OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 26

June 21, 2004

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

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

2003-OR-00898 - Nancy Jonas v. Discount Auto Center	Pending
25758 - Doris Stieglitz Ward v. State	Pending
25764 - Hospitality Management Associates, Inc., et al. v. Shell Oil Co., et al.	Pending
25789 - Antonio Tisdale v. State	Pending

PETITIONS FOR REHEARING

25801 - State v. Minyard Lee Woody	Denied 06/15/04
25815 - Vivian Newell, et al. v. Trident Medical Center	Pending
25817 - Franklin Lucas v. Rawl Family Limited Partnership	Pending
25824 - Anand Patel v. Nalini Patel	Pending
25833 - Donney Council v. William Catoe	Pending

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

2004-MO-026 - Carolina Travel v. Milliken Company	Granted 06/09/04

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2004-UP-374-The State v. Edward Orange
(Williamsburg, Judge Clifton Newman)

2004-UP-375-The State v. Robert D. Schilling
(Richland, Judge G. Thomas Cooper, Jr.)

2004-UP-376-The State v. Robert Lee Simmons
(Berkeley, Judge R. Markley Dennis, Jr.)

2004-UP-377-The State v. Anthony D. Pringle
(Sumter, Judge Clifton Newman)

2004-UP-378-The State v. Michael A. Simmons
(Charleston, Judge Deadra L. Jefferson)

2004-UP-379-The State v. Raymond Dean Rogers
(York, Judge John C. Hayes, III)

PETITIONS FOR REHEARING

3724-State v. Pagan	Pending
3730-State v. Anderson	Pending
3776-Boyd v. Southern Bell	Pending
3778-Hunting v. Elders	Pending
3779-Home Port v. Moore	Pending
3780-Pope v. Gordon	Pending
3781-Nationwide Mutual v. Prioleau	Pending
3784-State v. Miller	Pending
3786-Hardin v. SCDOT	Pending
3787-State v. Horton	Pending

3789-Upchurch v. Upchurch	Pending
3790-State v. Reese	Pending
3794-State v. Pipkin	Pending
3795-State v. Hill	Pending
3800-Ex parte Beard	Pending
3802-Roberson v. Roberson	Pending
3809-State v. Belviso	Pending
3810-Bowers v. SCDOT	Pending
3813-Bursey v. SCDHEC & SCE&G	Pending
3814-Beckman Concrete v. United Fire	Pending
2003-UP-292-Classic Stair v. Ellison	Pending
2003-UP-481-Branch v. Island Sub-Division	Pending
2004-UP-219-State v. Brewer	Pending
2004-UP-261-Zahn v. Allen	Pending
2004-UP-270-Anderson v. Buonforte	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-276-Washington v. Miller	Pending
2004-UP-289-E. Hathaway Const. v. Eli	Pending
2004-UP-295-State v. Corbitt	Pending
2004-UP-304-State v. Littlejohn	Pending
2004-UP-306-State v. Lopez	Pending

2004-UP-307-State v. Seawright	Pending
2004-UP-319-Bennett v. State	Pending
2004-UP-327-Lindsey v. Catoe	Pending
2004-UP-330-In the matter of Williams, A.	Pending
2004-UP-333-Nationwide Insurance v. Smith et al.	Pending
2004-UP-334-Hernandez v. Town of Mt. Pleasant	Pending
2004-UP-336-Clayton v. Lands Inn, Inc.	Pending
2004-UP-338-Lynn Whitsett Corp. v. Norbord	Pending
2004-UP-339-Shaffer v. Bacot	Pending
2004-UP-343-State v. LaFavor	Pending
2004-UP-344-Dunham v. Coffey	Pending
2004-UP-345-Huggins v. Ericson et al.	Pending
2004-UP-346-State v. Brinson	Pending
2004-UP-348-Centura Bank v. Cox	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3596-Collins Ent. v. Coats & Coats et al.	Granted 6/10/04
3602-State v. Al-Amin	Pending
3610-Wooten v. Wooten	Pending
3635-State v. Davis	Pending
3639-Fender v. Heirs at Law of Smashum	Pending
3642-Hartley v. John Wesley United	Denied 6/10/04

3645-Hancock v. Wal-Mart Stores	Pending
3647-State v. Tufts	Pending
3653-State v. Baum	Pending
3654-Miles v. Miles	Denied 6/10/04
3655-Daves v. Cleary	Pending
3656-State v. Gill	Pending
3661-Neely v. Thomasson	Pending
3663-State v. Rudd	Pending
3667-Overcash v. SCE&G	Pending
3669-Pittman v. Lowther	Pending
3674-Auto-Owners v. Horne et al.	Pending
3676-Avant v. Willowglen Academy	Pending
3677-The Housing Authority v. Cornerstone	Pending
3678-Coon v. Coon	Pending
3679-The Vestry v. Orkin Exterminating	Pending
3680-Townsend v. Townsend	Pending
3681-Yates v. Yates	Pending
3683-Cox v. BellSouth	Pending
3684-State v. Sanders	Pending
3685-Wooten v. Wooten	Pending
3686-Slack v. James	Pending

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

3730-State v. Anderson	Pending
3733-Smith v. Rucker	Pending
3737-West et al. v. Newberry Electric	Pending
3739-Trivelas v. SCDOT	Pending
3740-Tillotson v. Keith Smith Builders	Pending
3743-Kennedy v. Griffin	Pending
3744-Angus v. Burroughs & Chapin	Pending
3745-Henson v. International (H. Hunt)	Pending
3747-RIM Associates v. Blackwell	Pending
3749-Goldston v. State Farm	Pending
3753-Deloitte & Touche, LLP v. Unisys Corp.	Pending
3755-Hatfield v. Van Epps	Pending
3757-All Saints v. Protestant Episcopal Church	Pending
3758-Walsh v. Woods	Pending
3759-QZO, Inc. v. Moyer	Pending
3765-InMed Diagnostic v. MedQuest Assoc.	Pending
3767-Hunt v. S.C. Forestry Comm.	Pending
2003-UP-009-Belcher v. Davis	Pending
2003-UP-060-State v. Goins	Pending
2003-UP-111-State v. Long	Pending
2003-UP-135-State v. Frierson	Pending

2003-UP-277-Jordan v. Holt	Granted 6/10/04
2003-UP-316-State v. Nickel	Pending
2003-UP-336-Tripp v. Price et al.	Pending
2003-UP-360-Market at Shaw v. Hoge	Pending
2003-UP-396-Coaxum v. Washington et al.	Pending
2003-UP-444-State v. Roberts	Pending
2003-UP-453-Waye v. Three Rivers Apt.	Denied 6/10/04
2003-UP-462-State v. Green	Pending
2003-UP-467-SCDSS v. Averette	Pending
2003-UP-468-Jones v. Providence Hospital	Pending
2003-UP-470-BIFS Technologies Corp. v. Knabb	Pending
2003-UP-473-Seaside Dev. Corp. v. Chisholm	Pending
2003-UP-475-In the matter of Newsome	Pending
2003-UP-478-DeBordieu Colony Assoc. v. Wingate	Pending
2003-UP-480-Smalls v. Fuji Photo Film	Pending
2003-UP-483-Lamar Advertising v. Li'l Cricket	Pending
2003-UP-489-Willis v. City of Aiken	Pending
2003-UP-490-Town of Olanta v. Epps	Pending
2003-UP-491-Springob v. Springob	Pending
2003-UP-494-McGee v. Sovran Const. Co.	Pending
2003-UP-503-Shell v. Richland County	Pending

2003-UP-515-State v. Glenn	Pending
2003-UP-521-Green v. Frigidaire	Pending
2003-UP-522-Canty v. Richland Sch. Dt.2	Pending
2003-UP-527-McNair v. SCLEOA	Pending
2003-UP-533-Buist v. Huggins et al.	Pending
2003-UP-535-Sauer v. Wright	Pending
2003-UP-539-Boozer v. Meetze	Pending
2003-UP-549-State v. Stukins	Pending
2003-UP-550-Collins Ent. v. Gardner	Pending
2003-UP-556-Thomas v. Orrel	Pending
2003-UP-565-Lancaster v. Benn	Pending
2003-UP-566-Lancaster v. Benn	Pending
2003-UP-588-State v. Brooks	Pending
2003-UP-592-Gamble v. Parker	Pending
2003-UP-593-State v. Holston	Pending
2003-UP-633-State v. Means	Pending
2003-UP-635-Yates v. Yates	Pending
2003-UP-638-Dawsey v. New South Inc.	Pending
2003-UP-640-State v. Brown #1	Pending
2003-UP-659-Smith v. City of Columbia	Pending
2003-UP-662-Zimmerman v. Marsh	Pending

2003-UP-669-State v. Owens	Pending
2003-UP-672-Addy v. Attorney General	Pending
2003-UP-678-SCDSS v. Jones	Pending
2003-UP-688-Johnston v. SCDLLR	Pending
2003-UP-689-Burrows v. Poston's Auto Service	Pending
2003-UP-703-Beaufort County v. Town of Port Royal	Pending
2003-UP-705-State v. Floyd	Pending
2003-UP-706-Brown v. Taylor	Pending
2003-UP-711-Cincinnati Ins. Co. v. Allstate Ins.	Pending
2003-UP-715-Antia-Obong v. Tivener	Pending
2003-UP-716-State v. Perkins	Pending
2003-UP-718-Sellers v. C.D. Walters	Pending
2003-UP-719-SCDSS v. Holden	Pending
2003-UP-723-Derrick v. Holiday Kamper et al.	Pending
2003-UP-735-Svetlik Construction v. Zimmerman	Pending
2003-UP-751-Samuel v. Brown	Pending
2003-UP-755-Abbott Sign Co. v. SCDOT #2	Pending
2003-UP-757-State v. Johnson	Pending
2003-UP-758-Ward v. Ward	Pending
2003-UP-766-Hitachi Electronic v. Platinum Tech.	Pending
2004-UP-001-Shuman v. Charleston Lincoln Mercury	Pending

2004-UP-011-Baird Pacific West v. Blue Water	Pending
2004-UP-012-Meredith v. Stoudemayer et al.	Pending
2004-UP-019-Real Estate Unlimited v. Rainbow Living	Pending
2004-UP-029-City of Myrtle Beach v. SCDOT	Pending
2004-UP-038-State v. Toney	Pending
2004-UP-050-Lindsey v. Spartan Roofing	Pending
2004-UP-055-Spartanburg Cty. v. Lancaster	Pending
2004-UP-061-SCDHEC v. Paris Mt.(Hiller)	Pending
2004-UP-098-Smoak v. McCullough	Pending
2004-UP-100-Westbury v. Dorchester Co. et al.	Pending
2004-UP-110-Page v. Page	Pending
2004-UP-119-Williams v. Pioneer Machinery	Pending
2004-UP-142-State v. Morman	Pending
2004-UP-147-KCI Management v. Post	Pending
2004-UP-148-Lawson v. Irby	Pending
2004-UP-149-Hook v. Bishop	Pending
2004-UP-153-Walters v.Walters	Pending
2004-UP-229-State v. Scott	Pending

The Supreme Court of South Carolina

In the Matter of Laurie A. Baker, Respondent.

ORDER

The Court recently issued an opinion definitely suspending respondent from the practice of law for a period of three months. In the Matter of Baker, Op. No. 25837 (S.C. Sup. Ct. filed June 14, 2004) (Shearouse Adv. Sh. No.25 at 26). The Court has identified an error in the opinion.

Accordingly, the original opinion is hereby withdrawn and the attached opinion is substituted.

IT IS SO ORDERED.

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

Columbia, South Carolina

June 21, 2004

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Laurie A. Baker, Respondent.

Opinion No. 25837
Submitted April 26, 2004 - Refiled June 21, 2004

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Barbara M. Seymour, both of Columbia, for the Office of Disciplinary Counsel.

Desa A. Ballard, of West Columbia, for respondent.

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

FACTS

Matter I

In May 1998, respondent graduated from law school and was admitted to the North Carolina Bar three months later. She was employed by the firm of Forquer & Green in Charlotte, North Carolina. After she was admitted to the South Carolina Bar in August 1998, respondent was assigned to the firm's Rock Hill law office. Respondent was the only licensed attorney working in the Rock Hill office of Forquer & Green.

On September 1, 1999, Forquer & Green merged with the firm of Brock & Scott. In South Carolina, the firm operated as Green, Brock, Forquer & Scott. At the time of the merger, respondent became an employee of the new law firm and was given a one percent interest in the firm.

With the merger, three non-lawyer employees moved into the Rock Hill office. The three employees included an unlicensed law school graduate (Mr. Brown) and two legal assistants. Respondent supervised all three employees.

While employed at Green, Brock, Forquer & Scott, Mr. Brown conducted real estate closings, both inside and outside of the office, without respondent or another attorney being present. Mr. Brown signed respondent's name on real estate closing documents without indicating he was signing for her. This was done with respondent's knowledge and, in some cases, in her presence.

After conducting real estate closings, it was Mr. Brown's practice to have other firm employees sign as witness and/or notary on the documents even though they were not present at the closings. Mr. Brown also routinely signed as witness and notary to documents related to closings at which he was not present. Respondent was not specifically aware of these practices; however, she admits she was responsible for Mr. Brown's supervision.

From September 1999 until January 2000, respondent and Mr. Brown handled approximately sixty to eighty real estate closings per month. Although respondent represents she had concern, respondent made no meaningful inquiry into the propriety of non-lawyers conducting real estate closings. Respondent did not conduct any legal research, consult with an attorney outside her firm, or seek guidance from the South Carolina Bar concerning the propriety of a non-lawyers conducting real estate closings.

Matter II

On January 17, 2000, respondent left Green, Brock, Forquer & Scott. As a favor to the firm, however, respondent conducted a real estate closing in Greenville for Complainants A and B. Following the closing, respondent left the closing documents in the firm's Rock Hill office and took no further action in regard to the closing. Where she had failed to sign her name on the closing documents, Mr. Brown signed respondent's name, including on an affidavit and a certification. On one document, Mr. Brown notarized respondent's signature when he had signed her name himself. Mr. Brown signed his own name as witness on the documents even though he was not present when the documents were executed. Mr. Brown notarized Complainant A's and Complainant B's signatures in two places. Some of the documents in the closing file were incomplete or left blank. Mr. Brown completed the documents and filled in the blanks.

When Complainants A and B subsequently attempted to refinance the property, they discovered the mortgage and deed had never been filed. Respondent admits she failed to adequately explain her limited role in connection with the closing. She further admits she failed to ensure the closing documents where appropriately completed and filed.

LAW

Respondent admits that by her misconduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.2 (lawyer may limit objectives of representation with client consent after consultation); Rule 5.3 (lawyer having direct supervisory authority over non-lawyer employee shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; lawyer is responsible for conduct of non-lawyer employee if the conduct would be a violation of the Rules of Professional Conduct if engaged in by a lawyer and lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved); Rule 5.5 (lawyer shall not assist non-lawyer in performance of activity which constitutes unauthorized practice of law); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). In addition, respondent admits her misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law) and Rule 7(a)(6) (lawyer shall not violate the oath of office taken upon admission to practice law in this state).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a three month period, effective on the date of this opinion. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Patricia Houston Messer, Respondent/Appellant,

v.

John A. Messer, III, Appellant/Respondent,

Appeal From Greenville County
R. Kinard Johnson, Jr., Family Court Judge

Opinion No. 3825
Heard January 13, 2004 – Filed June 14, 2004

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

S. Allan Hill, of Greenville; for Appellant/Respondent.

William B. Swent, of Greenville; for Respondent/Appellant.

HOWARD, J.: Patricia Houston Messer ("Wife") brought this contempt action against her former husband, John A. Messer, III

("Husband"), to collect alimony payable under a separation agreement incorporated into the parties' final divorce decree.

After multiple hearings, the family court ruled: 1) income should be imputed to Husband for his voluntary underemployment; 2) Husband improperly classified income derived from the sale of his business under a covenant not to compete as capital gains, thus shielding the income from the alimony formula contained in the agreement; 3) Husband was responsible for Wife's attorney's fees; and 4) Wife waived her right to additional alimony for the period prior to 1997. Both parties appeal. We affirm in part, reverse in part, and remand.

FACTUAL/PROCEDURAL BACKGROUND

Wife and Husband were married in 1960 and separated in 1982. They had two minor children when they separated, a son, fourteen years of age, and a daughter, ten years of age.

The parties entered into a separation agreement later approved and incorporated into the final divorce decree. In pertinent part, the decree provided Husband would pay Wife $1,200 per month in alimony and $250 per month in child support for each child during their minority. Thereafter, when the children graduated from high school, they each had two years in which to begin college, during which the child support obligation continued. Once they entered college, child support payments for each child decreased to $100 per month and ceased once each child had been given the opportunity to complete at least four years of college or post-graduate study.

Once child support payments ceased under the formula above, Husband's alimony payments became subject to an alimony formula. Pursuant to the formula, Husband was to pay thirty percent of the first $85,000 of his adjusted gross income, excluding capital gains, and ten percent of his income as so defined over $85,000. Furthermore, the formula provides, "in no event . . . [shall Husband pay] less than Sixteen

Thousand ($16,000.00) per year, nor more than Twenty Nine Thousand Five Hundred ($29,500.00) Dollars per year."[1]

The alimony formula contained a second, limiting clause ("the seventy-five percent clause") providing as follows:

> That because of any future changes in federal tax structure or the economic or physical conditions affecting the husband, he, at no time, under the payment schedules set forth above, shall pay more than Seventy Five (75%) percent of his annual income after Federal and State Taxes, FICA deductions, and child support payments are deducted.

At the time of separation, Husband was a salaried employee in his father's mirror manufacturing company, Messer Mirror, earning $42,000 per year. By 1988, through purchase and inheritance of the company's stock, the Husband controlled the company and owned a fifty-seven percent interest in it. In 1988, the Husband sold Messer Mirror to Messer Industries, a newly formed company owned by outside interests, under an Asset Purchase Agreement for a total acquisition price of $6.5 million. As a part of the purchase agreement, Messer Industries agreed to pay Husband $1.5 million as consideration for a five-year covenant not to compete.

In the ensuing years, Husband declared each payment under the covenant as capital gain, rather than ordinary income, thereby shielding the income from the alimony formula. He also invested his proceeds from the sale in investments yielding non-taxable income. Because payments were temporarily discontinued during a dispute between Messer Industries and the Husband, he will continue to be paid $66,766 per year through 2007.

After Husband discontinued child support, he ceased making alimony payments because his ordinary income was so low no alimony was payable under the seventy-five percent clause. Subsequently, Wife filed a petition

[1] Thus, any amount exceeding $125,000 cannot be subject to the alimony formula, as ordinary income of $125,000 will trigger the maximum alimony provision contained within this clause.

seeking a rule to show cause, arguing the seventy-five percent clause was inapplicable and Husband's ordinary income was artificially low.

Husband moved to dismiss the action because the agreement incorporated into the decree contained an arbitration provision. The family court dismissed the petition, ruling the action must be arbitrated. Thereafter, Wife appealed to this Court, and this Court reversed and remanded, ruling the arbitration clause was unenforceable.[2]

Upon remand, the family court: 1) ruled Husband was liable for unpaid alimony and interest accruing after August 1997; 2) ruled Wife waived her claim for alimony for the period prior to August 1997; and 3) awarded Wife attorneys' fees. Both parties appeal.

STANDARD OF REVIEW

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

ISSUES PRESENTED

I. Husband's Appeal

A. Did the family court err by ruling Husband violated the covenant of good faith and fair dealing?

B. Did the family court err by reclassifying income derived from the covenant not to compete as ordinary income?

[2] Ex Parte Messer, 333 S.C. 391, 509 S.E.2d 486 (Ct. App. 1998).

C. Did the family court err by imputing income to Husband?

D. Did the family court err in its interpretation of the seventy-five percent clause?

E. Did the family court err by awarding Wife attorneys' fees?

II. Wife's Appeal

A. Did the family court err by ruling Wife waived her right to additional alimony under the alimony formula accruing prior to 1997?

LAW/ANALYSIS

I. Husband's Appeal

A. Did the family court err by ruling Husband violated the covenant of good faith and fair dealing?

Husband argues the family court erred by ruling he violated the covenant of good faith and fair dealing by minimizing his ordinary income and thus his alimony obligation.[3] We agree.

In the enforcement of an agreement, the court does not have the authority to modify terms that are clear and unambiguous on their face. Ebert v. Ebert, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995).

At the time of the decree, Husband was a salaried employee in his father's mirror manufacturing company, Messer Mirror, earning $42,000 per year. By 1988, through purchase and inheritance of the company's stock, Husband owned a fifty-seven percent controlling interest in the company. Subsequently, Husband sold Messer Mirror to Messer

[3] The family court applied the contractual doctrine of good faith and fair dealing to the provisions of the decree. Neither party has argued the family court erred in this respect. Thus, this is the law of the case.

Industries, a newly formed company owned by outside interests. As part of the purchase agreement, Messer Industries agreed to employ Husband for five years as president at a compensation of $86,000 per year, comprised of a salary of $80,000 and a car allowance valued at an additional $6,000 per year.

In 1996, Husband's salaried position with Messer Industries was terminated. Thereafter, he did not seek another salaried position. Instead, Husband started Continental Marketing to market furniture. He organized and managed Continental's finances to avoid paying ordinary income to himself, where possible. Although other members of his family work in the business and receive ordinary income, he does not. At the same time, many of his living expenses, such as automobile, medical and dental bills, are paid through the company without incurring ordinary income subject to the alimony formula.

As a result of these events, Husband claimed his adjusted gross income, excluding capital gains, fell below the minimum amount triggering alimony under the alimony formula, thereby eliminating his alimony obligation in each subsequent tax year.

In its final order, the family court acknowledged Husband's management and tax reporting of Continental's finances may be "technically legal and indeed may well constitute wise tax planning." Nevertheless, the family court ruled Husband voluntarily and purposefully decreased the amount of his ordinary income to avoid paying alimony. Thus, the family court held that by minimizing his tax consequences in the manner described above, Husband acted in bad faith.

We agree with Husband's argument that under the plain terms of the agreement and the decree, he has not acted in bad faith by minimizing his tax consequences, even though it has the effect of decreasing the Wife's alimony. The decree specifically bases the alimony formula on the ordinary, taxable income of Husband as determined for federal income tax purposes, excluding capital gain. This provision is not hidden, implied, or difficult to understand. It is expressly stated, and is policed by the Husband's certification to the Internal Revenue Service as to the

correctness of his reporting and by his obligation to provide a copy of his returns each year to Wife. Unequivocally, this was the bargain Wife made. Therefore, we do not agree with the court's finding of bad faith where the structure and reporting of income was not found to be legally improper.[4] There is nothing in the wording of the agreement or the decree requiring Husband to forego tax saving advantages merely because they have the effect of decreasing his ordinary income to the disadvantage of Wife.

B. Did the family court err by reclassifying income derived from the covenant not to compete as ordinary income?

Husband next argues the family court erred by reclassifying income derived from the covenant not to compete as ordinary income subject to the alimony formula. We disagree.

Initially, we note, the family court placed the burden of proving the payments were properly considered as capital gains under existing tax law on Husband as the "taxpayer." Although Husband would have the burden of proof under the tax code,[5] see General Ins. Agency, Inc. v. Commissioner, 401 F.2d 324, 329 (4th Cir. 1968), this is not a tax case. Rather, this is an action by Wife asserting Husband has violated the decree. Therefore, it is Wife's burden to establish facts demonstrating a violation of the decree to provide a prima facie case of noncompliance. See Brasington v. Shannon, 288 S.C. 183, 184, 341 S.E.2d 130, 131 (1986) ("In a proceeding for contempt for violation of a court order, the moving party must show the existence of the order and the facts establishing the respondent's noncompliance. The burden then shifts to the respondent to

[4] To the extent the family court ruled Husband acted in bad faith by transferring income-producing assets to his new Wife, Husband has not appealed this issue. Thus, it is the law of the case.

[5] The tax court's degree of scrutiny depends on the nature of the relationship between the parties to the business asset sales agreement. Where the parties do not have tax consequences adverse to each other in the transaction, the tax court strictly scrutinizes an allocation of the purchase price in a business asset sale. Bemidji Distributing Co., Inc. v. Commissioner, 82 T.C.M (CCH) 677 (U.S. Tax Ct. 2001).

establish his defense and inability to comply with the order.") Wife had the burden of establishing a prima facie violation of the decree. Thus, we conclude the family court erred by placing the burden of proof on the Husband, as it would be under the tax code. Notwithstanding this error, we conclude Wife met her burden of proving the Husband improperly reported this income as capital gains.

When determining the tax consequences of payments received under a non-compete covenant, the U.S. Court of Appeals for the Fourth Circuit applies what has been termed the "economic reality" test. General Ins. Agency, 401 F.2d at 329-30. Under this test, a court must: (1) look to the parties' purchase agreement and determine whether they "intended to allocate a portion of the purchase price to such covenant at the time they executed their formal sales agreement;" and (2) look to the "business reality" of the transaction, determining whether the covenant not to compete would have real economic benefit to the acquiring entity, indicating its terms were negotiated independently of the overall sale price of the company being acquired. If both prongs of the test are satisfied, payment for the non-compete covenant must be treated as ordinary income for income tax purposes. Id.

The factors to be considered in the application of the economic reality test include: "(a) The grantor's (i.e., covenantor's) business expertise to compete; (b) the grantor's intent to compete; (c) the grantor's economic resources; (d) the potential damage to the buyer posed by the grantor's competition; (e) the grantor's contacts and relationships with customers, suppliers, and other business contacts; (f) the duration and geographic scope of the covenant; (g) enforceability of the covenant not to compete under State law; (h) the age and health of the grantor; (i) whether payments for the covenant not to compete are pro rata to the grantor's stock ownership in the company being sold; (j) whether the payments under the covenant not to compete cease upon breach of the covenant or upon the death of the grantor; and (k) the existence of active negotiations over the terms and value of the covenant not to compete." Thompson v. Commissioner, 73 T.C.M. (CCH) 3169 (U.S. Tax Ct. 1997); see Beaver Bolt, Inc. v. Commissioner, 70 T.C.M. (CCH) 1364 (U.S. Tax Ct. 1995).

The evidence within the record indicates Husband and his father created Messer Mirror sometime around 1967, and by 1988, Husband was the controlling stockholder and president of Messer Mirror. That same year, Messer Industries agreed to purchase Messer Mirror. The agreement contained three main documents – the asset purchase agreement, the employment agreement, and the covenant not to compete.

The asset purchase agreement provided Messer Industries would pay two million dollars, pro-rata, to Messer Mirror's stockholders for the purchase of Messer Mirror. Additionally, the agreement provided Messer Industries would pay 1.5 million dollars solely to Husband for a covenant not to compete, the sums being segregated within the document. The asset purchase agreement then provided a covenant not to compete, which prohibited Husband from engaging in any investment, consulting, or advising of any company engaging in business involving mirror and glass production. Furthermore, the covenant contained a liquidated damages clause, wherein Husband agreed to pay 1.5 million dollars for a breach of the covenant, along with any equitable remedies Messer Industries may choose.

The employment agreement provided Messer Industries would employ Husband as president for five years at a salary of $86,000 per year, including a car allowance. Additionally, the agreement contained a covenant not to compete prohibiting Husband from engaging in or performing any services for any company that competed with Messer Industries or any of their subsidiaries. Furthermore, the agreement contained a damages provision stating breach of the agreement permitted Messer Industries to bring a suit in law or equity to recover its damages.

Husband also signed an additional document entitled "Noncompetition Agreement." The noncompetition agreement prohibited Husband from engaging or assisting another to engage in the business of glass or "any business that substantially competes with the business of . . . [Messer Industries]." The agreement also provides Husband shall be paid 1.5 million dollars as compensation. Furthermore, the agreement provides the remedies for its breach are monetary damages, a temporary restraining order, a preliminary injunction, a permanent injunction, the right to

withhold future payments under the agreement, or a combination of some or all of the above.[6]

Viewing this evidence in light of the economic realities test, we conclude the family court properly reclassified the income derived from the covenant not to compete as ordinary income. First, the payments for the covenant not to compete were segregated from payment for the stock purchase. Furthermore, and most importantly, only Husband received payments for the covenant not to compete. Second, the evidence indicates the covenant had a real economic benefit to Messer Industries, reflected by the separate, multiple, overlapping covenants, prohibiting different conduct by Husband and the amount of the liquidated damages provision found within the asset purchase agreement.[7]

Lastly, the evidence indicates Husband posed a real economic threat to Messer Industries if he chose to compete, as the evidence indicates he, along with his father, built Messer Mirror, and, at the time of purchase, occupied the positions of president and controlling stockholder. He possessed vast knowledge of the market, including customers and suppliers, and access to Messer Industries inside information. Furthermore, no evidence exists indicating Husband's age or health would prevent him from competing.

---

[6] We note, the covenant not to compete provides the payments to Husband continue even if he dies prior to the expiration of the five-year life of the covenant. Husband argues this fact weighs in favor of classifying the covenant's income as capital gain. However, the covenant also provides payments will cease upon a breach, a fact weighing in favor of classifying the income as ordinary.

[7] Husband contends the document entitled, "Noncompetition Agreement" had no real economic benefit to Messer Industries, as Husband was already bound by covenants not to compete in both his employment agreement and the asset purchase agreement. However, we find this argument unconvincing, as the covenants not to compete found in the employment agreement and the asset purchase agreement prohibit different conduct by Husband and provide different remedies for their breach.

Based on these facts, we hold the weight of the evidence indicates the income derived from the covenant not to compete is ordinary income. Thus, we come to the same conclusion as that reached by the family court, that the income should be considered ordinary income and not capital gain for purposes of calculating alimony under the agreement.

C. Did the family court err by imputing income to Husband?

Husband argues the family court erred by imputing income to him because: 1) as a matter of construction of the decree, the decree permitted Husband to cease working entirely; and 2) the amount of income the family court imputed to him for his earning capacity was excessive.

1. Construction of the Decree

Husband argues the family court erred, as a matter of construction of the decree, by imputing income to him for purposes of the alimony calculus. Husband contends the decree does not require him to work, and thus, imputation of income to him impermissibly expands the provisions of the decree. We disagree.

In support of his position, the Husband cites to the unofficially published Ohio Court of Appeals, Ninth Circuit, case of Mayer v. Mayer, 1999 WL 1059674 (Ohio Ct. App. 1999).[8] Assuming arguendo the case has any precedential value, we conclude the facts of the case are vastly different from those in this case.

In Mayer, the husband agreed to pay alimony based upon 46.5% of his income, with the husband to receive "a credit against said spousal support obligation in an amount equal to 46.5% of the Wife's gross income from her employment *should she become employed* during the time that the

[8] Rule 2, Ohio Supreme Court Rules for the Reporting of Opinions, provides in part that unofficially published and unpublished opinions of the Courts of Appeals may be cited by any court or person as "persuasive" authority on a court, including the deciding court, in the judicial district in which the opinion was rendered.

Husband's spousal support obligation is in effect." The agreement was approved by the court. The husband brought a later action to reduce his alimony obligation based on his changed circumstances. Additionally, he argued income should be imputed to the wife. The lower court agreed. The Ohio Court of Appeals reversed, holding the language "should [wife] become employed" was clear, and the lower court had no authority to modify the agreement so as to impute income to the wife absent express authority to do so.

In the present case, no analogous provision exists. Though capital gains and non-taxable income are excluded from the formula, there is no provision requiring Husband to pay a percentage of his ordinary income as alimony "should he become employed." To the contrary, Husband had a history of stable employment at the time the agreement was reached and approved by the court, an underlying fact undoubtedly serving as the foundation for the support provisions. Consequently, we hold this case is inapposite. Furthermore, as a matter of interpreting the decree, we conclude the family court did not err by imputing income to Husband.

Generally, where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement. Bogan v. Bogan, 298 S.C. 139, 142, 378 S.E.2d 606, 608 (Ct. App. 1989). However, where an agreement has been merged into a court's decree, the decree, to the extent possible, should be construed to effect the intent of both the judge and the parties. McDuffie v. McDuffie, 308 S.C. 401, 409, 418 S.E.2d 331, 336 (Ct. App. 1992); see also Ratchford v. Ratchford, 295 S.C. 297, 299, 368 S.E.2d 214, 215 (Ct. App. 1988) (holding a court should not decide an issue relating to an agreement that has been incorporated into a decree as if there were no agreement); Mattox v. Cassady, 289 S.C. 57, 60, 344 S.E.2d 620, 622 (Ct. App. 1986) ("Like any other agreement, when the language of a settlement agreement is susceptible of more than one interpretation, it is the duty of the court to ascertain the intentions of the parties."); Elliot v. Elliott, 274 S.C. 224, 226, 262 S.E.2d 413, 414 (1980) ("[T]he contractual nature of [the parties'] agreement was, to some extent, lost when it was incorporated into the . . . Family Court Order.").

"'A court approved divorce settlement must be viewed in accordance with principles of equity and there is implied in every such agreement a requirement of reasonableness.'" Ebert v. Ebert, 320 S.C. 331, 340, 465 S.E.2d 121, 126 (Ct. App. 1995) (quoting 17A Am. Jur. 2d Contracts § 479 (1991)). "In the absence of an express provision in the contract, the law will imply an agreement to do those things that according to reason and justice should be done to carry out the purpose for which the contract was made." Columbia East Assocs. v. Bi-Lo, Inc., 299 S.C. 515, 520-521, 386 S.E.2d 259, 262 (Ct. App. 1989).

Though the terms of the decree grant Husband great latitude in his choice of employment and provide a standard measure for reporting income, Husband's right to manipulate his income must be governed by what is reasonable in light of the purposes of the agreement and the decree. There certainly is no fact in the record to support a conclusion that the parties or the court contemplated Husband's current financial circumstances, and any suggestion that the support provisions in the agreement and decree were intended to diminish or extinguish Wife's support if Husband's wealth increased to the point he no longer needed to work is illogical. Simply stated, such a reading of the provisions undermines the essential purpose of the agreement. Read as a whole, one purpose of the decree was to provide a continuing means of support for Wife that kept pace with Husband's income. Therefore, we hold the family court did not err by ruling income should be imputed to Husband.

2. Amount of Imputed Income

Husband argues the family court imputed an excessive amount of income to him.

It is well-settled in South Carolina that an award of alimony should be based on the payor spouse's earning potential rather than merely his current, reported earnings. See S.C. Code Ann. § 20-3-130(C)(4) & -130(C)(6) (Supp. 2002) (requiring the family court to consider "the employment history and earning potential of each spouse" and "the current and reasonably anticipated earnings of both spouses when awarding alimony"). Accordingly, a spouse obligated to pay alimony may not

voluntarily or intentionally change his employment or economic circumstances so as to curtail his income and thereby avoid paying alimony or child support. See Camp v. Camp, 269 S.C. 173, 174, 236 S.E.2d 814, 815 (1977) (holding that the courts "will closely scrutinize the facts of any case wherein a husband and father voluntarily changes employment so as to lessen his earning capacity and, in turn, his ability to pay alimony and child support monies").

The family court ruled it was unnecessary to determine the exact amount of income to impute to Husband because the combination of his imputed salary and the income from the covenant not to compete would exceed $125,000 per year, the amount triggering the maximum alimony provision in the formula. In reaching this conclusion, the court noted that in 1992, less than $20,000 would need to be imputed, in 1993 – 1995, no income would need to be imputed, and in more recent years, only approximately $60,000 would need to be imputed.

Contrary to the family court's position, we do find it necessary to determine the amount of income to be imputed to Husband because, prior to this lawsuit, Messer Industries temporarily discontinued Husband's payments under the covenant not to compete. Should the same thing occur in the future, it is necessary to know the amount of income to be imputed in order to properly calculate the alimony payable.

As the family court noted, Husband had an annual salary of $86,000 beginning in 1988 and continuing until 1993. Thereafter, he worked for the company until his position was terminated in 1996. We find no evidence in the record indicating his income earning potential was impaired by age or health. Consequently, we conclude imputing $86,000 per year as salary reflects Husband's earning potential and should be imputed to him as ordinary income for the years following 1996.

Thus, we agree with the family court's conclusion that Husband's ordinary income will trigger the maximum amount of alimony permitted under the formula for every year following 1996, so long as Husband continues to receive income from the covenant not to compete and has not reached retirement age. Furthermore, we agree with the family court's

finding that imputation of income for Husband's voluntary underemployment should cease beginning in 2007, the year Husband will reach retirement age.

D. Did the family court err in its interpretation of the seventy-five percent clause?

Next, Husband argues the family court erred by misconstruing the seventy-five percent clause contained in the decree.

Generally, where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement. Bogan, 298 S.C. at 142, 378 S.E.2d at 608. However, where an agreement has been merged into a court's decree, the decree, to the extent possible, should be construed to effect the intent of both the judge and the parties. McDuffie, 308 S.C. at 409, 418 S.E.2d at 336; see also Ratchford, 295 S.C. at 299, 368 S.E.2d at 215 (holding a court should not decide an issue relating to an agreement that has been incorporated into a decree as if there were no agreement); Mattox, 289 S.C. at 60, 344 S.E.2d at 622 ("Like any other agreement, when the language of a settlement agreement is susceptible of more than one interpretation, it is the duty of the court to ascertain the intentions of the parties."); Elliot, 274 S.C. at 226, 262 S.E.2d at 414 ("[T]he contractual nature of [the parties'] agreement was, to some extent, lost when it was incorporated into the . . . Family Court Order.").

Based on its construction of the alimony formula, the family court ruled that regardless of the amount of Husband's ordinary income, Husband's alimony obligation must at least be $16,000. We conclude this interpretation renders the seventy-five percent clause meaningless.

The alimony provisions set alimony at $1,200 per month until child support ended. Once child support ended, the alimony formula applied, fixing the amount at thirty percent of the first $85,000 of Husband's adjusted gross income, excluding capital gains, and ten percent of his income over $85,000, with a minimum of Sixteen Thousand ($16,000.00)

per year and a maximum of Twenty Nine Thousand Five Hundred ($29,500.00) Dollars per year.

The seventy-five percent clause followed these provisions. Premised upon the possibility of future changes in Federal Tax structure, or economic or physical conditions affecting the husband, it states "at no time under the payment schedules set forth above, shall [Husband] pay more than Seventy Five (75%) percent of his annual income after Federal and State Taxes, FICA deductions, and child support payments are deducted."

Based upon the language, we conclude the seventy-five percent clause applies as a limitation under either of the alimony provisions. Therefore, when it is applicable, the seventy-five percent clause overrides the minimum $16,000 alimony provision.

We reach this conclusion for two reasons. First, the seventy-five percent clause states that it applies under "the payment schedules," thus referring to both the payment schedule in effect when child support is paid and the schedule under the alimony formula. Second, the numerator employed in the clause is Husband's "annual income after Federal and State Taxes, FICA deductions, and child support payments are deducted." There would be no reference to the deduction of child support payments if the clause only applied under the alimony formula, because payment under the formula only commences after child support ceases. Therefore, the Seventy Five (75%) clause provides a limitation on the amount of alimony payable under either schedule, thereby overriding the stated minimum of $16,000, when it applies.

However, by its clear terms, the limitation only applies when the alimony obligation exceeds 75% of Husband's annual income less stated deductions as a result of changes in Federal Tax structure, or economic or physical conditions affecting the husband. We agree with Wife that this provision was intended to provide protection to Husband in the event of adverse consequences from future tax law changes, economic conditions, or physical conditions affecting him that are beyond his control. Reading the clause in light of the entire agreement, we conclude the clause was not

intended to allow Husband to limit his alimony obligation by voluntarily lowering his annual income.

Notwithstanding our conclusion the seventy five percent clause can operate as a limitation on alimony under the formula, it does not aid Husband under the present circumstances for the reason above stated. As we have already discussed, income subject to the formula is imputable to him in the amount of $86,000 per year based on his underemployment, and to the extent it is paid, ordinary income is imputable for the amounts paid under the covenant not to compete. These figures provide a combined ordinary income exceeding $125,000, the amount triggering the $29,500 maximum alimony.

E. Did the family court err by awarding Wife attorneys' fees?

Husband argues the family court erred by awarding Wife attorney's fees. Specifically, Husband contends the family court did not substantiate its award by requiring the production of detailed time sheets and other documentation. This argument is without merit.

The family court is authorized by statute to award attorney's fees in conjunction with marital litigation. See S.C. Code Ann. § 20-7-420(2) (Supp. 2002). In determining the amount of attorney's fees to award, the court should consider the nature, extent, and difficulty of the case, the time necessarily devoted to the case, counsel's professional standing, the contingency of compensation, the beneficial results obtained, and the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

In this case, the family court analyzed each of the factors outlined above and detailed its findings in its final order. Its findings are further supported by the affidavits of Wife's counsel submitted to the family court and contained in the record before us.

Accordingly, we find no abuse of discretion in the family court's award of attorney's fees to Wife.

II. Wife's Appeal

A. Did the family court err by ruling Wife waived her right to additional alimony under the alimony formula accruing prior to 1997?

Wife argues the family court erred by ruling she and Husband orally modified the decree. We agree.

In pertinent part, the decree provided that once the children were emancipated, Husband's alimony obligation was subject to a calculus. Furthermore, the decree provided, "no modification nor waiver of any of the terms hereof shall be valid unless in writing and signed by both parties."

According to the unappealed finding of the family court, by November of 1991, both children were emancipated. The evidence indicates that subsequently, Wife demanded Husband begin paying alimony as calculated under the alimony formula. However, Husband refused, and Wife orally agreed to allow Husband to pay less than the decree required. Thereafter, in 1997, Husband discontinued paying alimony altogether, and Wife brought this suit.

Based on this evidence, the family court ruled Wife's oral consent to an alteration of the alimony agreement was sufficient to modify the provisions of the alimony formula. Consequently, the family court held Wife waived her right to the alimony payments required by the formula for the period prior to 1997.

Although we agree that generally a written contract may be orally modified, notwithstanding a provision in the contract barring oral modification,[9] where, as here, a contract has been merged into a court order, and the order contains a provision barring oral modification, any oral modification is unenforceable. See Miles v. Miles, 355 S.C. 511, 519, 586

[9] See Sanchez v. Tilley, 285 S.C. 449, 452, 330 S.E.2d 319, 320 (Ct. App. 1985).

S.E.2d 136, 140 (Ct. App. 2003) ("[I]t is axiomatic that parties cannot modify a court order."). Therefore, we hold the family court erred by ruling the decree was orally modified. Thus, we remand this matter to the family court for a determination of the amount of past due alimony owed to Wife.[10]

CONCLUSION

For the foregoing reasons, we **AFFIRM** the family court's determination that income should be imputed to the Husband both for his underemployment and for his allocation of payments received under the covenant not to compete as capital gain. Additionally, we **AFFIRM** the award of attorneys' fees to Wife.

We **REVERSE** the order of the family court, imputing income to the Husband based on bad faith in the management of his new corporation and interpreting the seventy-five percent clause to apply only to the stated maximum amount of alimony payable under the alimony formula. Furthermore, we **REVERSE** the family court's determination that Wife, by oral modification, waived her right to additional alimony accruing prior to 1997.

Lastly, we **REMAND** to the family court to hold a hearing, and to take such additional testimony as may be necessary, to determine the past and future alimony payments due from Husband to Wife in accordance with the order of the family court as modified by this opinion.

HEARN, C.J., and KITTREDGE, J., concur.

---

[10] At trial, Husband argued, as additional equitable defenses, Wife's claim for additional alimony prior to 1997 was barred by both laches and estoppel. Disposing of these claims, the family court ruled neither of the doctrines applied to the facts of this case. Husband has not appealed that ruling. Thus, it is law of the case.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Robert Orlando Hill, Appellant.

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

Opinion No. 3826
Heard April 8, 2004 – Filed June 21, 2004

REVERSED AND REMANDED

Deputy Chief Attorney Joseph L. Savitz, III, of Columbia, and Ernest Charles Grose, Jr., of Greenwood, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, all of Columbia; and Solicitor William Townes Jones, of Greenwood, for Respondent.

STILWELL, J.: Robert Orlando Hill appeals his convictions for murder and possession of a firearm during the commission of a violent crime,

arguing the trial court erred in (1) allowing the State to comment on his post-arrest silence and (2) refusing to issue a specific self-defense charge he requested. We reverse his convictions and remand for a new trial.

BACKGROUND

Hill was charged with shooting Artie Hill (Victim, no relation) while Victim sat in the passenger seat of a parked car. The State presented four witnesses of the incident at trial. Ira Green testified Victim was sitting in the car when Hill rode up on his bicycle, walked up to the passenger side of the car, and fired the gun at Victim's head. Green said Victim never opened the door or tried to get out of the car. Shannon Hill's (no relation) testimony essentially mirrored Green's, but she remembered approximately five shots. A third witness, Michelle Clinkscales, testified she was standing nearby when she heard shots. After a pause, she heard more shots and saw Hill ride away on his bike. The fourth witness, Jeffrey Tatum, testified he had been riding in the car with Victim for over an hour when they arrived at the apartment complex where the shooting occurred. Tatum said when they stopped in the parking lot, he and another friend got out of the car. He explained Hill arrived on his bike, said, "hey, I heard you was looking for me," got off his bike, walked toward the car, and started shooting Victim. Tatum testified Victim had a stick in the car, but never attempted to use it.

Hill also testified, admitting to shooting Victim but claiming he did so in self-defense. When asked why he thought it was self-defense, he said, "this right here has been going on for a long time. More than one occasion Artie put sticks and baseball bats at me trying to take my life . . . ." Specifically regarding this incident, Hill stated Victim yelled something out of the window as Hill rode up on his bike. He then saw Victim had a stick beside him and was reaching for the door. Hill testified that he was then scared for his life and "ran up to the car to defend" himself. Victim suffered six gunshot wounds, including four to the head.

DISCUSSION

Hill argues the trial court erred by allowing the State to comment on his post-arrest silence in violation of the Due Process Clause and Doyle v. Ohio, 426 U.S. 610 (1976). The State counters that Hill opened the door to the questions and, alternatively, that any error was harmless. We agree with Hill.

Hill surrendered shortly after the shooting and was later taken to jail. Sergeant Terrance Harvard, the investigator in charge, testified he saw Hill in jail about an hour after the shooting. Hill signed a pre-printed voluntary statement form indicating he had been warned of his rights, including his right to remain silent. In the space designed for a statement, Hill signed his name and wrote, "I do not want to make a statement." This form was marked as a court exhibit at trial.

Sergeant Harvard did not testify to any conversation he had with Hill. The questioning Hill challenges occurred during his own testimony. When cross-examined about what he did after the shooting, Hill said, "[t]hat's when I went and turned myself in so I could come here today to prove my innocence, that it was self-defense. That's why I didn't write a statement or no report on everything that happened." Hill repeated this claim again and later added, "I told everybody it was self-defense."

Shortly thereafter, the solicitor asked the following question:

> SOLICITOR: You didn't tell Terry Harvard that night it was self-defense, did you?

Hill's counsel immediately objected and moved for a mistrial. The objection was overruled. After a second inquiry about whether he had told anyone the shooting was self-defense prior to testifying at trial, defense counsel objected again, and the objection was again overruled. When Hill volunteered he had told his attorney and the State asked when he first met with his attorney, the trial court sustained defense counsel's objection but denied his mistrial motion.

In Doyle v. Ohio, the United States Supreme Court held a state prosecutor violates a defendant's due process rights by impeaching his exculpatory story, told for the first time at trial, through cross-examination regarding his post-arrest silence. Doyle, 426 U.S. at 611. The court reasoned that because Miranda[1] warnings implicitly assure that silence will carry no penalty, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Id. at 618. Relying on Doyle, our supreme court held "the State may neither comment upon nor present evidence at trial of a defendant's decision to exercise his right to remain silent or be represented by an attorney." Edmond v. State, 341 S.C. 340, 345, 534 S.E.2d 682, 685 (2000).

As an exception to the general rule, "the State may cross-examine a defendant about his post-arrest, post-Miranda silence when he offers an exculpatory story at trial and claims he told police the same version upon arrest." State v. McIntosh, ___ S.C. ___, ___, 595 S.E.2d 484, 489 (2004). However, such is not the case here as Hill did not claim he told police the shooting was in self-defense. Here, the State clearly questioned Hill on his post-arrest, post-Miranda silence in violation of Doyle.

The State contends any Doyle violation in this case was invited by Hill's testimony and even if error, was harmless. We disagree.

Our supreme court recently addressed the question of whether a defendant opened the door to a Doyle violation in McIntosh. In that case, the State asserted the defendant's testimony created an appearance that he fully cooperated with law enforcement, thus opening the door to questions about whether he shared his exculpatory story with police at the time of his arrest. McIntosh, ___ S.C. at ___, 595 S.E.2d at 490-91. McIntosh testified he voluntarily returned to South Carolina upon learning authorities were looking for him but said he did not give them a statement. He explained he would have been talking to police if he knew anything about the crimes. Our supreme court held McIntosh did not, "explicitly or implicitly, assert he

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

cooperated with police." Id. at ___, 595 S.E.2d at 491. Instead, the court noted the focus of his defense was that he knew nothing about the crimes and thus had nothing to tell police. Id. Like McIntosh, Hill explained he turned himself in to authorities and did not give a statement. Hill claimed he surrendered so he could prove self-defense in court. This testimony did not amount to an assertion that he cooperated with authorities and did not invite the State to challenge his self-defense explanation by questioning him on his exercise of his right to remain silent.

Nor was the error harmless beyond a reasonable doubt. For a Doyle violation to be harmless, the record must establish:

> that the reference to silence be a single reference; that the single reference never be repeated or alluded to in either the trial or in jury argument; that the prosecutor does not directly tie the defendant's silence to his exculpatory story; that the exculpatory story be totally implausible, transparently frivolous; and that evidence of guilt be overwhelming.

State v. Truesdale, 285 S.C. 13, 18-19, 328 S.E.2d 53, 56 (1984). Although there is an argument that many of these factors are present, the State directly tied Hill's silence to this exculpatory story. In essence, the prosecution attempted to show had Hill acted in self-defense he would have immediately explained this to authorities. Because the State directly tied Hill's silence to his defense, the error cannot be harmless. We therefore reverse Hill's convictions and remand for a new trial.[2]

REVERSED AND REMANDED.

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

---

[2] Because our holding on this issue disposes of the case, we do not address Hill's remaining issue. See Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340-41, 428 S.E.2d 886, 889 (1993) (noting appellate court need not address remaining issues when determination of prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Woodrow Wilson Brown, Appellant,

v.

Joseph Wilson Brown and Town of Harleyville, Respondents.

Appeal From Dorchester County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 3827
Submitted April 6, 2004 – Filed June 21, 2004

AFFIRMED

Helen Tyler McFadden, of Kingstree, for Appellant.

Christy Stephens, of Walterboro, for Respondents.

STILWELL, J.: Woodrow Brown brought this action against Joseph Wilson Brown and the Town of Harleyville alleging negligence by a police officer resulting in injury to Woodrow. The trial court granted summary judgment in favor of the town. We affirm.[1]

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

FACTS

Officer McKee of the Harleyville Police Department stopped Earl Felder's car after he noticed Felder driving in an erratic manner. Woodrow, his brother Joseph, and another young man were all traveling as passengers in the car. While speaking with Felder, the officer smelled alcohol on his breath and required him to perform several field sobriety tests. Felder performed marginally well indicating that, although he had consumed alcohol, he did not lack control of his functions, nor was he fully impaired. The men insisted they lived at an address less than one mile from the stop site and promised to go straight home. Officer McKee did not issue a citation but determined one of the passengers should drive the car.

When asked by the officer whether any of the passengers could drive, Joseph volunteered. Joseph was allowed to drive only after he satisfactorily completed the same battery of field sobriety tests given to Felder. The men assured the officer they would go straight home.

As an added precaution, Officer McKee followed the car to observe Joseph's driving. The officer testified that Joseph was not driving erratically or unsafely. He finally turned around and resumed his patrol once the car reached the town limit of Harleyville.

Rather than driving home as promised, the men waited until the patrol car was out of sight and reversed course and began driving to a party. Sometime before reaching the party, Joseph ran off the road and into a tree. Woodrow, along with other passengers, suffered minor injuries. When the highway patrol arrived they discovered Joseph was not a licensed driver. He was issued tickets for driving without a license, no insurance, driving too fast for conditions, and failing to wear a safety belt. No citation was issued for DUI.

Two years after the accident, Woodrow brought this action asserting claims for common law negligence against Joseph and negligence against the town for 1) failing to properly train and supervise its officers; 2) failing to properly require officers to provide for health and safety on the roadway; 3)

failing to charge Felder with DUI; 4) choosing Joseph, an unlicensed driver, to operate the vehicle; and 5) violations of statutes and the common law of South Carolina. The trial court granted the town's motion for summary judgment, finding the public duty rule applied and as such Woodrow failed to establish a duty owed to him individually by Officer McKee. Additionally, the court concluded Woodrow produced no evidence of any special undertaking by the officer that would create an exception to the rule.

DISCUSSION

When we review the trial court's grant of a motion for summary judgment, we apply the same standard that governs the trial courts. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. On appeal, we review the evidence and all inferences reasonably drawn from it in the light most favorable to the nonmoving party. Rule 56(c) SCRCP; Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

Woodrow claims the trial court incorrectly applied the public duty rule without first determining whether the officer properly exercised his discretion under S.C. Code Ann. § 15-78-60 (Supp. 2003). We disagree.

Woodrow's complaint alleges general acts of negligence without basing those allegations on any specific statutory authority. Rather, he claims only generally that the town violated state statutes and common law. The trial court granted summary judgment based upon the public duty rule. The public duty rule is only implicated when a plaintiff relies upon a statute as creating a duty. See Trousdell v. Cannon, 351 S.C. 636, 641, 572 S.E.2d 264, 266-267 (2002); Arthurs v. Aiken County, 346 S.C. 97, 103, 551 S.E.2d 579, 582 (2001) (holding when and only when the plaintiff relies upon a statute as creating the duty does the public duty rule come into play). Under the public duty rule, a statute prescribing the duties of a public officer does not, without more, impose on him a duty of care toward individual members of the public in the performance of his duties. See Rayfield v. South Carolina Dep't of Corr., 297 S.C. 95, 105, 374 S.E.2d 910, 915-16 (Ct. App. 1988).

To the extent Woodrow relies on violations of a statute or statutes, we agree with the trial court his claims are barred by the public duty rule. We note the code sections corresponding to Woodrow's claims merely recite in broad terms when circumstances make it unlawful to operate a motor vehicle, procedures surrounding incidents of possible DUI or, as in the case of the latter section, the general licensing requirement for motorists. None of the statutes implicated by Woodrow's claims identify any particular class of victims or any particular harm that would create a special duty exception to the general rule. See Rayfield, 297 S.C. at 106, 374 S.E.2d at 916. See also Jensen v. Anderson County Dep't of Soc. Servs., 304 S.C. 195, 200, 403 S.E.2d 615, 617 (1991) (wherein the supreme court adopted this court's six step special duty analysis as an exception to the public duty rule). We conclude the duty, if any, created by the statutes in question is owed to the public at large and not to Woodrow individually.

Woodrow's complaint also included negligence claims based on Officer McKee's decision to choose Joseph as the replacement driver and alleged failure by the town to properly train and supervise its police officers. Neither of these claims is based on statutory duties. Therefore, they are not barred by the public duty rule. See Arthurs, 346 S.C. at 103, 551 S.E.2d at 582 (2001). However, the town raised the affirmative defense of immunity based upon the tort claims act and in particular S.C. Code Ann. §§ 15-78-60(4), (5), (20), (25) (Supp. 2003) in its motion for summary judgment. We agree that Woodrow's remaining claims are barred by the act.[2]

S.C. Code Ann. § 15-78-60 carves out exceptions to the limited waiver of governmental immunity established by the tort claims act, including discretionary immunity that arises when a government employee's decision is within the discretion or judgment allowed. See S.C. Code Ann. § 15-78-60(5) (Supp. 2003). Officer McKee was faced with the choice of issuing a DUI citation, requiring the passengers to find another way home and have the car towed, or selecting another driver after determining whether that

[2] Though we recognize the trial court's order was silent on this issue, on appeal this court may affirm on any ground contained in the record. See Rule 220(c), SCACR.

individual was fit to drive. He chose Joseph to drive after he volunteered and satisfactorily completed field sobriety tests. Woodrow admitted in his affidavit that Joseph was in a better condition to drive than he. The other passenger expressly refused to drive.

Major Neil Baxley, a police-training instructor, stated in his affidavit that Officer McKee operated pursuant to accepted practices of law enforcement in South Carolina and was not required to arrest Felder. Major Baxley opined Officer McKee was entitled to use his discretion to best remedy the situation. Viewing the evidence in the light most favorable to Woodrow, we find Officer McKee's selection of Joseph was a considered, discretionary judgment. As such, the town is immune to Woodrow's negligence claim under section 15-78-60(5) of the tort claims act. See Clark v. South Carolina Dep't of Pub. Safety, 353 S.C. 291, 304, 578 S.E.2d 16, 22 (Ct. App. 2002) (stating the requirements necessary to establish discretionary immunity under the tort claims act).

Finally, Woodrow alleges the town failed to properly train and supervise its police officers. There is no evidence in the record to support this claim beyond Woodrow's allegations in his affidavit that, in his opinion, Officer McKee was not following standard law enforcement procedures when he made the discretionary judgment to allow Joseph to drive instead of arresting Felder and impounding the car. As we have already determined that the officer's decision met the requirements to establish discretionary immunity under the tort claims act, we conclude the town is likewise immune from this claim pursuant to section 15-78-60(5).

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Damico S. Flowers, Appellant.

Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

Opinion No. 3828
Submitted March 19, 2004 – Filed June 21, 2004

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General W. Rutledge Martin, all of Columbia; and Solicitor Ralph E. Hoisington, of Charleston, for Respondent.

HOWARD, J.: Damico S. Flowers appeals his convictions for trafficking in cocaine; possession with intent to distribute cocaine near a school, park or playground; trafficking in crack cocaine; possession with intent to distribute crack cocaine near a school, park or playground; possession of marijuana with intent to distribute; possession of marijuana near a school, park or playground; possession of a pistol by a person under twenty-one years of age; and possession of a pistol during the commission of a violent crime. He argues the circuit court erred by admitting evidence obtained pursuant to a warrantless search of his girlfriend's residence, when he had previously denied officers' request to enter the residence. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

On August 14, 2001, Officer Phillip Kirkland and Sergeant Delmar Johnson went to 1918 Graham Street to investigate a complaint of drug activity and shots being fired in the yard. The officers knocked on the door and identified themselves as police. A male voice from inside the home told the officers to come in. As they stepped into the entryway of the home, Flowers jumped up and told the officers to step back outside onto the porch. The officers complied and Flowers followed them out, closing the door behind him. Flowers told the officers he did not own the residence but the owner would be returning soon.

Shortly thereafter, the owner of the residence, Latonya Simmons, arrived in her vehicle. Sergeant Johnson approached Simmons while Officer Kirkland remained with Flowers. According to Sergeant Johnson, he asked Simmons if any drugs were in the residence, and she indicated there were. Sergeant Johnson then asked Simmons if he could search the house. With Simmons' consent, Sergeant Johnson and Simmons entered the residence.

Inside the home, Sergeant Johnson saw bags of marijuana and crack cocaine lying on a speaker in plain view. Additionally, he saw a gun lying on

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

a nearby table. Both Simmons and Flowers were taken into custody. Simmons then signed a consent to search form. A further search of the residence revealed more illegal drugs. Subsequently, Flowers confessed that all of the contraband belonged to him.

At trial, Flowers moved to suppress the drug evidence, arguing it was obtained pursuant to a warrantless search of his girlfriend's residence over his objections. Flowers claimed he had a reasonable expectation of privacy in the residence, requiring the officers to heed his refusal to allow a search, notwithstanding Simmons' later consent. The circuit court denied the motion, finding although Flowers had a reasonable expectation of privacy in the residence, his statements to the police indicating he did not own the house and the owner would return shortly limited his authority to the time until the owner returned. The circuit court found Flowers did not have standing to challenge Simmons' consent to search the residence.

LAW/ANALYSIS

Flowers argues the circuit court erred by admitting evidence obtained pursuant to a warrantless search of his girlfriend's residence, when he had previously denied officers' request to enter the residence.[2]

"[T]he appellate standard of review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding and the appellate court may only reverse where there is clear error." State v. Green, 341 S.C. 214, 219 n.3, 532 S.E.2d 896, 898 n.3 (Ct. App. 2000) (citing State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000)).

Evidence obtained as a result of an unlawful search constitutes a violation of the Fourth Amendment and is inadmissible at trial. State v. Nelson, 336 S.C. 186, 192 n.3, 519 S.E.2d 786, 789 n.3 (1999). When a

[2] Initially, we note Flowers does not contend this is a landlord-tenant relationship. Nor does he claim to have exclusive control over any portion of the residence.

defendant has a reasonable expectation of privacy in the property being searched, Fourth Amendment rights apply to the search. Minnesota v. Olson, 495 U.S. 91, 95-96 (1990). A reasonable expectation of privacy exists when the defendant has a relationship with the property or property owner. State v. Missouri, 352 S.C. 121, 129, 572 S.E.2d 467, 470-471 (Ct. App. 2002). Although a person present only intermittently or for a purely commercial purpose does not have a reasonable expectation of privacy, an overnight guest may have a reasonable expectation of privacy in the host's property. Olson, 495 U.S. at 98-99.

Third party consent may be given by one who has common authority over or some other sufficient relationship to the premises or effects being searched. State v. Moultrie, 271 S.C. 526, 528, 248 S.E.2d 486, 487 (1978) (citing United States v. Matlock, 415 U.S. 164, 94 S. Ct. 988 (1974)). Common authority does not require common ownership, but merely "'mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable' for the searching officers to believe that the person granting consent had the authority to do so." Moultrie, 271 S.C. at 528, 248 S.E.2d at 487 (quoting Matlock, 415 U.S. at 171 n.7). However, a homeowner may grant consent to search the premises on which a criminal defendant resides if the homeowner possesses common authority over or sufficient relationship to the premises or effects to be inspected. State v. Pressley, 288 S.C. 128, 130, 341 S.E.2d 626, 627 (1986).

The circuit court found Flowers had a legitimate expectation of privacy in Simmons' residence. Flowers and Simmons both testified Flowers spent approximately five nights a week at Simmons' home, kept a change of clothing there, and occasionally paid the rent. This evidence is sufficient to conclude that Flowers and Simmons had common authority over the residence, and to support the circuit court's finding that Flowers had a reasonable expectation of privacy in Simmons' residence.

Flowers argues because he had previously denied the officers' request to search, Simmons did not have authority to subsequently consent to a search. However, Flowers provides no authority for the proposition that a guest's refusal to consent to a search deprives a homeowner of the right to

subsequently grant consent. To the contrary, a homeowner does not relinquish control over the premises to a third party simply because the third party occasionally resides in the home. Pressley, 288 S.C. at 130, 341 S.E.2d at 627; see also State v. Vaster, 601 P.2d 1292, 1294-95 (Wash. App. 1979) (holding where a guest does not maintain exclusive control over any portion of the residence, even if the guest has a legitimate expectation of privacy, a homeowner's power to consent to a search of his own home overrides the objection of a guest to a search).

CONCLUSION

As evidence exists to support the circuit court's denial of the motion to suppress, Flowers' convictions are

AFFIRMED.

GOOLSBY and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Ikeisha N. Perry, Appellant.

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

Opinion No. 3829
Submitted March 19, 2004 – Filed June 21, 2004

AFFIRMED

Acting Chief Attorney Joseph L. Savitz III, Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Warren Blair Giese, of Columbia, for Respondent.

GOOLSBY, J.: Ikeisha N. Perry appeals her conviction for homicide by child abuse in connection with the death of her nine-month-old son Jaquan. We affirm.[1]

BACKGROUND

On September 21, 2000, about 1:15 p.m., Perry and her boyfriend Henry Fletcher brought Jaquan to the pediatric intensive care unit at Richland Memorial Hospital. When they arrived, Jaquan was in full cardiopulmonary arrest, and the emergency room staff began resuscitation efforts. When Robert Hubbird, a pediatric intensive care physician at the hospital arrived at the unit, Jaquan's pulse had just been restored after about twenty-five minutes of resuscitation. Nevertheless, because a significant amount of time had passed since Jaquan collapsed during which no one administered CPR, he quit breathing and lost his pulse again, requiring multiple resuscitations. Eventually, having determined that these measures were ineffective, Hubbird ordered the staff to discontinue further attempts to save Jaquan, and the child was pronounced dead at 4:20 p.m.

Jaquan's injuries included multiple rib fractures, injury to the liver, and severe damage to the large and small bowels. The injuries indicated non-accidental trauma.

On December 13, 2000, the Richland County grand jury indicted Perry and Fletcher for homicide by child abuse in connection with Jaquan's death. The defendants were tried together in February 2002. The jury found both Perry and Fletcher guilty, and the trial court sentenced them each to life imprisonment.

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

DISCUSSION

On appeal, Perry contends the trial court erred in allowing the State to introduce evidence that she failed to show remorse for Jaquan's death both before and after her arrest. She argues this evidence was inadmissible as an infringement on her constitutional rights.[2] We hold Perry did not preserve this argument for appeal.

"The state may not directly or indirectly comment on the defendant's right to remain silent."[3] "References to a defendant's lack of remorse are . . . improper as violative of a defendant's Fifth, Eighth, and Fourteenth Amendment rights."[4] Such rules are "rooted in due process and the belief that justice is best served when a trial is fundamentally fair."[5]

Hubbird testified that, when he informed Perry that Jaquan had died, she displayed "an incredibly flat affect," showing no emotion and appearing uninterested. Hubbird went on to testify that he found Perry's behavior unusual because, at other times when he delivered bad news, the recipient

---

[2] Perry cites the following authorities in support of her argument: Doyle v. Ohio, 426 U.S. 610 (1976) (concerning references to a defendant's silence after receiving Miranda warnings); State v. Reid, 324 S.C. 74, 476 S.E.2d 695 (1996) (holding references to a defendant's lack of remorse violate the Fifth, Eighth, and Fourteenth Amendments); State v. Johnson, 293 S.C. 321, 360 S.E.2d 319 (1987) (holding the State's reference to the defendant's lack of remorse was error because it was a comment on the defendant's assertion of his constitutional rights to plead not guilty and require the State to carry its burden of proof).

[3] Payne v. State, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003).

[4] State v. Reid, 324 S.C. 74, 78, 476 S.E.2d 695, 696 (1996), overruled on other grounds by State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002).

[5] Edmond v. State, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000), quoted in State v. McIntosh, ___ S.C. ___, ___, 595 S.E.2d 484, 490 (2004).

would usually ask many questions and show intense emotion. Furthermore, Crolos Jenkins, an acquaintance of Perry, testified he was the only one at the hospital who was upset about Jaquan and that Perry and her family were acting "like it was a family reunion up there." In addition, the police officer who questioned Perry testified that she was not particularly upset on the day Jaquan died and did not show any remorse.

Perry objected to these statements only on the basis of relevance.[6] This objection would not encompass the argument that the admission of such evidence amounted to a deprivation of due process.

Rule 402 of the South Carolina Rules of Evidence provides in pertinent part that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina."[7] Under the clear language of this rule, the exclusion of evidence on a constitutional ground is an exception to the principle that relevant evidence must be admitted. Here, the trial court, in overruling Perry's objection that the evidence was not relevant, made no determination as to whether it was constitutionally impermissible. It was therefore incumbent on Perry, in objecting to the admission of evidence about her lack of remorse, to raise the issue of due process to the trial court in order to preserve this objection for direct appeal.

AFFIRMED.

HOWARD and BEATTY, JJ., concur.

---

[6] We note that any decision concerning the relevance of the evidence would have been within the discretion of the trial court. See State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001) ("The trial court is given broad discretion in ruling on questions concerning the relevancy of evidence, and its decision will be reversed only if there is a clear abuse of discretion.").

[7] Rule 402, SCRE (emphasis added).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Quinzell Robinson, Appellant.

Appeal From Sumter County
Howard P. King, Circuit Court Judge

Opinion No. 3830
Submitted June 8, 2004 – Filed June 21, 2004

AFFIRMED

Assistant Appellate Defender Aileen P. Clare, of S.C. Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Cecil Kelley Jackson, of Sumter, for Respondent.

KITTREDGE, J.: Quinzell Robinson was convicted of armed robbery and sentenced to sixteen years imprisonment. He appeals, arguing a violation of his Constitutional protection from double jeopardy and reversible error in the admission of evidence concerning his flight from police custody. We affirm.

FACTS

On March 28, 2001, Robinson and Kevin Atkins were riding in a blue van. Robinson and Atkins stopped at Connor's Superette convenience store in Sumter County and made a small purchase. Following their exit, the store clerk saw a blue van leave the parking lot. A short time later, Atkins again entered the store, this time with female companion Bridgette Epps. Atkins, wielding a handgun, pinned the store clerk behind the service counter and ordered her to open the register. Once open, both Atkins and Epps began grabbing money from the register. As customers approached the store, Atkins and Epps fled the store. A few seconds following the robbery, the clerk again noticed the blue van exiting the parking lot. The clerk activated a silent alarm signal from the store and called the police.

While patrolling the area of the robbery, officers spotted a blue van and pulled it over. Robinson, the driver, and Atkins, the only passenger at this time, were arrested.[1] At some point during the armed robbery investigation, Robinson was informed that he was also a suspect in an unsolved murder. Robinson, who had agreed to cooperate with law enforcement concerning the armed robbery, led police to the area where the gun used in the robbery was discarded. The police found the weapon with Robinson's assistance. While returning to the police station, a handcuffed Robinson successfully fled from the police vehicle while it was slowing for a traffic light. He was apprehended and arrested five days later at a nearby residence wearing a wig, a dress, lipstick, and high-heeled shoes and hiding under several mattresses.

---

[1] Epps jumped from the van and fled on foot when she saw the police car. She was subsequently arrested and cooperated with law enforcement, providing a confession.

Robinson, Atkins, and Epps were indicted for armed robbery, possession of a firearm during the commission of a crime, and conspiracy.

In the first trial against Robinson, following approximately two days of testimony, jury deliberations began on the third day at 9:54 a.m.. The trial judge recharged the jury in response to the jury's requests, and witness testimony was replayed. At 4:03 p.m., the jury sent a note to the judge stating it had not come to a unanimous decision on the first and second charge (armed robbery and conspiracy), but had agreed on a verdict as to the third charge (possession of a firearm). Over Robinson's objection, the judge charged the jury pursuant to Allen v. United States, 164 U.S. 492 (1896).

At 5:32 p.m., the jury sent the judge another note indicating that it remained deadlocked on the two undecided charges and inquiring into court policies regarding the jurors' personal responsibilities, such as picking up their children. The judge responded by allowing any juror who needed to make alternative personal arrangements access to a telephone. The judge also explained that law enforcement officers would aid any juror who needed assistance with transportation or otherwise. As to the jury's deadlock status, the judge expressed his desire that the deliberations continue until a verdict was reached, but requested the jury determine if more time would be beneficial in pursuit of a unanimous verdict.

Six minutes after giving this direction, the judge received a final note from the jury, which stated:

> We feel that further deliberation would not make a difference. We do appreciate your patience, but we can't reach a decision on the 1st and 2nd charges.

The judge summoned the jury into the courtroom where a verdict of not guilty was published as to the charge of possession of a firearm during the commission of a crime. Over Robinson's objection, the judge then declared a mistrial in regard to the two undecided charges.

Over Robinson's renewed objection and motion to dismiss, Robinson was retried on the two remaining charges. The jury found Robinson not guilty of conspiracy, but guilty of armed robbery. He appeals from his armed robbery conviction and sentence.

ISSUES ON APPEAL

I. Did the trial court err in denying Robinson's motion to dismiss based on the Double Jeopardy Clause?

II. Did the trial court err in allowing evidence of Robinson's flight from law enforcement?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Cutter, 261 S.C. 140, 147, 199 S.E.2d 61, 65 (1973). We are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). Concerning the admission of evidence, the trial judge's determination will be sustained absent error and resulting prejudice. State v. Hamilton, 344 S.C. 344, 353, 543 S.E.2d 586, 591 (Ct. App. 2001).

DISCUSSION

I. Mistrial

Robinson argues the declaration of mistrial in his initial trial was in error, thereby precluding the subsequent trial. Specifically, Robinson argues the retrial violated the United States and South Carolina Constitutions' Double Jeopardy Clauses. We disagree.

The Double Jeopardy Clauses of the United States and South Carolina Constitutions are in accord. The federal constitution provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V. The South Carolina counterpart

similarly provides that "[n]o person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . ." S. C. Const. art. I, § 12. See State v. Easler, 327 S.C. 121, 132, 489 S.E.2d 617, 623 (1997) ("Article I, section 12 of the S.C. Constitution is essentially identical to the Fifth Amendment and, on its face, confers no greater rights than the federal constitution."); see also Benton v. Maryland, 395 U.S. 784, 794 (1969) (holding the United States Constitution's Double Jeopardy Clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment). Pursuant to this clause, a defendant, such as Robinson, is protected from multiple prosecutions for the same offense after an improvidently granted mistrial.[2] State v. Kirby, 269 S.C. 25, 27-28, 236 S.E.2d 33, 34 (1977); State v. Baum, 355 S.C. 209, 214, 584 S.E.2d 419, 421 (Ct. App. 2003). If, in a criminal trial, a mistrial is declared "without an absolute necessity for it, the [mistrial] is equivalent to an acquittal, and may be pleaded as a bar to a subsequent indictment." State v. Bilton, 156 S.C. 324, 342, 153 S.E. 269, 276 (1930) (internal quotation marks omitted). We must, therefore, determine the propriety of the trial court's initial declaration of mistrial.

We find the trial court properly declared a mistrial. It is universally recognized that a genuine inability of the jury to reach a unanimous verdict constitutes a manifest necessity for the declaration of a mistrial. 21 Am. Jur. 2d Criminal Law § 402 (2003). "[A] mistrial declared by the judge following the jury's declaration that it was unable to reach a verdict . . . remains the prototypical example [of] . . . 'manifest necessity.'" Oregon v. Kennedy, 456 U.S. 667, 672 (1982). The trial judge, however, has a duty to urge the jury to reach a verdict, provided he does not coerce them. State v. Williams, 344 S.C. 260, 263-64, 543 S.E.2d 260, 262 (Ct. App. 2001). The typical judicial mechanism for encouraging an indecisive jury is the Allen charge, in which jurors are instructed on, among other things, their duties to approach the evidence with an open mind and consider the opinions of their fellow jurors.[3]

---

[2] The Double Jeopardy Clause applies in other situations, but we limit our analysis to the particular protection applicable here.

[3] See Allen v. United States, 164 U.S. 492 (1896) (defining the charge used to encourage a deadlocked jury to reach a verdict).

If a jury, following additional deliberations in the wake of an Allen charge, remains deadlocked, section 14-7-1330 of the South Carolina Code of Laws is triggered. The statute reads, in pertinent part, "[b]ut if [the jury] returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law." S.C. Code Ann. § 14-7-1330 (1976). At the second indication of deadlock, courts typically inquire as to whether more deliberations would be beneficial to the jury, and the issue of consent is determined from the jury's response. See Buff v. South Carolina Dep't of Transp., 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000) ("[W]hen a jury has twice indicated it is deadlocked, the trial judge should diplomatically discuss with the jury whether further deliberations could be beneficial. The jury's consent to resume or to discontinue deliberations is determined, either expressly or impliedly, by its response to the trial judge's comments.")

In the case before us, deliberations for a two-day criminal trial lasted an entire day. Upon receiving notification of deadlock, the judge administered an Allen charge. When the judge received further notice of deadlock, he diplomatically inquired whether more time would help facilitate unanimity. The jury responded with the unequivocal answer that additional time to deliberate would not break the deadlock. Not only was the declaration of mistrial at this juncture proper, it was mandated by law. Had the trial court ordered further deliberations, any subsequent verdict would have likely been tainted. See, e.g., State v. Simon, 126 S.C. 437, 120 S.E.2d 230 (1923) (finding the demand of further deliberations by the trial judge after clear indication of second deadlock was coercive).

We conclude that the Double Jeopardy Clause was no bar to the retrial of Robinson.

II. Evidence of Flight

The State, over Robinson's objection, introduced evidence of Robinson's flight from police officers while he was assisting them in the recovery of the weapon used in the armed robbery. Robinson argues the trial court abused its discretion in admitting this evidence. Robinson specifically

contends that because he was told he was also a suspect in an unrelated crime, the evidence of flight was irrelevant and admitted in violation of Rule 402, SCRE. We disagree.

Rule 402, SCRE reads in relevant part, "[e]vidence which is not relevant is not admissible." Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001). "Flight from prosecution is admissible as evidence of guilt." State v. Pagan, 357 S.C. 132, 140, 591 S.E.2d 646, 650 (Ct. App. 2004) (quoting State v. Al-Amin, 353 S.C. 405, 413, 578 S.E.2d 32, 36-37 (Ct. App. 2003)). See also State v. Beckham, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999) (stating that evidence of flight has been held to constitute evidence of guilty knowledge and intent); State v. Grant, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980) ("[A]ttempts to run away have always been regarded as some evidence of guilty knowledge and intent.") (internal quotation marks omitted); State v. Ballenger, 322 S.C. 196, 200, 470 S.E.2d 851, 854 (1996) (noting that flight is "at least some evidence" of defendant's guilt); State v. Thompson, 278 S.C. 1, 10-11, 292 S.E.2d 581, 587 (1982), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (finding evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension); State v. Freely, 105 S.C. 243, 89 S.E. 643 (1916) (declaring the flight of one charged with a crime has always been held to be some evidence tending to prove guilt); State v. Williams, 350 S.C. 172, 176, 564 S.E.2d 688, 691 (Ct. App. 2002) (citing 29 Am.Jur.2d Evidence § 532 (1994)) (noting that flight, when unexplained, is admissible as indicating consciousness of guilt).

Case law, however, further recognizes that the relevance of flight evidence is premised on a nexus between the flight *and the offense charged*. See, e.g., United States v. Beahm, 664 F.2d 414, 419-20 (4th Cir. 1981) (finding evidence of flight inadmissible where a defendant flees "after 'commencement of an investigation' unrelated to the crime charged, or of which the defendant was unaware"); United States v. Foutz, 540 F.2d 733,

740 (4th Cir. 1976) (stating that evidence of flight should be excluded where defendant flees while being investigated for another crime).

While we agree with Robinson that his knowledge of the murder investigation somewhat attenuated the inference of guilt in connection with the armed robbery charge, we believe that in the unique factual setting of this case, the trial court acted within its discretion in admitting the flight evidence. Evidence of flight should be excluded when the flight is clearly linked to a separate offense for which the defendant is not on trial. That, however, is not the case here. Robinson was keenly aware of the armed robbery charge, for he was assisting law enforcement in the armed robbery investigation when he fled. In reviewing a challenge to the admissibility of such evidence, the inquiry must be an objective one. We reject Robinson's claim that his statement of why he fled from police is dispositive on the question of admissibility. Objectively viewed, there is a sufficient nexus between Robinson's flight and the armed robbery charge to affirm the admission of flight evidence. Furthermore, he was allowed to present to the jury his alternative explanation of his flight, without referencing the murder investigation. We further conclude that the probative value of this relevant evidence is not "substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE.

CONCLUSION

We find no violation of the Double Jeopardy Clause and no error in the admission of evidence regarding Robinson's flight. Robinson's conviction and sentence for armed robbery is

AFFIRMED.

ANDERSON and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charleston, S.C. Registry for Golf & Tourism, Inc., a/k/a Charleston Registry for Golf and Tourism, Inc., Calvin Stone, and Martin James Barrier, Appellants,

v.

Young Clement Rivers & Tisdale, LLP, Respondent.

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 3831
Submitted April 6, 2004 – Filed June 21, 2004

AFFIRMED

Fleet Freeman and Lon H. Shull, both of Mt. Pleasant, and Thomas R. Goldstein, of Charleston, for Appellants.

Susan Pedrick McWilliams, Regina Hollins Lewis and Nikole Setzler Mergo, all of Columbia, for Respondent.

BEATTY, J.: Charleston, S.C. Registry for Golf and Tourism, Inc., a/k/a Charleston Registry for Golf and Tourism ("Charleston Registry") along with Calvin Stone and Martin James Barrier ("Appellants") brought this suit against the law firm of Young, Clement, Rivers & Tisdale, LLP ("Young Clement") alleging causes of action for negligence, breach of fiduciary duty, and negligent supervision related to the firm's affiliation with attorney Douglas A. Barker. The circuit court granted summary judgment in favor of Young Clement on all of the claims. We affirm.

FACTS

The claims raised in this case center around the individual business activities and legal employment of Douglas Barker. During the relevant time periods, Barker was a partner in the fledgling business, Charleston Registry, and an associate attorney practicing with the Young Clement law firm. The origin, course, and overlap of Barker's independent business and legal endeavors are key to understanding the nature of the claims brought against Young Clement. The undisputed facts surrounding these relationships are described below.

Barker's Association with Charleston Registry

Barker first met Calvin Stone and Martin J. Barrier in Charleston sometime in the late 1980s. Barker left Charleston in 1990 to attend law school in California. Shortly thereafter, Stone and Barrier formed Charleston Registry, a business that planned and sold golf trips.

Barker returned to Charleston in the summer of 1993 to complete a legal internship. During that time, he learned of Stone and Barrier's new business venture. After inquiring with Stone and Barrier, he was

invited to work part-time for Charleston Registry that summer performing accounting and bookkeeping work.

After graduating from law school, Barker worked as an attorney in California. In 1995, while still practicing law in California, Barker contacted Stone and Barrier about becoming involved in the business. Over the course of several phone conversations in the fall of 1995, Stone informed Barker that the business was doing well and growing rapidly but expressed concern that the accounting functions were becoming overwhelming for him and Barrier.

In late 1995 or early 1996, Barker informed Barrier that he was moving back to Charleston and that he would "soon be employed by a prestigious law firm in Charleston." Barker proposed to Barrier that he could provide legal and accounting services to Charleston Registry in exchange for an ownership interest in the business. After meeting with Barker in early 1996, before Barker's employment with Young Clement, Barrier decided to relinquish his ownership interest in the business to Barker in exchange for protection from any tax liability Charleston Registry had incurred.[1]

After this agreement was reached, all accounting functions were turned over to Barker. Barker took possession of all of Charleston Registry's financial records, the company's post office box key, and the company's checkbook. Stone subsequently granted Barker signature authority on the business checking account.

Barker's Employment at Young Clement

After assuming control of the legal and financial affairs of Charleston Registry, Barker began work as an associate attorney at Young Clement on April 1, 1996. The general terms of his employment at Young Clement were memorialized in a May 31, 1996 letter to Barker from Thomas Tisdale, the firm's managing partner. Regarding Barker's work assignments, the letter provided:

[1] This agreement was not reduced to writing until September 1996.

> Work Assignments. We are looking forward to having you work as an associate attorney, primarily in the litigation area of our firm. You will be working with Brad Waring in connection with your training and most of your work assignments. He will be accountable to the firm for the progress of your training. You should discuss with him all matters relating to your assignments, and with me, all other matters relating to your relationship with the firm. The firm is employing your total and best professional efforts. Although you will normally handle your work assignments during regular office hours, we will expect you to devote such additional time as may be necessary to complete assignments entrusted to you.

(Emphasis added).

The law firm also had in place strict procedures for keeping track of all the professional activities its attorneys engaged in — regardless of whether those activities were directly related to their work at Young Clement. Young Clement required its lawyers to record the precise amount of time they spent working on client projects each day. Young Clement's policy, however, extended further than recording billable hours for purposes of charging clients for services rendered. Young Clement mandated that time records be maintained for all time expended by lawyers and paralegal personnel whether or not the particular endeavor is billable to a client, with the single exception of the lunch break.

In direct contravention of these policies and procedures, Barker continued to be involved with and perform services for Charleston Registry while working at Young Clement. Between April and September 1996, Barker prepared several documents on behalf of the

corporation, including proposed bylaws of the company, a renunciation of rights for Martin Barrier, and minutes of the organizational meeting of the board of directors. Barker, Stone, and Barrier met on September 12, 1996 and executed or adopted these documents.

Also during his tenure at Young Clement, Barker used the law firm's letterhead to write two letters pertaining to Charleston Registry. The first letter, dated December 20, 1996, was addressed to Paul Dominick, an attorney at another law firm. The letter indicated Barker had been retained by Calvin Stone and Charleston Registry to represent the company in a defamation claim against clients of Dominick. Barker testified, however, that he never mailed the letter because Stone did not think it was worth the effort to proceed with the matter after Barker faxed Stone a draft of the letter. This testimony is uncontroverted.

The second letter, dated May 22, 1997, was addressed to Stone. In the letter, Barker alleged that Stone had improperly absconded with some of Charleston Registry's corporate accounting records and instructed Stone to ensure the records be maintained intact. Barker stated in the letter he was writing "[a]s the CEO of CRGT, Inc." and "a 50% shareholder and director of that corporation."

None of his activities involving Charleston Registry was ever discussed with Tisdale, Waring, or any other lawyer or staff member at Young Clement. Barker never recorded any of his work for Charleston Registry on his hourly time records. Young Clement never opened a file for Charleston Registry or sent an engagement letter to Charleston Registry. Young Clement never billed Charleston Registry, Stone, or Barrier for any services rendered by Barker. Furthermore, Stone and Barrier never had any contact with attorneys at Young Clement regarding their involvement with Barker.

In September 1997, Barker received a demand letter from counsel for Charleston Registry, Stone, and Barrier which alleged Barker had misappropriated corporate funds and committed professional malpractice. Barker immediately brought the letter to the attention of

Tisdale. Tisdale and Waring then reviewed everything in Barker's files regarding Charleston Registry. Tisdale fired Barker a week later.

Charleston Registry proceeded with their suit against Barker individually, and in May of 2000, they brought the present action against Young Clement seeking damages for negligence, breach of fiduciary duty, and negligent supervision. After the close of discovery, the trial court granted Young Clement's motion for summary judgment in October 2002. This appeal followed.

STANDARD OF REVIEW

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; see also Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997); Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998). In reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court: summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998).

LAW/ANALYSIS

I. Breach of Fiduciary Duty and Negligence

Appellants first argue the trial court erred in dismissing their claims against Young Clement for breach of fiduciary duty and negligence. We disagree.

Before considering whether or not there are material questions of facts sufficient to defeat a summary judgment motion on the merits of Appellants' claims, we must first consider whether or not Young Clement is subject to judgment on Appellants' claims. Under these claims, Appellants allege that, while working as an attorney for Young Clement, Barker agreed to perform legal and financial services for Charleston Registry and then failed to fulfill those agreed-upon duties. Though these allegations concern only the acts and omissions of Barker, Appellants contend Young Clement was liable based on its agency relationship with Barker. Appellants claimed Young Clement endowed Barker with apparent authority to transact business on behalf of the law firm. The trial court disagreed, ruling Appellants failed to present any evidence to a support finding that Barker acted with the actual or apparent authority of Young Clement.

An agency relationship may be established by evidence of actual or apparent authority. Fochtman v. Clanton's Auto Auction Sales, 233 S.C. 581, 583, 106 S.E.2d 272, 274-75 (1958). While actual authority is that which is expressly conferred upon the agent by the principal, apparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds the agent out as possessing. Moore v. North Am. Van Lines, 310 S.C. 236, 239, 423 S.E.2d 116, 118 (1992). This Court has further refined the definition of apparent authority:

> The doctrine of apparent authority focuses on the principal's manifestation to a third party that the agent has certain authority. Concomitantly, the principal is bound by the

> acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption. Thus, the concept of apparent authority depends upon manifestations by the **principal** to a third party and the reasonable belief by the third party that the agent is authorized to bind the principal.

R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 432, 540 S.E.2d 113, 117-18 (Ct. App. 2000) (citations omitted) (emphasis added). Accordingly, "[t]he proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that between the principal and the third party." Id. at 432, 540 S.E.2d at 118. Further, "[a]n agency may not be established solely by the declarations and conduct of an alleged agent." Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996).

Based upon these general principles, our courts have required three elements be proven to establish apparent authority: "(1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Graves v. Serbin Farms, Inc., 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991).

Appellants offered no evidence which would tend to prove Young Clement consciously or impliedly represented to Charleston Registry that Barker was its agent prior to Barker's relationship with Charleston Registry. Nor did Appellants offer any evidence of a change in the character of Charleston Registry's relationship with Barker or Young Clement after Barker began working at Young Clement. Barker's relationship with Charleston Registry began well

before his first day of work at Young Clement. As described above, Barker offered his legal and accounting services to Charleston Registry at least four months prior to beginning work at the law firm. It is also undisputed that Barker took possession of the company's financial records one month before starting with Young Clement. Though Stone and Barrier claim Barker told them in early 1996 that he would soon be working for a prestigious law firm, Stone admitted in his testimony that, at that time, he did not believe that Charleston Registry was represented by Young Clement.

Appellants have likewise failed to offer any proof that, during the time Barker actually worked at Young Clement, the law firm consciously or impliedly held Barker out as its agent with respect to Barker's handling of Charleston Registry's affairs. In fact, the evidence, as recited above, indicates otherwise: Young Clement never sent an engagement letter to Charleston Registry; no retainer agreement was ever entered into between Young Clement and Charleston Registry; the firm opened no file for Charleston Registry or its principals, Stone and Barrier; Young Clement never billed Charleston Registry for any services rendered or ever profited in any way from Barker's involvement with the company; and, Stone and Barrier admitted that neither of them ever spoke with an attorney at Young Clement regarding Charleston Registry or any other matter and most of their meetings with Barker took place during lunch.

The only evidence which could have possibly indicated Barker was acting on behalf of Young Clement were the two letters he wrote using the firm's letterhead. As noted above, however, only one of those letters was actually mailed, and the one that was mailed clearly indicated in the body of the letter that Barker was writing in his capacity as an owner and manager of Charleston Registry, not as an attorney with Young Clement. It would have been wholly unreasonable, therefore, for Barrier and Stone to surmise from this letter that the firm of Young Clement had taken on Charleston Registry as a client. Moreover, there is no evidence that Appellants relied, to their detriment, on any representation made by Young Clement.

Because no genuine issue of fact was raised as to the first element necessary for apparent authority, Appellants' claims fail as a matter of law. We therefore find no error in the trial court's grant of summary judgment on these claims.

II. Negligent Supervision

Appellants next argue the trial court erred in dismissing their claim for negligent supervision against Young Clement. We disagree.

In this cause of action against Young Clement, Appellants claim the law firm negligently supervised Barker by failing to adequately monitor his involvement with Charleston Registry. The disposition of this claim depends upon whether Young Clement owed a duty to Charleston Registry. If Young Clement owed no duty to Charleston Registry any harm suffered by Charleston Registry is irrelevant. This is because the common law ordinarily imposes no duty on a person to act. See Rayfield v. South Carolina Dep't of Corrections, 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988). Thus, a person usually incurs no liability when he fails to take steps to protect others from harm not created by his own wrongful conduct. Id. However, our supreme court has held that an employer is under a duty in some circumstances to exercise reasonable care to control an employee acting outside the scope of employment. See Degenhart v. Knights of Columbus, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992). The Court in Degenhart found that an employer may be liable for negligent supervision if the employee intentionally harms another when the employee: (1) is upon the premises of the employer, or is using a chattel of the employer, (2) the employer knows or has reason to know that he has the ability to control his employee, and (3) the employer knows or should know of the necessity and opportunity for exercising such control. Id. at 115-17, 420 S.E.2d at 496; see also Restatement (Second) of Torts § 317 (1965) (outlining the same elements for negligent supervision). [2]

[2] An employer may have a legal duty to use due care in supervising an employee as a result of a contractual relationship with the employee. This duty sounds in tort, not in contract. This ensuing duty is limited to

As with the agency issue discussed above, the elements necessary to prove negligent supervision of an employee acting outside of the scope of his employment are not present in the record. The record before us contains no evidence that Young Clement knew, or should have known, of Barker's involvement with Charleston Registry. Therefore, Young Clement did not know of the necessity to control Barker.

The only additional evidence Charleston Registry offered on this issue was Young Clement's internal performance reviews of Barker. In these reviews, senior Young Clement attorneys reviewed the quality of Barker's work and his ability to get along with other employees at the law firm. These reviews uniformly rated Barker's performance as poor. Charleston Registry claims these negative reviews should have alerted Young Clement to the need to monitor Barker's activities more closely, which they argue would have led them to discover Barker's involvement with Charleston Registry.

We find no merit to this argument. The performance reviews contained in the record concern only Barker's past work for Young Clement. They do not reference any of Barker's activities beyond the quality of his assigned work and his interaction with the firm's staff. Moreover, they give no indication that the Young Clement attorneys were aware of any business endeavors undertaken by Barker. The reviews, therefore, have no bearing on the question whether Young Clement knew or should have known of Barker's involvement with Charleston Registry.

---

the employee's actions undertaken in his capacity as an agent for the employer. Degenhart, 309 S.C. at 117, 420 S.E.2d at 496-497; see also Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 302, 468 S.E.2d 292, 299 (1996). Since Baker was acting in his individual capacity, this theory is not applicable.

Finding no evidence to support Charleston Registry's claim for negligent supervision, we are compelled to affirm the trial court's dismissal on summary judgment.

CONCLUSION

Having reviewed all the evidence in the light most favorable to Appellants, we find they have failed to raise any genuine issue of material fact on their claims for breach of fiduciary duty, negligence, and negligent supervision. In sum, the undisputed material facts indicate that Barker's relationship with Charleston Registry was an independent business relationship. Accordingly, the trial court's order granting summary judgment in favor of Young Clement is

AFFIRMED.

HEARN, C.J., and ANDERSON J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charles D. Carter, Appellant,

v.

The University of South Carolina, Respondent.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 3832
Heard April 7, 2004 – Filed June 21, 2004

AFFIRMED

Mary P. Miles, of West Columbia, for Appellant.

Daphne Dell Sipes, of Columbia, for Respondent.

BEATTY, J.: Charles D. Carter appeals the trial court's grant of summary judgment in favor of the University of South Carolina in this action for declaratory judgment and injunctive relief. We affirm.

FACTS

The College of Criminal Justice at the University of South Carolina granted provisional admission to Appellant Charles D. Carter

in the spring of 1997. At the end of the semester, the program dismissed him for academic reasons. The dismissal letter, dated May 19, 1997, stated in part: "you will not be permitted to continue in the College of Criminal Justice." Carter appealed his dismissal, using the university's internal procedure. In the interim, Carter was also facing difficulties concerning a disciplinary, non-academic matter. Carter settled that disciplinary matter on September 8, 1997, by agreeing to be placed on "conduct probation" until December 1998. Carter also signed a form acknowledging that his "rights as a charged student" had been explained to him.

On September 18, 1997, after being placed on conduct probation and while his academic appeal was ongoing, Carter received a parking citation from university police. Carter and the officer then argued. As a result, the officer gave a "Notice of Policy Violation" to Carter. The Campus Judicial Board held a hearing on February 3, 1998, to address that incident. Carter did not attend the meeting, but the Board ruled that Carter was responsible for the violation and expelled him from the university. Carter appealed, arguing that he was not a student at the time of the incident. The university denied his appeal in a letter dated February 26, 1998, as a final disposition of the matter. The university had already denied Carter's academic appeal on October 6, 1997.

Carter sued the university in 2000, seeking injunctive relief[1] and a declaratory judgment that he was not a student in September of 1997. The trial judge granted summary judgment to the university, finding that Carter was a student within the description of the *USC Student Handbook and Policy Guide* ("the Handbook") and that Carter was therefore subject to the policies contained therein.

ISSUES

I. Did the trial court err in ruling that Carter was a student?

---

[1]Apparently, the university had barred Carter from entering the campus, but the university has since agreed that Carter can enter university property.

II. Did the trial court err in ruling that the university police could write the citation even if Carter was not a student since Carter's behavior was harassing?
III. Did Carter properly and timely plead, establish, and raise a cognizable interest?
IV. Is Carter's request moot?

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. "In determining whether . . . triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." Osborne ex rel. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). An appellate court reviews the granting of summary judgment under the same standard applied by the trial court. George v. Fabri, 345 S.C. 440, 451, 548 S.E.2d 868, 873 (2001).

LAW/ANALYSIS

The university argues that Carter was still a student on the day of the incident for two reasons. First, Carter had signed a form acknowledging as much just one week earlier. Second, Carter created a "continuing student relationship" with the university by availing himself of the university's internal appellate procedures. Carter strenuously disagrees. He maintains that he was not a student on September 18, 1997, because the university had dismissed him in the spring of that year. Additionally, Carter contends that the phrase "continuing student relationship" is excessively vague and is therefore unenforceable. We find that Carter was a student at the time of the incident.

On September 8, 1997, Carter signed a "Case Disposition Form" to settle his disciplinary appeal.[2] Carter admitted on that day that the university had explained to him his "rights as a charged student involved in the disciplinary process." (Emphasis added.) Carter agreed to be placed on conduct probation for fifteen months. Carter clearly envisioned being a student well into the future. We fail to detect any change in his status between the date of the signature and that of the parking incident. Having been a student on September 8, Carter cannot then argue that he was not a student on September 18. Nothing altered his status during that time.

We now turn to the university's second argument. The Handbook provides in pertinent part that "[p]ersons who are not officially enrolled for a particular term but who have a continuing student relationship with the University of South Carolina are considered 'students.'"[3] According to Carter, the phrase "continuing student relationship" is not sufficiently defined. Given the facts before us, that argument must necessarily fail.

> The record shows that Carter was appealing his dismissal from the College of Criminal Justice in the spring and early summer of 1997. He wrote no fewer than three letters, requesting hearings, meetings, reconsideration. Even after the parking incident, Carter sought a meeting with the Faculty Academic Affairs Liaison Committee and admitted that he had "appealed [his dismissal] all the way to the president's office." There were also numerous letters to Carter from university personnel on the matter. The letters made clear

---

[2] Carter was clearly a student in the spring of 1997, having enrolled and attended classes in the College of Criminal Justice. See Delaureal v. Forster, 816 So.2d 877, 880 (La. App. 2002) (holding that "someone enrolled at [a university] and pursuing a [program of studies] . . . has a primary relationship to [that university] as a student"); *The American Heritage Dictionary* 1208 (2d ed. 1985) (defining a student as "[o]ne who attends a school, college, or university").

[3] At oral argument, Carter conceded that he was bound by the Handbook.

that the appeal was "[i]n accordance with the policy of the Board of Trustees" and that "all [university] administrative (procedural) steps" were being followed. In responding to Carter's appeals, the university relied partially on its *Graduate Studies Bulletin*, a manual that addresses the rights of students attending the university.

When taken as a whole, the record shows that the academic appellate process was ongoing at the time of the parking incident. Carter's dismissal became final only on October 6, 1997, when the university's Board of Trustees informed Carter of its final decision. It is that letter which terminated Carter's status as a student.[4] See Mason v. State ex rel. Bd. of Regents of Univ. of Okla., 23 P.3d 964, 970 (Okla. Civ. App. 2000) (holding that any contractual relationship which may exist between a university and a student is terminated when the student is expelled from the university and is "no longer party to any contract" with the university). That letter was sent after the parking incident. We therefore affirm the trial court's ruling that

[4] It is commonly held that a contract exists between a university and its students. See, e.g., R.J. Hendricks, II v. Clemson Univ., 353 S.C. 449, 461, 578 S.E.2d 711, 717 (2003) (ruling that "that some aspects of the student/university relationship are indeed contractual"); Organiscak v. Cleveland State Univ., 762 N.E.2d 1078, 1081 (Ohio Ct. 2001) ("It is axiomatic that when a student enrolls in a college or university, pays his tuition and fees, and attends such school, the resulting relationship may reasonably be construed as being contractual in nature."). However, courts have disagreed about the extent to which student handbooks provide the terms of that contract. Compare id. ("The terms of the contract between the university and the student are generally found in the college catalog and handbooks supplied to students.") and Cornett v. Miami Univ., 728 N.E.2d 471, 473 (Ohio Ct. 2000) ("The terms of the contract between the university and the student are generally found in the college catalog and handbooks applied to students."), with Pacella v. Tufts Univ. School of Dental Medicine, 66 F.Supp.2d 234, 241 (Mass. D. 1999) (ruling that the provisions of the handbook are not contractually binding on the university in part because the university could unilaterally modify them without notice).

Carter had a continuing student relationship with the university on September 18, 1997.

Having so ruled, we need not address Carter's remaining issues. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining that appellate courts need not review remaining issues when disposition of prior issues are dispositive).

CONCLUSION

Based on the foregoing, the trial court's ruling is

AFFIRMED.

HEARN, C.J., and HOWARD, J., concur.