sentence for a conviction for first degree burglary is not suspendable under section 24-21-410 of the South Carolina Code. We disagree.

"The cardinal rule of statutory construction is to ascertain and effectuate legislative intent." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). As such, a court must abide by the plain meaning of the words of a statute. *Id.* When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation. *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 569, 703 S.E.2d 197, 200 (2010). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581. "'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.'" *Id.* (*quoting* Norman J. Singer, *Sutherland Statutory Construction* §46.03 at 94 (5th ed. 1992)). Although it is a well-settled principle of statutory construction that penal statutes should be strictly construed against the state and in favor of the defendant, *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991), courts must nevertheless interpret a penal statute that is clear and unambiguous according to its literal meaning. *State v. Mills*, 360 S.C. 621, 624, 602 S.E.2d 750, 752 (2004).

A circuit court's authority to suspend a sentence and impose probation derives solely from section 24-21-410, which states:

> After conviction or plea for any offense, *except a crime punishable by death or life imprisonment*, the judge of a court of record with criminal jurisdiction at the time of the sentence may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation. Probation is a form of clemency.

S.C. Code Ann. § 24-21-410 (Supp. 2010) (emphasis added). The South Carolina Code defines the crime of first degree burglary as follows: "Burglary in the first degree is a felony *punishable by life imprisonment*. . . . The court, in its discretion, may sentence the defendant to a term of not less than fifteen years." S.C. Code Ann. § 16-11-311(B) (2003) (emphasis added). Therefore, the sentence for this offense ranges from a maximum of life imprisonment to a minimum of fifteen years imprisonment. *Id.*

We find the sentence for a conviction of first degree burglary falls squarely within the exception provided in section 24-21-410 because first degree burglary is a felony "punishable by life imprisonment." S.C. Code Ann. § 16-11-311(B) (2003). In drafting section 24-21-410, the legislature made clear its intention to give judges the discretion to suspend criminal sentences in favor of probation, unless the seriousness of a crime warrants the severe penalties of death or life imprisonment. In those cases, the legislature chose to restrict a court's authority to suspend sentences below the statutorily-mandated sentencing range.

Appellant relies on this Court's holding in *State v. Thomas* for the proposition that a sentence for the conviction of first degree burglary is suspendable because the burglary statute does not expressly prohibit suspension. 372 S.C. 466, 642 S.E.2d 724 (2007). In *Thomas*, the statute at issue required that a person convicted of distributing cocaine within proximity of a school be "'fined not less than ten thousand dollars and imprisoned not less than ten nor more than fifteen years.'" *Id.* at 468, 642 S.E.2d at 725 (*quoting* S.C. Code Ann. § 44-53-445(B)(2) (2002)). This Court found that numerous penal statutes include explicit language that prohibits suspension of the prescribed prison sentence, and that the omission

of such a prohibition in the statute at issue indicated the legislature's intent to not limit a court's authority to suspend sentences for that crime. *Id.* at 469, 642 S.E.2d at 725. The holding in *Thomas* has no bearing on this case. The sentence imposed for the criminal conviction in *Thomas* was not punishable by death or life imprisonment, and therefore, did not fall within the exception of section 24-21-410. Applying the plain and ordinary meaning of section 24-21-410 understandably led this Court to find that a crime not punishable by death or life imprisonment may be suspended, unless the statute expressly prohibits suspension.

Appellant further contends that the language excepting crimes "punishable by death or life imprisonment" implies that a crime carrying such a sentence may, nevertheless, be suspended if the statute includes other sentencing options. Therefore, Appellant argues, because section 16-11-311(B) imposes a sentence ranging from fifteen years to life imprisonment, it does not fall within the exception contained in section 24-21-410. We believe this is a forced construction of the statute. If the legislature intended to restrict a court's authority to suspend sentences for crimes that are *only* punishable by death or life imprisonment, it would have used the language "*punished* by death or life imprisonment" or "*only punishable* by death or life imprisonment." As the language of section 24-21-410 is unambiguous, we are confined to interpret its plain meaning. The plain language of the statute gives no indication the legislature intended to limit the exception in the manner urged by Appellant. If the legislature intends to give the courts the discretionary authority to suspend sentences for crimes that include a range of punishment in addition to death or life imprisonment, it is up to the legislature to memorialize that intention in the words of a statute.

CONCLUSION

We find that section 24-21-410 of the South Carolina code does not give courts the authority to suspend sentences for crimes punishable by death or life imprisonment, and this includes crimes that include lesser sentences than death or life imprisonment. Therefore, we affirm the circuit court's

order finding that a sentence for a conviction of first degree burglary may not be suspended according to section 24-21-410 of the South Carolina Code.

AFFIRMED.

PLEICONES, BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte: Bon Secours-St. Francis Xavier Hospital, Inc., Julia P. Copeland, and James J. Hinchey, Appellants,

In re: Thomas R. Wieters, M.D., Respondent,

v.

Bon Secours-St. Francis Xavier Hospital, Inc., Allen P. Carroll, William B. Ellison, Jr., Jeffrey M. Deal, M.D., and Sharron C. Kelley, Defendants.

Appeal from Charleston County
J. Michael Baxley, Circuit Court Judge

Opinion No. 27016
Heard March 2, 2011 – Filed August 1, 2011

AFFIRMED AS MODIFIED

Timothy W. Bouch and Amy E. Melvin, both of Leath, Bouch & Seekings, of Charleston, for Appellants.

Gregg Meyers, of Charleston, for Respondent.

CHIEF JUSTICE TOAL: Appellant Bon Secours-St. Francis Xavier Hospital (the Hospital) was a defendant at trial[1] in the underlying civil case. On March 2, 2010, the morning of the trial, Appellants removed the case to federal court for the second time and on the same grounds as the initial removal. The federal district court judge again remanded the case to state court. Judge Baxley, the state trial judge, imposed severe sanctions against the Appellants for the delay created by the second removal. Appellants appeal the order for sanctions. We affirm as modified.

FACTS/PROCEDURAL BACKGROUND

The underlying case is a state law civil suit for defamation and civil conspiracy. In 2002, Dr. Thomas R. Wieters was suspended from the medical staff by the Hospital for unprofessional, threatening, and disruptive behavior. In April 2003, the Hospital, pursuant to the Health Care Quality Improvement Act of 1986 (HCQIA) found at 42 U.S.C. §§ 11101–52, filed a report regarding Dr. Wieters's status with the National Practitioners Data

[1] Allen P. Carroll, the Administrator of the Hospital; William B. Ellison, Jr, M.D., the President of the Professional Staff; Jeffrey M. Deal, M.D., the President of the Professional Staff following Dr. Ellison; and Sharron C. Kelley, the Medical Staff Coordinator; Pennie Peralta, Senior Nurse Executive; and Esther Lerman Freeman, M.D., a mental health professional, were also named defendants.

Bank (NPDB).[2] In November 2004, Dr. Wieters filed the underlying action in state court.[3] The Hospital's Answer presented many affirmative defenses, including immunity under the HCQIA for any statement reported to the NPDB. In December 2004, Appellants removed the case to federal court for the first time under 28 U.S.C.A. § 1441(b),[4] alleging Dr. Wieters's "right to relief necessarily depends upon resolution of a substantial question of federal law." Dr. Wieters filed a Motion to Remand, asserting the Complaint alleged only state causes of action, and the Hospital could not defend its way into federal court. United States District Court Judge Weston Houck granted Dr. Wieters's motion to remand in January 2005. Five years of discovery and mediation ensued. In 2009, the case was assigned to the Charleston County State Court multi-week docket, and a detailed scheduling order was issued setting the trial date for March 8, 2010. In early 2010, the defendants at trial filed Motions for Summary Judgment, and the court denied the motions of the Hospital and four senior executives (defendants Carroll, Ellison, Deal, and Kelley).

The state court trial was re-scheduled to begin at 2 p.m. on March 2, 2010. In his February 8 Memo in Opposition to the Motions for Summary Judgment, Dr. Wieters disputed the Hospital's alleged immunity under the

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[2] Dr. Wieters was also suspended from Roper Hospital for similar behavior. He filed a similar suit against Roper Hospital after Roper Hospital posted a report with the NPDB. The trial court granted Roper Hospital's motion for summary judgment.

[3] The underlying action does not contest the suspension, only the content and publication of the report with the NPDB.

[4] This statute reads, in pertinent part:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

HCQIA, stating at several points that the HCQIA expressly allows defamation suits, and further referenced the HCQIA. The trial judge denied the Hospital's motion for summary judgment. On March 1, Dr. Wieters filed his Pretrial Brief and Proposed Jury Instructions, all of which again stated the HCQIA allows for suit when party knowingly makes false statements to the NPDB.

On the morning of March 2, 2010, three hours before the trial was scheduled to begin, Appellants removed the case to the federal district court for the second time, relying upon Dr. Wieters's Pretrial Brief filed the evening before. Appellants claimed the Pretrial Brief, along with the jury instructions and February 8 Memo in Opposition to the Motions for Summary Judgment, constituted "other paper" under 28 U.S.C. § 1446(b).[5] This "other paper," they claimed, indicated that Dr. Wieters was bringing a case under the HCQIA, thereby making removable a previously non-removable case. Thus, Appellants' argument went, Dr. Wieters presented a question of federal law by referencing the HCQIA, and removal then was proper. State Circuit Court Judge Baxley held a hearing at 2 p.m. on March 2 to question the Appellants regarding the removal and to make clear that if the case was remanded back to the jurisdiction of the state court, Appellants could expect sanctions for its misbehavior in waiting until the last minute before trial to remove the case again when Appellants had the information regarding Dr. Wieters's references to the HCQIA since early February and the grounds for removal were the same as in 2004.

As Judge Baxley expected, United States District Court Judge Houck remanded the case to state court on March 18, 2010. Judge Houck explained

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[5] This statute reads, in pertinent part:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable . . . .

in his Order that the Complaint does not state a federal question, nor can one be inferred, and the Complaint has never been amended since his original remand order in 2005. Further, he stated whether the HCQIA creates a private right of action such that Dr. Wieters could bring a claim under the HCQIA has not been determined by the Fourth Circuit Court of Appeals, but that the First, Eighth, Tenth, and Eleventh Circuit Courts of Appeals have all determined that it does not. Judge Houck noted the Hospital raised federal law as a defense, and that is insufficient to create federal question jurisdiction under 28 U.S.C. § 1331 to justify removal. Judge Houck found that "[b]ecause a potential defense will not support federal question jurisdiction under Section 1331, it follows that federal question jurisdiction will not obtain by a mere reference to the HCQIA" in the filing relied upon by the Hospital.

As promised, Judge Baxley issued a Notice of Sanctions Hearing on March 24 for the Appellants to show cause as to why sanctions should not be ordered "for delaying the trial of this case by frivolously filing for removal to the Federal Court on the morning of the day this jury trial was to begin." Dr. Wieters filed for Rule 11 sanctions the following day, requesting reasonable expenses and attorneys' fees. The sanctions hearing was held on April 19, 2010, and Judge Baxley issued his Order for Sanctions on July 1. In his Order, Judge Baxley found the Hospital's second removal was based upon the same grounds as the first removal, was without merit, and was interposed solely for delay. In ordering the sanctions, Judge Baxley considered the complexity of the multi-week docket and the difficulty and expense involved in cancelling one case and calling another. He appeared particularly perturbed by the inference that Appellants had been considering removal since Dr. Wieters filed his February 8 Memo in Opposition, and that the hassle and expense could have been avoided if Appellants had been upfront with the court regarding its intentions to remove a second time.[6]

[6] This inference arises from William Cleveland's affidavit, which states Appellants "said that the first time such arguments [allegedly supporting removal] had been made were in Plaintiff's memorandum in opposition to a motion for summary judgment" filed in February. Thus, Appellants were not

The sanctions ordered totaled roughly $68,000.00 and are summarized as follows:

- $53,685.65 for lost income to Dr. Wieters, trial costs and fees, and reasonable attorneys' fees;[7]
- $6,313.00 payable to the South Carolina Judicial Department to reimburse the cost of the salary and benefits of Judge Baxley, his law clerk, and the court reporter for being unable to operate the week for which trial was scheduled;
- $5,000.00 to the Access to Justice Commission for denying the public access to the court during the scheduled trial week, along with a letter to Executive Director Robin Wheeler explaining the reason for the payment;
- $2,550.00 to the Charleston County Clerk of Court to reimburse the cost of summoning and administering the jury panel for that week; and
- $50.00 to each juror for the inconvenience they suffered, along with a letter of apology and explanation.

Appellants appeal those sanctions beyond the lost income, costs, and fees, arguing a good faith removal to federal court cannot be the basis for sanctions, and that the trial judge abused his discretion in the order of sanctions.

ISSUES

Appellants present the following issues for review:

I. Can removal be the basis for an order of sanctions?

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blindsided by the references to the HCQIA the night before trial, but had been aware of Dr. Wieters' position for nearly one month.

[7] These sanctions have been resolved separately by the parties and are not at issue in this appeal.

II. Did the trial judge abuse his discretion in ordering sanctions?

STANDARD OF REVIEW

A trial court may impose sanctions on a party, a party's attorney, or both for filing a pleading, motion, or other paper to cause delay or when no good grounds exist to support the filing. *See* Rule 11, SCRCP; *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996). "A court imposing sanctions under Rule 11 should, in its order, describe the conduct determined to constitute a violation of the Rule and explain the basis for the sanction imposed." *Runyon*, 322 S.C. at 19, 471 S.E.2d at 162. When reviewing judge's order of sanctions, the appellate court takes its own view of the facts. *Father v. S.C. Dep't of Soc. Servs.*, 353 S.C. 254, 260–61, 578 S.E.2d 11, 14 (2003). "[W]here the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard." *Id.* at 261, 578 S.E.2d at 14. An abuse of discretion may be found if the trial court's conclusions lack reasonable factual support. *Runyon*, 322 S.C. at 19, 471 S.E.2d at 162.

ANALYSIS

I. Ability to Sanction

Appellants argue they should not have been sanctioned for the second removal because it was done in good faith. We disagree.

Rule 11 states,

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

Rule 11, SCRCP. A trial court may impose sanctions on a party, a party's attorney, or both for filing a pleading, motion, or other paper to cause delay or when no good grounds exist to support the filing. *See Runyon*, 322 S.C. at 19, 471 S.E.2d at 162. The sanctions may include: an order to pay the reasonable costs and attorneys' fees incurred by the party defending against the action brought in bad faith; a reasonable fine to be paid to the court; a reasonable monetary penalty to the party defending the action brought in bad faith; or a directive of a nonmonetary nature designed to deter the party or the party's attorney from bringing any future action in bad faith. *Id.*

We agree with both Judge Baxley's version of the facts and his conclusion that the second removal was not based on good grounds and was interposed solely for delay. While Rule 11 is evaluated by a subjective standard,[8] the rule still may be violated with a filing that is so patently without merit that no reasonable attorney could have a good faith belief in its propriety. We find such is the case here. Regarding the grounds for removal, first, it is clear that although Appellants cite different federal statutes to support their 2004 and 2010 removals, the underlying reason for both removals remains the same—Appellants' alleged defense under the HCQIA. The fact that they relied upon 2010 documents for their second removal does not change the reality that they were attempting to remove primarily because of their asserted defense under the HCQIA. Second, as Judge Houck noted, removal is based upon the claims alleged in the initial pleading. Dr. Wieters's complaint alleged a state law defamation claim, not a federal cause of action, and he never amended his pleading. As a defense, Appellants asserted the

[8] Prior to its 1983 amendment, Rule 11 of the Federal Rules of Civil Procedure provided a subjective standard for determining whether an attorney's actions violated the rule. The amendment, however, changed it to an objective standard. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) (recognizing the change from a subjective standard to an objective standard with the 1983 amendment to Rule 11). The South Carolina Rules of Civil Procedure, however, did not undergo a similar amendment. The notes to the rule demonstrate that the subjective standard has not been changed. Rule 11, SCRCP note ("This version of Rule 11(a) is not nearly so stringent as the latest version of the Federal Rule which became effective August 1, 1983.")

HCQIA provided absolute immunity from tort liability for defamation, and any reference Dr. Wieters's later made to the HCQIA was in response to that defense. Dr. Wieters simply asserted the HCQIA permitted the state law claim, meaning that it was not preempted or barred by the HCQIA, not that the HCQIA created an individual cause of action under which they were bringing the suit. Viewing all the pleadings and papers in context of each other and the lengthy history of this litigation, we find Appellants could not have formed a good faith belief the second removal was appropriate. We will not approve attorneys engaging in semantic games with the courts and allow artful crafting of "new" grounds for removal when no evidence exists to support a subjective belief that the plaintiff was asserting a federal cause of action.

As to the delay, Appellants were first aware of Dr. Wieters's references to the HCQIA in early February when they received the Memo in Opposition to the Motion for Summary Judgment. Even when Appellants received the pretrial brief and jury instructions the evening before the trial, they did not bring to the court the question of whether the filings created a basis for removal; instead, they sought the advice of a practicing member of the Bar and a law professor on the removability question. Appellants waited until mere hours before the commencement of the multi-week jury trial before filing for removal. Judge Baxley characterized this action as "a thinly veiled effort at a continuance." We agree with Judge Baxley's assessment. We do not suggest that Appellants were under an obligation to seek clarification from the court before filing for removal. However, Appellants continually contend the lateness of their removal was a result of not learning of Dr. Wieters's references to the HCQIA until the eleventh hour. This was simply not the case as they had received nearly identical language in the February 8 memo almost a month before receiving the proposed jury instructions and pretrial brief.

We take this opportunity to state definitively that vexatious removal is sanctionable conduct, and parties will be held accountable for the

unnecessary expense and delay caused by abuses of the right to removal.[9] We want to make clear that we do not intend to chill a defendant's exercise of its removal rights, and we are cognizant that a defendant may remove a case up to the very minute before trial. We note that Appellants in this case are not being sanctioned for removing at the last minute—Appellants' behavior goes far beyond simply exercising their right to remove a case to federal court. A finding of vexatious removal should be rare, but the case before us is an extreme one, and the coalescence of all the facts merit appropriate sanctions. Therefore, we find Judge Baxley did not err in ordering sanctions against Appellants.

II. Propriety of the Sanctions

As explained in *Runyon v. Wright*, a trial judge has wide discretion in ordering sanctions. Judge Baxley found Appellants' second removal attempt to be reprehensible and an improper delay tactic that cost the court system and the other party significant resources, time, and money. For that reason, Judge Baxley imposed stiff sanctions. While the unappealed portion of the ordered sanctions are standard and appropriate, we find the sanctions appealed from exceed the bounds of a judge's discretion.

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[9] Several other jurisdictions have upheld sanctions for improper and abusive removals. *See ITT Indus. Credit Co. v. Durango Crushers, Inc.*, 832 F.2d 307, 308 (4th Cir. 1987) (finding "the removal petition was so patently without merit that the inescapable conclusion is that it was filed in bad faith," thus the federal district court properly imposed sanctions for removing the case when clearly there was no basis for removal); *Massad v. Greaves*, 977 A.2d 662 (Conn. App. 2009) (state court is the appropriate forum to sanction party for abuse of removal process); *Nodier v. Ungarion & Eckert, LLC*, No. 2006 CA 1461, 2007 WL 1300805, *7–8 (La. App. May 4, 2007) (state court award of sanctions appropriate for improper removal, but sanctions must solely encompass matters relating to the removal); *Stratton v. Frankwell Inv. Serv., Inc.*, Nos. 01-99-004050CV, 01-99-00459-CV, 2000 WL 233110, *3 (Tex. App. Mar. 2, 2000) (upholding state trial court's sanction for wrongful removal intended to delay trial).

The award to the other party of its detailed, itemized costs and fees incurred as a result of the improper removal plainly is allowed under the express language of Rule 11, SCRCP. However, we find Judge Baxley abused his discretion in going beyond the conventional awards of costs and fees when he required Appellants to reimburse the South Carolina Judicial Department for the cost of the court's salary and benefits for the week it was unable to proceed with the scheduled trial, to reimburse the Charleston County Clerk of Court for the expense it incurred in summoning and administering the jury panel, to pay $5,000.00 to the Access to Justice Commission with a letter of apology to Robin Wheeler, and to pay $50.00 to each juror with a letter of apology. Accordingly, we reverse those sanctions.

CONCLUSION

Under the specific facts of this case, we find Appellants' second attempt at removal to be sanctionable. Further, the appealed sanctions were an abuse of the trial judge's discretion. Therefore, we affirm Judge Baxley's order as modified to remove the sanctions not relating to reimbursing the other party for its costs and fees.

BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., concurring in a separate opinion. HEARN, J., concurring in a separate opinion.

JUSTICE PLEICONES: I concur but write separately as I would find no sanctionable conduct here. [10] I agree with Justice Hearn that these appellants had a good faith basis for removing this case in March 2010. I disagree with both the majority and with Justice Hearn, however, that it was appellants' burden to take further action after receiving Dr. Wieters' February 8 "Memo in Opposition to the Motion for Summary Judgment." Moreover, having received opinions on March 2 from three attorneys and a law professor that the new assertions in Dr. Weiters' Pre-Trial Brief, filed at 11:48 pm on March 1, rendered the case removable, appellants timely filed this removal motion at 1:07 pm on March 2. In my opinion, the delay occasioned by this request for removal, while inconvenient, is no more than that attendant to any such removal, and therefore I find no evidence it was interposed for delay.

I concur in the majority's decision to reverse all sanctions challenged in this appeal.

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[10] In light of this, I would leave for another day the authority of a circuit judge to impose a state sanction for removal where the federal court chose not to impose one under 28 U.S.C. § 1447(c) (1996).

JUSTICE HEARN: I concur in the result reached by the majority. I wholeheartedly agree with the majority's statement that vexatious removal can warrant sanctions, and I agree that the sanctions before us on appeal should be reversed. While I further agree with the finding that the second removal was interposed for delay, it is my opinion that Appellants had a good faith belief in the legal underpinnings of the second removal.

In my view, the majority places too much emphasis on the original pleadings filed in this case. All parties agree that based on the district court's resolution of the original removal, the complaint itself does not raise questions of federal law. However, removal is not always "based upon the claims alleged in the initial pleading"; 28 U.S.C. § 1446(b) specifically permits removal "[i]f the case stated by the initial pleading *is not removable*" and it later becomes removable based on an "amended pleading, motion, order or *other paper*." (emphasis added). At this juncture, we must therefore examine Appellants' belief that these other papers stated a federal question, not whether the complaint implicated questions of federal law.

In 2004, Appellants' removal was premised upon the necessity of resolving substantial questions of federal law raised by a state law cause of action, not traditional federal question jurisdiction.[11] The district court remanded this matter because the only federal questions raised related to Appellants' defenses. However, Appellants did remove specifically on the basis of pure federal question jurisdiction in 2010.[12] Although the complaint itself only raised state law claims, Appellants relied on section 1446(b) to remove based on Dr. Wieters' submissions to the circuit court in the weeks leading up to trial. Appellants accordingly removed because these other papers—the memorandum, pre-trial brief, and proposed jury instructions

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[11] This is known as the "litigation provoking problem." *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808-810 (1986). In those cases, jurisdiction is not premised on the existence of federal law creating a cause of action, but instead on the "presence of a federal issue in a state-created cause of action." *Id.* at 809-10.

[12] Appellants also reargued the 2004 grounds in the alternative. It is in response to these reargued grounds that the district court repeated that federal questions raised solely as a defense are not a sufficient basis for removal.

stating that the HCQIA grants "explicit authority" for his claims and even preempts certain areas of state law—purported to raise a federal law-based claim. Thus, contrary to the view of the circuit court and accepted by the majority, Appellants did not seek to remove on the same grounds in 2010 as they did in 2004. Furthermore, the second removal was not based on Appellants' defenses, but rather on Dr. Wieters' statements that *he* was bringing his claims under the explicit authority of federal law.

Given the statements contained in Dr. Wieters' filings and the advice Appellants sought from their general counsel, counsel for their insurance company, a law professor, and a highly respected local attorney, I believe the only reasonably conclusion is that Appellants had a good faith basis for removal in 2010. Based on the record before the Court, it is purely conjectural to conclude otherwise. Additionally, in my opinion the removal was not based on frivolous grounds but rather on the novel issue within the Fourth Circuit of whether the HCQIA provides for an independent cause of action. The fact that the district court predicted the Fourth Circuit would not find a private cause of action has no bearing on Appellants' subjective beliefs. Therefore, this is not a situation with "attorneys engaging in semantic games with the courts" but rather attorneys paying close attention to arguments made by their adversaries during litigation. While this undoubtedly is a fine line to walk, the record before us in this case convinces me that Appellants had a good faith belief in the grounds supporting the second removal.

However, I agree with the circuit court's conclusion that the removal was interposed for delay. I too wish to reiterate that a defendant generally has a right to remove a case up to the start of trial. Holding otherwise would undoubtedly chill the statutory right a defendant has to remove a case to federal court. The record shows Appellants received notice of Dr. Wieters' arguments knowing full well that the trial had a date certain set less than one month away. Moreover, Appellants could and should have sought clarification from Dr. Wieters or taken some other action to determine whether he was raising a federal question before receiving the additional filings on the eve of trial. Given the impending date certain for trial, there certainly were steps Appellants could have taken to ameliorate the inevitable delay their removal would cause. Because they did not do so in spite of this knowledge, I do not believe the circuit court abused its discretion.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cheryl DiMarco, Respondent,

v.

Brian DiMarco, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
Barry W. Knobel, Family Court Judge

Opinion No. 27017
Submitted June 22, 2011 – Filed August 1, 2011

REVERSED

Brian A. DiMarco, of Greenville, pro se, Petitioner

Kim R. Varner, of Varner & Segura, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: Brian A. DiMarco (Petitioner) sought a writ of certiorari to review the court of appeals' decision that affirmed as modified the family court's contempt order against him. We reverse the court of appeals because the sanction ordered by the family court violates Petitioner's rights under the Sixth Amendment of the United States Constitution.

FACTS/PROCEDURAL BACKGROUND

Petitioner was subject to a court order to make monthly child support payments to Cheryl A. DiMarco (Mother). According to Petitioner, he had made child support payments for over ten years before Mother filed for an increase in 2006. The family court instead decreased the support order and ordered the payments be made through the court beginning on April 1, 2008. Petitioner asserts he timely attempted to make the first payment to the court, but the court lacked record of the order and could not accept the payment.

On May 13, 2008, the clerk of the family court filed a Rule to Show Cause because Petitioner was behind on his child support payments. The hearing was scheduled for June 25, 2008, at nine o'clock in the morning. On June 23, 2008, Petitioner paid the arrearage, bringing his child support account to a zero balance.

On the morning of June 25, Petitioner did not appear on time for the Rule to Show Cause hearing before Judge Johnson. Accordingly, Judge Johnson issued a warrant for Petitioner's arrest. No testimony was taken on whether or not Petitioner had failed to pay child support. Shortly thereafter, Petitioner arrived at the courthouse. Because Judge Johnson discovered he and Petitioner were members of the same Rotary Club, Judge Johnson asked Judge Knobel to preside over the hearing.

During the hearing before Judge Knobel, everyone who spoke noted Petitioner did not owe any outstanding child support at that time: the clerk of court ("Our records show that he has a zero balance at this time."), Mother's attorney ("I understand that since then he did pay the correct amount. So I

don't think there's any dispute."), Judge Knobel ("I know you have a zero balance at this time."), and Petitioner. During his argument, Mother's attorney stated, "I think the court needs to very much impress upon him taking the law into his own hands and not showing up, not being here on time it's just, just it's driving everyone nuts."

From the bench, Judge Knobel gave the following order:

> The sentence is going to be 12 months, it'll be civil contempt I will suspend that he is to have a $250.00 court cost that'll be due by July 11th. We'll let him out of detention at this point in time.

His written order also indicates a twelve month suspended confinement and $250.00 in court costs payable no later than July 11, 2008. The court of appeals affirmed as modified, holding Petitioner was sentenced to twelve months incarceration, suspended upon his payment of $250.00 in court costs. We granted a writ of certiorari to review that decision.

STANDARD OF REVIEW

A finding of contempt rests within the sound discretion of the trial judge. *Durlach v. Durlach*, 359 S.C. 64, 70, 596 S.E.2d 908, 912 (2004) (citation omitted). Such a finding should not be disturbed on appeal unless it is unsupported by the evidence or the judge has abused his discretion. *Id.*

ANALYSIS

Petitioner argues the court of appeals erred in affirming as modified the family court's contempt order. We agree.

Civil contempt must be shown by clear and convincing evidence. *Poston v. Poston*, 331 S.C. 106, 113, 502 S.E.2d 86, 89 (1998). Criminal contempt must be shown beyond a reasonable doubt. *Id.* In determining whether a contempt sanction is criminal or civil, one must identify the purpose for which the sanction is imposed. Whereas civil contempt is either

coercive or remedial in nature, criminal contempt is purely punitive. *Id.* at 111, 502 S.E.2d at 88. Incarceration may be either civil or criminal. *Id.* at 112, 502 S.E.2d at 89. The distinguishing factor is whether the incarceration is for a definite period of time, which is the hallmark of criminal contempt, or whether the contemnor may avoid or cut short the incarceration by complying with the court's directive, which indicates civil contempt. *Id.* The difference between the two is substantial because the constitutional safeguards provided in the Sixth Amendment[1] may be triggered in criminal contempt proceedings. A contemnor has a constitutional right to a jury trial before a criminal sentence of more than six months incarceration may be imposed. *Curlee v. Howle*, 277 S.C. 377, 385, 287 S.E.2d 915, 919 (1982).

Judge Knobel, as the court of appeals noted, stated he intended to hold Petitioner in civil contempt, not criminal contempt. The court of appeals said "the family court's contempt sanction has elements of both civil and criminal contempt." *DiMarco v. DiMarco*, Op. No. 2010-UP-289 (S.C. Ct. App. filed May 24, 2010). The civil element of the sanction, the court found, was that the incarceration would not be imposed unless Petitioner failed to pay the $250.00 to the court. The criminal element was that if Petitioner failed to pay the $250.00, he would be incarcerated for a definite period of time. To remedy the family court's unclear sanction, the court of appeals modified the

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[1] The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

order and held Petitioner must pay the $250.00 in court costs, and if he failed to do so by the deadline established, then he would be incarcerated for twelve months. In doing so, the court of appeals crafted a sanction that violates Petitioner's Sixth Amendment rights.

We disagree with the court of appeals that the ordered sanction had elements of both civil and criminal contempt. A sanction is either civil or criminal; it cannot be both because they serve different purposes. A judge certainly may order both a civil and a criminal contempt sanction, and, in that case, the sanctions should be separate and distinct. That is not what the family court judge did in this case. The ordered sanction was purely punitive in nature as Petitioner was in full compliance with the support order and there was no necessary act to be compelled through the contempt sanction.

The $250.00 in court costs, ostensibly for appearing late to the first Rule to Show Cause hearing that day, was an allowable criminal contempt sanction because it punished Petitioner for his tardiness and lack of respect for the court. The fine itself, in that regard, is unobjectionable. However, ordering a definite twelve month incarceration if Petitioner failed to pay the court costs on time violates Petitioner's right to a jury trial. *Curlee*, 277 S.C. at 385, 287 S.E.2d at 919.

When incarceration is for a definite period of time and the contemnor may not purge the contempt by compliance with a court order, it is criminal incarceration and may trigger the protections of the Sixth Amendment. The court of appeals recognized the incarceration was for a definite period of time, but attempted to introduce a civil contempt element by saying Petitioner could avoid the sentence altogether by paying the court costs as ordered. There is no doubt Petitioner could avoid the incarceration by paying the costs, but clearly any litigant can avoid further sanctions by simple compliance. The problem with this order is that his noncompliance would trigger a twelve month, definite, non-purgeable incarceration, and our law requires Petitioner be afforded a jury trial before receiving such a sentence. The trial transcript is clear that Petitioner was not allowed a jury trial, nor was he allowed to have his attorney present.

CONCLUSION

For the above reasons, we reverse the court of appeals' decision and the ordered sanctions.

PLEICONES, BEATTY and KITTREDGE, JJ., concur. HEARN, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Glenda Barron, Petitioner,

v.

Labor Finders of South Carolina, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 27018
Heard April 7, 2011 – Filed August 1, 2011

AFFIRMED AS MODIFIED

A. Christopher Potts, of Hitchcock & Potts, of Charleston, for Petitioner.

Paul Martin Platte, of Rogers Townsend & Thomas, of Columbia, for Respondent.

JUSTICE PLEICONES: We granted certiorari to review the Court of Appeals' decision in Barron v. Labor Finders of South Carolina, 384 S.C. 21, 682 S.E.2d 271 (Ct. App. 2009). We affirm as modified.

FACTS

A. Employment History

Petitioner began working for respondent in respondent's Charleston office around 1990. During petitioner's employment, respondent planned to open a second office location in the Charleston area and informed petitioner she would be promoted to regional sales manager for both Charleston locations. In 2004, petitioner signed an agreement acknowledging her status as an at-will employee and setting her compensation as "straight commission" of 3% of customer payments deposited and posted by both Charleston offices each week, to be paid within ninety days of the invoice date.

The second Charleston office opened in September 2004 and began earning income that November. In January of the following year, petitioner became concerned that respondent had not paid her the full amount of commissions she had earned. Petitioner relayed her concerns and subsequently met with her supervisor to discuss the matter. During the meeting, petitioner showed the supervisor a copy of the compensation agreement, of which the supervisor was previously unaware. The supervisor contacted respondent's owner, who acknowledged that, due to an oversight, he forgot to pay petitioner the commissions from the new Charleston location. Petitioner never filed a written complaint with the Department of Labor, Licensing, and Regulation, as outlined by the Payment of Wages Act ("the Act").[1]

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[1] The Act requires an employer timely pay all wages due to an employee. S.C. Code Ann. § 41-10-40 (Supp. 2010). Section 41-10-60 of the South Carolina Code states the Department of Labor may institute an investigation

Respondent terminated petitioner's employment the next day, stating it was forced to downsize in light of recent budget cuts. Eight or nine days later, respondent issued petitioner a check in excess of the amount she was owed for commissions.

B. Procedural History

Petitioner instituted this action, alleging violations of the Act, breach of contract, breach of contract accompanied by a fraudulent act, and wrongful termination in violation of public policy. The circuit court granted summary judgment in favor of respondent as to all causes of action.

Petitioner appealed the entry of summary judgment as to her wrongful termination claim. The Court of Appeals affirmed.

ISSUE

Did the Court of Appeals err in affirming the circuit court's grant of summary judgment as to petitioner's wrongful termination claim?

STANDARD OF REVIEW

When reviewing the grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002). Summary judgment is appropriate when the pleadings, depositions, affidavits and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Id.; Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. Fleming, supra.

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when an employee alleges a violation of the Act. S.C. Code Ann. § 41-10-60 (Supp. 2010).

LAW/ANALYSIS

Petitioner argues the Court of Appeals erred in holding she could not maintain a wrongful termination claim under the public policy exception to the at-will employment doctrine. While we agree the Court of Appeals erred in its analysis, we nonetheless affirm as modified.

In South Carolina, employment at-will is presumed absent the creation of a specific contract of employment. Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 310, 698 S.E.2d 773, 778 (2010). An at-will employee may be terminated at any time for any reason or for no reason, with or without cause. Id. Under the "public policy exception" to the at-will employment doctrine, however, an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy. Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985). The public policy exception clearly applies in cases where either: (1) the employer requires the employee to violate the law, Ludwick, supra, or (2) the reason for the employee's termination itself is a violation of criminal law. Culler v. Blue Ridge Elec. Co-op., Inc., 309 S.C. 243, 422 S.E.2d 91 (1992) (employee was terminated after he refused to contribute to political action fund, and his termination violated S.C. Code Ann. §16-17-560).

While the public policy exception applies to situations where an employer requires an employee to violate the law or the reason for the termination itself is a violation of criminal law, the public policy exception is not limited to these situations. See Garner v. Morrison Knudsen Corp., 318 S.C. 223, 456 S.E.2d 907 (1995); Kieger v. Citgo, Coastal Petroleum, Inc., 326 S.C. 369, 482 S.E.2d 792 (Ct. App. 1997). In both of these cases, the courts declined to address whether the public policy exception applied because, in their procedural posture, it was not appropriate to decide the novel issue without further developing the facts of the case. Garner, 318 S.C. at 227, 456 S.E.2d at 910 n.3 (appeal from a grant of a 12(b)(6), SCRCP, motion to dismiss); Kieger, 326 S.C. at 373, 482 S.E.2d at 794 (same). Both cases make clear, however, that an at-will employee may have a cause of

action for wrongful termination even if the discharge itself did not violate criminal law or the employer did not require the employee to violate the law.

The public policy exception does not, however, extend to situations where the employee has an existing statutory remedy for wrongful termination. See Dockins v. Ingles Markets, Inc., 306 S.C. 496, 413 S.E.2d 18 (1992) (employee allegedly terminated in retaliation for filing complaint under Fair Labor Standards Act had existing statutory remedy for wrongful termination); see also Epps v. Clarendon County, 304 S.C. 424, 405 S.E.2d 386) (1991) (employee had an existing remedy for wrongful termination under Title 42 U.S.C. § 1983).

Here, relying largely on Lawson v. S.C. Dep't of Corrections, 340 S.C. 346, 532 S.E.2d 259 (2000), the Court of Appeals held the public policy exception did not apply as petitioner was not asked to violate the law and the reason for her termination itself was not a violation of criminal law. Barron, at 28, 682 S.E.2d at 274. We find the Court of Appeals misread Lawson as limiting the public policy exception to these two situations. In Lawson, we determined the employee could not establish a claim for wrongful termination under the public policy exception where the employee alleged he was terminated in retaliation for reporting hiring policy violations under the Whistleblower statute. Although we initially noted the employee's allegations did not support a wrongful termination claim as he was not asked to violate the law and his termination itself did not violate the criminal law, we ultimately found the public policy exception did not apply because the employee was limited to the existing statutory remedy for wrongful termination provided by the Whistleblower statute. Lawson, at 350, 532 S.E.2d at 261.

Here, the Court of Appeals correctly recognizes that the public policy exception applies to situations where an employer requires an employee to violate the law, or the reason for the termination itself is a violation of criminal law. We find the court erred, however, in holding the exception is limited to these situations where our courts have explicitly held the public policy exception is not so limited. Garner, supra; Kieger, supra.

Accordingly, we overrule the Court of Appeals' opinion to the extent it holds the public policy exception applies only in situations where the employer asks the employee to violate the law or the reason for the termination itself is a violation of criminal law.

Although we find the Court of Appeals erred in its analysis, we nonetheless affirm its holding that summary judgment was proper here. Petitioner largely relies on Evans v. Taylor Made Sandwich Co., 337 S.C. 95, 522 S.E.2d 350 (Ct. App. 1999) to support her contention she can maintain a claim for wrongful termination in violation of public policy. Specifically, petitioner argues she can pursue a claim for wrongful termination under Evans because there was evidence respondent fired her in retaliation for complaining internally about her unpaid wages. Because Evans has never been reviewed by this Court, we take the opportunity to address the holdings set forth in that opinion, as relates to petitioner's argument.

In Evans, the Court of Appeals held an employee may maintain a claim for wrongful termination in violation of public policy when he is terminated in retaliation for reporting a violation of the Act to the Department of Labor. In that case, several employees filed wage complaints with the Department of Labor, which prompted an investigation of the employer. Id. at 98, 522 S.E.2d at 351. Shortly after the investigation was complete, the employer terminated all of the employees. Id. A jury awarded the employees damages for wrongful termination. Id. at 99, 522 S.E.2d at 351. The Court of Appeals affirmed the jury verdict, holding the employees could maintain a claim for wrongful termination in violation of public policy because, while the law of this state provides a remedy for the recovery of wages which remain unpaid after termination, it does not provide a remedy for wrongful termination itself. Id. at 102, 522 S.E.2d at 353. The court also found there was sufficient evidence to affirm the jury's determination that discharging an employee in retaliation for filing a complaint with the Department of Labor was a violation of the public policy of this state. Id. at 103, 522 S.E.2d at 354.

We overrule Evans to the extent it holds that a jury may determine whether discharging an employee on certain grounds is a violation of public policy. In this state, an at-will employee has a cause of action for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy. Ludwick, supra. The determination of what constitutes public policy is a question of law for the courts to decide. See Citizens' Bank v. Heyward, 135 S.C. 190, 133 S.E. 709, 713 (1925) ("The primary source of the declaration of public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration."). It is not a function of the jury to determine questions of law such as what constitutes public policy. Rather, once a public policy is established, the jury would determine the factual question whether the employee's termination was in violation of that public policy.

While we overrule Evans to that extent, we agree with the Evans court that there is no existing statutory remedy for wrongful termination within the Act that would prohibit an employee from maintaining a claim based upon a violation of public policy. The Act provides a statutory remedy whereby an employee may recover wrongfully withheld wages. See S.C. Code Ann. § 41-10-80(C) (Supp. 2010). The Act does not, however, provide a statutory remedy whereby an employee may recover damages for wrongful termination. Because the Act does not provide a statutory remedy for wrongful termination, we find an action for wrongful termination cannot be precluded under the holdings outlined in Dockins, supra, and Epps, supra.

Although we agree with the Evans court that there is no statutory remedy within the Act that would *preclude* an employee from maintaining a wrongful termination action, we nevertheless decline to address whether the public policy exception applies when an employee is terminated in retaliation for filing a wage complaint with the Department of Labor. We find the Court of Appeals properly affirmed the circuit court's grant of summary judgment because there is simply no evidence the Act was ever implicated. Petitioner never filed a complaint with the Department of Labor as required by the Act,

nor did she ever indicate to respondent she had filed or intended to file a complaint. Thus, viewing the evidence in the light most favorable to petitioner, there is no genuine issue of material fact whether petitioner was terminated in retaliation for availing herself of the protections of the Act. Fleming, supra.

We do not foreclose the possibility that a claim for wrongful termination in violation of public policy may exist when an employee is terminated in retaliation for instituting a claim under the Act. We simply decline to address the issue at this time because there is no evidence petitioner was terminated in retaliation for filing or threatening to file such a claim.

CONCLUSION

While the Court of Appeals erred in its analysis, we nonetheless find the circuit court's grant of summary judgment was properly affirmed. Accordingly, the opinion of the Court of Appeals is

AFFIRMED AS MODIFIED.

TOAL, C.J., BEATTY, KITTREDGE, JJ., and Acting Justice Brooks Goldsmith, concur.

The Supreme Court of South Carolina

In the Matter of Scott Matthew Wild, Petitioner

ORDER

Respondent was suspended on February 7, 2011, for a period of ninety (90) days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

July 28, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Aaron R. Allen, M.D., Respondent,

v.

Pinnacle Healthcare Systems, LLC d/b/a Grand Strand Imaging and d/b/a Myrtle Beach Medical Center; Robert J. Gunn; David V. Vandergriff; Rick Joyce; and Timothy W. Gunn, Defendants,

of whom Robert J. Gunn, Rick Joyce, and Timothy W. Gunn are, Appellants.

Appeal From Horry County
Ralph P. Stroman, Master-in-Equity

Opinion No. 4855
Submitted April 1, 2011 – Filed July 27, 2011

AFFIRMED IN PART AND REVERSED IN PART

Susan P. MacDonald and Kathleen King, of Myrtle Beach, for Appellants.

James P. Stevens, Jr., of Loris, for Respondent.

SHORT, J.: Robert Gunn, Rick Joyce, and Timothy Gunn[1] (collectively, Appellants) appeal from the master's order finding them jointly and severally liable for Dr. Aaron Allen's unpaid wages, prejudgment interest, and statutory attorney's fees. Appellants argue the master erred in: (1) finding them personally liable to Allen under the South Carolina Payment of Wages Act (the Act); and (2) awarding damages to Allen. We affirm in part and reverse in part.[2]

FACTS

Allen is a neurologist, who owned Atlantic Coastal Neuroscience Associates, LLC (Atlantic). Atlantic had offices in Lumberton, North Carolina, and Myrtle Beach, South Carolina. Appellants are former members of Pinnacle Healthcare Systems, LLC (Pinnacle), which was organized in North Carolina.[3] Pinnacle owned and operated Myrtle Beach Medical Center and Grand Strand Imaging. In June 2000, Allen, as the CEO of Atlantic, signed an employment contract (Contract) with Pinnacle. Pinnacle hired Allen to work as a physician and neurologist, and to be the Director of Professional and Specialty Services at Myrtle Beach Medical Center and Grand Strand Imaging. The terms of the Contract, prepared by Pinnacle, provided that Pinnacle was hiring Allen for a term of five years, beginning June 26, 2000, and ending June 26, 2005. Pinnacle agreed to pay Allen a base salary of $1,500 per month, with additional compensation bonuses of $25,000 per month payable on the first and the fifteenth day of each month. Additionally, at the end of each month, Pinnacle agreed to pay Allen a bonus

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[1] The original named defendants included: Pinnacle Health Care Systems, LLC d/b/a Grand Strand Imaging and d/b/a Myrtle Beach Medical Center; Robert J. Gunn; David V. Vandergriff; Rick Joyce; and Timothy W. Gunn. Pinnacle failed to answer Allen's complaint, was in default, and was defunct at the time of trial.

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

[3] Robert Gunn was the executive manager and owned forty percent of Pinnacle. Rick Joyce and Timothy Gunn were both members and owned twenty and fifteen percent of Pinnacle, respectively. Robert Gunn and Joyce testified they handled the finances and payroll for Pinnacle.

of sixty percent of collections to apply to all electrodiagnostic procedures or techniques performed, as well as other diagnostic procedures developed or used by Allen, less his regular salary. The Contract provided: "In the initial transitional portion of the contract while [Allen] is making arrangements to leave his Lumberton, North Carolina practice, his pay will be prorated to [$1,000] per day (minimum of 8 hours on the job each day)." The Contract was signed only by Allen and David Vandergriff, the operating manager of Pinnacle, on behalf of Pinnacle. Allen worked for Pinnacle until March 12, 2002.

Allen filed a complaint against Pinnacle, Vandergriff, and Appellants, alleging they failed to pay him wages in violation of the Act. Allen alleged Pinnacle owed him $780,000.[4] Allen's complaint also alleged breach of contract and sought injunctive relief. Allen additionally sought to pierce the corporate veil and the appointment of a receiver for Pinnacle.

By a consent order of reference, the parties agreed to refer the case to J. Stanton Cross, Jr., the Master-in-Equity for Horry County. A trial was held before Ralph P. Stroman on January 15, 2009.[5] During the trial, Allen elected to proceed solely on the claim pursuant to the Act. Appellants also made a motion for directed verdict during trial, which the master denied. The master filed his order on February 20, 2009, finding Appellants jointly and severally liable for Allen's unpaid wages, prejudgment interest, and statutory attorney's fees. Appellants filed a Rule 59(e), SCRCP, motion to reconsider, which the master denied on April 9, 2009, after a hearing on the matter. This appeal followed.

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[4] Allen testified he received his last payment from Pinnacle on September 18, 2001.

[5] It is not clear from the record whether Ralph P. Stroman was acting as a Special Standing Referee for Horry County, as listed on the cover of the briefs and record on appeal, or if he was acting as Master-in-Equity for Horry County as he signed his February 20, 2009 Order, or if he was acting as the Interim Master-in-Equity as he signed his April 9, 2009 Order Denying Motions to Reconsider and to Alter or Amend Judgment. Therefore, for the purpose of this opinion, we refer to him as a Master-in-Equity.

STANDARD OF REVIEW

Actions for violation of the Act are actions at law. Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 307, 698 S.E.2d 773, 777 (2010). When reviewing an action at law, referred to a master or special referee for final judgment with direct appeal to the supreme court or the court of appeals, the appellate court's jurisdiction is limited to correcting errors of law, and the appellate court will not disturb the master or special referee's findings of fact as long as they are reasonably supported by the evidence. Linda Mc Co. v. Shore, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010).

LAW/ANALYSIS

I. South Carolina Payment of Wages Act

Appellants argue the master erred in finding them personally liable to Allen under the Act. We disagree as to Appellants Robert Gunn and Rick Joyce, but agree as to Appellant Timothy Gunn.

The Act, found in sections 41-10-10 to -110 of the South Carolina Code (Supp. 2010), defines "employer" as "every person, firm, partnership, association, corporation, receiver, or other officer of a court of this State, the State or any political subdivision thereof, and any agent or officer of the above classes employing any person in this State." S.C. Code Ann. § 41-10-10(1) (Supp. 2010). The Act also defines "wages" as "all amounts . . . which are due to an employee under any . . . employment contract." S.C. Code Ann. § 41-10-10(2) (Supp. 2010). Section 41-10-30(A) provides that any changes in the "normal hours and wages agreed upon [and] the time and place of payment . . . must be made in writing at least seven calendar days before they become effective." S.C. Code Ann. § 41-10-30(A) (Supp. 2010). Section 41-10-40 generally requires an employer to timely pay all wages due, and section 41-10-50 provides that when an employer discharges an employee, it must timely pay him all wages due. S.C. Code Ann. §§ 41-10-40, 50 (Supp. 2010).

In Dumas v. InfoSafe Corp., 320 S.C. 188, 195, 463 S.E.2d 641, 645 (Ct. App. 1995), this court interpreted the Act, and held the legislature intended to impose individual liability on agents or officers of a corporation who knowingly permit their corporation to violate the Act. "To hold otherwise would require us to ignore the words 'and any agent or officer of the above classes.'" Id. "[T]he South Carolina Payment of Wages Act is remedial legislation designed to protect working people and assist them in collecting compensation wrongfully withheld." Id. at 194, 463 S.E.2d at 645.

Appellants argue Allen must prove they held more than a mere membership or a management position in Pinnacle to hold Appellants individually liable. Appellants cite to section 33-44-303(a) of the South Carolina Code, which provides "[a] member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager" and maintain this applies to Pinnacle. S.C. Code Ann. § 33-44-303(a) (2006). Appellants assert that under Temple v. Tec-Fab, Inc., 370 S.C. 383, 389, 635 S.E.2d 541, 544 (Ct. App. 2006), rev'd in part on other grounds, 381 S.C. 597, 675 S.E.2d 414 (2009), and Dumas, they must have knowingly permitted Pinnacle to violate the Act to be personally liable for paying wages that were withheld from Allen, and no evidence exists that they knowingly permitted or directed Pinnacle to violate the Act.

Additionally, Appellants claim that after they transferred their interest in Pinnacle to Vandergriff on October 1, 2001, they were no longer members of Pinnacle and no longer had any authority to be involved with the company. Appellants argue it is irrelevant that they signed the transfer of interest to Vandergriff on December 21, 2001, because the document said the transfer of ownership was to be effective as of October 1, 2001. They assert that "express terms and provisions in a contract as to time are effective and cannot be ignored," and the effective date of a contract is the date the contract becomes enforceable or otherwise takes effect, which sometimes differs from the date on which it was enacted or signed.

Appellants maintain that because they transferred their interest in Pinnacle on October 1, 2001 to Vandergriff, they were no longer responsible for the payment of Allen's wages. However, the "Transfer of Interest of Pinnacle HealthCare Systems, LLC" agreement was not signed and dated until December 21, 2001, and Vandergriff's answers to Allen's interrogatories confirmed the transfer of interest did not occur until December 21, 2001. Robert Gunn and Joyce also signed an "Asset Purchase Agreement" on October 25, 2001, selling Pinnacle to Grand Strand Imaging. The Asset Purchase Agreement states in paragraph 3(b) that Appellants "shall solely retain, pay, perform, defend, and discharge all[] liabilities and obligations of the Seller of every kind . . . including, but not limited to, any duty to any employee to pay wages, compensation, or health, unemployment, or pension benefits . . . of any kind . . . ." The Agreement also states in paragraph 11 that "Seller shall retain the sole liability, which Buyer does not assume, for all salaries, compensation, vacation time, sick time and other benefits accrued for the benefit of its employees prior to the Closing Date." Additionally, Joyce testified that after October 1, 2001, he had to submit financials to Southeastern Radiology, and file a corporate tax return for Pinnacle. Furthermore, on March 21, 2002, Robert Gunn signed and filed Pinnacle's Annual Report with the North Carolina Secretary of State.

In Vandergriff's answers to Allen's interrogatories, he states that until a few months prior to when Pinnacle was closed in February/March 2002, Robert Gunn or Timothy Gunn and Joyce "were in possession of almost all, if not all, of the books and records of [Pinnacle]'s practice." He further stated that Robert Gunn and Joyce may still have possession of these documents, including bank account records, payroll records for all employees, and state employment security commission forms for all employees. Vandergriff explained that when Appellants transferred ownership to him, they gave him "few, if any, corporate documents," and shortly after the transfer, the practice was closed because of a criminal investigation by the Drug Enforcement Agency.

Allen testified he received his last paycheck on September 18, 2001, and it was for his work in August 2001. He testified he then informed Robert

Gunn, Joyce, and Vandergriff in late 2001 that he was not being paid his wages. Robert Gunn and Joyce testified they handled the finances and payroll for Pinnacle. They testified Allen never told them he was not being paid, but September 18, 2001 was the last date that all the employees were paid. They claimed they were not responsible for paying employees after that date. Robert Gunn testified he did not think anyone was still working at the company after they left. Allen testified none of the members told him the interest in Pinnacle had been transferred or that Robert Gunn and Joyce no longer had an interest in the company.

On March 19, 2002, Allen's attorney sent a letter to Pinnacle, formally demanding that Pinnacle pay his wages and other amounts pursuant to the Contract. Appellants objected to the introduction of the letter as hearsay, but did not deny having received it.[6] Robert Gunn testified he received the letter from Allen's attorney, and responded that Allen should direct his inquiries to Vandergriff because he was no longer a part of Pinnacle; however, Gunn did not present a copy of the letter he allegedly sent back to Allen, and he continued to pay the debts of Pinnacle for years after the transfer. Joyce also admitted he received the letter. Joyce testified he and Robert Gunn decided to leave the company because it was in financial trouble, but they never told the employees they were leaving or they might not be paid their wages. The Contract provided that if Allen was "terminated because of business reversals, change of venue, reorganization of the parent corporation, change of employment . . . then [sixty] days notice must be given and termination payment equal to [$240,000] for each remaining year of the contract." Although Pinnacle did not explicitly terminate Allen's employment, they effectively did so by ceasing to pay him for his work, and Pinnacle gave him no notification that the company was being sold or that he might not receive any more paychecks. Allen worked in excess of six months without being paid any wages, and he left in March 2002, after being constructively discharged.

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[6] Although Appellants objected to the letter as hearsay, they did not object to Allen testifying as to the contents of the letter. The master admitted the letter subject to the objection, and allowed Allen to testify about what he remembered.

The master's order concludes:

> [I]t becomes obvious that [Appellants] had an obligation to advise the employees who were working and not getting paid that they may not get paid so they would not continue working without the payment of wages. . . . [I]t is inconceivable and incredible that [Appellants] did not know that [Allen] was not being paid his wages. In light of the fact that both R. Gunn and R. Joyce testified that they handled the finances and payroll of the LLC and that every two weeks R. Joyce got a list from Vandergriff as to who was to be paid on payroll, I find that [Appellants] knew that [Allen] was not getting paid and knowingly failed to pay [Allen] his wages in violation of [the Act].

We find the master's findings of fact are reasonably supported by the evidence, and the master did not err in finding Appellants Robert Gunn and Joyce are personally liable to Allen under the Act.

However, we find the master erred in finding Appellant Timothy Gunn personally liable to Allen. Timothy Gunn was listed as a member of Pinnacle and owned fifteen percent of the company. Appellants assert there was no evidence that he was an officer or agent of Pinnacle, that he was involved in the operation of the company, or that he had any knowledge or contact with Allen. The only testimony about Timothy's involvement in Pinnacle came from his brother, Robert Gunn, who testified Timothy invested $40,000 in Pinnacle, and "it was [his] way of trying to get [his], rise my brother up a little bit out of his station in life, see if this would help him." Therefore, without evidence that Timothy Gunn knowingly permitted Pinnacle to violate the Act, we cannot hold him liable simply because he was a member of Pinnacle.

Appellants also argue Allen was not an employee; thus, they were not personally liable for his wages. However, Appellants cite no law for this assertion. Therefore, we find Appellants abandoned this issue on appeal by failing to cite to any authority. See Rule 208(b)(1)(D), SCACR (requiring citation to authority in the argument section of an appellant's brief); First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal).

II. Damages

Appellants argue the master erred in awarding damages to Allen; however, this issue was not included in Appellant's sole statement of the issue on appeal. Therefore, we need not address this argument on the merits. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

III. Attorney's Fees

Appellants also argue the award of attorney's fees to Allen was an abuse of discretion because the master failed to address the six factors set forth in Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989).[7] Appellants argued the master erred in awarding attorney's fees in their motion to reconsider; however, they did not argue the award of attorney's fees to Allen was an abuse of discretion because the master failed to address the six factors set forth in Baron Data Systems. In their motion to

[7] In Baron Data Systems, our supreme court established six factors, none of which are controlling, that the court should consider in establishing reasonable attorney's fees: (1) the nature, extent and difficulty of the legal services rendered; (2) the time and labor necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar legal services; and (6) the beneficial results obtained. Id. at 384-85, 377 S.E.2d at 297.

reconsider, Appellants argued the award of attorney's fees against them was inappropriate because a dispute existed as to whether the individual members owed Allen any wages and they were no longer members of Pinnacle after October 1, 2001. We find this issue is not preserved for our review. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("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."). Additionally, Appellants did not include this issue in their statement of issues on appeal. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). Therefore, we find this issue is not preserved for our review.

CONCLUSION

Accordingly, the master's order is

AFFIRMED IN PART and REVERSED IN PART.

HUFF, J., concurs.

PIEPER, J., concurs in part and dissents in part in a separate opinion.

PIEPER, J., concurring in part and dissenting in part: I agree with the majority decision to affirm as to Robert Gunn and to reverse as to Timothy Gunn. However, I respectfully dissent as to Rick Joyce and would reverse the trial court's determination that Rick Joyce is personally liable under the South Carolina Payment of Wages Act (the Act) for wages owed to Aaron Allen.[8]

The Act mandates that "[e]very employer in the State shall pay all wages due . . . ." S.C. Code Ann. § 41-10-40(A) (Supp. 2010). The Act

[8] I would also note that absent a finding of personal liability under the Act, Timothy Gunn and Rick Joyce are not liable to Allen for attorney's fees.

defines an "employer" as "every person, firm, partnership, association, corporation, receiver, or other officer of a court of this State, the State or any political subdivision thereof, and any agent or officer of the above classes employing any person in this State." S.C. Code Ann. § 41-10-10(1) (Supp. 2010). An officer or agent of a company may be held personally liable under the Act when such person knowingly permits his or her company to violate the Act. Dumas v. InfoSafe Corp., 320 S.C. 188, 195, 463 S.E.2d 641, 645 (Ct. App. 1995).

In this case, Allen entered into an employment agreement with Pinnacle Healthcare Systems, LLC (Pinnacle), a manager-managed limited liability company organized by Robert Gunn. Rick Joyce was designated a member of Pinnacle and was involved in handling the company's payroll and finances. Although Joyce's involvement with the company's finances provided him knowledge that Pinnacle was violating the Act by not paying Allen's wages, as a member of the company, Joyce lacked the authority to make any decisions regarding the payment of wages. See S.C. Code Ann. § 33-44-404(b)(1), (2) (2006) ("[E]ach manager has equal rights in the management and conduct of the [manager-managed] company's business . . . and any matter relating to the business of the company may be exclusively decided by the manager or, if there is more than one manager, by a majority of the managers . . . .") (emphasis added).

Joyce's lack of authority may be determined from the extent of his involvement with Pinnacle's finances. Each pay period, Joyce would receive a fax from Pinnacle's operating manager that designated who was to be paid and the amount of the payment. Joyce would then input the information from the fax into Pinnacle's system so a payroll service could issue payments. Although Joyce knew how much each employee was being paid, he lacked the authority to make any decisions regarding payroll. Accordingly, I would find Joyce was not "permitting" Pinnacle to violate the Act. See Baisden v. CSC-Pa, Inc., No. 2:08-cv-01375, 2010 WL 3910193, at *7 (S.D.W.Va. October 1, 2010) (determining that a jury could find two corporate officers knowingly permitted a corporation to violate the Act because the officers "were actively involved in the day-to-day management of the corporation and regularly made determinations regarding the payment of wages and

commissions"); see also In re Kouzios, No. 08–B–29463, 2011 WL 873410, at *1 (Bankr. N.D. Ill. March 11, 2011) (providing "the Illinois Wage Act makes officers and agents liable only if the officer or agent 'actively asserted substantial control over the management and financial affairs of the corporation' and 'knowingly permit[ted] the employer to violate [the Wage Act]'"). Furthermore, without the authority to act on behalf of Pinnacle, Joyce is not an "agent or officer" of the company. See S.C. Code Ann. § 33-44-301(b)(1) (2006) ("A member is not an agent of the company for the purpose of its business solely by reason of being a member."); S.C. Code Ann. § 33-44-101 cmt. (2006) ("In a manager-managed company agency authority is vested exclusively in one or more managers and not in the members."). Therefore, I would reverse the trial court on this issue since Joyce was not an agent or officer who knowingly permitted Pinnacle's violation of the Act.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Leon Hill, Appellant.

Appeal From Richland County
J. Michelle Childs, Circuit Court Judge

Opinion No. 4856
Submitted June 1, 2011 – Filed July 27, 2011

AFFIRMED

Appellate Defender M. Celia Robinson, South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy John McInosh, Assistant Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr., Office of the Attorney General, of

Columbia, Daniel E. Johnson, Solicitor, Fifth Judicial Circuit Court, for Respondent.

HUFF, J.: Appellant, Leon Hill, was convicted of two counts of criminal sexual conduct (CSC) with a minor in the first degree and two counts of lewd act upon a child. Hill appeals, asserting the trial judge erred in (1) denying his motions concerning the jury pool on the grounds that the pool was not random and it failed to constitute a fair cross section of the community, (2) admitting into evidence a DVD of the child victim's forensic interview because the defense was deprived the opportunity to cross-examine the victim in regard to the making of the video or the victim's statements made during the interview, (3) allowing the State to question an expert witness regarding the content of the video so as to elicit the expert's opinion that the child had not been coached and was therefore presumably truthful, (4) denying defense counsel's motion for a mistrial based upon the State's failure to disclose information that constituted impeachment evidence of the State's lead investigator, and (5) charging the jury the victim's testimony need not be corroborated and allowing the State to inform the jury of such where the statement of law was unduly emphasized in the State's opening and closing arguments. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

Victim, who was eleven years old at the time of trial, testified to his subjection to acts of fellatio and anal intercourse with his uncle, Leon Hill. These acts occurred in Hill's basement room, as well as in a house that Hill and Victim were painting, during which time a man named "Tony" was present in the house. Victim's mother testified the matter was first brought to her attention by Tony Smith, and she then immediately questioned Victim. As a result, Victim's mother contacted the police, took Victim to the emergency room for an examination, talked to Investigator Livingston, and took Victim to the Assessment Resource Center for an interview. Investigator Roy Livingston, who was subsequently assigned this case, met

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

with Victim and his mother for an interview, and then referred Victim to the Assessment Resource Center to be interviewed by professionals. Investigator Livingston also interviewed Tony Smith, but did not take a written statement from Smith. He stated he did not write down what Smith told him, other than what he put in some typed notes.

Dr. Joseph Campbell, the emergency room physician who saw Victim in the hospital, testified Victim indicated to him that he had been subjected to anal penetration with someone's "privates" and that Victim had been instructed to perform oral sex on someone's "privates," with the latest incident having occurred roughly five days prior to the examination. Dr. Campbell found a small abrasion during his rectal exam of Victim that could have been consistent with sexual trauma, but acknowledged it could have also been consistent with other non-sexual causes.

The State also presented the testimony of Ray Olszewski, who worked at the Assessment and Resource Center and was qualified as an expert in the field of forensic interviewing in child abuse assessments. Olszewski testified he interviewed Victim following referral from the Sheriff's department. Over defense counsel's objection, the trial court admitted into evidence a DVD recording of Olszewski's forensic interview of Victim, which was played for the jury. Olszewski explained that one of the tools he used in trying to discern whether a child was coached in his accusations was to look for the level of detail provided by the child, noting that children who are coached often lack detail. He then described some of the specific types of details he looked for, and stated he looked for these details in Victim's interview. Over objection of defense counsel, Olszewski was allowed to testify that he saw those details in Victim's interview.

Tony Smith also testified for the State. Smith, who was a friend of Hill's, testified to incidents he observed while Hill and Victim were working with him, in particular two occasions where he found Hill behind locked doors with Victim, and Victim emerged on one of those occasions with his pants unzipped. Smith later spoke with someone in Victim's family about his concerns.

Dr. Susan Luberoff, who was qualified as an expert in child sexual assault examinations, testified that she examined Victim and found an anal area that was abnormal and appeared to be a healed injury from some type of force applied outside Victim's body, consistent with a penetrating injury. Dr. Luberoff distinguished the abnormality she observed from the abrasion noted in the emergency room physician's chart. She did not observe the abrasion in the area noted by the emergency room doctor, but explained that the abrasion was described as very small and she would have expected that to have healed rather quickly such that she would not expect to be able to see it when she performed her exam six days after the emergency room exam. She did note that an abrasion is the type of injury that may be seen in a sexual assault examination. The abnormality she observed on Victim was an old, healed injury that, in her opinion, was from a force applied from the outside of Victim's body.

Following submission of the matter to the jury, Hill was found guilty of two counts of lewd act upon a child and two counts of CSC with a minor in the first degree. The trial court sentenced Hill to thirty years on each of the CSC charges and a consecutive sentence of ten years for the lewd act convictions, for a total of forty years. This appeal follows.

ISSUES

1. Did the trial judge err in denying defense objections to the jury pool and voir dire process made on the grounds that the pool was not random and did not constitute a fair cross-section of the community?

2. Did the trial judge err in allowing in evidence, over defense objection, a DVD of a forensic interview with the child victim pursuant to S.C. Code Ann. section 17-23-175, where the defense was deprived of an opportunity to cross-examine the child victim about the making of the video or about the statements made during the interview in violation of the statute and in violation of appellant's right to confront the witnesses against him in

violation of the confrontation and due process guarantees in the federal and state constitutions?

3. Did the trial judge err in allowing the prosecution to question the expert witness regarding the content of the interview so as to elicit his expert opinion that the child had not been coached and was therefore presumably truthful where such inquiry clearly invaded the jury's exclusive role of determining credibility, exceeded the time and place limitation on such testimony, and constituted impermissible bolstering?

4. Did the trial judge err in overruling the defense motion for a mistrial, made on the basis of the State's non-disclosure of information which would have been material to the defense in that it constituted powerful impeachment evidence of the State's lead investigator in violation of Rule 5, SCRCrimP and Brady v. Maryland, 373 U.S. 83 (1963)?

5. Did the trial judge err in charging the jury that the victim's testimony need not be corroborated and in allowing the prosecutor to inform the jury that the victim's testimony need not be corroborated where that statement of the law was unduly emphasized by the prosecution on opening and closing?

LAW/ANALYSIS

I. Jury Pool

When the case proceeded to trial, defense counsel raised an issue with the jurors available for selection in Hills' trial. Counsel maintained, because other juries had already been selected prior to his opportunity to draw from the pool, those available did not represent a jury of his peers, but were an extreme group of society left after jurors for the other trials had been selected. In particular, counsel asserted that four of the remaining prospective jurors were chaplains, pastors or in seminary school, and that sixteen of the first twenty-four of the remaining jurors were female. He argued, because two other juries were drawn before his, the randomness afforded to Hill had been significantly reduced. He therefore made a motion

for a new jury pool. After taking testimony from the jury coordinator regarding the general manner in which juries are drawn and the jury pools that are available, and in particular as to this case, the trial judge found the jury selection process in this case was fair and adequate and did not affect Hills' right to a fair trial. Accordingly, she denied Hill's motion for a new jury pool.

On appeal, Hill asserts that the right to trial by jury contemplates a jury drawn from a pool broadly representative of the community and impartial in a specific case. He contends the trial judge erred in overruling defense counsel's objections to the jury pool as not representing a broad cross section of the community where he was required to select his jury after the other juries had been selected, such that his jury pool did not represent a fair cross section of the community. We find no error.

"The sixth amendment right to a trial by jury has been made applicable to the states via the fourteenth amendment." State v. Warren, 273 S.C. 159, 162, 255 S.E.2d 668, 669 (1979). "The right to trial by jury contemplates a jury drawn from a pool broadly representative of the community and impartial in a specific case." Id.

Where a defendant moves to quash a jury venire or challenges the panel or array, the burden is on him to introduce or to offer strong and convincing evidence in support of his motion, and the failure to prove such contentions is fatal. State v. Rogers, 263 S.C. 373, 381, 210 S.E.2d 604, 608 (1974). Further, "[s]uch a challenge is without merit where it consists solely of an attorney's statements, unsworn and unsupported by any proof or offer of proof." Id.

> In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show that 1) the group excluded is a "distinctive" group in the community; 2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) this underrepresentation is

> due to a systematic exclusion of the group in the jury selection process.

State v. Patterson, 324 S.C. 5, 21, 482 S.E.2d 760, 767-68 (1997).

Here, Hill failed to introduce any evidence to support his motion for a new jury pool. There is no evidence to support counsel's assertion that sixteen of the first twenty-four available jurors were female, or that four of the prospective jurors were pastors, chaplains or attending seminary school. Counsel's challenge on this basis was made solely on the basis of his unsworn statements to the trial judge, unsupported by any proof or offer of proof. Further counsel provided no evidence that these figures on the number of women and those employed or studying in the religious field would not be representative of a cross section of the community. Lastly, Hill failed to demonstrate a distinctive group that was underrepresented or that there was a systematic exclusion of a distinctive group. Accordingly, Hill failed to meet his burden to support his motion to be provided a new jury pool.

II. Admission of Forensic Interview DVD

In a pre-trial motion, the defense challenged the admission of the recording of Victim's forensic interview asserting (1) the statute sanctioning such admission was unconstitutional as it violated Hill's Sixth Amendment right to confrontation and (2) it did not meet the requirement of trustworthiness under the statute. Thereafter, the trial court held a hearing on the matter and concluded the recording met the requirements of the statute and therefore determined it was admissible.[2] The trial proceeded with the

[2] Although Hill mentions in his brief that he challenged the constitutionality of the admission pursuant to the statute in question before the trial court, he does not argue the constitutionality of the statute itself on appeal or designate it is an argument in his statement of issues on appeal. Rather, he focuses on whether the statute's conditions were met and whether he was denied the right to confront witnesses against him by virtue of the fact that the recording was introduced into evidence through a later witness, after the child had been called to testify. Further, the trial judge did not specifically rule on counsel's

State first presenting the testimony of Victim. The State then presented the testimony of numerous other witnesses before presenting that of Olszewski, the forensic interviewer, through whom the State sought to introduce the DVD. Immediately prior to Olszewski taking the stand, defense counsel objected to the introduction of the recording on the basis that he would not be afforded an opportunity to effectively cross-examine Victim as required by the statute since the recording was not in evidence at the time the child was subject to cross-examination. Counsel maintained that, without the recording in evidence, once Victim left the stand the State's opportunity to introduce the recording into evidence was lost. The trial judge allowed the recording into evidence over Hill's objection.

On appeal, Hill contends the conditions required for admission of the DVD under South Carolina Code Ann. section 17-23-175(A) were not met, and his right to confrontation was ignored. Specifically he argues, as this particular case was presented by the State, the defense was "actually wholly deprived of any opportunity to cross-examine the child regarding his out of court statements as presented by DVD." He maintains, because the DVD was admitted into evidence after the child victim left the stand, the State's mode and order of presentation wholly denied him the right to cross-examine Victim as to the making of and content of the DVD statement, thereby violating the statute's requirements and his right to confrontation. We disagree.

Section 17-23-175(A) of the South Carolina Code permits the admission of out-of-court statements by a child under the age of twelve in criminal proceedings when the following conditions are met:

> (1) the statement was given in response to questioning conducted during an investigative interview of the child;
>
> (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means . . . ;

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argument that the statute itself was unconstitutional. Thus, such argument would not be preserved for appeal.

> (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
>
> (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

S.C. Code Ann. § 17-23-175(A) (Supp. 2010).[3]

The Sixth Amendment's Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "The constitutional right to confront and cross examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial." State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987).

In Crawford v. Washington, 541 U.S. 36, 54 (2004), the United States Supreme Court held that the admission of testimonial hearsay statements against an accused violates the Confrontation Clause if: (1) the declarant is unavailable to testify at trial, and (2) the accused has had no prior opportunity to cross-examine the declarant. State v. Stokes, 381 S.C. 390, 400-01, 673 S.E.2d 434, 439 (2009). "Statements taken by police officers in the course of

[3] Although Hill cites the entirety of section 17-23-175(A) and generally asserts "the statute's conditions were not met," the only argument Hill makes concerning violation of this statute is in regard to section 17-23-175(A)(3), which requires the child testify at the proceeding and be subject to cross-examination on the elements of the offense and the making of the out-of-court statement.

interrogations are considered testimonial." Id. at 401, 673 S.E.2d at 439.[4] However, the Confrontation Clause places no constraints at all on the use of the declarant's prior testimonial statements when the declarant appears for cross-examination at trial. Id. "The Confrontation Clause 'does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.'" Id. (quoting Crawford).

"[A]s to cross-examination specifically, the Confrontation Clause 'guarantees only an **opportunity** for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" Id. at 401-02, 673 S.E.2d 434, 439, (quoting United States v. Owens, 484 U.S. 554, 559 (1988) and noting emphasis in original). "Indeed, the opponent's opportunity for cross-examination has been deemed the 'main and essential purpose of confrontation.'" Id. at 402, 673 S.E.2d at 440 (quoting Delaware v. Fensterer, 474 U.S. 15, 19-20 (1985)). "Thus, it is the **opportunity** to cross-examine that is constitutionally protected." Id. (emphasis in original). Where trial counsel is given the opportunity to cross-examine a witness but chooses not to do so, there is no violation of the right to confrontation, for the Confrontation Clause guarantees the opportunity for effective cross-examination, but not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. Id. at 402-03, 673 S.E.2d at 440.

Here, Hill was clearly afforded the opportunity to cross-examine Victim while Victim was on the stand.[5] Hill does not argue he was prohibited by any rule of law from examining Victim about the elements of

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[4] As noted, the record shows law enforcement referred Victim to the Assessment Resource Center to be interviewed by professionals.

[5] The defense presumably had access to the DVD and was aware of the statements made by Victim prior to Victim's testimony. The record shows Hill made pre-trial motions concerning the admissibility of Victim's recorded statement, inquired as to whether the trial judge had an opportunity to view the recording, and made no motion concerning a discovery violation based upon any failure of the State to provide the recorded statement to the defense.

the offense or the making of the out-of-court statement during his cross-examination of Victim. He simply maintains that his cross-examination of Victim was not effective because the State failed to first place the DVD into evidence. However, as noted, the Confrontation Clause guarantees only the opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish. In addition, we note Hill does not assert he was in any way prohibited from recalling Victim to the stand to examine the child after introduction of the DVD through the forensic investigator. Accordingly, the requirements of section 17-23-175(A) were met, and Hill was not denied his right to confrontation.

III. Testimony of Forensic Interview Expert

During direct examination of the State's expert witness Olszewski, who conducted the forensic interview of Victim, the solicitor elicited testimony regarding the signs the interviewer would look for in such an interview as to whether a child has been coached. When the solicitor attempted to ask a question particular to Victim, defense counsel objected, arguing testimony about whether Victim was coached would go to the expert's opinion of the truthfulness of the interview and was therefore inadmissible. The trial court directed the solicitor to proffer the testimony she sought to elicit, and the following proffer of Olszewski then occurred:

> Q: We already been through what red flags you look for and how one of the things you look for is details in an interview. In the context of this forensic interview with [Victim], did you look for details regarding red flags as to being coached?
>
> A: Yes.
>
> Q: And what do you consider - - what do you in your capacity as a forensic interviewer when you are looking for details, what do you mean by details?

A: We're talking about like idiosyncratic details maybe for example were any lubricants used? Is the child able to describe sensory information, maybe how something felt on their body for example. Are they able to give descriptions of locations things or, you know, things like that.

Q: And was that present in this interview?

A: Yes.

Defense counsel stated that "[i]t was the last question asked by [the solicitor] that we object to."

The trial judge found that the question of whether Olszewski saw the details was not the same as whether Victim was coached, and even so, the question did not elicit whether the witness thought Victim told the truth. The judge further noted that Hill's defense in regard to the forensic interview called into question whether Victim had been over-prepped, and found the testimony was admissible. Olszewski was then allowed to testify consistently with his proffered testimony, specifically indicating he saw the details in Victim's interview.

Hill argues that the State was wrongly permitted to ask the expert about the red flags he looked for to indicate a child was coached in the offered testimony, and that one of the things he looked for in an un-coached, truthful child was detailed account. He contends, upon the expert answering the question so as to indicate that he did see the details in the interview with Victim, the jury was clearly informed the expert believed the child was un-coached and truthful. Under these circumstances, Hill asserts the trial judge erred in allowing the State to offer expert testimony that could be construed as indicating the expert's opinion was that the child witness was truthful and had not been coached. He argues the expert's testimony constituted a clear indication to the jury that the expert found Victim's statement credible, and this evidence should have been excluded as invading the jury's province and

because its probative value was outweighed by the unfairly prejudicial effect pursuant to Rule 403, SCRE. We disagree.

The law is clear that it is improper for a witness to give testimony as to his or her opinion about the credibility of a child victim in a sexual abuse matter. See State v. Dawkins, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989) (noting treating psychiatrist's indication he believed victim's allegations concerning symptoms were genuine was improper); State v. Dempsey, 340 S.C. 565, 568-71, 532 S.E.2d 306, 308-09 (Ct. App. 2000) (finding, where child sexual abuse counselor's testimony included how he determined whether a child was telling the truth, his specific finding that child victim's answers and responses did not include any abnormality that would lead him to believe that child victim was not telling the truth, his testimony that children were being truthful in ninety-five percent of instances in which sexual abuse was alleged, and his conclusion that child victim in that case was being reliable, constituted improper vouching for the child victim).

In the case of State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009), our supreme court reversed this court's finding that the jury could infer from the forensic interviewer's testimony that she thought the victim told her the truth about being sexually assaulted. Id. at 503-04, 671 S.E.2d at 609. There, the forensic interviewer gave testimony concerning how she conducted her interviews. Specifically, she testified that, in conducting forensic interviews and building a rapport with a child, they talk about things, she introduces herself to the child, tells the child what the interviewer's role is, goes over the rules of the interview, "[they] talk a lot about telling the truth and telling a lie and [they] make an agreement with each other" to tell each other the truth and, "if [they] get past that, if the child agrees to do that, [they] go on." Id. at 504, 671 S.E.2d at 609. The supreme court found the forensic interviewer never stated she believed the child victim, noting the interviewer did not even state the victim in that case agreed to tell her the truth, and the interviewer gave no indication concerning the victim's veracity. Id. at 503-04, 671 S.E.2d at 609. Under those circumstances the court held, "[t]here is no

evidence whatsoever that [the forensic interviewer] believed the Victim to be telling the truth." Id. at 504, 671 S.E.2d at 609.

In the case at hand, as in Douglas, the forensic interviewer never addressed the veracity of Victim.[6] He testified only that he saw the types of details in Victim's interview that he would look for to determine whether a child had been coached. He gave no opinion on whether Victim was being truthful, or even that Victim had not, in fact, been coached. Accordingly, we find no reversible error in the admission of this testimony.[7]

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[6] Though Hill argues on appeal that the trial judge improperly allowed the State to question the expert about the red flags he looked for to indicate a child was coached, and that one of the things he looked for in an un-coached child was detailed account, the record shows defense counsel limited his objection at trial to the question of whether the forensic interviewer observed the details in his interview with Victim, and specifically agreed the State could "talk about red flags looked for" by the forensic interviewer.

[7] Although Hill presents in his statement of issues on appeal that the inquiry of the forensic interviewer invaded the jury's exclusive role of determining credibility, exceeded the time and place limitation on such testimony, and constituted impermissible bolstering, the only argument Hill makes in the argument portion of his brief is in regard to whether the objected to evidence impermissibly allowed the forensic interviewer to indicate his opinion on Victim's veracity. At any rate, the forensic interviewer did not testify as to Victim's complaint of a sexual assault, much less testify to any sexual assault in corroboration of Victim's testimony beyond time and place of any such assault. See Jolly v. State, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994). (holding, when a victim testifies in a criminal sexual conduct case, evidence from other witnesses that the victim complained of the sexual assault is admissible in corroboration; however, such evidence is limited to the time and place of the assault and cannot include details or particulars).

IV. Mistrial Motion for Failure to Disclose Impeachment Evidence

The next issue Hill raises on appeal is whether the trial judge erred in "overruling the defense motion for a mistrial, made on the basis of the State's non-disclosure of information which would have been material to the defense in that it constituted powerful impeachment evidence of the State's lead investigator in violation of Rule 5, SCRCrimP and Brady v. Maryland, 373 U.S. 83 (1963)." In arguing this matter, appellate counsel little more than quotes from the numerous pages of the transcript regarding various arguments raised before the trial judge surrounding the matter, including arguments that are not appropriately before this court.[8] Hills' brief never incorporates those arguments as appellate argument, but merely recites the lengthy arguments made by both trail counsel and the solicitor, and fails to even maintain that trial counsel "correctly argued" these matters or otherwise adopt trial counsel's arguments. Neither does Hill narrow down the issue for this court to review. Hill's appellate counsel recounts the arguments made and the ruling of the trial judge and then follows that recitation with the following paragraph, which is the only appellate argument on this issue in Hill's brief:

> This ruling was error where the defense was not alerted to impeachment evidence against the State's lead investigator which

[8] For instance, appellate counsel recites trial counsel's argument concerning the alleged Rule 5 violation by the State, but the only argument made concerning Rule 5 related to the State's alleged failure to turn over handwritten notes of Investigator Livingston. After Livingston took the stand and indicated he did not handwrite any notes from the interview, but only took down Smith's personal information, and it was clarified that the State turned over Livingston's summary of the interview to the defense, defense counsel made no further argument regarding Rule 5. Further, defense counsel never based its impeachment argument on a Rule 5 violation when it sought to "clarify" its argument on the matter the following day after the State had rested, but only raised it as a Brady violation.

was known to the prosecutor, in violation of Brady. Under these circumstances, a mistrial was required.

Based upon the simple recitation of the extensive arguments raised at the trial level, including several disruptions of side issues requiring in camera testimony, as well as the lack of clarity on the ultimate issue at the appellate level and the fact that appellate counsel merely recites the extensive testimony and arguments of counsel without even adopting trial counsel's arguments, along with appellate counsel's two sentence conclusory argument with citation to only Brady and no analysis whatsoever as to why or how Brady applies, we find this issue is abandoned. The mere fact that Hill cited to Brady does not provide this court with any guidance as to why the State should be deemed to have withheld material impeachment evidence entitling Hill to a mistrial. See State v. Jones, 344 S.C. 48, 58-59, 543 S.E.2d 541, 546 (2001) (noting, where the only passage in a brief relating to an issue appealed is a single conclusory statement which leaves unargued the error assigned by exception, the issue will be deemed abandoned on appeal; an issue will be deemed abandoned on appeal if it is argued in a short, conclusory statement without supporting authority); Rule 208(b)(D), SCACR (requiring the content of the argument portion of the brief include the particular issue to be addressed set forth in distinctive type, "followed by discussion and citations of authority") (emphasis added). See also State v. Porter, 389 S.C. 27, 35-36, 698 S.E.2d 237, 241 (Ct. App. 2010) (holding, where the only citations in the argument section of appellant's brief were to a North Carolina statute and two cases, but those authorities did not support the specific argument raised, the argument was deemed abandoned).

V. Corroboration Charge

On appeal, Hill contends the trial judge erred in charging the jury that Victim's testimony need not be corroborated and in allowing the prosecution to inform the jury of the same, where that statement of law was unduly emphasized by the prosecution. He maintains the trial judge erred in allowing the prosecution to unduly emphasize the no-corroboration charge in opening and closing arguments, and where the statement of law had been

unduly emphasized by the prosecution, the trial judge further erred in nevertheless choosing to similarly instruct the jury. We find no error.

Section 16-3-657 of the South Carolina Code provides, "The testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658." S.C. Code Ann. § 16-3-657 (2003). These criminal statutes generally encompass the prohibition of various forms and degrees of criminal sexual conduct, and include criminal sexual misconduct with a minor for which Hill was charged. S.C. Code Ann. § 16-3-655 (A) (Supp. 2010).

In State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006), the appellant asserted that the trial judge erred in charging section 16-3-657 to the jury because the charge constituted an impermissible comment on the facts of the case, it improperly emphasized the testimony of one witness, and it carried a strong possibility of unfairly biasing the jury against the defendant. Id. at 115, 631 S.E.2d at 249. Our supreme court noted the trial court had charged the jury that the State had the burden of proving the defendant was guilty of the charged offenses beyond a reasonable doubt, and further instructed the jurors that they were the sole and exclusive judges of the facts of the case, that the trial court was prohibited from commenting on or having an opinion about the facts of a case, and that it was the responsibility of the jury to assess the credibility of the witnesses who testified in the case. Id. at 116, 631 S.E.2d at 249-50. The supreme court then stated as follows:

> It is not always necessary, of course, to charge the contents of a current statute. Section 16-3-657 prevents trial or appellate courts from finding a lack of sufficient evidence to support a conviction simply because the alleged victim's testimony is not corroborated. However, § 16-3-657 does much more. In enacting this statute, the Legislature recognized that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical or forensic evidence

> identifying a particular perpetrator. The Legislature has decided it is reasonable and appropriate in criminal sexual conduct cases to make abundantly clear--not only to the judge but also to the jury--that a defendant may be convicted solely on the basis of a victim's testimony.

Id. at 117, 631 S.E.2d at 250 (emphasis added). The court then concluded, while a trial judge is not required to charge section 16-3-657, when the judge chooses to do so, giving the charge does not constitute reversible error when "this single instruction is not unduly emphasized and the charge as a whole comports with the law." Id. at 117-18, 631 S.E.2d at 250. The court determined, because the jury in that case was thoroughly instructed on the State's burden of proof and the jury's duty to find the facts and judge the credibility of witnesses, the trial judge fully and properly instructed the jury on those principles. Id. at 118, 631 S.E.2d at 250.

Here, the sole instruction the trial judge charged the jury on corroboration was as follows: "The testimony of a victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence." Notably, the judge immediately followed that statement with, "Necessarily you must determine the credibility of witnesses who have testified in this case." The judge also included in her charge several instructions regarding the State having the burden to prove Hill guilty beyond a reasonable doubt, and further charged the jury that it was the exclusive judge of the facts and was not to infer that the trial judge had any opinion about the facts. Thus, this jury was thoroughly instructed on the State's burden of proof and the jury's duty to find facts and judge credibility of witnesses, as well as admonished not to infer that the trial judge had any opinion about the facts. Accordingly, the single instruction on "no corroboration," was not unduly emphasized, and the charge as a whole comported with the law, such that there was no reversible error in the "no corroboration" charge.

Further, we find no merit to Hill's assertion on appeal that the trial judge erred in allowing the prosecution to unduly emphasize this law in its

opening and closing. First, it is questionable whether this argument is properly preserved for review inasmuch as, although defense counsel made a pretrial objection to the State being allowed to address it in its opening and closing, counsel failed to make any contemporaneous objection to the State's references to the "no corroboration" law in its opening and closing arguments, and failed to argue to the trial judge that the State's references during opening and closing "unduly emphasized" the statement of law. State v. Johnson, 363 S.C. 53, 58, 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); 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 review). At any rate, after a review of the State's opening and closing statements, we do not find the State's arguments unduly emphasized this law. Additionally, not only did the trial judge take precautions to ensure the jury was thoroughly instructed on the State's burden of proof and the jury's duty to find the facts and judge the credibility of witnesses, the State also informed the jury of these matters in its opening and closing arguments. Accordingly, we find no error.

CONCLUSION

For the foregoing reasons, Hill's convictions are

AFFIRMED.

WILLIAMS and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stevens Aviation, Inc., Respondent,

v.

DynCorp International LLC, and Science Applications International Corporation, Defendants,

of whom DynCorp International LLC is, Appellant.

Appeal from Greenville County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 4857
Heard June 22, 2011 – Filed July 27, 2011

REVERSED

C. Mitchell Brown, A. Mattison Bogan, and Michael J. Anzelmo, all of Columbia; and William S. Brown, Lane W. Davis, and Steven E. Buckingham, all of Greenville, for Appellant.

Keith D. Munson and Catherine R. Atwood, both of Greenville; and Linda L. Shapiro, Kathy A.

Wisniewski, and John W. Rogers, all of St. Louis, MO, for Respondent.

THOMAS, J.: In this action, DynCorp International LLC (DynCorp) appeals a circuit court's grant of partial summary judgment to Stevens Aviation, Inc. (Stevens) on the interpretation of a contract between DynCorp and Stevens. DynCorp argues the circuit court erred in (1) granting partial summary judgment on grounds not before it; (2) incorporating a prior agreement between Stevens and DynCorp into a later agreement between them; (3) holding the later agreement was an enforceable requirements contract; and (4) ruling on these issues without permitting DynCorp to conduct further discovery. We reverse.

FACTS & PROCEDURAL HISTORY

Sometime before March 2000, the United States federal government issued a request for bids on an aviation maintenance contract for C-12, RC-12, and UC-35 airplanes owned by the United States Army and Navy (the Prime Contract). The Prime Contract provides that the contractor shall conduct "strip and paint" services, "aircraft condition inspection" (ACI), "site organizational maintenance," and "over and above maintenance" of C-12s, RC-12s, and UC-35s.

On March 16, 2000, DynCorp and Stevens entered a "Teaming Agreement" that imposed certain duties on each party to coordinate a proposal to secure the Prime Contract, with DynCorp as the contractor and Stevens as the subcontractor. The Teaming Agreement also explicitly incorporated two attachments. First, it incorporated an attachment titled "Statement of Work," which provided that Stevens "shall be proposed to perform" ACIs, "strip and paint requirements," and "depot level maintenance for the C-12/RC-12 aircraft fleet" above DynCorp's capabilities. Second, it incorporated an attachment titled "Proprietary Data Provisions," which limited both parties' rights to disclose each other's proprietary business information.

DynCorp was subsequently awarded the Prime Contract, and on March 20, 2001, the parties entered a "Subcontract" that governs their relationship in performing the Prime Contract. Two provisions of the Subcontract's "Preamble" provide the following:

> WHEREAS, the parties entered into a Teaming Agreement ("TA") executed on 16 March, 2000, which identifies the roles and responsibilities of the parties as Prime and Subcontractor in a cooperative effort to perform the requirements of U.S. Army Contract DAAH23-00-C-0226 ("Prime Contract");
>
> WHEREAS, this Subcontract supersedes all prior written or oral agreements between the parties, excluding the Proprietary Data Exchange Agreement executed on March 16, 2000, and constitutes the entire agreement between the parties hereto with respect to this Subcontract;
>
> . . . .
>
> NOW THEREFORE, in consideration of the promises, mutual covenants and agreements contained herein, the parties hereto agree as follows:

Two pages later, the Subcontract defines "Aircraft" as "all Army RC/C-12 and UC-35 aircraft covered under the Prime Contract."

Section C of the Subcontract specifically addresses Stevens's duties regarding the work to be performed for DynCorp:

C.1 STATEMENT OF WORK/TECHNICAL SPECIFICATION

A. The work shall be performed in accordance with the [Prime Contract's Statement of Work] (Contract DAAH23-00-C-0226; Attachment 1).

B. C-12/RC-12 STRIP AND PAINT. [Stevens] shall provide all labor, services, facilities, equipment, and direct and indirect parts and materials required to strip and completely repaint aircraft (for other than ACI requirements), at the direction of DynCorp. Such work will be performed in accordance with the [Prime Contract's Statement of Work], Section 4 (4.1.3) . . . .

C. AIRCRACT CONDITION INSPECTION (ACI). [Stevens] shall provide all labor, services, equipment, tools, facilities, tooling, lubricants, excluding engine oil, direct and indirect parts and material, fuel, and strip and repaint services required to perform all the requirements of Appendix P [the Prime Contract's] Statement of Work . . . . Items found defective beyond those addressed by Appendix P will be handled on an Over-and-Above basis.

D. OVER AND ABOVE MAINTANENCE. [Stevens] shall perform both Depot and Non-Depot Maintenance in accordance with Sections 4.0 AND 5.0 of the [Prime Contract's Statement of Work]. DynCorp will reimburse [Stevens] for the labor required for:

. . . .

> (3) Other over and above tasks, as directed by DynCorp.
>
> . . . .
>
> E. SITE ORGANIZATIONAL MAINTENANCE. As directed by DynCorp, [Stevens] shall accomplish work, at [Stevens]'s facility, that would normally be performed at the site by the site personnel.

In August 2009, Stevens filed a complaint against DynCorp, alleging DynCorp breached the Subcontract by diverting C-12s, RC-12s, and UC-35s to other businesses for maintenance work covered by the Subcontract. After the parties filed numerous motions, the circuit court granted partial summary judgment to Stevens. The circuit court held the Subcontract incorporated the Teaming Agreement and constituted an enforceable requirements contract for specified maintenance of the C-12s, RC-12s, and UC-35s covered by the Prime Contract. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in granting partial summary judgment on grounds not before it?

2. Did the circuit court err in incorporating the Teaming Agreement into the Subcontract?

3. Did the circuit court err in finding the Subcontract created an enforceable requirements contract as a matter of law?

4. Did the circuit court err in granting partial summary judgment without permitting DynCorp to conduct discovery?

STANDARD OF REVIEW

When reviewing the grant of summary judgment, "this Court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP. Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Wallace v. Day, 390 S.C. 69, 73, 700 S.E.2d 446, 448 (Ct. App. 2010) (per curiam) (citations and internal quotation marks omitted).

A contract or provisions within it are unambiguous if they are not "susceptible to more than one reasonable interpretation . . . ."[1] TEG-Paradigm Envtl., Inc. v. U.S., 465 F.3d 1329, 1338 (Fed. Cir. 2006). "When the contract's language is unambiguous it must be given its plain and ordinary meaning and the court may not look to extrinsic evidence to interpret its provisions." Id. (internal quotation marks omitted).

I. Grounds Not Before the Circuit Court

DynCorp asserts it lacked notice the circuit court would consider whether the Subcontract incorporated the Teaming Agreement. However, DynCorp did not make this argument in its Rule 59(e) motion or memorandum supporting that motion. Therefore, the issue is not preserved for our review. See In re Estate of Timmerman, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) ("When a party receives an order that grants certain relief not previously contemplated or presented to the circuit court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal.").

[1] Both the Teaming Agreement and the Subcontract provide they are to be construed using the federal common law of government contracts and, if that law is not dispositive, the laws of Texas.

II. Incorporating the Teaming Agreement

DynCorp next argues the circuit court erred in incorporating the Teaming Agreement into the Subcontract. We agree.

To incorporate the terms of extrinsic material, a contract need not use "magic words." Northrop Grumman Info. Tech., Inc. v. United States, 535 F.3d 1339, 1346 (Fed. Cir. 2008) (internal quotation marks omitted). However, the contract "must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract (rather than merely to acknowledge that the referenced material is relevant to the contract, e.g., as background law or negotiating history)." Id. at 1345.

Here, the Subcontract identifies the Teaming Agreement with sufficient particularity to incorporate the entire document, but it does not sufficiently communicate an intention to incorporate the Teaming Agreement as a whole. The provision is contained in one of the preamble's "whereas" clauses, and generally, "whereas" clauses "are not considered 'contractual' and cannot be permitted to control the express provisions of the contract . . . ." KMS Fusion v. United States, 36 Fed. Cl. 68, 77 (1996). Read in its entirety, moreover, the Subcontract reveals that the parties did not intend to incorporate the Teaming Agreement as a whole. Although incorporation does not require magic language, the Subcontract incorporated other items by using language with such clarity that it is obvious the parties understood how to incorporate substantive provisions of the document into the Subcontract. First, the Subcontract explicitly provides that over fifty federal regulations were "hereby incorporated." Second, the integration clause in the Preamble immediately before the Teaming Agreement language provides that the Subcontract supersedes prior written agreements except for the "Proprietary Data Exchange Agreement executed by the parties on 16 March 2000."[2] See

[2] In response to a question from the bench during oral argument, Stevens's answer suggested the Subcontract's mention of the "Proprietary Data

TEG-Paradigm Envtl., 465 F.3d at 1339 ("One common way to incorporate extrinsic evidence is through an integration clause that expressly incorporates the extrinsic evidence.").

If the Subcontract does not incorporate the entire Teaming Agreement, Stevens claims the Subcontract's reference to the Teaming Agreement merely incorporates the Teaming Agreement's provisions that establish the "roles and responsibilities" of the parties. Yet this contention must fail because it would require this court to handpick which duties to incorporate without guidance from the Subcontract. The Subcontract's reference to the "roles and responsibilities of the parties" established by the Teaming Agreement is hardly precise enough to identify which roles and responsibilities the Subcontract incorporates. The Teaming Agreement establishes various duties, many of which would be inapposite to the parties' relationship once the Subcontract was created. For example, the Teaming Agreement imposes a duty on DynCorp to submit a proposal for the Prime Contract, a duty on DynCorp to award the Subcontract to Stevens, and a duty on Stevens to help DynCorp develop the proposal for the Prime Contract. Consequently, the Subcontract does not clearly show the Teaming Agreement was intended to be relevant for more than background law or negotiating history. The circuit court erred in finding the Teaming Agreement was incorporated into the Subcontract.

III. Requirements Contract

For various reasons, DynCorp contends the circuit court erred in holding the Subcontract was an enforceable requirements contract for maintenance of C-12s, RC-12s, and UC-35s. In the interest of clarity, DynCorp's arguments condense to two points of interest: the Subcontract

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Exchange Agreement executed on 16 March 2000" refers to a document titled "Proprietary Data Provisions," which is part of the Teaming Agreement and was executed on March 16, 2000. Thus, if the Teaming Agreement were incorporated in total, the incorporation of this proprietary business information agreement was unnecessary.

does not (1) apply to UC-35s or (2) create an exclusive relationship between the parties for all of the services covered. We agree with both contentions.

a. Applicability to UC-35s

First, DynCorp maintains the Subcontract does not apply to UC-35s. We agree. The Subcontract does not include per-unit pricing for UC-35s, and therefore, it cannot be construed as an enforceable requirements contract for that aircraft. Ceredo Mortuary Chapel, Inc. v. United States, 29 Fed. Cl. 346, 351 (1993) ("[P]er-unit pricing . . . is an essential element in a requirements contract showing that the supplier is bound to perform regardless of the quantity of work." (internal quotation marks omitted)). Consequently, the circuit court erred in finding the Subcontract was an enforceable requirements contract as to UC-35s governed by the Prime Contract.

b. Exclusivity of the Contractual Relationship

Second, DynCorp insists the Subcontract does not create an exclusive relationship between the parties regarding all of the services it addresses.[3] We agree.

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[3] DynCorp further emphasizes that the Subcontract fails to include certain language required by Federal Acquisition Regulations (FAR) to create an enforceable requirements contract. However, the FAR requiring that language does not apply to the Subcontract because it is a private contract. See 48 C.F.R. § 1.104 ("The FAR applies to all acquisitions as defined in Part 2 of the FAR, except where expressly excluded."); 48 C.F.R. § 2.101 ("Acquisition means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease . . . ."). In addition, the Subcontract did not incorporate the FAR despite incorporating fifty other FARs. See Northrop Grumman Info. Tech., 535 F.3d at 1344 ("[T]his court has been reluctant to find that statutory or regulatory provisions are incorporated into a contract with the government unless the contract explicitly provides for their incorporation." (internal quotation marks omitted)).

To create an enforceable requirements contract under the applicable law, a contract need not include the word "exclusive" or minimum quantity terms; rather, the seller merely must have "the exclusive right and legal obligation to fill all of the buyer's needs for the goods or services described in the contract. . . . [A]n essential element of a requirements contract is the promise by the buyer to purchase the subject matter of the contract exclusively from the seller." Coyle's Pest Control, Inc. v. Cuomo, 154 F.3d 1302, 1305 (Fed. Cir. 1998) (alterations in original) (internal quotation marks omitted). Terms that suggest exclusivity include language that the seller must "furnish all labor . . . and related services" to the buyer or the buyer must order services for "all its properties" from the seller. See id. at 1305. Even if a contract contains such language, however, the contract is not an exclusive requirements contract if the contract merely requires a party "to furnish all labor . . . and related services on assigned properties . . . ." Id. at 1305-06 (first emphasis omitted).

Here, the Subcontract includes language that at first glance suggests exclusivity. The Subcontract states Stevens "shall provide all . . . [ACI] required to perform Appendix P of the Prime Contract's Statement of Work." However, a thorough review of the provisions establishing the remaining maintenance obligations reveals that the Subcontract does not create "the exclusive right and legal obligation to fill all of [DynCorp's] needs for the . . . services described in the contract." Coyle's Pest Control, 154 F.3d at 1305 (internal quotation marks omitted). As to the strip and paint services, the Subcontract states that Stevens "shall provide all . . . services required to strip and completely repaint aircraft (for other than [ACI] requirements) at the direction of DynCorp." Similarly, the Subcontract provides Stevens would perform site organizational maintenance and over and above maintenance "as directed by DynCorp." Consequently, we reverse the circuit court's holding that the Subcontract is an enforceable requirements contract for C-12, RC-12, and UC-35 maintenance.[4] DynCorp must pay Stevens for the services under

[4] Although the ACI provision does not include "at the direction" language, Stevens fails to argue the nonexclusive provisions—the provisions addressing strip and paint, site organizational, and over and above maintenance—are divisible from the remaining portions of the Subcontract such that the

the Subcontract only to the extent that maintenance was performed. See id. at 1306 (holding that because a contract was "not enforceable as either a requirements contract or as an indefinite quantity contract[,] . . . Coyle [wa]s entitled to payment only for services actually ordered by HUD and provided by Coyle").

IV. Completion of Discovery

Lastly, DynCorp argues the circuit court erred in granting partial summary judgment because it considered extrinsic evidence introduced by Stevens without permitting DynCorp to conduct discovery to refute that evidence. Because the Teaming Agreement is not incorporated into the Subcontract, we agree the circuit court erroneously considered extrinsic evidence. Despite this mistake, however, we grant partial summary judgment without further discovery on the issues before us. Our holdings are a matter of law, and therefore, further discovery of extrinsic evidence to interpret the provisions relevant to this appeal is unnecessary. See TEG-Paradigm Envtl., 465 F.3d at 1338 ("When the contract's language is unambiguous it must be given its plain and ordinary meaning and the court may not look to extrinsic evidence to interpret its provisions." (internal quotation marks omitted)).

CONCLUSION

For the aforementioned reasons, the ruling of the circuit court is

REVERSED.

HUFF and WILLIAMS, JJ., concur.

Subcontract could create an exclusive relationship. Therefore, we may not consider that argument to enforce the Subcontract. See I'On LLC v. Town of Mount Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("Of course, a respondent may abandon an additional sustaining ground . . . by failing to raise it in the appellate brief.").