The Supreme Court of South Carolina

In the Matter of Lynne
Bice Brown (Dick), Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 16, 1984, petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated April 6, 2001, petitioner submitted her resignation from the South Carolina Bar. The Court has no record of having received the letter of resignation. Petitioner now seeks to renew her resignation with the request that it be retroactive to April 6, 2001. We grant her request.

Within fifteen (15) days of the issuance of this order, petitioner shall deliver her certificate to practice law in this State to the Clerk of the Supreme Court. In addition, petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Within fifteen (15) days of the issuance of this order, petitioner shall file an affidavit with the Clerk of the Supreme Court showing that she has fully complied with the provisions of this order. Upon full compliance with this order, petitioner's resignation shall be effective retroactive to April 6, 2001, and her name shall be removed from the roll of attorneys.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

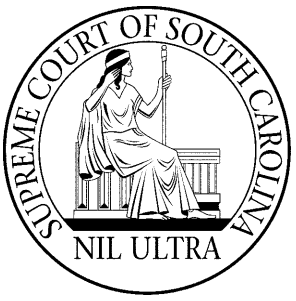
s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

June 24, 2004



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 27

June 28, 2004

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

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The Supreme Court of South Carolina

In the Matter of William B. Harper, Respondent.

ORDER

Respondent pled guilty to misprison of felony in violation of 18 U.S.C. § 4. The superseding information charges that "from on or about November 2001 up to on or about March 7, 2003, in the District of South Carolina and elsewhere, the Defendant, [respondent], having knowledge of the actual commission by persons known and unknown to the United States Attorney of a felony cognizable by a Court of the United States, that is, Conspiracy, in violation of Title 18 United States Code Section 371 and Wire Fraud, in violation of Title 18 United States Code Section 1343, willfully did conceal the same and did not as soon as possible make known the commission of said felony to a Judge or other person in civil authority under the United States."

The Office of Disciplinary Counsel petitions the Court to place respondent on interim suspension pursuant to Rule 17(a) and (b),

RLDE, of Rule 413, SCACR. Respondent consents to being placed on interim suspension.

The petition is granted and respondent is suspended, pursuant to Rule 17, RLDE, Rule 413, SCACR, from the practice of law in this State until further order of the Court.

IT IS SO ORDERED.

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

Columbia, South Carolina

June 22, 2004

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ronnie W. Ellison, Respondent,

v.

Frigidaire Home Products, Employer, and WCI Outdoor Products, Carrier, Appellants.

Appeal From Orangeburg County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 3833
Heard May 12, 2004 – Filed June 28, 2004

REVERSED

E. Ross Huff, Jr., of Columbia, for Appellants.

Edgar Warren Dickson, of Orangeburg, for Respondent.

HEARN, C.J.: In this workers' compensation action, Appellant-Employer Frigidaire Home Products contends the circuit court erred in concluding an employee's leg injury entitled him to compensation for total, permanent disability. We agree and reverse.

FACTS

While Respondent Ralph Ellison was operating a forklift for Frigidaire in November of 1999, he caught his foot in a box and fractured his leg in three places. Dr. Kirol treated Ellison for the fractures and determined that the forklift accident left Ellison with a twenty percent impairment to his left lower extremity. Dr. Kirol restricted Ellison from lifting more than twenty-five pounds and restricted him from standing or walking for more than six hours per day.

At the time of the accident, Ellison had been suffering from hypertension and prostate cancer for several years. Following the accident, Ellison was diagnosed with sleep apnea, diabetes, and congestive heart failure.

Both parties agree that Ellison's leg injury is compensable under workers' compensation because it arose out of and in the course of employment; however, the parties disagree about the amount of compensation to which Ellison is entitled. Frigidaire contends Ellison is limited to the scheduled member benefits because only his leg, a scheduled member, was injured in the forklift accident. The single commissioner disagreed and awarded Ellison total, permanent disability, concluding the combination of Ellison's accidental leg injury and his other medical ailments rendered Ellison totally and permanently disabled. Frigidaire appealed to the South Carolina Workers' Compensation Appellate Panel, and then to the circuit court. Both tribunals affirmed the single commissioner's decision. This appeal follows.

STANDARD OF REVIEW

In an appeal from the South Carolina Workers' Compensation Commission, the circuit court and this court may not substitute their judgment for that of the commission as to the weight of the evidence on questions of fact, but may reverse decisions tainted by an error of law. See S.C. Code Ann. § 1-23-380(g) (1986); Stephen v. Avins Constr. Co., 324 S.C. 334, 337, 478 S.E.2d 74, 76 (Ct. App. 1996).

LAW/ANALYSIS

Frigidaire contends the circuit court erred in awarding Ellison permanent, total disability compensation for his injured leg. We agree.

South Carolina replaced traditional tort recovery for workplace injuries with the present system of workers' compensation in an effort to reduce litigation and provide injured workers with prompt and certain recovery. Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 115, 580 S.E.2d 100, 107 (2003) ("By displacing traditional tort law the Legislature intended to provide a no-fault system focusing on quick recovery, relatively ascertainable awards and limited litigation."). One of the methods by which the Workers' Compensation Act facilitates this purpose is through streamlining recovery for certain enumerated—or "scheduled"—injuries. Section 42-9-30 of the South Carolina Code (1976 & Supp. 2003) provides specific recoveries for total or partial physical losses and impairments suffered by an employee to certain scheduled members including: thumbs, fingers, toes, hands, arms, feet, legs, eyes, and ears. Recovery for an injury to a scheduled member varies only with the degree of impairment; lost earning potential is wholly irrelevant. Bateman v. Town & Country Furniture Co., 287 S.C. 158, 160, 336 S.E.2d 890, 891 (Ct. App.1985) ("Loss of earnings is not required for recovery under [the scheduled member] section; compensation is based on the character of the injury."). By codifying recovery for injuries to scheduled members, "the legislature presumes a claimant has lost earning capacity to a degree which corresponds to the claimant's degree of impairment." Lyles v.

Quantum Chem. Co., 315 S.C. 440, 446, 434 S.E.2d 292, 295 (Ct. App. 1993).

In Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960), our supreme court stated the following in addressing the ability of a claimant to recover more than the statutory amount for a scheduled injury:

> Where the injury is confined to the scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation, even though other considerations such as age, lack of training, or other conditions peculiar to the individual, effect a total or partial industrial incapacity. To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected.

See also Wigfall, 354 S.C. at 106, 580 S.E.2d at 103 ("Singleton stands for the exclusive rule that a claimant with one scheduled injury is limited to the recovery under § 42-9-30 alone."). Thus, only where an injury to a scheduled member is accompanied by additional complications affecting another part of the body can an award exceed scheduled recovery. Lee v. Harborside Café, 350 S.C. 74, 78, 564 S.E.2d 354, 356 (Ct. App. 2002). Otherwise, if no causal connection exists, scheduled recovery is exclusive. Brown v. Owen Steel Co., 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994).

Here, the only injury caused by the forklift accident is the tibia/fibula fracture, an injury to a scheduled member. No matter how severely Ellison's other medical conditions debilitate him, no causal connection exists between his fractured leg and his sleep apnea, diabetes, congestive heart failure, hypertension, or prostate cancer.[1] Because the leg injury caused neither of

[1] Ellison argues that the case of Simmons v. City of Charleston, 349 S.C. 64, 562 S.E.2d 476 (Ct. App. 2002), supports his argument that he can recover

these conditions nor any other additional injuries, the circuit court should have determined Ellison's recovery was limited to scheduled member recovery.

Ellison argues that the legislature's establishment of the Second Injury Fund is indicative of its intent to provide permanent and total disability benefits to an employee whose injury to a scheduled member renders the employee totally disabled due to a pre-existing medical condition. We disagree. The provisions of section 42-9-400(a) of the South Carolina Code (1976) merely entitle an employer's insurance carrier to be reimbursed by the Fund if injuries to an employee are amplified because of the employee's pre-existing medical conditions. The intent of the statute is to encourage the employment of people with disabilities; it is not meant to modify the law clearly set forth in Singleton.

Because there is no dispute that Ellison's injury was confined to his leg and there is no evidence that the injury affected any other body part, the decision of the circuit court is

REVERSED.

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

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total and permanent disability from an injury to one scheduled body member. We disagree. In Simmons, our court found that where an injury to one scheduled body member impairs another body member, a claimant may recover total and permanent disability. However, here, there is absolutely no evidence that Ellison's fractured leg affected any other body part or exacerbated any of his other medical conditions.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The City of North Myrtle Beach, Appellant,

v.

Norma Lewis-Davis and Nancy Lewis-Worriax, Respondents.

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 3834
Heard June 10, 2004 – Filed June 28, 2004

REVERSED

Charles E. Carpenter, Jr. and S. Elizabeth Brosnan, both of Columbia; and Christopher Paul Noury, of North Myrtle Beach; and Douglas C. Baxter, of Myrtle Beach, for Appellant.

John R. Clarke, of North Myrtle Beach, for Respondents.

ANDERSON, J.: In this condemnation action, the City of North Myrtle Beach appeals the trial court's order holding landowners Norma Lewis-Davis and Nancy Lewis-Worriax could file a separate action for trespass against Appellant despite the expiration of the statute of limitations. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

Respondents own lots in the Windy Hill section of North Myrtle Beach. Appellant sought to obtain a portion of Respondents' lots for a roadway and sidewalk easement. Respondents rejected Appellant's $25,000 tender; therefore, on January 27, 2000, Appellant filed a condemnation notice and tender of payment against Respondents, pursuant to section 28-2-240 of the South Carolina Code. On March 13, 2000, Respondents counterclaimed, rejecting the $25,000 tender and seeking $500,000 just compensation. In their counterclaim, Respondents alleged Appellant trespassed on their property by cutting down trees and damaging a sign. In its reply filed March 24, 2000, Appellant moved to dismiss the counterclaim under Rule 12(b)(6), SCRCP. Appellant filed a separate motion to dismiss on April 10, 2000. The motion was scheduled, continued, and then withdrawn to allow new counsel for Appellant to become familiar with the case.

On April 17, 2001, Respondents moved to amend their answer to allege additional damages for trespass. On October 19, 2001, Judge J. Michael Baxley granted the motion to amend. On March 4, 2002, Appellant again moved to dismiss the counterclaim for trespass based on South Carolina State Highway Department v. Moody, 267 S.C. 130, 226 S.E.2d 423 (1976). Moody holds, "a condemnation proceeding, or an appeal therefrom, is not a proper proceeding in which to seek redress for trespass and/or damages, proximately caused by negligence." Id. at 134, 226 S.E.2d at 424. The Moody court reasoned that "[a]llowing the landowner to pursue inverse condemnation within this condemnation proceeding denied the Department of due process, because it obviously had no notice that the landowners would

seek compensation for damages . . . growing out of the negligent conduct of the independent contractor." Id. at 136, 226 S.E.2d at 426.

On June 13, 2002, Judge Steven H. John granted Appellant's motion to dismiss, finding, under Moody, Respondents could not assert a counterclaim for trespass in a condemnation action. However, Judge John decided that despite the fact that the Tort Claims Act's two-year statute of limitations would bar any subsequent lawsuit by Respondents for trespass, Respondents could file a separate suit despite the efficacy of the statute of limitations. Judge John reached this conclusion because he believed Judge Baxley's order granting Respondents' motion to amend "prejudiced [Respondents] and led them to believe their rights were protected and that it was not necessary to file a separate action for their damages." Judge John took judicial notice that Appellant did not file a Rule 59(e) Motion to Alter of Amend a Judgment regarding Judge Baxley's order.

On June 24, 2002, Appellant filed a motion to alter or amend. On October 28, 2002, Judge John issued an amended order which reaffirmed his prior ruling. Appellant served a notice of appeal on November 27, 2002. At trial on December 9, 2002, Respondents received judgment in the amount of $70,560. On December 12, 2002, Respondents commenced a separate lawsuit against Appellant and another defendant, Weaver Company, Inc., alleging trespass and negligence.

LAW/ANALYSIS

I. ISSUE NOT PROPERLY BEFORE THE TRIAL COURT

Although Judge John granted Appellant's motion to dismiss, he held Respondents could file a separate action for trespass despite the expiration of the statute of limitations. However, Judge John did not base this decision on a ground Respondents raised. While Judge John relied on his belief that Judge Baxley's order granting Respondents' motion to amend prejudiced them, Respondents only sought leave to refile on the basis that the statute was tolled on March 13, 2000, the date they filed their initial counterclaim.

Respondents attempt to argue in their brief that they raised the issue of prejudice in a letter written to Judge John. However, the letter only mentions Judge Baxley's order: "An Order was issued by Judge Baxley on October 19, 2001 allowing [Respondents] to amend their Answer and assert an additional claim of trespass." This sentence does not raise the issue of prejudice to Respondents from Judge Baxley's order. In fact, the sole reference Respondents make in the letter to tolling the statute of limitations is that "the statute was tolled when [Respondents] initially brought the counterclaim on March 13, 2000." Indubitably, Respondents made no claim for relief based on Judge Baxley's order.

"It is an error of law for a court to decide a case on a ground not before it." Griffin v. Capital Cash, 310 S.C. 288, 294, 423 S.E.2d 143, 147 (Ct. App. 1992); see Friedberg v. Goudeau, 279 S.C. 561, 562, 309 S.E.2d 758, 759 (1983) (reversing the grant of summary judgment because the ground for summary judgment was not properly before the trial court). A reversal is required when the trial court's ruling exceeds the limits and scope of the particular motion before it. Skinner v. Skinner, 257 S.C. 544, 550, 186 S.E.2d 523, 526 (1972). Because we decide Judge John granted Respondents relief on a ground they did not raise or argue, it was error for him to rule the statute of limitations was tolled as of the date of Judge Baxley's order.

II. STATUTE OF LIMITATIONS

Assumptively reasoning that the statute of limitations issue was properly before the trial court, the judge still erred in determining the statute would not time-bar subsequent actions. The trial court rationalized that because Judge Baxley's order led Respondents to believe they did not need to file a separate action for trespass, the statute of limitations was tolled as of the date of that order. This is flawed argumentation because Judge Baxley's order merely allowed Respondents to amend their pleading to assert additional damages for trespass. The order did not address the legal merits of the claim.

A. Statutory and Case Law Application

The statute of limitations for "an action for trespass upon or damage to real property" is three years. S.C. Code Ann. 15-3-530 (Supp. 2003).

> A statute of limitations reduces the interval between the accrual and commencement of a right of action to a fixed period, thereby putting to rest claims after the passage of time. See 51 Am.Jur.2d Limitations on Actions § 15 (1970); Nowlin v. General Tel. Co., 310 S.C. 183, 186, 426 S.E.2d 114, 116 (Ct. App. 1992), aff'd, 314 S.C. 352, 444 S.E.2d 508 (1994). This procedural device operates as a defense to limit the remedy available from an existing cause of action. Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242 (1993) (citing Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987), cert. denied, 487 U.S. 1218, 108 S.Ct. 2871, 101 L.Ed.2d 906 (1988)). Unless an action is commenced before expiration of the limitations period, the plaintiff's claim is normally barred. See, e.g., McLain v. Ingram, 314 S.C. 359, 444 S.E.2d 512 (1994).

Blyth v. Marcus, 322 S.C. 150, 152-53, 470 S.E.2d 389, 390-91 (Ct. App. 1996).

> There is universal acceptance of the logic of Statutes of Limitations that litigation must be brought within a reasonable time in order that evidence be reasonably available and there be some end to litigation. Not only do such statutes apply to suits against the State but also to suits brought by the State.

Webb v. Greenwood County, 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956). "[S]tatutes are designed to promote justice by forcing parties to pursue a case in a timely manner. Parties should act before memories dim, evidence grows stale or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public affairs." State ex rel. Condon v. City of Columbia, 339 S.C. 8, 19, 528 S.E.2d 408, 413-14 (2000).

> Statutes of limitation evolved over time with definite purposes in mind. They protect people from being forced to defend themselves against stale claims. The statutes recognize that with the passage of time, evidence becomes more difficult to obtain and is less reliable. Physical evidence is lost or destroyed, witnesses become impossible to locate, and memories fade. With passing time, a defendant faces an increasingly difficult task in formulating and mounting an effective defense. Additionally, statutes of limitation encourage plaintiffs to initiate actions promptly while evidence is fresh and a court will be able to judge more accurately.

Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 163-64, 511 S.E.2d 699, 706 (Ct. App. 1999).

> Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. 54 C.J.S. Limitations of Actions § 2, at 16-17 (1989). Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. 51 Am.Jur.2d, Limitation of Actions § 18, at 603 (1970). One purpose of a statute of limitations is "to relieve the courts 'of the burden of trying stale claims when a plaintiff has slept on his rights.'" McKinney v. CSX Transp., Inc., 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989) (quoting Burnett v. New York Cent. R.R., 380 U.S. 424, 428, 85 S.Ct. 1050, 1054, 13 L.Ed.2d 941, 945 (1965)). Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation. 51 Am.Jur.2d Limitation of Actions § 17, at 602-03 (1970).

Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). When an action is dismissed without prejudice, the statute of limitations will bar another suit if the statute has run in the interim. Davis v. Lunceford, 287 S.C. 242, 243, 335 S.E.2d 798, 799 (1985).

B. Motion to Amend

Rule 15 (a) states "a party may amend his pleading . . . by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15 (a), SCRCP.

> "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." Pool v. Pool, 329 S.C. 324, 328-9, 494 S.E.2d 820, 823 (1998) (citing Soil & Material Eng'rs, Inc. v. Folly Assocs., 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct. App. 1987)).
>
> "It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice." Pruitt v. Bowers, 330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct. App. 1998). Courts have wide latitude in amending pleadings and "[w]hile this power should not be used indiscriminately or to prejudice or surprise another party, the decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal." Berry v. McLeod, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997). "The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." Id.

Duncan v. CRS Sirrine Eng'rs, Inc., 337 S.C. 537, 542, 524 S.E.2d 115, 117-18 (Ct. App. 1999).

Collins v. Sigmon, 299 S.C. 464, 385 S.E.2d 835 (1989) provides helpful instruction regarding a trial judge's proper treatment of a motion to

amend. In Collins, a defendant moved to amend his answer to add counterclaims and affirmative defenses. The plaintiff contested the motion, arguing the counterclaims were barred by res judicata. While the trial court held res judicata did not operate as a bar, the supreme court reversed, finding the trial court erred by ruling on the res judicata issue in the context of a motion to amend. Collins edifies:

> A motion to amend an Answer should be contested primarily by procedural arguments, not arguments concerning the substance and merits of the counterclaims and/or defenses proposed. For example, one might argue that it is too late in the case to allow an amendment, and that prejudice would result from such an amendment. Arguments going to the legal merits of a proposed defense or counterclaim are better taken up in the context of a Rule 12(b) motion to dismiss or a Rule 56 motion for summary judgment. It follows that the trial judge should generally not consider these substantive arguments at the mere amendment stage.

Id. at 466, 385 S.E.2d at 836.

Because Judge Baxley's order did not address the legal merits of the claim, it was impossible for his order to prejudice Respondents. Judge Baxley's order was unrelated to whether Respondents could plead a counterclaim in a condemnation action. Judge Baxley's order allowed Respondents to amend their pleading. That order did not lead Respondents to believe they could file a counterclaim for trespass in this condemnation action. Respondents have conceded that a counterclaim for trespass may not be brought in a condemnation action, but rather, must be brought in a separate action. However, Respondents still proceeded with asserting their counterclaim in the condemnation action. The trial court erred in holding the statute of limitations was tolled on the date of Judge Baxley's order.

Furthermore, Respondents acknowledge that Judge Baxley's order did not address the legal merits of their counterclaim. They proffer that because Appellant did not challenge Judge Baxley's order, it became the law of the

case. We disagree. Although Appellant did not file a Rule 59(e) motion, Appellant was not required to take this action because the order was not a ruling regarding Respondents' right to properly plead a counterclaim in a condemnation action; it was only a ruling regarding notice and opportunity to respond to the amendment. Under Collins, Appellant should not have challenged the merits at the amendment stage. Applying Collins, Appellant only had to file a Rule 12(b) motion, and that is precisely what it did. See id. at 466, 385 S.E.2d at 836. If we were to accept Respondents' argument, a party would be required to appeal an order granting a motion to amend each time the party wished to attack the merits of the amendment. This would, in effect, nullify the language in Rule 15(a), SCRCP, allowing a party to plead in response to an amended pleading. Thus, Judge Baxley's order was only the law of the case as to Respondents' amendment to their counterclaim.

A pleading error by Respondents does not serve as a justification for tolling the statute of limitations. Respondents bear the burden of protecting their claim from procedural bars and may not use tolling to save their claim. No rule or statute exists which tolls statute of limitations periods based on improper pleadings. Therefore, we reject any argument that the statute of limitations was tolled when Respondents filed their initial counterclaim on March 13, 2000.

III. WAIVER OF STATUTE OF LIMITATIONS

Appellant argues the trial court erred in holding Appellant waived the statute of limitations defense by (1) waiting until after the statute of limitations expired to file a motion to dismiss; and (2) failing to file a Rule 59(e) motion to alter or amend Judge Baxley's order.

A party can waive a statute of limitations defense. McLendon v. South Carolina Dep't of Highways & Pub. Transp., 313 S.C. 525, 525-26, 443 S.E.2d 539, 540 (1994).

> Waiver is a question of fact for the finder of fact. Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). Waiver is a voluntary and intentional

> abandonment or relinquishment of a known right. Id. at 342-44, 415 S.E.2d at 387. It may be expressed or implied by a party's conduct, and it may be applied to bar a party from relying on a statute of limitations defense. Mende v. Conway Hosp., Inc., 304 S.C. 313, 404 S.E.2d 33 (1991).

Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). "A simple voluntary relinquishment of a right with knowledge of all the facts—an expression of intention not to demand a certain thing is sufficient to constitute a waiver." South Carolina Tax Comm'n v. Metropolitan Life Ins. Co., 266 S.C. 34, 40, 221 S.E.2d 522, 524 (1975). "Waiver of [the statute of] limitations may be shown by words or conduct. Thus, waiver may result from express agreement, . . . from failure to claim the defense, *or by any action or inaction manifestly inconsistent with an intention to insist on the statute*." Mende, 304 S.C. at 315, 404 S.E.2d at 34 (quoting 54 C.J.S. Limitation of Actions § 22 at 52 (1987)) (emphasis in original).

Appellant did not waive the right to assert the statute of limitations defense. Appellant has challenged Respondents' counterclaim from the very beginning stages of this litigation. Prior to the expiration of the statute of limitations, Appellant twice sought dismissal of the counterclaim—in its reply, as well as in a separate motion. Appellant was not required to file a Rule 59(e) motion to alter or amend Judge Baxley's order because it did not go to the legal merits of the claim. Thus, Appellant did not waive its right to assert the statute of limitations as a defense.

In their brief, Respondents concede Appellant did not waive its right to assert the statute of limitations as a defense, but argue that fact is immaterial because Judge John "correctly reconciled the holding in Moody with the law of the case." Respondents claim Judge John correctly reconciled the Moody mandate with Judge Baxley's "unappealed law of the case" when he referred to Judge Baxley's order and allowed Respondents to continue with their new action. Respondents' contention that it is immaterial that Appellant did not waive its right to assert the statute of limitations fails in that Judge Baxley's "law of the case" only applied to Respondents' amendment to their counterclaim and Judge John erred in tolling the statute of limitations.

IV. NEGLIGENCE CAUSE OF ACTION

In Respondents' separate action against Appellant and Weaver Company, Inc., they alleged a cause of action for trespass and added a new cause of action for negligence. Based on our adjudication that the trespass cause of action is barred by the two-year statute of limitations, we rule the negligence cause of action is time-barred.

CONCLUSION

For the foregoing reasons, the trial court erred in tolling the statute of limitations. Accordingly, the decision of the trial court is

REVERSED.

HUFF and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Gilbert Bowie, **Appellant.**

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

Opinion No. 3835
Submitted June 10, 2004 – Filed June 28, 2004

AFFIRMED

Assistant Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

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

ANDERSON, J.: Gilbert Bowie appeals his conviction and sentence for trafficking in cocaine, 400 grams or more. He argues the trial court erred in refusing to suppress cocaine seized from a hotel room because the affidavit to the search warrant lacked probable cause. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

On April 27, 2001, at approximately 7:00 p.m., deputies with the Richland County Sheriff's Department drove to the Days Inn on Garner's Ferry Road looking for a motel room reserved by Donald Williams, a known local drug dealer, and held for "Mr. Gill." The officers set up surveillance of the motel and observed Gilbert Bowie arrive around 9:00 p.m. in a Toyota Tercel with Florida tags. Bowie entered the lobby and informed the desk clerk: "'I'm Mr. Gill, and you have a key for me.'" The clerk gave Bowie a key to Room 215 and Bowie walked upstairs.

At about 9:10 p.m., two men in a Dodge truck with Florida tags arrived at the motel. The men were later identified as Juan Poviones and Jose Barrocas. Poviones and Barrocas checked into Room 309. Around 9:30 p.m., Bowie left in the Toyota and Poviones and Barrocas left in the Dodge truck. The three men traveled to Cedar Terrace Shopping Center. They stopped at Eckerd drugstore and a Substation II restaurant, located just down the road from the motel. Poviones and Barrocas talked briefly to Bowie in the parking lot of the Substation, but then split up and appeared to not know each other. All three men returned to the motel at the same time. Poviones and Barrocas walked to Room 309 and Bowie entered Room 215. The officers attempted surveillance of both rooms. Although the door to Room 215 could not be seen, the officers noticed Bowie going to and from the elevator toward Room 215.

The officers obtained search warrants for both rooms after midnight. Upon entering Room 309, the officers encountered Poviones and Barrocas.

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

Further, in the search of Room 309, the officers found a black duffel bag containing four yellow "brick-like" packages of cocaine, totaling 3,978 grams. The duffel bag looked exactly like a bag the officers had observed Bowie carrying into the motel earlier that night. The fingerprints on the packages of cocaine matched Bowie's fingerprints.

The Richland County Grand Jury indicted Bowie for trafficking in cocaine, 400 grams or more. At trial, defense counsel moved to suppress the cocaine seized from Room 309 because the affidavit to the search warrant lacked probable cause. The Circuit judge ruled: "[A]fter considering the two search warrants and their affidavits, . . . they are not on their face insufficient." The judge concluded: "Since based on the finding that the affidavits and the warrants are not insufficient, then I would find that testimony could be offered to supplement the affidavit." The court further found "there was a good faith effort by the officer in communicating with his lieutenant to give all the facts, and that the fact that the magistrate did not include all of those in there, I don't think the warrant should be suppressed."

The jury found Bowie guilty of trafficking in cocaine, 400 grams or more. He was sentenced to thirty years imprisonment and a $200,000 fine.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344 (Ct. App. 2004). We are bound by the trial court's factual findings unless they are clearly erroneous. Wilson, 345 S.C. at 5, 545 S.E.2d at 829; see also Abdullah, 357 S.C. at 349, 592 S.E.2d at 347 ("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings."). This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. On review, we are limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998); State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990); see also

State v. Corey D., 339 S.C. 107, 529 S.E.2d 20 (2000) (an abuse of discretion is a conclusion with no reasonable factual support). This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed. State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (Ct. App. 2003); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002); see also State v. Keith, 356 S.C. 219, 588 S.E.2d 145 (Ct. App. 2003) (noting that duty of reviewing court is to ensure that magistrate had substantial basis for concluding that probable cause existed). This review, like the determination by the magistrate, is governed by the "totality of the circumstances" test. State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000); King, 349 S.C. at 148, 561 S.E.2d at 643. The appellate court should give great deference to a magistrate's determination of probable cause. State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997); State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct. App. 1996); see also State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976) (magistrate's determination of probable cause should be paid great deference by reviewing court).

LAW/ANALYSIS

I. SEARCH WARRANT AFFIDAVIT

Bowie argues the affidavit to the search warrant for Room 309 lacked probable cause. He contends the trial judge erred in refusing to suppress cocaine seized from that room. We disagree.

The affidavit to the search warrant for Room 309 provided:

DESCRIPTION OF PROPERTY SOUGHT

Cocaine, paraphernalia and paperwork associated with the sale, storage and use of cocaine.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED

7300 SUMTER HWY, DAYS INN MOTEL ROOM 309. THE LOCATION IS A THREE STORY MOTEL LOCATED ACROSS THE STREET FROM SHONEYS ON SUMTER HWY. THE ROOM TO BE SEARCHED IS NUMBER 309 ON THE THIRD FLOOR ON THE FRONT SIDE. SEARCH TO INLCUDE ALL PERSONS IN OR ASSOCIATED WITH ROOM 309 AND A SILVER DODGE TRUCK WITH FLORIDA REGISTRATION, T79XPH.

REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

The Richland County Sheriff's Department received information on this date from a confidential and reliable informant that a subject named "Gill" would arrive from Florida with a quantity of cocaine. The information was specific that the subject would arrive around 9pm and would ask for a key to room 215, the location to be searched. Surveillance was established at the motel. A subject driving a green Toyota with Florida registration, UO4BBE, arrived at approximately 9PM, and identified himself and received the room key to room 215. The Toyota is registered to a Jesus Rodriguez who had a prior arrest for narcotics. The subject was followed from the location to several businesses including a Eckerds and a sandwich shop on Garners Ferry Road. Two other subjects in a Dodge truck with Florida registration, T79XPH, were observed meeting this first subject. These subjects returned to the motel, parked in the rear parking lot and entered through a rear door. The motel confirmed

> that these two subjects are in room 309, the location to be searched. Based on the observations of the agents these subjects were together and believed to be involved in the trafficking of illegal narcotics. The informant is reliable in that it has provided information on at least one occasion that led to at least one arrest and the seizure of a quantity of cocaine. Based on the totality of the information including the corroborating surveillance agents believe that the subjects have a quantity of cocaine in their possession. Through the affiant's and other Richland County Sheriff's Department Narcotic officers experience in drug enforcement, it is known that subjects present at the scene of illegal drug distribution and/or possession commonly have drugs in their possession and/or stored and/or transported in their vehicles.

A magistrate may issue a search warrant only upon a finding of probable cause. State v. Tench, 353 S.C. 531, 579 S.E.2d 314 (2003); State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002). "The South Carolina General Assembly has enacted a requirement that search warrants may be issued 'only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant.'" State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999) (quoting S.C. Code Ann. § 17-13-140 (1985)).

The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (Ct. App. 2003); State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995). For an affidavit in support of a search warrant to show probable cause, it must state facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time. State v. Winborne, 273 S.C. 62, 254 S.E.2d 297 (1979). The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued. State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct. App. 1996); State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995). In determining the validity of the warrant, a reviewing court may consider only information

brought to the magistrate's attention. State v. Owen, 275 S.C. 586, 274 S.E.2d 510 (1981); State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001).

To determine probable cause, we look to the totality of the circumstances test set forth in Illinois v. Gates, 462 U.S. 213 (1983). The totality of the circumstances test establishes:

> [t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. at 238; see also State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000) (stating that under totality of circumstances test, reviewing court considers all circumstances, including status, basis of knowledge, and veracity of informant, when determining whether or not probable cause existed to issue search warrant).

A magistrate must determine probable cause based on all the information available to him at the time of issuance of the warrant. State v. Crane, 296 S.C. 336, 372 S.E.2d 587 (1988). Affidavits are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in a common sense and realistic fashion. State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976); Dupree, 354 S.C. at 683, 583 S.E.2d at 441. Affidavits must be judged on the facts presented and not on the precise wording used. State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981).

Our task is to decide whether the magistrate had a substantial basis for concluding probable cause existed. State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994); see also State v. 192 Coin-Operated Video Game Machs., 338 S.C. 176, 525 S.E.2d 872 (2000) (finding that as long as the magistrate had a substantial basis for concluding a search would uncover

evidence of wrongdoing, the Fourth Amendment requires no more). Probable cause is a flexible, common-sense standard. Texas v. Brown, 460 U.S. 730 (1983). The term "probable cause" does not import absolute certainty. State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971); State v. Arnold, 319 S.C. 256, 460 S.E.2d 403 (Ct. App. 1995). Instead, it "merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief'" that an offense has been committed and that the accused committed it. Brown, 460 U.S. at 742 (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." Brown, 460 U.S. at 742. In determining whether a search warrant should be issued, magistrates are concerned with probabilities and not certainties. Sullivan, 267 S.C. at 617, 230 S.E.2d at 624.

Searches based on warrants will be given judicial deference to the extent that an otherwise marginal search may be justified if it meets a realistic standard of probable cause. Bennett, 256 S.C. at 241, 182 S.E.2d at 294; Arnold, 319 S.C. at 260, 460 S.E.2d at 405. A determination of probable cause depends upon the totality of the circumstances. State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987).

The magistrate made a practical, common-sense decision to issue the search warrant for Room 309, given the facts in the affidavit that another Florida car containing two other subjects met Bowie and returned to the motel where he was staying and that the agents believed all the subjects were together and involved in trafficking. A logical interpretation of the affidavit accompanying the search warrant in this case, and the deference which must be accorded the magistrate, overcome any asserted deficiency. Based on the totality of the circumstances, we hold the affidavit provided the magistrate with a substantial basis for finding probable cause to search Room 309. Therefore, the trial judge properly found the affidavit was not facially insufficient.

II. SWORN ORAL TESTIMONY

Even if the search warrant affidavit was insufficient on its face to establish probable cause, we nonetheless find the affidavit was properly supplemented by sworn oral testimony. The supplemental oral testimony to the magistrate by Agent Michael Poole is curative. Agent Poole, of the Richland County Sheriff's Department, testified:

> Q. [Y]ou ultimately were put under oath in order to swear out the search warrants when Lieutenant Senn arrived?
> A. Yes, sir, I was put under oath.
> Q. Agent Poole, if you would tell the Court what additional sworn testimony you gave to Judge Davis in addition to what was contained inside the affidavits for the search warrant for room 215, and more specifically, room 309?
> A. After [Bowie] arrived and we realized that the other two defendants in 309, that they appeared to be together, I relayed to him that when they were around the motel they very distinctly acted like they did not know each other, that they were not together. But when we saw them at the Subway and at the drug store they appeared to be together; that they were following each other around, the truck would go first and the other car behind, everywhere they went that they were obviously together, but they distinctly acted like they were not together at the motel.
> Q. Did you provide any information regarding when it was they had arrived at the motel?
> A. Yes. I told him it appeared that he was supposed to arrive at 9 o'clock and Mr. Gill [Bowie] arrived right at 9 or a couple minutes after.
> Q. What about the other two individuals, is that when they arrived?
> A. No, right shortly after that.
> Q. Do you recall whether you relayed that to the judge?
> A. Yes, that they came in a few minutes later.
> Q. Any other information besides what is contained inside the affidavits for rooms 309 and 215, any other information that was

provided to Judge Davis regarding the probable cause surrounding room 309?
A. I think there was one point where [Bowie] appeared to circle the parking lot later on before we had a warrant signed, like he was just circling to make sure, it appeared to me, like things were safe.
Q. In your talking with Judge Davis, did you at any point in time communicate to him whether the three of them appeared to be there together?
A. I told him in my opinion they appeared to be together and they were deliberately trying to represent that they were not.
Q. You were sworn at the judge's office when you obtained these search warrants?
A. Yes, I was.

Sworn oral testimony to the magistrate may supplement a search warrant insufficient in itself to establish probable cause. State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990); State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987); State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001); see also State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678-79 (2000) ("Oral testimony may also be used in this state to supplement search warrant affidavits which are facially insufficient to establish probable cause."); State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997) ("A search warrant that is insufficient in itself to establish probable cause may be supplemented by sworn oral testimony."); State v. Crane, 296 S.C. 336, 372 S.E.2d 587 (1988) (holding the magistrate should determine probable cause based on all the information available to him at the time the warrant is issued, including sworn oral testimony).

Agent Poole's supplemental oral testimony regarding Bowie's interaction with Poviones and Barrocas, the two men staying in Room 309—specifically, their traveling together to Eckerd and the Substation II, and their representation in public of not knowing each other—bolsters the magistrate's finding of probable cause and the trial court's refusal to suppress the cocaine found in Room 309.

III. REASONABLE EXPECTATION OF PRIVACY/STANDING

Bowie asserts he has standing to argue "there was no probable cause to support the search of Room 309" even though Room 309 was not his room. We disagree.

For the sake of clarity, we emphasize that the concept of "standing" in the context of a Fourth Amendment challenge has been diminished and is now encapsulated within a "reasonable expectation of privacy" analysis. The United States Supreme Court has indicated a preference for an analysis focusing on "the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." Rakas v. Illinois, 439 U.S. 128, 139 (1978); see also State v. Hiott, 276 S.C. 72, 76-77, 276 S.E.2d 163, 165 (1981) ("[T]he United States Supreme Court has recently shifted away from a 'standing' approach to an inquiry focusing directly on the substantive issue of whether the claimant possessed a 'legitimate expectation of privacy' in the area searched."). "[I]n determining whether a defendant is able to show the violation of his (and not someone else's) Fourth Amendment rights, the definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing." Minnesota v. Carter, 525 U.S. 83, 88 (1998) (internal quotations omitted).

Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. See Rakas, 439 U.S. at 133-34; Alderman v. United States, 394 U.S. 165 (1969); State v. Missouri, 352 S.C. 121, 572 S.E.2d 467 (Ct. App. 2002). Thus, a person seeking to have evidence suppressed based upon a Fourth Amendment violation "must establish that his own Fourth Amendment rights were violated" by the search and seizure. State v. McKnight, 291 S.C. 110, 114-15, 352 S.E.2d 471, 473 (1987) (citing United States v. Salvucci, 448 U.S. 83 (1980)); see also Rakas, 439 U.S. at 138 ("'[R]ights assured by the Fourth Amendment are personal rights, [which] . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure.'").

A defendant seeking to suppress evidence on Fourth Amendment grounds bears the burden of proving he had a reasonable expectation of privacy in the area searched or the item seized. United States v. Rusher, 966 F.2d 868 (4th Cir. 1992); see also Rawlings v. Kentucky, 448 U.S. 98 (1980) (declaring a legitimate expectation of privacy is necessary to trigger Fourth Amendment protections); McKnight, 291 S.C. at 115, 352 S.E.2d at 473 (stating defendant who seeks to suppress evidence on Fourth Amendment grounds must demonstrate he has a legitimate expectation of privacy in connection with the searched premises in order to have standing to challenge the search); State v. Miller, Op. No. 3784 (S.C. Ct. App. filed April 26, 2004) (Shearouse Adv. Sh. No. 17 at 83) (noting where one does not have an expectation of privacy, he may not challenge the admission of evidence based on the violation of another's right to privacy). "A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable." Minnesota v. Olson, 495 U.S. 91, 95-96 (1990) (internal quotations omitted). "[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." Carter, 525 U.S. at 88 (internal quotations omitted). "[C]apacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas, 439 U.S. at 143.

For Bowie to establish a Fourth Amendment violation, he must show a personal and legitimate expectation of privacy in Room 309. See Olson, 495 U.S. at 95-97; Rakas, 439 U.S. at 143-44; Missouri, 352 S.C. at 129-30, 572 S.E.2d at 470-71. Poviones and Barrocas occupied Room 309, not Bowie. Therefore, Bowie did not have a personal and legitimate expectation of privacy in a room he did not even occupy. The fact that Bowie had associates staying in Room 309 is not enough to grant him an expectation of privacy in that room. See Missouri, 352 S.C. at 129-30, 572 S.E.2d at 471 (holding defendant, who was an occasional overnight guest, had no expectation of privacy in friend's apartment where he was merely a permittee

on the premises on the date in question). Moreover, Bowie's duffel bag in Room 309 does not confer an expectation of privacy.

Bowie does not have a REASONABLE EXPECTATION OF PRIVACY to challenge the existence of probable cause in regard to the search of Room 309.

CONCLUSION

Based on the foregoing, Bowie's conviction and sentence are

AFFIRMED.

HUFF and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Steve Gillian, **Appellant.**

Appeal From Richland County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 3836
Heard June 10, 2004 – Filed June 28, 2004

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Melody J. Brown, all of Columbia; and Solicitor Warren B. Giese, of Columbia, for Respondent.

ANDERSON, J.: Steve Gillian appeals a murder conviction arguing reversible error by the trial court in the admission of evidence concerning two prior burglaries and the denial of his right to fully cross-examine two State's witnesses. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Steve Gillian planned a lake house burglary which took place on Friday, January 26, 2001. After making maps for use in the burglary and copying a key he obtained to the home, Gillian recruited five younger boys, ages seventeen to eighteen, to actually enter the house for him. Jeremiah Page and Dustin Johnson were two of the young men recruited by Gillian. While the five boys unlawfully entered the home, Gillian waited at a nearby gas station. A five-shot "Taurus" .38 caliber revolver was one of the items taken from the home.

The boys met Gillian at a local restaurant following the burglary. Gillian was furious at the group's failure to steal any items of value and threatened to kill them. However, Gillian was enthusiastic about the theft of the gun, which he placed in his car's trunk, stating he intended to use it to "do some dirt." Gillian and one other boy then returned to the home to steal additional items, some of which were taken to a wooded area near Gillian's parents' home.

Later that evening, Gillian unsuccessfully attempted to reach Johnson by telephone with the hopes of persuading him to purchase some bullets for the handgun. Johnson "had a fake I.D. that said he was 21." The following day, Gillian, an aspiring hip-hop performer, contacted an older associate in the music industry for the same purpose, but the man refused to buy bullets for Gillian. Thereafter, Johnson reluctantly agreed to purchase the bullets from a local Wal-Mart. Gillian, who gave Johnson the money to pay for the bullets, accompanied Johnson to the Wal-mart store. Both Johnson and Gillian were identified on store security video purchasing the bullets on Saturday, January 27. Gillian still possessed the handgun that afternoon.

On Saturday evening, Gillian attended various parties in the Irmo and Chapin area. Most of these parties were hosted by high school students whose parents were out of town. Around midnight, Gillian, Page (an accomplice in the prior burglary), and several friends, most of whom had been drinking, met at high school senior Michael Glenn's home. Shortly after arriving at Glenn's home, Gillian left this gathering to pick up his friend Jason Ward. Gillian, accompanied by Ward, returned to the party. In the early hours of Sunday morning, Gillian and Ward left the party without Page and drove to the apartment of one of Ward's co-workers.

After Gillian and Ward left the party, Page began acting violently. He was forcefully removed from the Glenn residence by two party attendees. Once he calmed down outside, Page asked the occupants if he could reenter the residence and use the phone to secure a ride home. Once inside the home, Page telephoned Gillian and informed him of the previous altercation. About 5:00 a.m., Gillian received a cell phone call. In response to the call, Gillian declared to Ward: "Jason, we got to go. Somebody just got shot. We got to go." Gillian and Ward returned to the party approximately ten minutes after Gillian spoke with Page.

Upon arriving at the Glenn residence, Gillian physically attacked at least four of the younger party attendees and demanded to see the two people who had thrown Page out of Glenn's house. Gillian slapped several partygoers and head-butted one in the face, breaking his nose. Gillian asked the partygoers "why they jumped [Page] and just threatened to beat them up for jumping his friend." After questioning the boys who had earlier escorted Page from the party and learning they had not seriously injured him, Gillian turned his rage upon the much smaller Page for misleading him, severely beating Page, who was "[c]rying and trying to cover his face."

At this point, Ward, who had been sitting quietly at the kitchen table, confronted Gillian about his behavior. Ward stated: "Why are you messing with these kids, man? They are scared of you. They don't want to fight you. . . . [Q]uit picking on these little high school kids." Gillian "told [Ward] that he was nothing and to shut up." Gillian then directed his intensified hostility toward his friend Ward, who calmly refused to fight Gillian despite minutes

of attempted instigation and taunting. Ward eventually responded to Gillian's threats by quickly punching him "once or twice" and pinning him to the floor in front of several party attendees. After Gillian "agreed . . . to calm down," Ward allowed him to stand up, but the threats continued. Around 5:30 a.m., Ward agreed to leave the party with Gillian. Ward said to Gillian, "Just take me home." As he left the Glenn residence, Gillian loudly declared to several party guests, "You will see this in the newspapers tomorrow."

Around 6:30 a.m., residents of an area in close proximity to the Boozer Shopping Center heard approximately four to five gunshots. Ward's body was found behind the shopping center at about 8:30 a.m. on January 28. Ward had four bullet wounds to the head and one to the neck. It was later established the wounds were caused by ".38-caliber copper-jacketed bullets" identical to those purchased earlier by Gillian. Markings on the four recovered bullets were consistent with bullets fired from a .38 caliber handgun manufactured by the "Taurus" company, as well as seven other manufacturers. The murder weapon was never recovered.

Gillian arrived at his parents' home around 8:30 a.m. on Sunday morning and entered his brother's bedroom. While speaking to his brother, he confessed he had "shot [Ward] several times." Prior to Ward's murder, Gillian had made comments to his cousin to the effect his music career would benefit from the reputation gained by killing another. According to Gillian's cousin, Gillian earlier professed that "if he had killed someone, it would make him real" and he "thought if he killed someone, he could appeal to the rap-type music crowd." Around 9:00 a.m., Gillian walked over to his cousin's house next door and entered his bedroom. In a drunken stupor, Gillian told his cousin he had killed someone, explaining that he lured the victim behind the jewelry store he had once robbed under the guise of showing the victim how he broke into the store. Select members of Gillian's family and friends knew of Gillian's robbery, months before, of several women's "Tag Heuer" watches from a jewelry store. Dems Jewelry Store, in Boozer Shopping Center, had reported a break-in and a resulting loss of thirty-four women's "Tag Heuer" watches in July of 2000.

Steve Gillian was later arrested and indicted for the murder of Jason Ward. The jury found Gillian guilty of murder. The judge sentenced Gillian to life imprisonment without parole.

ISSUES

I. Did the trial court err in allowing evidence of Gillian's two prior burglaries?

II. Did the trial court err in denying Gillian the right to fully cross-examine witness Jeremiah Page as to the possible sentence he was facing for first-degree burglary?

III. Did the trial court err by refusing to admit evidence of the attempted police ruse concerning "doctored" photographs of Gillian's car near the murder scene?

LAW/ANALYSIS

I. EVIDENCE OF PRIOR BURGLARIES

Gillian argues the trial court erred in admitting evidence of his two prior burglaries. Specifically, he maintains "[e]vidence of the other burglaries was not necessary to establish that [Gillian] had possession of a gun at the time of the murder." He contends the evidence was admitted in violation of Rules 403 and 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). We disagree.

Generally, South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged. State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987); see also State v.

Beck, 342 S.C. 129, 536 S.E.2d 679 (2000) (finding that evidence of prior crimes or bad acts is inadmissible to prove bad character of defendant or that he acted in conformity therewith).

However, evidence of other crimes is generally admissible when it is necessary to establish a material fact or element of the crime charged. See Johnson, 293 S.C. at 324, 360 S.E.2d at 319; State v. Byers, 277 S.C. 176, 284 S.E.2d 360 (1981); State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002). Thus, such evidence is admissible when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the proof of the other; or (5) the identity of the person charged with the present crime. See Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); see also Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003) (explaining that Rule 404, the modern expression of the Lyle rule, excludes evidence of other crimes, wrongs, or acts offered to prove character of person in order to show action in conformity therewith; the rule creates an exception when testimony is offered to show motive, identity, existence of common scheme or plan, absence of mistake or accident, or intent).

If not the subject of a conviction, a prior bad act must first be established by clear and convincing evidence. Beck, 342 S.C. at 135, 536 S.E.2d at 683. The bad act must logically relate to the crime with which the defendant has been charged. Beck, 342 S.C. at 135, 536 S.E.2d at 682-83; see also State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999) (declaring that record must support logical relevance between prior bad act and crime for which defendant is accused). In making the determination of whether evidence of prior bad acts is admissible, the trial court must gauge its logical relevancy to the particular purpose for which it is sought to be introduced. See State v. Nix, 288 S.C. 492, 343 S.E.2d 627 (Ct. App. 1986). If the prior bad act evidence is "logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime." Id. at 497, 343 S.E.2d at 630-31 (internal quotations omitted). If there is any evidence to support the admission of bad act evidence, the trial judge's ruling will not be disturbed

on appeal. Pagan, 357 S.C. at 143, 591 S.E.2d at 652 (citing State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001)).

Even if evidence of other crimes is admissible under Rule 404(b), the trial judge must exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); Beck, 342 S.C. at 135-36, 536 S.E.2d at 683; see also Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

In the case at bar, the State introduced evidence of two prior burglaries committed by Gillian.

A. The Lake House Burglary

Evidence sufficiently relevant to the possession of particular property later used in furtherance of criminal activity is generally admissible to prove the identity of the accused in the subsequent trial for those crimes, even when such evidence incidentally reflects the defendant's guilt of a previous crime. See State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994), overruled in part on other grounds by State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995); State v. Nix, 288 S.C. 492, 343 S.E.2d 627 (Ct. App. 1986).

In State v. Southerland, our Supreme Court explicated:

> Southerland contends that the trial judge erred by allowing the State to introduce evidence that he stole the shotgun used to kill Quinn from a trailer two weeks before the murder and that he traded the shotgun for drugs the day after the murder. We disagree.
>
> . . . .

> . . . [T]he introduction of the evidence at trial was proper. While evidence of other crimes is inadmissible to prove the bad character of a defendant, it may be admissible when it tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity. State v. Johnson, 306 S.C. 119, 125, 410 S.E.2d 547, 551 (1991), cert. denied, 503 U.S. 993, 112 S.Ct. 1691, 118 L.Ed.2d 404 (1992) (citing State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)). The evidence showed that Southerland possessed a shotgun at the time of the murder, that the shotgun was the type used to kill Quinn, and that Southerland disposed of the shotgun after the murder. This evidence established **identity** and a common scheme. Therefore, we find that the trial court properly admitted the evidence.

Southerland, 316 S.C. at 382-83, 447 S.E.2d at 866 (emphasis added).

Here, evidence relating to Gillian's role in the burglary of the lake house was properly admitted to show that the stolen gun, which was in Gillian's possession, was consistent with the type of weapon that fired the bullets recovered from Ward's body. A .38 caliber "Taurus" revolver was one of the items stolen from the home. Gillian obtained this revolver from his burglary accomplices and placed it in the trunk of his car. The fact that this particular firearm was deemed compatible with the bullet wounds inflicted on Ward was central to the State's case against Gillian. Although the State presented evidence Gillian possessed a gun and purchased .38 caliber ammunition, evidence of the break-in and theft of that particular firearm was necessary to establish the probative connection between the stolen handgun and the following facts: (1) the victim was shot five times by a five-shot revolver; and (2) the recovered bullets were consistent with those fired by a "Taurus" revolver. The evidence of the prior burglary buttressed the testimony of the former gun owner and the State's forensic expert.

The lake house burglary was necessarily admitted to prove a material fact of the State's case for murder, that being Gillian's possession of the particular firearm allegedly used in the murder of Ward. Evidence of this

burglary was admissible as tending to establish Gillian's identity as perpetrator of Ward's murder. Gillian's commission of the lake house burglary was demonstrated by clear and convincing proof. Gillian's lake house burglary was properly admitted as it had a clear "logical relevance" to Gillian's possession of a firearm linked, if only circumstantially, to the murder. Therefore, the evidence was probative as to the fundamental element of identity pursuant to Rule 404(b), SCRE. See State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) (holding evidence properly admitted when logical relevance existed between the evidence and an element of the crime charged).

B. The Dems Jewelry Store Burglary

Upon visiting his cousin the morning following the alleged murder, Gillian admitted to luring Ward to the area of his prior jewelry store break-in. Gillian's cousin testified:

> He took him behind Dems, "The jewelry store that I had robbed," is what he said. He said, "I was going to kind of show him how I robbed the place. Instead I just shot him a couple of times and left him there because I figured no one would find out because they did not find out that I robbed the place."

Gillian's cousin understood these statements to refer to Gillian's prior theft of women's watches from Dems Jewelry Store. About six months prior to the murder, Dems reported a break-in and theft of thirty-four women's watches. Ward's body was discovered behind Boozer Shopping Center, the location of Dems Jewelry Store.

The evidence establishes a clear chain of inferences indubitably relevant to the identity of Gillian as Ward's killer. Because the probative value of Gillian's confession to his cousin is severely diminished without evidence of the prior jewelry store burglary, the evidence was necessary to establish a key element of the crime charged, that being the identity of Gillian as the guilty party. See State v. Johnson, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987) ("Evidence of other crimes is . . . admissible . . . [if] necessary to

establish a material fact or element of the crime charged."). The State presented clear and convincing evidence that Gillian committed the Dems Jewelry Store burglary.

The trial court properly admitted evidence of the Dems Jewelry Store burglary. Evidence of Gillian's burglary of Dems Jewelry Store was admissible as tending to establish Gillian's identity as Ward's murderer pursuant to Rule 404(b), SCRE.

C. Res Gestae

The admission of the evidence in regard to the lake house and Dems Jewelry Store burglaries is proper under State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003):

> Adams contends the trial court erred in allowing the admission of evidence regarding the theft of the cabinets because it amounted to the prejudicial admission of a prior bad act.
>
> Our Supreme Court discussed the res gestae theory in State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996):
>
> > One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . .' [and is thus] part of the res gestae of the

> crime charged." And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

Id. at 122, 470 S.E.2d at 370-71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)). Under the res gestae theory, evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999).

> We rule the testimony regarding the cabinets was admissible under the res gestae theory. The timing of the burglaries, and what was taken from the model home in each one, were integral parts of the context in which the crime was committed. Thus, admission of the testimony regarding the cabinets was necessary and relevant to a full presentation of the evidence. The trial court did not err in allowing the admission of the evidence under the res gestae theory. . . . .

Adams, 354 S.C. at 379-80, 580 S.E.2d at 794-95.

In the case sub judice, the facts, modus operandi, and timing of the burglaries constitute quintessential res gestae evidence. Thus, admission of the testimony regarding the two burglaries was necessary and relevant to a full presentation of the evidence in this case.

II. JEREMIAH PAGE/SENTENCING POSSIBILITIES

A. Confrontation Clause/Rule 608(c), SCRE

Gillian asserts the trial court erred in denying his request to cross-examine witness Jeremiah Page concerning the possible sentence Page was facing for first-degree burglary.

Page testified extensively at trial as to the burglary of the lake house, Gillian's possession of the stolen revolver, Gillian's statement that he was going to "do some dirt" with the weapon, and the events at the Glenn residence. On direct examination, Page admitted he was currently charged with first-degree burglary and the Richland County solicitor had agreed to advise his plea judge of his cooperation in Gillian's trial. On cross-examination, Gillian's defense counsel asked if the first-degree burglary charge "carries a sentence of 15 to life." The Solicitor immediately objected. The objection was sustained and later questioning limited references to Page's possible sentence to "a lot of time" and "[s]erious time." Subsequently, Gillian argued he should have been allowed to cross-examine Page as to the possible sentence he was facing in order to show bias in his testimony. Gillian declared: "I would ask that the jury be informed that the sentence for burglary first is a mandatory 15 to life, and it's a no-parole offense." The judge held:

> [T]he problem with getting into specific sentences is it can actually be misleading to the jury.
>
> They may have the impression that he is facing 15 years to life. As you know, he is also facing the possibility of probation. It just depends on the circumstances.
>
> So that is why I have always stayed away from sentences, specific sentences, on anything. I think it always appropriate to say, "You are facing a lot of time," or a long sentence or something like that.

The Confrontation Clause guarantees an accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. The right of confrontation is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial. California v. Green, 399 U.S. 149 (1970); State v. Martin, 292 S.C. 437, 357 S.E.2d 21 (1987). The Confrontation Clause requires a witness to testify under oath and submit to

cross-examination so that the jury can observe the witness's demeanor and assess his credibility. State v. Cooper, 291 S.C. 351, 353 S.E.2d 451 (1987).

The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. See State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002); State v. Graham, 314 S.C. 383, 444 S.E.2d 525 (1994); State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986); see also Pointer v. Texas, 380 U.S. 400 (1965) (holding the Sixth Amendment applicable to the states through the Fourteenth Amendment). Specifically included in a defendant's Sixth Amendment right to confront the witness is the right to meaningful cross-examination of adverse witnesses. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001); Graham, 314 S.C. at 385, 444 S.E.2d at 527. The Sixth Amendment essentially "constitutionalizes" the right to present a defense in an adversary criminal trial. Schmidt, 288 S.C. at 303, 342 S.E.2d at 402.

The primary interest secured by the Confrontation Clause of the Sixth Amendment is the right to cross-examination. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001); Starnes v. State, 307 S.C. 247, 414 S.E.2d 582 (1991); see also Graham, 314 S.C. at 385, 444 S.E.2d at 527 (specifically included in defendant's Sixth Amendment right to confront witness is right to meaningful cross-examination of adverse witnesses). The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias. Davis v. Alaska, 415 U.S. 308 (1974); State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991); see also Mizzell, 349 S.C. at 331, 563 S.E.2d at 317 (defendant has right to cross-examine witness concerning bias under Confrontation Clause). Considerable latitude is allowed in the cross-examination of a witness for potential bias. State v. Clark, 315 S.C. 478, 445 S.E.2d 633 (1994); Brown, 303 S.C. at 171, 399 S.E.2d at 594; State v. McFarlane, 279 S.C. 327, 306 S.E.2d 611 (1983). On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness. Mizzell, 349 S.C. at 331, 563 S.E.2d at 317; State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976). The appropriate question under a Confrontation Clause

analysis is whether there has been any interference with the defendant's opportunity for effective cross-examination at trial. Kentucky v. Stincer, 482 U.S. 730 (1987); Shuler, 344 S.C. at 624, 545 S.E.2d at 815; Starnes, 307 S.C. at 250, 414 S.E.2d at 583.

A criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness. Delaware v. Van Arsdall, 475 U.S. 673 (1986). The Confrontation Clause does not, however, prevent a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. Id. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant. Id. Before a trial judge may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness, the record must clearly show the cross-examination is inappropriate. Mizzell, 349 S.C. at 331, 563 S.E.2d at 317.

In State v. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002), the defendant appealed his murder conviction, claiming the trial court erred by limiting his cross-examination of a State witness regarding the witness's pending charges. The South Carolina Supreme Court explained:

> Prior to the State's witness, Michael Peterson, taking the stand, defense counsel argued appellant should be allowed to ask Peterson about his pending charges. Defense counsel desired to question Peterson about what the pending charges were to show bias under Rule 608(c), SCRE, because Peterson had possibly been promised a deal in exchange for his testimony. The State responded there was no promised deal, but that Peterson had been told when he went to trial on the charges, the State would tell the trial judge he had cooperated by testifying in the instant case.

The trial court ruled defense counsel could generally ask whether Peterson had pending charges and whether there was anything promised him with regard to those pending charges. However, defense counsel was not allowed to question Peterson as to the crimes with which he was charged.

Peterson's pending charges were: (1) possession of crack cocaine with intent to distribute (PWID); (2) PWID within proximity of a school; (3) robbery, two counts; (4) first degree burglary; (5) grand larceny; (6) malicious injury to real property, two counts; and (7) possession of a controlled substance. If convicted of the first degree burglary charge, Peterson was facing a possible sentence of life imprisonment. S.C. Code Ann. § 16-11-311(B) (Supp. 2000).

. . . .

On cross, defense counsel questioned Peterson as to what he expected to receive regarding his pending charges in exchange for his testimony. Defense counsel also questioned Peterson about his prior convictions.

. . . .

Appellant sought to expose Peterson's possible bias and prejudice by asking Peterson what the crimes were with which he was charged. Because of the number of charges pending against Peterson and the severity of the potential sentences, we find the evidence was probative on the issue of bias and should have been admitted. There was the substantial possibility Peterson would give biased testimony in an effort to have the solicitor highlight to his future trial judge how he had cooperated in the instant case. The excluded evidence had "a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity" of Peterson's testimony. Therefore, under these circumstances, we find the

> trial court committed error under Rule 608(c) by improperly limiting the scope of appellant's cross-examination.

Sims, 348 S.C. at 23-26, 558 S.E.2d at 522-23 (citation omitted).

The Court, in State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002), addressed a similar issue. In Mizzell, the defendants were charged with first-degree burglary, grand larceny and possession of a firearm during the commission of a violent crime. Id. at 329, 563 S.E.2d at 316. During the trial, the State's key witness, Donald Steele, testified he and his wife accompanied defendants to the burglarized home. Id. at 330, 563 S.E.2d at 317. On cross-examination, Steele admitted the State charged him with the same crimes as defendants. Id. The trial court excluded evidence of the possible sentence Steele faced but permitted defendants to examine Steele about the sentence in general terms. Id. A jury convicted defendants of second degree burglary and grand larceny. Id. at 329, 563 S.E.2d at 316.

On appeal, defendants argued the trial court erred in violating their rights under the Sixth Amendment's Confrontation Clause by limiting the cross-examination of Steele. Specifically, defendants asserted the trial court should have permitted defense counsel to elicit from Steele the possible punishment he could receive if he were convicted of the charged crimes. Our Supreme Court inculcated:

> The trial judge prohibited questioning Steele about a specific possible sentence because the charges against Steele and [defendants] were the same. "The purpose of preventing disclosure of the potential sentence facing the defendant is that such evidence is irrelevant to the jury and could possibly prejudice the State's right to a fair trial." Illinois v. Brewer, 245 Ill.App.3d 890, 185 Ill.Dec. 917, 615 N.E.2d 787, 790 (1993). . . . .
>
> The jury is, generally, not entitled to learn the possible sentence of a defendant because the sentence is irrelevant to finding guilt or innocence. However, other constitutional

concerns, such as the Confrontation Clause, limit the applicability of this rule in circumstances where the defendant's right to effectively cross-examine a co-conspirator witness of possible bias outweighs the need to exclude the evidence.

. . . .

The case sub judice is distinctive because the co-conspirator witness was charged with the same crimes as [defendants] but had neither agreed to a plea bargain nor pled guilty. [Defendants] assert the State should not be allowed to rely on this distinction to exclude this testimony because the absence of the agreement, if anything, suggests the witness will testify more favorably to the State's position. [Defendants] argue Steele would reasonably have felt the quality of his cooperation would determine the degree of benefit he would later receive. See Boone v. Paderick, 541 F.2d 447, 451 (4th Cir. 1976) ("[A] promise to recommend leniency (without assurance of it) may be interpreted by the promisee as contingent upon the quality of the evidence produced; the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor."). We agree.

. . . .

The fact the witness has yet to reach a plea bargain or been found guilty should not prevent the admission of such evidence. The lack of a negotiated plea, if anything, creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency. Accordingly, we conclude the Court of Appeals erred in holding the trial judge properly excluded testimony concerning Steele's potential sentence if convicted of the same crimes as [defendants].

Mizzell, 349 S.C. at 331-33, 563 S.E.2d at 317-18.

Included in the Confrontation Clause protection is the right to cross-examine any State's witness as to possible sentences faced when there exists "a substantial possibility [the witness] would give biased testimony in an effort to have the solicitor highlight to [a] future [court]" how the witness cooperated in the instant case. See Sims, 348 S.C. at 25, 558 S.E.2d at 523; see also Mizzell, 349 S.C. at 332-33, 563 S.E.2d at 318. Accordingly, the trial court erred in excluding evidence concerning Page's possible sentence.

B. Harmless Error

Our inquiry, however, does not end upon finding the trial court committed an error in limiting the cross-examination of Page. "A violation of the defendant's Sixth Amendment right to confront the witness is not per se reversible error" if the "error was harmless beyond a reasonable doubt." State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) (quoting State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994)) (internal quotations omitted). This Court must determine whether the error was harmless beyond a reasonable doubt. Graham, 314 S.C. at 385, 444 S.E.2d at 527. No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990); State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985); State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004). Whether an error is harmless depends on the particular facts of each case and upon a host of factors, including:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case.

Mizzell, 349 S.C. at 333, 563 S.E.2d at 318-19 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)).

"Harmless beyond a reasonable doubt" means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt. Mizzell, 349 S.C. at 334, 563 S.E.2d at 319; Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). "In determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict." Mizzell, 349 S.C. at 334, 563 S.E.2d at 319 (internal quotations omitted).

Error is harmless where it could not reasonably have affected the result of the trial. In re Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003); Mitchell, 286 S.C. at 573, 336 S.E.2d at 151; State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997). Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); Adams, 354 S.C. at 381, 580 S.E.2d at 795; see also State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) (noting that when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside conviction for insubstantial errors not affecting result).

Although the Sims Court found the judge erred by improperly limiting the scope of appellant's cross-examination, the Supreme Court determined:

> However, the trial court's error of limiting the scope of appellant's cross-examination is harmless. See State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985) (trial errors are harmless where they could not reasonably have affected result of trial). The State's case against appellant was strong without resorting to Peterson's testimony. . . . .
>
> Accordingly, while the trial court erred by limiting appellant's cross-examination of Peterson, the error was harmless

> because the error could not reasonably have affected the result of trial. See State v. Mitchell, supra.

State v. Sims, 348 S.C. 16, 26, 558 S.E.2d 518, 523-24 (2002). In contrariety to Sims, the Mizzell Court concluded the trial court committed reversible error:

> Considering the Van Arsdall factors, we note much of Steele's testimony was either cumulative or corroborated by other witnesses. . . . .
>
> Critically, however, Steele was the only witness to testify as an eyewitness to [defendants'] burglary of the home. The lack of physical evidence placing [defendants] at the scene enhanced the importance of Steele's testimony. As in [State v.] Brown, [303 S.C. 169, 399 S.E.2d 593 (1991),] the co-conspirator witness is the only link placing [defendants] at the scene of the crime.
>
> . . . .
>
> Because Steele was the only witness to directly link [defendants] to the burglary, we cannot say the trial court's error was harmless beyond a reasonable doubt. Accordingly, we find the trial court committed prejudicial error in limiting [defendants'] cross-examination into Steele's possible sentence.

State v. Mizzell, 349 S.C. 326, 334-35, 563 S.E.2d 315, 319-20 (2002). The case at bar is analogous to Sims.

First, in the case against Gillian, the testimony of Page was largely cumulative. Other witnesses testified as to both the lake house burglary and the events of the evening and early morning hours leading up to the murder. In fact, Gillian's vague statement that he intended to use the gun to "[d]o some dirt" was the only evidence on record supported solely by the testimony of Page. Unlike Mizzell, the absence of this witness' testimony leaves no

material point of the State's case uncorroborated or unsupported by the testimony of other witnesses.

Second, even assuming the omission of Page's testimony, there remains, at the very least, abundant evidence upon which one could find Gillian guilty of murder. Gillian was in possession of a five-shot revolver consistent with the handgun used to shoot Ward five times. He stated to an entire household of partygoers, as he was leaving with Ward (who had just embarrassed him in front of several others), that they would "see this in the newspapers tomorrow." Following the murder, Gillian confessed to his brother that he had killed Ward. In addition, he admitted to his cousin that he had killed someone behind a jewelry store. Concomitantly, while the trial court erred by limiting Gillian's cross-examination of Page, the error was harmless because it could not reasonably have affected the result of the trial. See Sims, 348 S.C. at 26, 558 S.E.2d at 523-24; Mitchell, 286 S.C. at 573, 336 S.E.2d at 151.

III. THE POLICE RUSE

Gillian avers the trial court erred by refusing to admit evidence of the attempted police ruse concerning "doctored" photographs of Gillian's car near the murder scene. We disagree.

In testimony proffered outside of the jury's presence, Lieutenant James Smith, an investigator with the Richland County Sheriff's Department, admitted police falsified aerial photographs "to make it appear to be a satellite photograph showing the [d]efendant's vehicle at the rear of Boozer Shopping Center at the time frame of the incident." These falsified photographs were used during Gillian's interrogation in an attempt to compel a confession. This ruse, however, failed to elicit the desired confession. Because the photographs did not compel any evidence or statements which were used in the State's case, the trial court ruled all evidence of the ploy inadmissible.

"All 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." Rule 402, SCRE; State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Horton, Op. No. 3787 (S.C. Ct. App. filed April 6, 2004) (Shearouse Adv. Sh. No. 18 at 61). "Relevant evidence" is defined as 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. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004). Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In re Corley, 353 S.C. 202, 577 S.E.2d 451 (2003); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003); see also State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991) ("Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears."). Yet, even relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of under delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

The trial judge excluded the evidence based on a mixed determination of its irrelevance and its probability of confusing the jury on the issues of the case. Because the ruse did not result in a confession or incriminating statements, it was of questionable relevance to the issue of Gillian's guilt and did not expose, as the record reflects, any weakness in the State's case against Gillian.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). A trial judge's evidentiary rulings will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001); State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000).

Gillian misconstrues Frazier v. Cupp, 394 U.S. 731 (1969), asserting that case holds that evidence of police investigation tactics is always relevant

in a criminal trial; therefore, the trial court's exclusion was based on legal error. We find this reliance misplaced. Frazier concerned a confession elicited by disingenuous investigation tactics. The United States Supreme Court briefly noted that evidence of the police investigation was relevant and admissible to determine the voluntary nature of the confession. Frazier, 493 U.S. at 739. Similarly, State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996), reiterated the principle that a determination of whether a confession was given voluntarily requires an examination of all the circumstances surrounding the confession. Von Dohlen, 322 S.C. at 243, 471 S.E.2d at 694-95. The subterfuge at issue elicited no confession or incriminating statements. Consequently, no issue arose as to whether a statement was voluntarily given. The exclusion of the evidence, based on Rules 401 and 403, SCRE, did not arise from any error of law.

We find no abuse of discretion or error of law. The trial judge acted within his discretion in excluding the evidence.

CONCLUSION

For the foregoing reasons, Gillian's conviction and sentence for murder are

AFFIRMED.

HUFF and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Carla Taylor, Appellant.

Appeal From Greenville County
John C. Few, Circuit Court Judge

Opinion No. 3837
Heard April 21, 2004 – Filed June 24, 2004

AFFIRMED

J. Falkner Wilkes, of Greenville, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

HOWARD, J.: Carla Taylor was convicted of trafficking in twenty-eight grams or more of crack cocaine in violation of S.C. Code Ann. section 44-53-375 (C)(2) and possession of a firearm during the commission of a violent crime in violation of S.C. Code Ann.

section 16-23-490. On appeal, Taylor argues the trial court erred in admitting into evidence crack cocaine seized at the time of her arrest because the State failed to call the police evidence custodian as a witness to establish a complete chain of custody.[1] We affirm.

FACTS/PROCEDURAL HISTORY

Following a traffic stop on I-85 in Greenville County, Highway Patrol Trooper Shannon Webber arrested Taylor for trafficking in crack cocaine and possession of a firearm during the commission of a violent crime when a consent search of the car she was driving yielded 36.16 grams of crack cocaine and a handgun. Taylor was subsequently indicted and tried for both offenses.

At trial, the State offered the following evidence to establish the chain of custody of the crack cocaine seized in the arrest.[2] Trooper Webber testified he took possession of a substance believed to be crack cocaine at the scene of the arrest, placing it in a "best evidence bag" along with a form detailing all pertinent information.[3] He then sealed the bag and turned the evidence over to his superior officer, Sergeant Long. According to Webber, once sealed, the bag could not be opened without tearing it.

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[1] Taylor did not challenge the admission of the weapon at trial. The State argues on appeal that the weapon conviction is not implicated by Taylor's attack on the conviction for the underlying offense of trafficking in crack cocaine. Because we affirm the trafficking conviction, we need not address this issue.

[2] Taylor objected to the use of affidavits to establish the chain of custody in accordance with Rule 6(b), SCRCrimP.

[3] According to the testimony, this information included: a control number used throughout the chain of custody, the officer's name and employing agency, the date, the defendant's name, whether or not the arrest was lawful, the location of the arrest, and a brief description of the substance placed in the bag.

Sergeant Long testified that he transported the best evidence bag containing the substance to the Department of Public Safety's central evidence locker in Columbia. He then turned it in to the evidence custodian, Dale Blackmon.[4]

At the time of trial, Dale Blackmon was no longer employed by the Department of Public Safety, and did not testify. In lieu of Blackmon's testimony, the State called the successor custodian, Corporal Price. Price explained that only the evidence custodian had access to the evidence locker, with the exception of the supervisor and administrative assistant, who could receive evidence when the custodian was not on duty. He further testified regarding protocol and procedure for the handling and storage of evidence by the custodian, explaining each officer was assigned his or her own storage locker inside of a safe within the locker room. According to Price, a dangerous drug such as cocaine is not retained by the custodian in the evidence locker, but is immediately taken by the custodian to SLED. Once analyzed, it is placed back in the original evidence bag by the SLED chemist and is heat-sealed in another bag. The SLED chemist then returns the drug to the Department's evidence locker room where it is placed in the individual locker designated solely for the arresting officer. In this case, it remained in Trooper Webber's locker until retrieved by Price for trial.

Chemist Ford testified that he retrieved the evidence from the lockbox at SLED; immediately inspected it to assure there were no holes, punctures, or tears in the best evidence bag; and ensured the original seal by Webber had not been broken. After determining there were no signs of tampering, Ford broke the bag open, tested it, and determined it contained 36.16 grams of crack cocaine. He then placed the crack cocaine and the original best evidence bag into another evidence bag, heat-sealed it, labeled it, and placed it back in the vault.

[4] Blackmon's name appears incorrectly throughout the record as Blackburn.

Over defense counsel's objection, the trial court admitted the crack cocaine into evidence, ruling the State had provided sufficient evidence of the chain of custody without the testimony of the missing evidence custodian. Thereafter, Taylor was convicted by a jury of trafficking in crack cocaine in an amount exceeding thirty grams and possession of a firearm during the commission of a violent crime. Taylor was sentenced to fifteen years imprisonment on the trafficking offense and five years on the weapon offense.

DISCUSSION

On appeal, Taylor argues the testimony of everyone who handled the evidence, including that of the former evidence custodian, Dale Blackmon, was necessary to establish the chain of custody. Without Blackmon's testimony, Taylor argues, the evidence was inadmissible under the authority of State v. Chisolm, 355 S.C. 175, 584 S.E.2d 401 (Ct. App. 2003), cert. denied (April 8, 2004) and State v. Joseph, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997). We reject Taylor's broad reading of these cases as requiring the testimony of all persons handling the evidence as a condition of admissibility.

A party offering into evidence fungible items such as drugs or blood samples must establish a chain of custody as far as practicable. See, e.g., Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957); State v. Cribb, 310 S.C. 518, 522, 426 S.E.2d 306, 309 (1992); State v. Joseph, 328 S.C. 352, 364, 491 S.E.2d 275, 281 (Ct. App. 1997); State v. Johnson, 318 S.C. 194, 196, 456 S.E.2d 442, 443 (Ct. App. 1995). Where the analyzed substance has passed through several hands, the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis. While the proof of chain of custody need not negate all possibility of tampering, it must establish a complete chain of evidence as far as practicable. State v. Williams, 297 S.C. 290, 293, 376 S.E.2d 773, 774 (1989); Johnson, 318 S.C. at 196, 456 S.E.2d at 443.

The admission of evidence is addressed to the sound discretion of the trial judge. Williams, 297 S.C. at 293, 376 S.E.2d at 774; Raino v.

Goodyear Tire and Rubber Co., 309 S.C. 255, 258, 422 S.E.2d 98, 100 (1992); Johnson, 318 S.C. at 196, 456 S.E.2d at 443. On appeal, the question presented is whether the trial court's decision is controlled by an error of law or is without evidentiary support. State v. Irick, 344 S.C. 460, 463, 545 S.E.2d 282, 284 (2001); State v. Hughey, 339 S.C. 439, 453, 529 S.E.2d 721, 728-729 (2000); see also State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). If there is any evidence to support the trial judge's decision, the appellate courts will affirm it. State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 829 (2001).

Where the identity of persons handling the evidence is unknown, our courts have consistently held the evidence is inadmissible. In Benton v. Pellum, 232 S.C. 26, 100 S.E.2d 534 (1957), our supreme court upheld the trial judge's exclusion of the results of blood alcohol tests where blood was drawn from the defendant driver following an automobile accident and transported over the Christmas holiday to the Medical College in Charleston for testing. Although there was testimony of the hospital's *customary* practice regarding the mailing of the blood, there was no evidence that the technologist who drew the blood had sealed the vials or had otherwise taken any precautions against tampering. The record did not disclose who had possession of the package containing the vials of blood for several days, and it left the identity of those who handled the vials and the manner of transportation to conjecture. The unidentifiable handlers were missing links in the chain of custody, rendering the evidence inadmissible.

Subsequently, in State v. Williams, 301 S.C. 518, 392 S.E.2d 369 (1990), and State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992), our supreme court reiterated the holding in Benton v. Pellum, noting that it is an abuse of discretion to admit the results of a blood alcohol test where the identity of those who sealed, labeled, and transported the blood sample is not established. Cribb, 310 S.C. at 522, 426 S.E.2d at 309. See also Raino, 309 S.C. at 258, 422 S.E.2d at 100 (ruling the trial judge did not abuse his discretion in excluding blood test results where the evidence failed to establish who handled the blood).

In each of these cases the party offering the results failed to trace the handling of the evidence from the time it was gathered until it was tested. As a result, the identity of the people who had control of the evidence and what was done with it during their possession was left to speculation.

In contrast, where there is evidence to establish the identity of those who have handled the evidence and the manner in which it was handled, a weakness in the chain merely raises a question of credibility, not admissibility. The seminal case establishing this principle in South Carolina is State v. Williams, 297 S.C. 290, 376 S.E.2d 773 (1989). In Williams, our Supreme Court affirmed the decision of the trial court to admit blood test results even though the nurse who had drawn the blood of the defendant and placed it in the hospital refrigerator did not testify. In that case, Nurse Yorke, who removed the blood sample from the locked hospital refrigerator the morning after the accident and took it to the lab for testing, did testify. According to her, the vial was labeled with appellant's name, patient number, date of birth, and the date the blood was drawn. The hospital's internal chain of custody form was initialed by the nurse who drew the blood, indicating she had obtained the sample from appellant and then locked it in the refrigerator. Under those circumstances, our supreme court ruled that the initialed form complying with hospital protocol and Nurse Yorke's testimony sufficiently established a chain of custody to allow admission. Id. at 293, 376 S.E.2d at 774.

Similarly, where the handling of the evidence is reasonably demonstrated, a weakness in the chain implicates credibility, but does not render the evidence inadmissible. State v. Kahan, 268 S.C. 240, 244, 233 S.E.2d 293, 294 (1977) (ruling the ballistics test results of a nightgown worn by the deceased and placed in the evidence locker in a plastic bag were admissible even though there was no testimony as to the care and handling of the plastic bag containing the gown during the time it was in the evidence locker); State v. Smith, 326 S.C. 39, 482 S.E.2d 777 (1997) (affirming admissibility of blood tests even though the arresting officer stored the blood sample in his home refrigerator prior to testing, noting that there was no evidence of tampering);

Johnson, 318 S.C. at 196, 456 S.E.2d at 444 (upholding the admission of drug evidence where a discrepancy existed as to the dates of possession of persons in the chain of custody).

Recently, in State v. Carter, 344 S.C. 419, 544 S.E.2d 835 (2001), our supreme court again noted the distinction between a question of admissibility and a question of credibility of the evidence, stating

> [w]e have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the blood was not established at least as far as practicable. . . . On the other hand, where the identity of persons handling the specimen is established, we have found evidence regarding its care goes only to the weight of the specimen as credible evidence.

Id. at 424, 544 S.E.2d at 837-838.

We believe it is clear from these decisions that if the identity of each person in the chain handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion is shown in the admission, absent proof of tampering, bad faith, or ill-motive. In the case at bar, there is evidence to establish the identity of each person in the chain of possession and the manner of handling the crack cocaine. The evidence shows that the arresting officer placed the crack cocaine in a special bag provided to preserve the integrity of the evidence against tampering. It contained a glue-like seal that, once applied, was stronger than the bag. Hence, the bag could not be opened without tearing it. The arresting officer then gave the bag to Sergeant Long to transport to the evidence custodian for safekeeping.

Sergeant Long provided evidence of the next two links in the chain, himself and the non-testifying evidence custodian, Dale Blackmon, to whom he gave the sealed evidence bag containing the drugs. Corporal Price, the current custodian, provided evidence of

Blackmon's handling of the substance as the custodian during the time it was in her control, explaining that security and protocol required Blackmon to deliver the substance to the SLED chemist's evidence drop box. The SLED chemist, the next link in the chain, corroborated this delivery and testified the bag was intact when it was received for testing, identifying himself as the next link in the chain. In the same manner Nurse Yorke's testimony, coupled with the hospital forms, adequately established the chain of custody in State v. Williams, each person handling the crack cocaine was identified and the manner in which it was handled explained sufficiently to establish admissibility of the evidence here. In reaching this conclusion, we reject Taylor's reading of State v. Chisolm and State v. Joseph, to require that all persons in the chain of custody testify to establish admissibility.

In Chisolm, the defendant was arrested for distribution of crack cocaine and distribution of crack cocaine within the proximity of a school when he sold crack cocaine to an undercover agent. Following his arrest, the arresting officer placed the crack cocaine into an evidence bag comparable to the best evidence bag in this case. He then sealed the bag and placed it into a locked metal drop box at the police station.

Subsequently, dates and signatures on the possession forms for the evidence bag indicated the first evidence technician retrieved the crack cocaine from the lock box on May 10, 2000. The next notation indicated a second evidence technician delivered the evidence bag to a third technician on June 15, 2000. No evidence existed within the record indicating how long the first technician possessed the bag, in what condition he received it, where it was stored, or how the second technician came into possession of the bag. Furthermore, neither the first nor the second technician testified at trial.

Under those circumstances, a three judge panel of this court reversed the conviction, holding the cocaine was inadmissible because no evidence existed to establish either the whereabouts of the evidence between May 10 and June 15 or how the second technician came into possession of the evidence bag. In other words, the identity of the

persons handling the evidence was left to conjecture. In so ruling, the Court stated: "Custodial signatures on an evidence bag fail to establish an adequate chain of custody where the custodians do not provide testimony under oath or produce sworn statements pursuant to Rule 6(b), SCRCrimP." Id. at 801, 584 S.E.2d at 404.

Notwithstanding the language quoted above, we do not read Chisolm to require the testimony of each evidence custodian as a prerequisite to admissibility. Rather, Chisolm applies the longstanding rule that where there are unexplained gaps in the chain of possession, leaving to conjecture the identities of the people who handled the evidence and the manner of handling, the evidence is inadmissible. To the extent the language quoted above can be read to require the testimony of each person in the chain of custody under all circumstances, it is inconsistent with the precedent established by our supreme court, and is hereby overruled.

Likewise, we find State v. Joseph, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997) equally distinguishable. In Joseph, the trial judge admitted the Rule 6, SCRCrimP, affidavit of the chemist who analyzed the drugs in lieu of his testimony over the defendant's timely objection. Not only had the chemist tested the drugs, he also kept them for over six months outside of the controlled environment of the evidence locker room.

Construing Rule 6, this court held the affidavit was inadmissible. The admission of the affidavit, which contained the analysis report including the opinion of the chemist, violated the defendant's right to cross-examine the chemist. Furthermore, because it was inadmissible and the chemist did not testify, there was no admissible evidence to explain where the drugs had been or how they were handled during the six months. Neither the identity of the person in possession nor the manner of handling was established without the inadmissible affidavit. Consequently, there was a gap in the chain of custody.

Unlike Chisolm and Joseph, in this case the State introduced evidence to establish the identity of each person in the chain of

possession and the manner of handling. Consequently, we find no abuse of discretion in the admission of the crack cocaine into evidence. For the foregoing reasons, Taylor's convictions are

AFFIRMED.

HEARN, C.J., GOOLSBY, ANDERSON, HUFF, STILWELL, BEATTY, KITTREDGE, JJ., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lazer Construction Company, Inc., Respondent,

v.

Arnold H. Valentine, Individually and d/b/a Financial Benefits, Inc., Appellant.

Appeal From Anderson County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 3838
Submitted May 12, 2004 – Filed June 25, 2004

REVERSED AND REMANDED

Hamilton Osborne, Jr., James Y. Becker, and Sarah P. Spruill, all of Columbia, for Appellant.

Robert L. Waldrep, Jr., of Anderson, for Respondent.

GOOLSBY, J.: In this negligence action, Arnold H. Valentine, individually and d/b/a Financial Benefits, Inc. (Valentine) appeals a jury verdict in favor of Lazer Construction Company. We reverse and remand.[1]

FACTS AND PROCEDURAL HISTORY

Lazer is a South Carolina corporation engaged in the construction business. To promote employee retention, it has provided health insurance for its workers since 1984. As a cost-saving measure, it has followed the practice of changing health insurance providers about every two years.

In late 1996, on the recommendation of office manager Nancy Simms, Lazer employed Valentine to procure health insurance for its employees. After Valentine had presented to Lazer coverage options from several sources, Lazer selected health plans administered by The Fidelity Group (collectively referred to as "the plan"). Lazer enrolled its employees in the plan on April 1, 1997.

The application for participation and membership in the plan stated the plan was regulated under the Federal Employee Retirement Income Security Act of 1974, as amended, and was not subject to minimum standards or mandated benefits provisions of the insurance laws of any state. Furthermore, according to Valentine's information, Fidelity had reinsurance arrangements with Reliance Indemnity.

The South Carolina Department of Insurance advised Valentine by letter dated May 13, 1997, that it was investigating the plan because it had reason to believe that the plan was governed by state law and that Valentine, in marketing and selling the plan, had failed to comply with certain statutes. The letter further instructed Valentine to "cease immediately all marketing and sales of [the plan], and related plans within the State of South Carolina."

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

In July 1997, Lazer learned through Simms of the pending investigation. In addition, in August or September 1997, it became apparent to Lazer that there were problems with employee claims not being paid.

Valentine also learned that, contrary to his earlier information, the plan was not backed with reinsurance arrangements by Reliance Indemnity, but did not inform Lazer about this problem. Valentine, however, did become concerned that Fidelity was having too many problems to work through and communicated this concern to several of its clients, including Lazer. With regard to Lazer, Arnold Valentine told Simms that they "needed to start putting together alternate plans to be ready to exit Fidelity." To that end, Valentine presented other plan options to Lazer in October 1997. Lazer, however, re-enrolled in the plan on April 1, 1998.

In May 1998, Arnold Valentine attended a meeting in Summerville held by two other agents who had also distributed the plan. After the meeting, Valentine undertook to set up a system to document claims for payment from the plan. Sometime shortly after the meeting, Arnold Valentine met with Simms and Ken Hicks, the president of Lazer, to discuss the status of the plan to determine whether Lazer should move to another provider for coverage. Although Valentine informed Hicks of his concerns about the plan and Hicks and Simms monitored the situation closely, Lazer did not authorize Valentine to change its coverage to another company until August 1998.

Lazer then sued for damages, alleging Valentine sold an underfunded health and medical policy issued by a company not licensed to do business in South Carolina. The complaint listed four causes of action: breach of contract, negligence, fraud, and unfair trade practices. Valentine answered and alleged several defenses, including comparative negligence and assumption of the risk.

The trial proceeded solely on Lazer's claims of negligence and gross negligence. At the close of the testimony, the trial court granted Lazer's motion for a directed verdict as to Valentine's liability. The trial court also

struck Valentine's defenses of comparative negligence and assumption of the risk and refused to charge the jury on either defense.

The jury awarded Lazer actual and punitive damages. The trial court denied Valentine's post-trial motions, and this appeal follows.

LAW/ANALYSIS

Valentine contends the trial court erred in directing a verdict on the issue of liability. We agree.

"To establish a cause of action in negligence, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty."[2] Furthermore, "[a] determination of negligence, standing alone, is a far cry from a determination of liability. Liability encompasses all elements of a negligence claim, including damages proximately caused by the alleged negligence."[3]

The trial court determined Lazer was entitled to a directed verdict on the issue of liability because John O'Brien, its expert, testified that Valentine had breached its duty to Lazer in failing to investigate adequately the funding, licensing, and insurance rating of the plan. This testimony, however, does not conclusively establish that Valentine had breached any duty to Lazer or that the alleged deficiencies in Valentine's performance were the proximate cause of Lazer's damages.

Indeed, O'Brien acknowledged that Valentine, in investigating the plan, acted reasonably in relying on the advice and judgment of other agents, health care providers, and satisfied customers, as well as on the fact that several large companies had contracted with the plan. He also agreed that an

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[2] Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000).

[3] Hinds v. Elms, ___ S.C. ___, ___, 595 S.E.2d 855, 857 (Ct. App. 2004).

insurance agent would not have the authority to switch a customer to another plan without the customer's consent.

Furthermore, as counsel for Valentine noted, Valentine had communicated concerns to Lazer about the plan and quoted alternatives as early as October 1997. In addition, Arnold Valentine testified that he had spoken with Simms about the matter during the fall of 1997, advising her of the need to explore other programs so that Lazer would be ready to drop its coverage with Fidelity. Lazer, however, though aware of these concerns, re-enrolled in the plan in April 1998 and did not change its coverage until the following August.

Under these circumstances, we hold the trial court should have allowed the jury to determine whether Valentine had breached its duty of care to Lazer and whether the alleged breach of this duty was the proximate cause of Lazer's damages.[4] We therefore reverse the jury verdict on this ground and remand the case for a new trial.[5]

REVERSED AND REMANDED.

HOWARD and BEATTY, JJ., concur.

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[4] See Oliver v. South Carolina Dep't of Highways and Pub. Transp., 309 S.C. 313, 317, 422 S.E.2d. 128, 131 (1992) ("[L]egal cause is ordinarily a question of fact for the jury. Only when the evidence is susceptible to only one inference does it become a matter of law for the court."); Miller v. City of Camden, 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct. App. 1994) (stating that, although the trial court determines the existence and scope of a duty, "[t]hereafter, the jury determines whether a breach of the duty has occurred, resulting in damages"), aff'd as modified, 329 S.C. 310, 494 S.E.2d 813 (1997).

[5] We do not address Valentine's arguments on appeal concerning comparative negligence, assumption of the risk, and the evidence supporting Lazer's claim for damages.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

QHG of Lake City, Inc., d/b/a,
Carolinas Hospital System of
Lake City, Respondent,

v.

Karen McCutcheon, M.D., Appellant.

Appeal From Florence County
Kevin M. Barth, Special Referee

Opinion No. 3839
Submitted March 8, 2004 – Filed June 28, 2004

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Mark A. Brunty, J. Jackson Thomas, both of Myrtle Beach, for Appellant.

A.E. Justice, Jr., James D. Smith, Jr., both of Florence, for Respondent.

CURETON, A.J.: QHG of Lake City, Inc. d/b/a Carolinas Hospital System of Lake City commenced this action against Dr. Karen McCutcheon, alleging she breached an agreement that required her to either practice medicine in the Lake City area or repay loans from the hospital that financed McCutcheon's medical education. McCutcheon appeals the special referee's order awarding judgment and prejudgment interest to QHG based on its claim of quantum meruit. We affirm in part, reverse in part, and remand.

FACTS

On December 18, 1991, McCutcheon and Lower Florence County Hospital entered into a written agreement whereby the hospital agreed to provide loans to McCutcheon for payment of tuition and fees for her medical school education. Pursuant to this agreement, the hospital would forgive one year of the loans for each year McCutcheon practiced medicine in the Lake City area following her graduation from medical school. In addition to loan forgiveness, the hospital agreed to provide McCutcheon with financial assistance for setting up her medical practice.

From August 1991 to December 1994, County Hospital provided McCutcheon with $31,478.70 in loans for tuition, fees, and books. This amount was given to her over the course of eleven installments. While the first four installments were evidenced by promissory notes, no such instruments were executed for the remaining seven installments.[1] The four notes detail the repayment obligation and accrual of interest in identical language, varying only as to each installment's principal and applicable interest rate. For example, the note dated August 19, 1991, contains the following language:

> FOR VALUE RECEIVED, the undersigned promise (s) to pay to Lower Florence County Hospital, or order, the principal sum of Three Thousand Seven Hundred Ninety Five Dollars, with interest from date at the rate of nine and one half (9 1/2) per

[1] Although the final seven installments under the agreement were not evidenced by signed promissory notes, neither party disputes their existence.

> annum on the unpaid balance until paid. The said principal and interest shall be payable at the office of Lower Florence County Hospital in Lake City, South Carolina . . . payable in sixty (60) days from the date of graduation of the undersigned or sixty (60) days that the undersigned ceases to be a full time student in good standing provided however, this indebtedness shall be deferred and forgiven upon compliance with the agreement between undersigned and Lower Florence County Hospital dated August 19, 1991.[2]

In 1995, McCutcheon graduated medical school and began her residency program in Florence with McLeod Family Practice. She left the residency program before completing it and contacted the former administrator of the hospital who had negotiated the agreement with her. McCutcheon indicated that she was ready to begin practicing medicine, but did not feel adequately prepared to practice alone in a hospital setting. Rather, she believed she needed more experience before beginning her own practice and wanted somebody to mentor her or oversee her practice until she gained the necessary experience. Although the hospital offered McCutcheon an opportunity to take over a practice in Timmonsville, South Carolina, McCutcheon declined the offer. Instead, in July 1997, McCutcheon began practicing medicine in Surfside Beach, South Carolina, and has never practiced medicine in the Lake City area.

On August 6, 1999, QHG brought suit against McCutcheon, asserting causes of action for breach of contract and quantum meruit. The parties agreed to refer the case to a special referee solely under the theory of quantum meruit. After a hearing, the special referee issued an order on February 16, 2002, awarding judgment to QHG in the amount of $31,478.70

[2] The December 18, 1991 note covered a principal of $3,160.00 at a rate of 8.5 percent; the August 12, 1992 note covered a principal of $4,125.00 at 6 percent; the December 4, 1992 covered a principal of $3,300.00 at 7 percent.

for the outstanding principal, plus prejudgment interest in the amount of $23,314.43.[3] McCutcheon appeals.

STANDARD OF REVIEW

In an action in equity tried by the judge alone, this Court can make findings of facts in accordance with our own view of the preponderance of the evidence. However, this does not require us to ignore the fact that the special referee was in a better position to assess the credibility of witnesses. Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989); see Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 262 n.1, 440 S.E.2d 129, 131 n.1 (1994) (holding Supreme Court had jurisdiction to find facts in accordance with its own view of the preponderance of evidence in subcontractor's action against project owner seeking recovery under equitable doctrine of quantum meruit rather than recovery based on contract).

DISCUSSION

I. Quantum Meruit

McCutcheon argues the special referee erred in finding that QHG was entitled to relief based on its quantum meruit claim.

"In a law action, the measure of damages is determined by the parties' agreement, while in equity, 'the measure of the recovery is the extent of the duty or obligation imposed by law, and is expressed by the amount which the court considers the defendant has been unjustly enriched at the expense of the plaintiff.'" Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8,

[3] The special referee also awarded QHG attorney fees. Subsequently, McCutcheon filed a motion pursuant to Rule 59(e), SCRCP, in which she challenged the award of attorney fees. By order dated April 12, 2002, the special referee granted McCutcheon's motion, holding QHG was not entitled to attorney fees given there was no contractual basis for the award. There is, however, no issue before us on appeal regarding attorney fees.

532 S.E.2d 868, 872 (2000) (quoting United States Rubber Prods., Inc. v. Town of Batesburg, 183 S.C. 49, 55, 190 S.E. 120, 126 (1937)). "[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." Id. at 8, 532 S.E.2d at 872.

The equitable doctrine of quantum meruit allows an aggrieved party to recover for unjust enrichment. Columbia Wholesale Co., 312 S.C. at 261, 440 S.E.2d at 130. To prevail on this theory, a plaintiff must establish the following three elements: (1) a benefit conferred by plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for her to retain it without paying its value. Myrtle Beach Hosp., Inc., 341 S.C. at 8-9, 532 S.E.2d at 872.

A.

McCutcheon contends that QHG has not satisfied the first element of quantum meruit because she never entered into an agreement with that entity. Rather, McCutcheon asserts her agreement was with Lower Florence County Hospital, and it was that entity and not QHG that provided her with the medical school loans. [4]

Because McCutcheon makes this argument for the first time on appeal, it has not been properly preserved for our review. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); Hubbard v. Rowe, 192 S.C. 12, 17, 5 S.E.2d 187, 189 (1939) ("In matters of appeal, so far as it appears, all that this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised in the lower Court and passed upon by that Court.").

[4] QHG is an affiliate of the Carolinas Hospital System, which operates several healthcare facilities in South Carolina. In June of 1995, QHG leased the operation of the hospital from Lower Florence County Hospital.

B.

McCutcheon next asserts that the third element of quantum meruit has not been satisfied "[b]ecause QHG changed the agreement between Lower Florence County Hospital and Dr. McCutcheon and prevented her from fulfilling the agreement as it was contemplated in 1991." Specifically, McCutcheon argues that "[n]ot only did Lower Florence County Hospital have the obligation to set up a practice for Dr. McCutcheon or place her in an established practice, it also had a duty to ensure her an income." This argument is without merit.

Nothing in the agreement obligated the hospital to provide McCutcheon with employment within the hospital or to secure the same for her elsewhere. The following provision from the agreement details the full extent of the hospital's obligation to McCutcheon insofar as the establishment of her medical practice is concerned:

> Upon completion of Internship or Residency, HOSPITAL agrees to provide Physician certain financial aids to establish her medical practice. The scope of such aid will be determined by the usual custom at the time of practice opening.

By its very terms, the agreement only promises to provide McCutcheon with financial assistance for setting up her practice. Nowhere does the agreement state or even imply that the hospital promised to establish McCutcheon's medical practice for her, nor does it guarantee her a certain income. Quite the opposite, in detailing the available avenues by which McCutcheon could "fulfill medical practice obligations," the agreement makes clear that the practice of medicine in the Lake City area was how McCutcheon was to fulfill her end of the deal rather than a guarantee made by the hospital. Thus, the hospital neither prevented her from fulfilling her half of the agreement nor engaged in any other inequitable conduct.

Accordingly, we find no error in the special referee's determination that it would be inequitable to allow McCutcheon to retain the benefit of the

hospital's funding of her medical education where she did not fulfill her part of the agreement.

II. Interest

McCutcheon argues the special referee erred in awarding prejudgment interest in this case because prejudgment interest is not available in a cause of action for quantum meruit.

A.

Although our research does not reveal any South Carolina cases that are directly on point, we believe our Supreme Court and this Court have implicitly found that an award of prejudgment interest is permissible in an action to recover under the theory of quantum meruit.

In Anderson v. Purvis, our Supreme Court discussed the rule in equity with respect to the allowance of interest. Anderson v. Purvis, 220 S.C. 259, 262, 67 S.E.2d 80, 81 (1951). In discussing several older cases, the Court stated:

> 'Upon demands bearing interest at law, the Court of Equity is, it seems, bound to allow interest; but where the demand does not bear interest at law, interest will or will not be allowed according to the equity of the case'; and: 'Upon demands not bearing interest at law, equity usually allows interest, but may in its discretion withhold it.' In the late case of Epworth Orphanage v. Long, 207 S.C. 384, 36 S.E.2d 37, 50, it was said: 'A wide discretion is vested in the Courts in determining whether interest shall be allowed in equity cases.' And the following is from Gaskins v. Bonfils, 10 Cir., 79 F.2d 352, 356: 'A court of equity may, in the exercise of its sound discretion, allow interest upon equitable considerations even though it could not be recovered at law.'

Anderson, 220 S.C. at 262-63, 67 S.E.2d at 81 (citations omitted).

In terms of prejudgment interest, the general rule is that it is not recoverable on an unliquidated claim in the absence of agreement or statute. Builders Transp., Inc. v. South Property & Cas. Ins. Guar. Ass'n, 307 S.C. 398, 406, 415 S.E.2d 419, 424 (Ct. App. 1992). "The law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty." Babb v. Rothrock, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993); see Builders Transport, Inc., 307 S.C. at 406, 415 S.E.2d at 424 ("A claim is liquidated if the sum claimed is certain or capable of being reduced to a certainty."). "The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." Babb, 310 S.C. at 353, 426 S.E.2d at 791.

Section 34-31-20(A) of the South Carolina Code of Laws provides the statutory basis for prejudgment interest. This section states: "In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum." S.C. Code Ann. § 34-31-20(A) (1987) (emphasis added).

Because the applicable statute and case law do not exclude the award of prejudgment interest for a claim under the theory of quantum meruit, it appears that our appellate courts have implicitly recognized that such an award is permissible. See, e.g., Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C, 353 S.C. 327, 336-37, 577 S.E.2d 468, 473 (Ct. App. 2003) (affirming trial court's award of damages and prejudgment interest for recovery under quantum meruit/quasi-contract/implied by law); Stringer Oil Co. v. Bobo, 320 S.C. 369, 372, 465 S.E.2d 366, 368 (Ct. App. 1995) (implicitly recognizing that prejudgment interest may be awarded pursuant to claim based upon quantum meruit); Builders Transp., Inc., 307 S.C. at 406, 415 S.E.2d at 424 (recognizing general rule that prejudgment interest may be awarded in claims for liquidated amounts).

In light of this precedent, we perceive no basis upon which to deny prejudgment interest in a claim for quantum meruit. Thus, we hold that entitlement to prejudgment interest does not depend upon what theory of recovery a plantiff chooses to proceed under, but rather, whether or not the measure of recovery is fixed by the conditions existing at the time the claim arose.

Our decision is consistent with other jurisdictions. See, e.g., Murdock v. Cohen, 762 P.2d 691, 693 (Colo. Ct. App. 1988) (finding attorney entitled to prejudgment interest on quantum meruit claim based on state statutory provision); Peabody N.E., Inc. v. Town of Marshfield, 689 N.E.2d 774, 781-82 (Mass. 1998) (ruling construction company was entitled to recover damages and prejudgment interest from town based on theory of quantum meruit); Lucent Technologies, Inc. v. Mid-West Elec., Inc., 49 S.W.3d 236, 247 (Mo. Ct. App. 2001) ("On principle there is no reason for denying interest when the action is in quantum meruit and the claim is unliquidated in the sense that the amount due is to be measured and determined by the standard of reasonable value of the services." (quoting Mid-West Eng'g Constr. Co. v. Campagna, 421 S.W.2d 229, 234 (Mo. 1967))); Ogletree, Deakins, Nash, Smoak & Stewart, P.C. v. Albany Steel, Inc., 663 N.Y.S.2d 313, 315 (N.Y. App. Div. 1997) (holding trial court correctly awarded prejudgment interest on a quantum meruit claim to recover attorney fees given a "quantum meruit action is essentially an action at law, inasmuch as it seeks money damages in the nature of a breach of contract, 'notwithstanding that the rationale underlying such causes of action is fairness and equitable principles in a general rather than a legal sense.'" (quoting Hudson View II Assocs. v. Gooden, 644 N.Y.S.2d 512, 516 (1996))); Compton v. Hastings, 742 P.2d 75, 75-76 (Or. Ct. App. 1987) ("'Prejudgment interest is proper in *quantum meruit* cases if the exact amount owing is ascertained or ascertainable by simple computation or by reference to generally recognized standards and where the time from which interest must run can be ascertained.'" (quoting Hazlewood Water Dist. v. First Union Management, 715 P.2d 498, 501 (Or. Ct. App. 1986))); Burkholder v. Cherry, 607 A.2d 745, 747-48 (Pa. Super. Ct. 1992) (finding prejudgment interest may be awarded where recovery was based on quantum meruit); Base-Seal, Inc. v. Jefferson County, Texas, 901 S.W.2d 783, 788 (Tex. App. 1995)

("Prejudgment interest is recoverable in a suit on quantum meruit, provided the measure of recovery is fixed by the conditions existing at the time the injury is inflicted."); but see Modern Builders, Inc. of Tacoma v. Manke, 615 P.2d 1332, 1339 (Wash. Ct. App. 1980) ("By its very nature, an award of damages based upon quantum meruit is not liquidated and is not readily ascertainable in the parties' contract. Therefore, prejudgment interest may not be awarded when a labor and materialmen's lien is set by quantum meruit.").

Turning to the instant case, we find the litigation relates to specific sums of money advanced by one party to another party, and, thus, the measure of recovery is capable of being reduced to a certainty. Accordingly, the special referee properly awarded prejudgment interest to QHG.

B.

In an alternative argument, McCutcheon contends the special referee's calculation of prejudgment interest was in error. She asserts the special referee should not have used the note interest rates to calculate the advancements evidenced by the promissory notes because QHG waived any contract claim given it proceeded solely under the theory of quantum meruit. Furthermore, McCutcheon claims the prejudgment interest should not have accrued until the agreement was breached.

In determining the amount of interest owed, the special referee calculated interest from the dates on which each of the eleven loan installments were made. For the installments evidenced by promissory notes, the special referee applied the interest rates set forth by the terms of each note. The remaining installments were calculated at the statutory rate of 8.75 percent.

As to the four installments evidenced by promissory notes, McCutcheon's indebtedness to the hospital included not only the original principal amounts, but also the interest that accrued on the notes with each passing day. Because the special referee was determining amounts owed on four duly executed interest-bearing financial instruments, he correctly

calculated interest in accordance with each note's terms from their respective dates of execution.

In contrast, the remaining seven loan advancements were not evidenced by promissory notes, and therefore bore no interest through their own effect. Courts are allowed to affix prejudgment interest to obligations to pay money only "from the time when payment is demandable." Future Group, II v. Nationsbank, 324 S.C. 89, 101, 478 S.E.2d 45, 51 (1996). Here, payment was not "demandable" before McCutcheon breached the terms of the agreement. Thus, the special referee erred in calculating the accrual of interest from the date of each of the final seven loan advancements. We reverse this portion of the special referee's order and find that prejudgment interest at the statutory rate of 8.75 percent should have accrued from the date of McCutcheon's breach of the agreement. Because the record is unclear as to the exact date that McCutcheon breached the agreement, we remand for the special referee to determine this date and to calculate prejudgment interest accordingly.

III. Settlement

Finally, McCutcheon asserts the special referee improperly admitted into evidence a $250.00 check she sent to the hospital in August of 1998. The check, McCutcheon contends, was written as a part of a settlement negotiation and should have been excluded under Rule 408, SCRE.

Because the law favors compromises, our appellate courts have long held that testimony as to negotiations and offers to compromise are inadmissible for proving liability. Neal v. Clark, 199 S.C. 316, 19 S.E.2d 473 (1942); see Hunter v. Hyder, 236 S.C. 378, 387, 114 S.E.2d 493, 497 (1960) ("This Court has held that compromises are favored and evidence of an offer or attempt to compromise or settle a matter in dispute cannot be given in evidence against the party by whom such offer or attempt was made."). This principle is now codified in Rule 408, SCRE:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable

> consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 408, SCRE.

In the instant case, nothing in the record suggests McCutcheon and the hospital had ever negotiated anything at the time the check was written or that either party ever disputed whether McCutcheon was bound to repay the loans. As such, rather than sending the check in "an attempt to curb further litigation," the testimony at trial affords only the conclusion that McCutcheon intended the check as her first payment on the loan. See Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., 347 S.C. 545, 558, 556 S.E.2d 718, 725 (Ct. App. 2001) (recognizing correspondence appeared to establish a settlement relationship between the parties given the letters presented "an attempt to curb further litigation"). Nothing in the rule against settlement testimony requires courts to exclude evidence that a party tendered a sum mutually understood to be due. Therefore, the special referee committed no error in admitting McCutcheon's check.

CONCLUSION

Based on the foregoing, we affirm the special referee's decision awarding QHG judgment and prejudgment interest under the theory of quantum meruit. We also find the special referee committed no error in admitting McCutcheon's check into evidence. Because the prejudgment interest on the seven loan installments not evidenced by promissory notes should have been calculated to accrue from the date of McCutcheon's breach,

we reverse this portion of the special referee's order. We remand for the special referee to determine the exact date of the breach and to calculate prejudgment interest accordingly. Therefore, the judgment of the special referee is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF and STILWELL, JJ., concur.