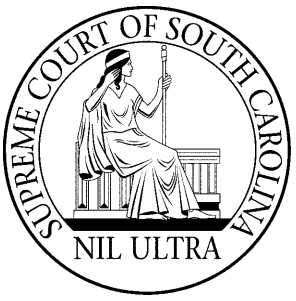

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 27
August 15, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Melenia Trotter, Employee, Petitioner,

v.

Trane Coil Facility, Employer, and Phoenix Insurance Company, Carrier, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
James E. Lockemy, Circuit Court Judge

Opinion No. 27024
Heard June 22, 2011 – Filed August 15, 2011

REVERSED

Ann McCrowey Mickle, of Mickle & Bass, of Rock Hill, and Stephen Benjamin Samuels, of Samuels Law Firm, L.L.C., of Columbia, for Petitioner.

Rebecca Anne Roberts and Byron P. Roberts, both of Roberts Law Group, L.L.C., of Chapin, for Respondents.

JUSTICE BEATTY: Melenia Trotter ("Trotter") was awarded workers' compensation benefits for a back injury by the South Carolina Workers' Compensation Commission ("Commission"). The circuit court affirmed. The Court of Appeals reversed in part, vacated in part, and remanded, finding the Commission abused its discretion in denying requests made by the employer and its carrier, Trane Coil Facility and Phoenix Insurance Co. (collectively, "Trane"), for a continuance or to hold the record open for the depositions of two witnesses to be taken. Trotter v. Trane Coil Facility, 384 S.C. 109, 681 S.E.2d 36 (Ct. App. 2009). This Court granted Trotter's petition for a writ of certiorari to review the opinion of the Court of Appeals. We reverse.

I. FACTS

Trotter was employed by Spherion, a temporary agency, in August 2004. At that time, she was sent to work for a 90-day trial period with Trane, a manufacturer of industrial air-conditioners in Blythewood, South Carolina.

After completing the probationary period, Trotter was hired by Trane for a permanent position in November 2004. Trotter worked at "the turb and trim station," which consisted of using an "air driver" (a screwdriver with a blade) to trim down tubes to the same length, and then "turbulating" the tubes by putting a spring into each tube. Trotter was on her feet most of the day and had to "push" into the tubes and move her lower body, particularly her hips, back and forth to perform her work. She spent approximately ninety percent of each workday, from 5:30 a.m. to 4:00 p.m., engaged in this activity.

According to Trotter, she began having spasms and some lower back pain that extended down her legs in December 2004, which she mentioned to

her Team Leader, Darryl Cloud, and to Duane DeBoo,[1] Trane's Safety Coordinator. Trotter continued to work with increasing discomfort in December 2004 and January 2005.

On Monday, January 31, 2005, Trotter was "turbulating the coil" when she felt "like something popped in [her] back" and experienced "excruciating pain." Trotter stated she reported this incident to Cloud, her Team Leader.

Trotter worked all that week with worsening pain and "really bad" back spasms. On Friday, February 4, 2005, she reportedly told Cloud and her supervisor, Pat Charleston, that she had hurt her back while turbulating and that she was in pain and needed to have something done. Trotter stated Charleston advised her that he would get DeBoo to come over and talk to her, but she did not see DeBoo before her shift ended and she went home.

That same Friday, Trotter made an appointment for the following Monday to see Dr. W. Scott James, III, a physician with Carolina Orthopaedic Surgery Associates. However, on Saturday, February 5th, Trotter had "[t]errible pain," so she went to the emergency room at Piedmont Medical Center in Rock Hill.

Trotter was seen by Dr. James on Monday, February 7, 2005. She told him that she had been having pain at work for the past "several months." He scheduled an MRI and gave her a doctor's note to stay off work. Trotter called Trane's personnel office and spoke to Carlos Mays, who told her to bring in the doctor's slip. She did so and allegedly showed it to her Supervisor, Charleston, who made a copy of it. Trotter did not return to work after February 4, 2005.

The MRI revealed Trotter had a large, herniated disc at L5-S1 with marked compression of the right S1 nerve root. Following Dr. James's

[1] Several versions of DeBoo's name appear in the decisions of this case, but the spelling above is supported by the record.

recommendation, Trotter underwent surgery on February 21, 2005.[2] Dr. James indicated in his notes that Trotter likely had a bad disc in her back that was aggravated by her job change.

Within a week after her surgery, Trotter called DeBoo and left a message regarding her work injury, but he did not return her call. Trotter called the personnel office and spoke to Adrian Barnhill, Trane's Human Resources Manager, who arranged a conference call on February 28, 2005 with Barnhill, DeBoo, Charleston, Mays, and Trotter. Trotter told them that she had had a work-related accident and that the turbulator had caused her to suffer a back injury. Trotter had never filed a workers' compensation claim before, so she asked them what she needed to do. They asked her to submit a written statement providing details of the accident, which she did on April 14, 2005.

On May 11, 2005, Trotter filed a Form 50 alleging an injury by accident to her back. Trane denied the claim, maintaining it did not receive notice of the injury until after Trotter's surgery and that there was insufficient proof of a work-related injury.

A hearing was held on September 20, 2005 before a single commissioner.[3] By order filed May 5, 2006, the commissioner found Trotter

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[2] Dr. James's medical notes of April 22, 2005 indicate that due to her significant pain and the fact there could be a delay in obtaining approval of a workers' compensation claim, he discussed with Trotter the option of going under her regular insurance, but told her that it was her decision and he would be willing to treat her, either way. Trotter decided to proceed under her regular insurance rather than delay her surgery.

[3] DeBoo, Charleston, Cloud, and Mays were not present at the hearing. Trane had terminated Cloud for misconduct, including not following procedures, not showing up for work, and taking part in inappropriate conversations, and his whereabouts were unknown. Charleston was hospitalized and scheduled to have surgery the day of the hearing. Barnhill was the only Trane employee to appear and testify for the employer. No

had established a compensable claim for her back and that Trane was responsible for all causally-related medical treatment, both past and future as directed by Dr. James, and "temporary total benefits from Mrs. Trotter's last day of work and continuing."

The commissioner noted that she had denied Trane's motions for a continuance or to leave the record open in order to take the depositions of Dr. James and Charleston and to add Spherion as a party. The commissioner stated Trane had the opportunity to depose Dr. James prior to the hearing, but it chose not to do so at that time for strategic reasons. Further, Charleston was scheduled to appear at the hearing, but he became incapacitated suddenly due to illness. She twice granted motions to hold the record open for Charleston's deposition to be taken, but no deposition was ever scheduled due to Charleston's continuing incapacity, so she closed the record. Finally, as to adding Spherion as a defendant, the commissioner found Trotter was employed with Trane, not Spherion, at the time of her injury.

An Appellate Panel of the Commission unanimously upheld the commissioner's order and adopted the findings of fact and conclusions of law contained therein in full. The circuit court affirmed.

Trane appealed to the Court of Appeals, which reversed in part, vacated in part, and remanded. Trotter v. Trane Coil Facility, 384 S.C. 109, 681 S.E.2d 36 (Ct. App. 2009). The Court of Appeals found the Commission abused its discretion in denying Trane's motions for a continuance or to hold the record open for the depositions of Dr. James and Charleston to be taken. Id. at 118, 681 S.E.2d at 41. It found Trane had exercised due diligence to obtain the depositions and the testimony was necessary to the case. Id. at 117-19, 681 S.E.2d at 41. The Court of Appeals vacated the remainder of the circuit court's order and remanded "all issues" to the Commission for reconsideration following the taking of the additional testimony. Id. at 119, 681 S.E.2d at 42. This Court has granted Trotter's petition for a writ of certiorari.

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explanation was given for Trane’s failure to call DeBoo and Mays as witnesses.

II. STANDARD OF REVIEW

The Administrative Procedures Act (APA) establishes the standard for judicial review of workers' compensation decisions. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, this Court can reverse or modify the decision of the Commission where the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence considering the record as a whole. Transp. Ins. Co. v. South Carolina Second Injury Fund, 389 S.C. 422, 699 S.E.2d 687 (2010); Pierre, 386 S.C. at 540, 689 S.E.2d at 618.

III. LAW/ANALYSIS

A. Requests for Continuance & to Leave Record Open

On appeal, Trotter contends the Court of Appeals erred in finding the denial of Trane's requests for a continuance or to leave the record open to depose Pat Charleston and Dr. James constituted an abuse of discretion.

A commissioner has the authority to postpone a scheduled hearing in a workers' compensation matter for "good cause," which includes such reasons as illness and the need for additional discovery. S.C. Code Ann. Regs. 67-613(B) (Supp. 2010); see also id. 67-215(A)(5) (motions).

The granting or refusal of a request for a continuance rests in the sound discretion of the hearing commissioner, whose ruling will not be disturbed unless a clear abuse of discretion is shown. Gurley v. Mills Mill, 225 S.C. 46, 80 S.E.2d 745 (1954); see also Williams v. Bordon's, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980) ("It has long been the rule in this State that motions for a continuance are addressed to the sound discretion of the trial judge, and his ruling will not be upset unless it clearly appears that there was an abuse of discretion to the prejudice of appellant.").

For appellate purposes, an abuse of discretion occurs where the ruling is based on an error of law or, where the ruling is grounded upon factual findings, is without evidentiary support. Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009); Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000); Bartlett v. Rachels, 375 S.C. 348, 652 S.E.2d 432 (Ct. App. 2007); Burroughs v. Worsham, 352 S.C. 382, 574 S.E.2d 218 (Ct. App. 2002).

"Of necessity it must be left to the commission to determine whether or not a case shall proceed to trial or be continued." Gurley, 225 S.C. at 51-52, 80 S.E.2d at 747. Where a party is not prejudiced by the denial of a motion for a continuance, reversal is not required. Wright v. Hiester Constr. Co., 389 S.C. 504, 698 S.E.2d 822 (Ct. App. 2010).

(1) Pat Charleston

As to Charleston, he was supposed to testify at the September 20th hearing, and his unavailability was sudden. He was hospitalized on the weekend before the hearing and had surgery the day of the hearing. The commissioner granted Trane's request to hold the record open for 14 days from the hearing date and, when Charleston was still incapacitated at the end of that time, the commissioner granted Trane's October 4, 2005 request for a two-week extension and agreed to hold the record open until October 20, 2005.[4] No deposition was ever scheduled, and the commissioner closed the record on October 20, 2005. Based on everything in the record, we find the commissioner did not commit a clear abuse of discretion in closing the record.

We agree with Trane that it was not "at fault" in failing to obtain Charleston's deposition, as Charleston was ill. However, the Court of

[4] Trane contends it was not notified of the second extension until the date the extension period expired. However, the question of notice was not addressed by the Court of Appeals and, thus, is not properly before this Court.

Appeals specifically acknowledged that "the exact date on which Charleston would become available for a deposition was unknown[.]" Trotter, 384 S.C. at 117, 681 S.E.2d at 41. The only medical information submitted to the commissioner by Trane at that time came from Charleston's treating physician, who indicated Charleston was still hospitalized, that he was unable to participate in a deposition, and that his prognosis was "poor." Charleston was suffering from a life-threatening illness (cancer) with no certain recovery date. After a month, during which time no deposition was scheduled and no update had been received from Trane, the commissioner closed the record.

Although the Court of Appeals states Trane did not ask the commissioner to leave the record open "indefinitely," that is, in effect, what is being urged on appeal as there is no indication in the record that Charleston would have been available for a deposition at any time prior to the issuance of the commissioner's order in May 2006. Trane did maintain at the appeal before the circuit court that Charleston was then well enough to provide a deposition, but that was in 2007, well after the 2005 hearing in this matter and the issuance of the commissioner's order in 2006. To further delay the resolution of Trotter's claim due to the continuing illness of a witness, however unfortunate the circumstances, would not serve the interests of justice, and was a factor necessarily considered by the commissioner in making her decision to close the record.

Moreover, Trane has shown no prejudice on appeal. Charleston's e-mail of February 28, 2005 to DeBoo was admitted into evidence. The e-mail set forth the essence of Charleston's expected testimony, i.e., that Trotter reported a back injury to him on Friday, February 4, 2005, but she did not report it as being work-related. Charleston further stated in his e-mail that Trotter went home on Friday, February 4th, and the next time she called, Trotter reported that she had undergone surgery and would be out of work for a few months. Thus, Charleston's account of events was in the record for consideration by the commissioner, and Trane has not shown any other material information that Charleston would have been able to contribute.[5] No

[5] Trane need not have relied only upon Charleston regarding notice. For example, Trotter testified that she had called the personnel office and spoke

error of law has been alleged or shown, and the commissioner's factual findings in this regard are fully supported by the record.

(2) Dr. James

As for Dr. James, we agree with Trotter that the Court of Appeals mischaracterized the evidence when it stated Trane "sought to depose Dr. James prior to the hearing, but due to scheduling difficulties, the deposition was scheduled for a date after the hearing." Trotter, 384 S.C. at 118-19, 681 S.E.2d at 41 (emphasis added). Upon reviewing the record, we find there is evidentiary support for the commissioner's finding that Trane had the opportunity to depose Dr. James on the agreed-upon date of September 7, 2005; however, it chose to cancel the deposition for strategic reasons.

On August 5, 2005, the Commission sent all parties a "Notice of Hearing" advising them that the hearing on Trotter's claim would be held on September 20, 2005. The parties initially scheduled the depositions of both Trotter and Dr. James for August 23, 2005, but when other, unrelated hearings arose for that date, the parties agreed to take both depositions on September 7, 2005. On August 11, 2005, Trane formally noticed the depositions of both Trotter and Dr. James for the agreed-upon date of September 7th. Both Trotter and Dr. James confirmed their availability.

Subsequently, on August 29, 2005, Trane told Trotter's counsel that it wanted to postpone Dr. James's deposition so it could have the transcript of Trotter's deposition in hand before deposing Dr. James. Trotter's counsel opposed the rescheduling, stating she did not believe this was a legitimate reason to postpone the proceedings. Counsel stated that Dr. James would be available on September 7th unless the Commission ordered otherwise.

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to Mays about her work injury prior to her surgery, but we note Trane did not call Mays as a witness to refute this testimony. Additionally, Trotter and Trane note in their briefs that Charleston is now deceased. Thus, we find granting an order of remand for his testimony would serve no purpose.

Trane filed a motion for a continuance with the Commission on August 31, 2005. On September 1, 2005, before a ruling had been made on the motion, Trane sent Trotter's counsel a letter informing her that it was changing Dr. James's deposition date from September 7th to September 14th. Trane apparently contacted Dr. James's office directly and reset the date without consulting Trotter's counsel. Trotter's counsel again opposed the rescheduling, stating she already had three other depositions set for September 14th. Therefore, she planned to remain available for the deposition to proceed on September 7th as previously agreed.

On September 7th, Trane took Trotter's deposition as noticed. Dr. James was available, but Trane cancelled his deposition and chose not to depose him at that time. The commissioner thereafter denied Trane's motion for a continuance of the hearing, finding Trane had the opportunity to depose Dr. James, but had elected not to proceed on the agreed-upon date of September 7th for strategic reasons. Trane's motion to hold the record open for Dr. James's deposition to be taken on a date after the hearing was likewise denied.

We conclude the commissioner did not abuse her discretion in denying Trane's motions for a continuance or to hold the record open for the taking of Dr. James's deposition. Trane could have attempted to schedule the depositions sequentially in the beginning in order to achieve its goal of having the transcript of Trotter's deposition before deposing Dr. James. However, once all parties had consented to taking the depositions on September 7th and Trane had formally noticed the depositions for that date, its options became more limited. Contrary to Trane's assertion, it does not have an unfettered right to postpone the hearing simply to implement a better strategy for itself. Trane assumed the risk that its motion would be denied, which was not prudent since a continuance is not a matter of right, but of discretion. See 17 C.J.S. Continuances § 4 (2011) (observing continuances are not favored and "[a] party has no absolute right to a continuance as a matter of law" (footnote omitted)).

In addition, Trane has not demonstrated any prejudice. Dr. James's medical notes were submitted to the commissioner and considered as part of the record, and on appeal Trane has shown no material information that Dr. James would have provided that is not already included in the record. Dr. James's notes fully address his diagnosis and treatment of Trotter's medical condition, and he specifically conceded in his notes that he had no direct knowledge of the circumstances surrounding Trotter's injury. Consequently, we hold the commissioner did not abuse her discretion in denying the requests for a continuance or to hold the record open for the deposition of Dr. James to be taken.

Lastly, we discern nothing "inconsistent" in the commissioner's rulings to initially leave the record open for the deposition of Charleston to be taken, but not Dr. James, as found by the Court of Appeals. Trotter, 384 S.C. at 119 n. 2, 681 S.E.2d at 42 n.2. Trane's request pertaining to Charleston was based on medical necessity and arose suddenly, and the request as to Dr. James was based on Trane's desire to obtain a strategic advantage. The circumstances were not similar and need not have been treated in the same manner by the commissioner.

A tribunal necessarily exercises wide discretion in managing a case, and decisions denying a request for a continuance are "rarely" overturned. Morris v. State, 371 S.C. 278, 283, 639 S.E.2d 53, 56 (2006) (citing State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)); M & M Group, Inc. v. Holmes, 379 S.C. 468, 475, 666 S.E.2d 262, 265 (Ct. App. 2008). "Every reasonable presumption in favor of a proper exercise of the trial court's discretion will be made." 17 C.J.S. Continuances § 5 (2011). Based on the foregoing, we reverse the decision of the Court of Appeals and reinstate the order of the Commission, which had adopted the single commissioner's findings and conclusions in full.

B. Scrivener's Error Regarding Date of Accident

Trotter next contends the Court of Appeals repeated a scrivener's error made by the commissioner regarding the date of the accident and asks this

Court to correct the error or to grant her leave to petition the Commission for correction of the date.

In her order, the commissioner stated in her "Findings of Fact" that (1) Trotter first experienced back pain in December 2004, (2) Trotter felt a "pop" in her back and had "excruciating pain" while "turbulating" at work on January 31, 2005, and (3) Trotter's injury occurred "in 2005." All of these findings are supported by the evidence.

Trotter points out, however, that in the "Conclusions of Law" portion of her order, the commissioner incorrectly states: "That on or about December 31, 2004 Mrs. Trotter felt a pop in her back while working." Trotter asserts the December 31, 2004 date is incorrect as all parties concede Trotter was not even working that day, so it is obviously a scrivener's error.

The Court of Appeals stated in its recitation of the facts that Trotter felt a "pop" in her back on January 31, 2005 while she was working. Trotter, 384 S.C. at 112, 681 S.E.2d at 38. It later quoted a passage from the commissioner's order that contained the December 31, 2004 date that Trotter contends is a scrivener's error. Id. at 115, 681 S.E.2d at 39-40.

In response, Trane contends the issue whether the December 31, 2004 reference is a scrivener's error is not preserved as Trotter did not attempt to resolve this question at the Commission or in the circuit court. Trane further argues the Court of Appeals noted the inconsistencies in the dates in its opinion. Trane states Trotter cannot now argue that the inconsistency was merely a scrivener's error, and it "requests that this date, along with the date[s] of January 31, 2005 and February 4, 2005, [the date on the Form 50] remain in the record to be resolved on remand."

Contrary to Trane's assertion, the Court of Appeals did not discuss the discrepancies in the commissioner's order. Trotter did raise the issue in her petition for rehearing to the Court of Appeals, but rehearing was denied. In addition, we find Trotter's request is not barred by principles of error

preservation. Cf. Rule 60(a), SCRCP (stating no explicit time limit for the correction of clerical errors).

Trane acknowledged during oral argument that the commissioner's order also contains a second reference to the December 31, 2004 date in the "Conclusions of Law," wherein she stated Trane's workers' compensation carrier "shall reimburse Mrs. Trotter's private insurance carrier for all causally related medical treatment incurred since the accident date of December 31, 2004." Because all parties concede that Trotter was not working on December 31, 2004 and since linking the date for reimbursing medical expenses to this 2004 date could cause confusion, we grant Trotter's request that this Court correct what are clearly scrivener's errors. We additionally direct the Commission to correct its records to change the December 31, 2004 references to January 31, 2005.

IV. CONCLUSION

We conclude the Court of Appeals erred in finding the Commission abused its discretion in denying Trane's motions for a continuance or to keep the record open for the depositions of Charleston and Dr. James to be taken. Consequently, we reverse the opinion of the Court of Appeals and reinstate the order of the Commission.[6] However, we grant Trotter's request to correct the scrivener's errors regarding the date of Trotter's accident and additionally direct the Commission to correct its records to reflect this change.

REVERSED.

TOAL, C.J., PLEICONES, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

[6] Based on our decision, we need not address Trotter's remaining issue, in which she argued the Court of Appeals erred in vacating the remainder of the circuit court's order and remanding all issues to the Commission.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Clarendon County, South Carolina, through the Clarendon County Assessor, Respondent/Appellant,

v.

TYKAT, Inc., Appellant/Respondent.

Appeal from Richland County
John D. McLeod, Administrative Law Judge

Opinion No. 27025
Heard May 25, 2011 – Filed August 15, 2011

AFFIRMED

Ian S. Ford, of Green Ford & Wallace, of Charleston, and William C. Coffey, Jr., and Ray E. Chandler, of Coffey Chandler Kent & McKenzie, P.A., of Manning, for Appellant/Respondent.

David W. Epperson, of Manning, and Michael E. Kozlarek and Walter H. Cartin, of Parker Poe Adams & Bernstein, LLP, of Columbia, for Respondent/Appellant.

JUSTICE KITTREDGE: This is a consolidated appeal from an ad valorem tax assessment. Tykat, Inc., appeals the Administrative Law Court's decision upholding Clarendon County's tax assessment on real property Tykat leased from the South Carolina Public Service Authority. Tykat contends the leased property was exempt from tax because the South Carolina Public Service Authority is constitutionally exempt from paying taxes and because Tykat's use of the property may be classified as a public purpose. Clarendon County (through its Assessor) cross-appeals the Administrative Law Court's denial of its request for attorneys' fees and costs. We affirm the order of the Administrative Law Court.

I.

The Clarendon County Assessor presented Appellant/Respondent Tykat, Inc., with an ad valorem tax assessment notice covering three estates in real property. Two of the properties were held by Tykat in fee simple, and those properties are not in dispute. The third property was owned in fee simple by the South Carolina Public Service Authority ("Authority") and leased by Tykat for use as a campground. The value of this leasehold interest was included in the tax notice sent to Tykat. The leasehold interest is the subject of this appeal.

Tykat appealed the assessment to the Clarendon County Board of Assessment Appeals ("Board"), and the Board found the leasehold interest was not taxable. Clarendon County petitioned for a contested case hearing before the Administrative Law Court ("ALC"). Tykat moved to dismiss the petition. The parties then filed cross-motions for summary judgment. The ALC granted Clarendon County's motion and denied Tykat's motion, and Tykat now appeals. Because the ALC denied Clarendon County's request for attorneys' fees and costs, the county also appeals.

We consolidated the appeals and granted Clarendon County's motion to certify the matter to this Court pursuant to Rule 204(b), SCACR.

II.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

A. Tykat Appeal

Article X, section 1 of the South Carolina Constitution permits the General Assembly to "provide for the ad valorem taxation by the State or any of its subdivisions of all real and personal property." Article X, section 3 then provides, in relevant part:

> There shall be exempt from ad valorem taxation:
>
> > (a) all property of the State, counties, municipalities, school districts and other political subdivisions, if the property is used exclusively for public purposes;
> >
> > . . . .

The parties do not dispute that the South Carolina Public Service Authority is a tax-exempt political subdivision. Rather, they dispute whether article X, section 3 operates to exempt Tykat—a private, for-profit entity—from ad valorem taxation on property leased from the Authority. As explained by the American Law Reports:

> Where land is leased to another, the original and traditional procedure . . . is to assess the entire value of the land to the owner of the reversion. Such an assessment covers the value of the leasehold, as well as the reversionary interest, the sum of the two being comprised in the value of a complete ownership of the land. But where the owner of the fee is exempt from taxation,

> that method cannot be followed, and the question arises whether the leasehold interest of the tenant may be taxed separately against him.

Maurice T. Brunner, Annotation, Comment note: availability of tax exemption to property held on lease from exempt owner, 54 A.L.R.3d 402 § 15, 513 (1973).

In South Carolina, this question has been answered by section 12-37-950 of the South Carolina Code (2000), which provides:

> When any leasehold estate is conveyed for a definite term **by any grantor whose property is exempt from taxation to a grantee whose property is not exempt**, the leasehold estate shall be valued for property tax purposes as real estate.

(Emphasis added).

Despite the plain language of section 12-37-950, Tykat attempts to extrapolate a rule from our decisions in South Carolina Public Service Authority v. Summers, 282 S.C. 148, 318 S.E.2d 113 (1984), and Charleston County Aviation Authority v. Wasson, 277 S.C. 480, 289 S.E.2d 416 (1982), that would extend the article X, section 3 tax exemption to lessees of property owned by a tax-exempt entity so long as the lessees use the property for a public purpose. We are constrained to reject this approach because the cases relied on by Tykat do not address the tax status of lessees and because the plain language of section 12-37-950 precludes the result Tykat desires.

The precedents relied upon by Tykat address whether a **tax-exempt owner in fee simple** retains its tax exemption when it leases real property to a private entity. These cases make no mention of a tax exemption for a lessee. See Summers, 282 S.C. at 150, 318 S.E.2d at 114 ("The Authority paid the taxes under protest and instituted this action to recover them . . . ."); Taylor v. Davenport, 281 S.C. 497, 316 S.E.2d 389 (1984) (holding, in a dispute between Greenwood County and the counties of Newberry and

Laurens, that property owned by Greenwood County and leased to a private entity was exempt from taxation); Wasson, 277 S.C. at 483, 289 S.E.2d at 418 ("The Authority, excepting to the assessor's determination, sought review . . . ."); cf. Quirk v. Campbell, 302 S.C. 148, 151-53, 394 S.E.2d 320, 322-23 (1990) (holding that, because a property was owned by Richland County and used for a public purpose, a fee in lieu of taxes agreement concerning the property did not violate constitutional provisions requiring uniformity in ad valorem tax rates).

By contrast, section 12-37-950 is directly on point. Section 12-37-950 unambiguously requires that Tykat's leasehold estate "be valued for property tax purposes as real estate," and it makes no mention of an exemption if the leasehold estate is used for a public purpose. Tykat has not argued section 12-37-950 runs afoul of article X, section 3. Accordingly, we are bound by the plain language of the statute. See Wynn ex rel. Wynn v. Doe, 255 S.C. 509, 512, 180 S.E.2d 95, 96 (1971) ("Where the language of [a] statute is plain and unambiguous . . . the court has no right to look for or impose another meaning."). Thus, our holding is limited to Tykat's effort to apply the Summers–Wasson line of cases to lessees of real property where the grantor is exempt from taxation. Applying the plain language of section 12-37-950, we hold that Tykat's leasehold interest was not exempt from ad valorem taxation, regardless of whether Tykat used that interest for a public purpose.[1]

For these reasons, we affirm the order of the ALC as to the issues raised in Tykat's appeal.[2] We turn now to the appeal by the county.

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[1] We note that pending legislation, if adopted, would alter the application of section 12-37-950. Specifically, Senate Bill 844, 119th Gen. Assemb., Reg. Sess. (S.C. 2011), would amend South Carolina Code section 12-37-220 (2000 & Supp. 2010) to provide that, "[n]otwithstanding the provisions of Section 12-37-950, a leasehold interest conveyed by the South Carolina Public Service Authority, regardless of the use made of the leasehold interest," is exempt from ad valorem taxation. This pending legislation does not alter the resolution of Tykat's appeal.

[2] Tykat has argued in the alternative that summary judgment was premature and that additional discovery was needed. However, Tykat filed a cross-motion for summary judgment wherein it asserted there were no genuine issues of material fact in this case. Accordingly, Tykat cannot now be heard to assert that summary judgment was premature. In addition, the ALC did not rule on this issue, and Tykat did not file a Rule 59(e), SCRCP, motion seeking a ruling

B. County Appeal

While the county concedes that Tykat's argument on appeal is not frivolous, it contends Tykat presented additional arguments that were frivolous, and therefore, the ALC erred in failing to award attorneys' fees and costs to the county under the Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 (2005 & Supp. 2010). We disagree. The county focuses on certain of Tykat's arguments below and characterizes them as frivolous. We have reviewed the ALC's denial of an award of attorneys' fees and costs under the Frivolous Civil Proceedings Sanctions Act, and we affirm pursuant to Rule 220(b)(1), SCACR.

III.

We affirm the decision of the ALC. Based on the limited challenge raised by Tykat, its leasehold interest was subject to ad valorem taxation under the plain language of section 12-37-950. Thus, we are bound to apply the statute as written. Our Summers–Wasson line of cases does not alter this result. Further, we affirm the denial of Clarendon County's request for attorneys' fees and costs.

AFFIRMED.

PLEICONES, ACTING CHIEF JUSTICE, BEATTY, HEARN, JJ., and Acting Justice James E. Moore, concur.

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thereon. See Home Medical Systems, Inc. v. S.C. Dep't of Revenue, 382 S.C. 556, 562-63, 677 S.E.2d 582, 585-86 (2009) (finding issue preservation rules and Rule 59, SCRCP, were applicable to proceedings before the ALC); Rule 29(D), SCRALC (permitting a party to "move for reconsideration of a final decision of an administrative law judge . . . to alter or amend the final decision, subject to the grounds for relief set forth in Rule 59, SCRCP").

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Hilton Head Automotive, LLC, Appellant,

v.

South Carolina Department of Transportation, Respondent.

Appeal from Beaufort County
Marvin H. Dukes, III, Special Circuit Court Judge

Opinion No. 27026
Heard April 20, 2011 – Filed August 15, 2011

AFFIRMED

Richard D. Bybee and M. Brent McDonald, of Smith, Bundy, Bybee & Barnett, of Mt. Pleasant, for Appellant.

Marshall H. Waldron, Jr., and Matthew D. Cavender, of Griffith Sadler & Sharp, P.A., of Beaufort, for Respondent.

JUSTICE KITTREDGE: This is an inverse condemnation case. Appellant Hilton Head Automotive, LLC, contends the South Carolina

Department of Transportation's reconfiguration of the median crossovers on U.S. Highway 278, which Appellant's business abuts, was a taking because it deprived Appellant and its customers of the ability to enter or exit the highway by making a left turn. We disagree and affirm the decision of the circuit court granting summary judgment in favor of the Department of Transportation.

The facts of this case are similar to those of the Hardin case as described in Hardin v. South Carolina Department of Transportation, 371 S.C. 598, 641 S.E.2d 437 (2007). As in Hardin, the property owner in this case was deprived of *immediate* left turn access to an abutting highway, but it retained a reasonable means of ingress and egress from that highway. Because Hilton Head Automotive ("HHA") was not deprived of a reasonable means of ingress and egress from Highway 278, it did not suffer a material injury to its easement of access to that highway, and therefore, did not suffer a compensable taking.

I.

In response to population growth and business development along U.S. Highway 278 in Beaufort County, the South Carolina Department of Transportation ("the Department") engaged experts for the purpose of streamlining the flow of traffic on that highway. Relying on the opinions of those experts, the Department determined that it should widen the highway, close two median crossovers, and open a new median crossover at a central location between the two intersections that bound HHA's property: Burnt Church Road and Bluffton Road/Highway 46.

The properties on the north side of Highway 278 agreed among themselves to share the cost of modifying and/or building private roads that would allow left turn access to all of their properties by way of the new median crossover. The properties on the south side of the highway, however, were unable to reach such an agreement. As a result, HHA's property—which is on the south side of the highway—lost its immediate left turn access to and from Highway 278. Nonetheless, HHA retained direct right turn

access to and from the eastbound lanes of Highway 278. Moreover, HHA could be reached from the westbound lanes of Highway 278 by making a U-turn at the new median crossover or at the lighted intersection with Bluffton Road/Highway 46. Correspondingly, a vehicle exiting HHA's property could reach westbound Highway 278 by making a U-turn at Burnt Church Road.[1]

HHA sought monetary and declaratory relief for inverse condemnation, violation of its due process and equal protection rights under the South Carolina Constitution, and civil conspiracy. The Department successfully moved for summary judgment on all causes of action. We certified HHA's appeal pursuant to Rule 204, SCACR.

II.

Summary judgment "shall be rendered . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

A.
Inverse Condemnation

The South Carolina Constitution provides, "[e]xcept as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property." S.C. Const. art. I, § 13(A). In an inverse condemnation action, a private property owner seeks to establish that a government entity has taken his or her property. The governmental conduct at issue generally takes one of two forms: (1) the entity has physically appropriated private property or (2) the entity has imposed restrictions on the use of the property that deprive the owner of the

[1] Bluffton Road is approximately 0.6 miles west of the entrance to HHA's property. Burnt Church Road is a mere 0.3 miles east of the entrance.

property's "economically viable use." See, e.g., Byrd v. City of Hartsville, 365 S.C. 650, 656-58, 620 S.E.2d 76, 79-80 (2005). In this case, HHA has alleged that the Department physically appropriated private property by materially injuring an easement appurtenant thereto.[2]

Following Hardin, a proper analysis of an inverse condemnation claim premised on an alleged physical taking must begin with a determination of the scope of the property rights at issue. 371 S.C. at 605, 609, 641 S.E.2d at 441, 443 (explaining that a court evaluating an inverse condemnation claim premised on a physical taking should "focus . . . on a landowner's actual property interests; that is, his easements"). As an abutting property owner, HHA had "an easement for access" to Highway 278, "regardless of whether [it had] access to and from an additional public road." Id. at 606, 641 S.E.2d at 442. In addition, HHA had "an easement for access to and from the public road system." Id.[3] If governmental action materially injured either of these easements, such that HHA no longer enjoyed the reasonable means of access to which it was entitled, a physical taking has occurred.[4] E.g., S.C. State

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[2] HHA has presented this matter to us solely in the context of a physical taking; we resolve the issue in the manner presented to us.

[3] In City of Rock Hill v. Cothran, this Court also recognized an abutter's right to proceed upon the abutting road to the next intersection. 209 S.C. 357, 369, 40 S.E.2d 239, 244 (1946) ("[T]he right of an abutting landowner to passage at least to the next intersection is a substantial property right . . . ."); see also Powell v. Spartanburg County, 136 S.C. 371, 374-76, 134 S.E. 367, 368 (1926) (holding that, where a portion of a road was formally discontinued and a new road was built to route traffic around the discontinued portion such that the two roads formed a semicircle pattern, property owners abutting on the old road "could not rightfully be deprived of the privilege of still using it to reach the newly located portion [of the road] *in either direction*," and therefore, nonsuit was improper where access to the new road was cut off at the south end of the old road, even though the new road was accessible from the north end of the old road (emphasis added)). While Hardin overruled Cothran in certain respects, it did not expressly overrule the existence of this property right. We take no position regarding the status of this right, as HHA has not lost the ability to proceed upon Highway 278 to the next intersection.

[4] Certain language in Hardin might suggest this "material injury" test is no longer good law. We take this opportunity to clarify. The "material injury" test is firmly rooted in our jurisprudence, and Hardin did not overrule this well-established aspect of our takings analysis. See Hardin, 371 S.C. at 609, 641 S.E.2d at 443 ("We therefore overrule the 'special injury' analysis . . . and specify that our focus in these cases is on how any road re-configuration affects

Highway Dep't v. Allison, 246 S.C. 389, 393, 143 S.E.2d 800, 802 (1965) ("[A]n obstruction that materially injures or deprives the abutting property owner of ingress or egress to and from his property is a 'taking' of the property, for which recovery may be had."); Sease v. City of Spartanburg, 242 S.C. 520, 524-25, 131 S.E.2d 683, 685 (1963) ("The protection of [the South Carolina "takings" clause] extends to all cases in which any of the essential elements of ownership has been destroyed or impaired as the result of the construction or maintenance of a public street."); Brown v. Hendricks, 211 S.C. 395, 403-04, 45 S.E.2d 603, 606-07 (1947) ("The accessibility of one's property may in some instances constitute a great part of its value, and to permit a material impairment of his access would result in the destruction of a great part of the value . . . and his property is therefore as effectually taken as if a physical invasion was made thereon and a physical injury done thereto." (quoting with approval Foster Lumber Co. v. Arkansas Valley & Western Ry. Co., 95 P. 224, 228 (Okla. 1908))).

The gravamen of HHA's claim is that its easements included a right to make an immediate left turn to and from Highway 278, and such right could not be infringed without just compensation. We disagree. As recognized in Hardin, a regulation or traffic control device preventing immediate left turns to or from one's property does not result in a taking, provided it does not otherwise cause a material injury to the abutter's easements of access. 371 S.C. at 607, 641 S.E.2d at 442 ("[A] landowner has no right to access abutting roads in more than one direction." (citing C.C. Marvel, Annotation, Power to restrict or interfere with access of abutter by traffic regulations, 73 A.L.R.2d 689, 691-98 (1960))). The relevant inquiry, then, is whether the abutter has retained a reasonable means of access to and from abutting roads and the public road system. Cf. Roland F. Chase, Annotation, Abutting owner's right to damages for limitation of access caused by conversion of conventional road into limited-access highway, 42 A.L.R.3d 13, § 3, 30 (1972) ("In numerous cases . . . courts have held or recognized that an owner of property abutting on a public street or highway *is* entitled to damages

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a property owner's easements."); id. at 609 n.4, 641 S.E.2d at 443 n.4 ("[N]either landowner . . . has been *deprived* of ingress or egress . . . *nor* have these landowners *been injured* in their ability to enter or exit their property." (emphasis added)).

where such street or highway is converted into a limited-access highway, *if* as a result of such conversion access to and from his property is made *unreasonably* circuitous or difficult." (first and second emphases added)). Historically, courts have rejected the view that a regulation regarding the direction of travel upon a particular road, without more, materially impaired an abutter's easement of access. Marvel, supra, 73 A.L.R.2d at § 3, 692 ("Regulations and regulatory devices, applicable to all traffic, such as . . . prohibitions against certain turns, etc., which merely impose some circuity of route upon the abutter, have been universally upheld against contentions that access was impaired."); see also S.C. State Highway Dep't v. Carodale Assocs., 268 S.C. 556, 561, 235 S.E.2d 127, 129 (1977) ("[A] landowner has no property right in the continuation or maintenance of the flow of traffic past its property. Traffic on the highway . . . is subject to the same police power regulations as every other member of the traveling public. Re-routing and diversion of traffic are police power regulations."); S.C. State Highway Dep't v. Wilson, 254 S.C. 360, 365-66, 175 S.E.2d 391, 394 (1970) (recognizing that the "clear weight of authority from other jurisdictions is to the effect that the construction of a median, or other traffic control device[], is an exercise of the police power"). HHA has not presented any evidence that would justify a departure from this well-established rule. Rather, the undisputed facts reveal that HHA could access the westbound lanes of Highway 278 with only minor inconvenience. As a matter of law, HHA's abutter's access to Highway 278 has not been materially impaired. Therefore, the circuit court properly granted summary judgment in favor of the Department.

At oral argument, HHA relied heavily on our decision in South Carolina State Highway Department v. Wilson. Wilson concerned whether, in the context of a clear exercise of the power of eminent domain, a median closure could form a compensable element of the damages.[5] In this case, we

[5] 254 S.C. at 368-69, 175 S.E.2d at 396 ("[I]n the instant case the proposed median is only an incidental part of the overall Department plans . . . . It logically follows, we think[,] that any damage attributable to the planned median is an incidental result of the exercise of the power of eminent domain, and under these circumstances we know of no sound reason for departing from the established rule in this State . . . [that] '[t]he entire parcel is considered as a whole, and the inquiry is, how much has the particular public improvement decreased the fair market value of the property . . . .'" (quoting S.C. State Highway Dep't v. Bolt, 242 S.C. 411, 417, 131 S.E.2d

find no taking has occurred, and therefore, we do not reach the issue of damages. Wilson does not apply.

For these reasons, we uphold the circuit court's decision granting summary judgment in favor of the Department on HHA's inverse condemnation claim.

B.
Collateral Claims

As part of the same project to streamline traffic on Highway 278, the Department initially planned to condemn a portion of HHA's property and construct a deceleration lane serving vehicles turning right onto that property. However, the Department later changed its plans to avoid the need to acquire property from HHA. HHA alleged the Department's decision in this regard amounted to a civil conspiracy orchestrated to put HHA at a strategic disadvantage by forcing it to bring an inverse condemnation claim, in violation of HHA's right to due process of law. In addition, because the Department compensated certain other property owners for damages caused by the project and included some owners in discussions regarding the placement of the new median crossover, HHA claimed the Department violated HHA's right to equal protection. Having carefully reviewed the record, we find HHA has failed to create a genuine issue of material fact as to these collateral claims.

III.

The median closure in this case did not work a material injury to HHA's easements of access to Highway 278, and therefore, did not amount to a physical taking of HHA's property. Further, HHA has failed to create a genuine issue of fact as to its collateral claims. Accordingly, the order of the circuit court granting summary judgment in favor of the Department is

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264, 267 (1963))).

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Roy Otis Tennant, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Abbeville County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 27027
Heard June 8, 2011 – Filed August 15, 2011

AFFIRMED AS MODIFIED

Chief Appellate Defender Robert M. Dudek, South Carolina Commission on Indigent Defense, of Columbia, Ernest Charles Grose, Jr., of Greenwood, and Tara Marie Schultz, of Laurens, for Petitioner.

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

Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia, and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

JUSTICE KITTREDGE: In this appeal from convictions for criminal sexual conduct in the first degree, kidnapping, and assault and battery of a high and aggravated nature, Petitioner Roy Otis Tennant challenges the trial court's rulings on several evidentiary issues. In particular, Tennant argues the trial court erred in excluding the testimony of a forensic psychologist, erred in excluding a note written by Tennant and addressed to the victim, and erred in excluding proffered statements regarding the sexual history between the victim and the defendant. We affirm the court of appeals' opinion as modified.

I.

The allegations against Tennant, according to the victim's testimony, were as follows. The victim was married to Tennant for approximately nine or ten years prior to the incident in question, which occurred on November 26, 2001. However, the victim had lived separately from Tennant since February 2001 and had obtained an order of protection against him. On November 26, 2001, Tennant and the victim attended a hearing regarding their pending divorce. Following the hearing, the victim took some clothes to a laundromat and then went to work. Tennant called the victim several times during her shift, saying that he did not want to divorce her and that he had "something" for her.

After work, the victim proceeded to the home of Tennant's grandmother, who watched the victim's children while the victim worked. Tennant lived at his grandmother's home. Upon the victim's arrival, Tennant approached her car and began accusing her of seeing another man. Tennant entered the vehicle and sat on the passenger side. Suddenly, Tennant placed a rope or cord around the victim's neck and began to strangle her. Tennant then pulled the victim from her car, dragging her on the ground, and placed

her in the trunk of her own vehicle. At some point during this attack, the victim passed out.

The victim awoke in the trunk of a car. From the trunk, she managed to push the car's speakers up and out of their proper place, onto the ledge behind the back seat. The car stopped, and Tennant opened the trunk. The victim found that Tennant had taken her to a dark, wooded area. At some point, Tennant duct taped the victim's arms together, but the victim later persuaded him to remove the tape. Tennant showed the victim a knife and threatened to stab her if she attempted to flee.

Tennant apologized for his actions and explained that he did not want a divorce. Tennant then asked the victim to have sex with him. Under the circumstances, the victim relented. She testified that she did so out of fear for her life. Tennant removed the victim's clothing, spread the clothing from the laundromat on the ground, and had sex with the victim. Tennant then helped the victim get dressed, and he asked her whether she was going to tell the police what had occurred. Tennant told the victim that he would run if the victim reported his actions.

Tennant drove the victim back to his grandmother's house. Upon their arrival at the house, Tennant instructed the victim to go to a bedroom and remain there until she took the children to school the next morning. During the night, Tennant again had sex with the victim. While taking the children to school, the victim flagged down a police officer and reported the incident. According to the victim, Tennant's grandmother's car passed in front of the police station "once or a few times" while the victim's car was parked at the station. Tennant was arrested later that day. According to evidence proffered by Tennant, at the time of his arrest, Tennant had overdosed on prescription medication.

At trial, the State introduced testimony from several witnesses corroborating aspects of the victim's story. For example, the officer to whom the victim first reported the incident confirmed the victim had "marks around her neck." In addition, the nurse who collected evidence from the victim

using a sexual assault kit testified that, during the examination, she noticed abrasions on the victim's lower back, breast, shin, knee, and knuckles. She also noticed leaves in the victim's hair and on the victim's body.[1] Moreover, the State introduced several articles of clothing with dirt and grass stains on them, along with a videotape showing the victim's car with the speakers displaced onto the ledge behind the back seat.

The State also introduced—without objection—a letter written by Tennant to the victim approximately eight to nine months following the attack. In this letter, Tennant apologized for "everything that happened back in November." Pursuant to Rule 106, SCRE, Tennant then sought to introduce a note found by law enforcement when Tennant was served with the arrest warrant on the day following the attack. Tennant has consistently referred to this note as a "suicide note" because he had overdosed on prescription medication around the time it was written. The note makes no mention of suicide, however. Rather, it simply recounts Tennant's view that his sexual encounter with the victim was consensual. The trial court denied Tennant's request to introduce the note.

On cross-examination, Tennant questioned the victim about whether she had visited Tennant in jail after she obtained the order of protection against him. He also questioned her about whether she had Thanksgiving dinner at Tennant's grandmother's house prior to the incident. The victim testified she did not remember either visit. She did admit, however, that she was wearing Tennant's shirt when the attack occurred and that she had retained "three or four" other shirts belonging to Tennant because she "wanted to keep" them.

Once the State rested, Tennant proffered testimony by Dr. Donna Marie Schwartz-Watts, an expert in forensic psychology, regarding Tennant's mental condition and his perception that his relationship with the victim was ongoing. This testimony included references to the purported suicide note. Tennant also proffered evidence regarding the victim's sexual history. The

[1] It is undisputed that Tennant's DNA matched the semen recovered during this examination.

trial court excluded the proffered evidence. Ultimately, Tennant did not testify in his own defense or call any other witnesses. In closing, Tennant argued his relationship with the victim was ongoing and the sexual encounter was consensual.

Tennant was convicted of criminal sexual conduct in the first degree, kidnapping, and assault and battery of a high and aggravated nature. The court of appeals affirmed. State v. Tennant, 383 S.C. 245, 678 S.E.2d 812 (Ct. App. 2009). We granted Tennant's petition for a writ of certiorari.

II.

In this appeal, Tennant argues the trial court erred in excluding Dr. Schwartz-Watts' testimony. Tennant further argues the trial court erred in excluding the purported suicide note. Finally, Tennant argues proffered information regarding the sexual history between the victim and the defendant was not barred by South Carolina's "rape shield" statute—S.C. Code Ann. § 16-3-659.1 (2003)—and therefore, the trial court erred in excluding it. We consider each issue in turn.

A.
Testimony of Dr. Schwartz-Watts

Tennant contends that Dr. Schwartz-Watts' testimony was admissible to show Tennant's "state of mind at the time of the alleged crime." In addition, he contends Dr. Schwartz-Watts' testimony should have been admitted for the purpose of impeaching the victim's credibility with regard to whether the victim visited Tennant while he was in jail. We disagree.

In general, a witness may not testify as to matters about which she has no personal knowledge. An exception to this rule permits testimony by an expert witness. Rule 602, SCRE. An expert may testify "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" and the witness is duly qualified. Rule 702, SCRE.

In this case, the only states of mind relevant to Tennant's guilt were (a) Tennant's capacity to tell right from wrong; (b) Tennant's ability to conform his actions to the requirements of law; and (c) the issue of consent.[2] Dr. Schwartz-Watts opined that "although [Tennant] was suffering from Schizoaffective Disorder and cocaine dependence at the time of the offense, these illnesses did not prevent him from knowing legal and moral right from wrong, nor did they prevent him from recognizing the wrongfulness of his actions." In addition, she opined that Tennant "did have the capacity to conform his conduct to the requirements of the law." Thus, the only state of mind left in contention was the matter of consent.

As Dr. Schwartz-Watts recognized, the issue of consent was a matter "outside the realm of [her] expertise." Nonetheless, Tennant attempted to use the doctor as a conduit for the introduction of his own statements regarding his belief that the victim consented to their encounter. For example, Dr. Schwartz-Watts testified Tennant reported to her that he believed the sex was consensual. These statements were inadmissible hearsay. See Rule 803(3), SCRE.

Tennant also sought to use Dr. Schwartz-Watts to introduce his out-of-court assertions that the victim had visited him in jail after having obtained an order of protection against him. These assertions were made to another doctor and recorded in that doctor's notes. Dr. Schwartz-Watts had no personal knowledge of the victim's alleged visits with Tennant, and this factual issue required no special expertise. Thus, the testimony was properly excluded. Rule 602, SCRE (requiring a witness other than an expert to have personal knowledge of the matters testified to); cf. State v. Douglas, 380 S.C. 499, 501-03 & n.2, 671 S.E.2d 606, 608-09 & n.2 (2009) (holding a forensic interviewer's personal observations of alleged victims did not require

[2] As explained in Gill v. State, the defense of "diminished capacity" is not recognized in this State. 346 S.C. 209, 220, 552 S.E.2d 26, 32 (2001). Even if diminished capacity could have been a defense, Tennant repeatedly disclaimed any desire to set forth a diminished capacity defense, and Dr. Schwartz-Watts offered no evidence that would support a diminished capacity theory in this case. Specifically, she testified there was "no evidence that *because of a psychiatric disorder* . . . [Tennant] could have perceived it to be consent." (Emphasis added).

specialized knowledge, and therefore, qualification as an expert was unnecessary).

In sum, because Dr. Schwartz-Watts could offer no "scientific, technical, or other specialized knowledge" that would assist the jury in deciding the issue of consent, and because she had no personal knowledge regarding the factual issues raised by Tennant, the trial court did not abuse its discretion in excluding Dr. Schwartz-Watts' testimony. See State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.").

B.
The Purported Suicide Note

Tennant's second and third issues on appeal address the admissibility of the purported suicide note. As with any issue regarding the admissibility of evidence, we review the trial court's ruling for abuse of discretion. Id.

The purported suicide note read as follows:

> [Victim]
>
> You told the police that I raped you and you know I did not you told me that you wanted to make love to me from the first day I got out of jail and you hadn't [al]ready because you said I may try and use it against you in our divorce I asked you did you want to make love to me and you said yes and started kissing me[.]

1. Rule 106, SCRE

Tennant argues the trial court erred in excluding the purported suicide note because, pursuant to Rule 106, SCRE, it should have been admitted as a matter of "fairness" once the State introduced a letter in which Tennant

apologized to the victim. We disagree. However, because the court of appeals' opinion suggests an improper standard for the application of Rule 106, we affirm the court of appeals' opinion as modified.

The apologetic letter introduced by the State read in relevant part as follows:

> [Victim]
>
> Hey you just can't imagine how happy I was to get your letter. I understand exactly what you [meant] and in response to your letter, I want you to know that I am very deeply sorry for everything that happened back in November and I pray desperately each night that the Lord will help you forgive me and put this behind us an[d] ease your pain. All I can do right now is pray. And its [sic] very important to me that you accept my apology. . . . [Y]ou will find that the spirit of the Lord will convict you to forgive me for what happened. There are a lot of things that I want to openly express my fe[e]lings about you and the heart of all of this confu[sion]. But to write you a letter explaining fe[e]lings and emotions would may well do more harm than good. Thats [sic] why I haven't done it [al]ready. . . . [Victim] I need you to forgive me for more than one reason but two. One is because I am real[l]y and tru[ly] sorry for what happened and unless I fe[e]l that you have forgiven me it will be hard for me to be at peace with myself. And the second reason is because I want to do what God expects me to do. . . .
>
> . . . .
>
> You ask me how can I talk about the Gospel of Jesus Christ after doing such a horrible thing.
>
> Ask someone that [sic] knows the word of God . . . .

> Saul once killed Christians . . . yet God found favor with Saul . . . .

According to the victim, this letter was one of a series of three letters. The first letter was written by Tennant to the victim; in that letter, Tennant discussed his belief in God and his desire to be the victim's friend. The victim responded with a letter expressing that she "couldn't understand how he could bring God out of his mouth after he did what he did, [and] wouldn't even tell [her] . . . that he was sorry for doing what he done." The apologetic letter quoted above was Tennant's response to the victim. The purported suicide note, on the other hand, was written at least eight months prior to this three-letter exchange. Moreover, the "suicide note" was a unilateral statement by Tennant; it was not part of an ongoing conversation between Tennant and the victim.

Rule 106 provides:

> When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

The court of appeals found "[t]he trial court did not err by rejecting [Tennant's Rule 106 argument] because the contents of the suicide note and the response letter are starkly different, and the writings were not contemporaneous or responsive to one another."

Rule 106 does not require that the writings at issue be written contemporaneously. Rather, the temporal element of Rule 106 concerns the order of proof. State v. Taylor, 333 S.C. 159, 170-71, 508 S.E.2d 870, 876 (1998) ("Rule 106 . . . is a procedural device governing the *timing* of completion evidence; the Rule is 'primarily designed to affect the order of proof.'" (emphasis added) (quoting U.S. v. Walker, 652 F.2d 708, 713 (7th Cir. 1981))). Moreover, Rule 106 does not require that the writings at issue

be "responsive to one another." The plain language of the rule permits introduction of "any other part **or any other writing** . . . which ought in fairness to be considered contemporaneously." (Emphasis added). The standard here is "fairness," not responsiveness. See generally Fed. R. Evid. 106 advisory committee's note (1972 proposed rules) ("The [corresponding federal] rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial."). In sum, the court of appeals erred to the extent it upheld the trial court's exclusion of the purported suicide note on the ground that the note was not written contemporaneously with, or in response to, the apologetic letter introduced by the State.

Nevertheless, the trial court did not abuse its discretion in denying Tennant's request to admit the purported suicide note pursuant to Rule 106. Tennant's note disclaiming responsibility for the alleged crime, while relevant, was not so inextricably connected to the letter introduced by the State that its omission was patently unfair. Thus, we defer to the trial court's exercise of discretion.

We turn now to the question of whether the purported suicide note was admissible via an exception to the hearsay rule.

2. Hearsay

Tennant further argues the purported suicide note was admissible because it was probative of his state of mind and of the issue of consent. We disagree.

The "state of mind" exception to the hearsay rule is set forth in Rule 803(3), SCRE:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

> (3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), **but not including a statement of memory or belief to prove the fact remembered or believed** unless it relates to the execution, revocation, identification, or terms of declarant's will.

(Emphasis added).

In the purported suicide note, Tennant recounted that the victim consented to their sexual encounter. This statement of Tennant's memory regarding his sexual encounter with the victim was offered to prove the truth of the matter asserted—that his memory was correct. Therefore, the note was hearsay. The note was properly excluded according to the plain language of Rule 803(3) because it was "a statement of memory or belief [offered] to prove the fact remembered or believed." As we explained in State v. Garcia:

> The purpose of th[e] exclusion [in Rule 803(3)] is "to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as a basis for an inference of the happening of the event which produced the state of mind." Advisory Committee Note to Rule 803(3), FRE. Consequently, while the present state of the declarant's mind is admissible as an exception to hearsay, **the reason for the declarant's state of mind is not.** United States v. Cohen, 631 F.2d 1223, 1225 (5th Cir. 1980) ("But the state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind. **If the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of**

condition-'I'm scared'-and not belief-'I'm scared because [someone] threatened me'.").

334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999) (emphasis added). Accordingly, Tennant could not introduce the note for the purpose of showing that the victim wanted to make love to him.[3]

For these reasons, we hold the trial court did not abuse its discretion in excluding the purported suicide note. We affirm the court of appeals' decision as modified in order to clarify the proper analysis of Rule 106, SCRE.

C.
Rape Shield

Last, Tennant argues the court of appeals erred in upholding the trial court's determination that South Carolina Code section 16-3-659.1 barred any evidence regarding the sexual history between the victim and Tennant. We agree. Nevertheless, because the proffered testimony was not relevant, we affirm as modified.

Statutory interpretation is a question of law. See Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) (citing Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007)). "We are free to decide a question of law with no particular deference to the circuit court." Catawba Indian Tribe, 372 S.C. at 524, 642 S.E.2d at 753. "A statute's language must be construed in light of the intended purpose of the statute.

[3] To the extent Tennant contends the note was not hearsay because it was offered for the purpose of showing his state of mind (rather than for the truth of the matters asserted), we note that Tennant's state of mind at or near the time of his arrest was not at issue. This self-serving declaration of innocence, made after the crime was complete and after Tennant became aware that the victim had reported his actions to the police, was not probative of Tennant's state of mind at the time of the sexual encounter. Thus, if the note was not hearsay, it also was not relevant.

Whenever possible, legislative intent should be found in the plain language of the statute itself." State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008).

South Carolina Code section 16-3-659.1(1) provides:

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656; however, evidence of the victim's sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant introduced to show source or origin of semen, pregnancy, or disease about which evidence has been introduced previously at trial is admissible if the judge finds that such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. Evidence of specific instances of sexual activity which would constitute adultery and would be admissible under rules of evidence to impeach the credibility of the witness may not be excluded.

This is commonly known as the "rape shield" statute.

The court of appeals held the phrase "introduced to show source or origin of semen, pregnancy, or disease" operated to preclude evidence of the victim's sexual conduct *with the defendant* unless introduced to show the source or origin of semen, pregnancy, or disease. Tennant argues—and we agree—that this construction was improper.

By our reading, the word "or" separating evidence of the victim's conduct with the defendant from evidence of the victim's conduct with other persons has the effect of creating two distinct forms of permissible evidence: (1) evidence of the victim's conduct with the defendant; and (2) evidence of specific instances of the victim's conduct with a third party introduced for the

purpose of showing the source or origin of semen, pregnancy, or disease. Thus, the requirement of an evidentiary nexus to "source or origin of semen, pregnancy, or disease" applies only to evidence of the victim's sexual conduct with persons other than the defendant. The rape shield statute imposes no such limitation concerning a victim's sexual conduct with a defendant.

Many jurisdictions separate these two forms of permissible evidence in their rape shield statutes. See, e.g., Fed. R. Evid. 412(b) ("In a criminal case, the following evidence is admissible, if otherwise admissible under these rules: (A) evidence of specific instances of sexual behavior . . . offered to prove that a person other than the accused was the source of semen, injury or other physical evidence; (B) evidence of specific instances of sexual behavior . . . with respect to the person accused . . . offered by the accused to prove consent or by the prosecution . . . ."); Colo. Rev. Stat. § 18-3-407(1) (2010) (creating a presumption that evidence of a victim's sexual conduct is "irrelevant" except "(a) Evidence of the victim's . . . sexual conduct with the actor; (b) Evidence of specific instances of sexual activity showing the source or origin of semen . . . or any similar evidence of sexual intercourse offered for the purpose of showing that the act or acts charged were or were not committed by the defendant."); N.J. Stat. Ann. § 2C:14-7 (West 2005);[4] Va. Code Ann. § 18.2-67.7(A) (2009) (amended 2011) (listing as permissible: "1. Evidence offered to provide an alternative explanation for physical evidence of the offense charged . . . limited to evidence designed to explain the presence of semen, pregnancy, disease, or physical injury . . .; or 2. Evidence of sexual conduct between the complaining witness and the accused offered to support a contention that the alleged offense was not accomplished by force, threat or intimidation . . . .").

Montana's rape shield statute is particularly similar to our own. The Montana Code provides:

> Evidence concerning the sexual conduct of the victim is inadmissible in prosecutions under this part except evidence of the victim's past sexual conduct with the offender or evidence of

[4] See infra n.5.

> specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease that is at issue in the prosecution.

Mont. Code Ann. § 45-5-511(2) (2009). The Montana Supreme Court interpreted this statute to permit two distinct types of evidence: (a) evidence of "conduct involv[ing] the defendant as a participant" and (b) "where an issue exists as to the origin of semen, pregnancy or disease . . . conduct [that] is probative on that issue." State ex rel. Mazurek v. District Court, 922 P.2d 474, 477 (Mont. 1996). We find these authorities persuasive.

For these reasons, we find that section 16-3-659.1 does not bar evidence of a victim's sexual conduct with a defendant, provided that such evidence is otherwise admissible. The trial court and court of appeals erred in limiting evidence of this kind to circumstances in which it is introduced to show the source or origin of semen, pregnancy, or disease. Nonetheless, Tennant was not prejudiced the error.

Tennant's proffered evidence included a wide range of allegations regarding the victim's sexual behavior and her relationship with Tennant. However, the only allegations at issue in this appeal are those concerning sexual conduct between Tennant and the victim. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). Specifically, Tennant argues the jury was deprived of evidence that the victim wanted Tennant "to hurt her" in order to achieve sexual satisfaction and that Tennant refused to do so. Tennant contends this evidence was relevant to his defense of consent.

There is nothing in the record to suggest that the sexual conduct that formed the basis of the crimes charged involved "rough sex" or an attempt to sexually satisfy the victim through the infliction of pain. The physical examination of the victim on the day following the attack did not reveal any signs of vaginal trauma. The victim testified to violence while Tennant choked her and placed her in the trunk of her vehicle, but there is no evidence that Tennant engaged in violence during the sexual activities that followed.

Rather, the victim testified she peacefully submitted to Tennant's request for sex out of fear for her life. In short, evidence that the victim might have enjoyed "rough sex" with Tennant during their marriage did not tend to show that the victim consented to the sexual encounter on the night in question.[5]

Because we find the proffered evidence regarding sexual conduct between Tennant and the victim was irrelevant, we find Tennant was not prejudiced by the trial court's error in interpreting section 16-3-659.1. See Taylor, 333 S.C. at 172, 508 S.E.2d at 876 ("[I]n order for this Court to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown."); Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

III.

In sum, we agree that the court of appeals' opinion requires clarification in two respects: (1) Rule 106, SCRE, does not require that the writings at issue be created contemporaneously or in response to one another; and (2) South Carolina Code section 16-3-659.1 (the rape shield statute) does not bar evidence of sexual conduct between the victim of a sexual crime and the

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[5] The potential relevance of evidence regarding a victim's sexual conduct with a defendant is aptly explained in New Jersey's rape shield statute, which provides in relevant part:

> c. Evidence of previous sexual conduct with persons other than the defendant . . . shall not be considered relevant unless it is material to proving the source of semen, pregnancy or disease.
>
> d. Evidence of the victim's previous sexual conduct with the defendant shall be considered relevant if it is probative of whether a reasonable person, knowing what the defendant knew at the time of the alleged offense, *would have believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of.*

N.J. Stat. Ann. § 2C:14-7 (emphasis added).

accused, so long as that evidence is otherwise admissible. We find no prejudice from these errors, and therefore, we uphold Tennant's convictions and sentence.

AFFIRMED AS MODIFIED.

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

The Supreme Court of South Carolina

In the Matter of John Barry Kern, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(c), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

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

trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that J. Rutledge Young, III, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Young's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

s/ Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina

August 8, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Rita G. Bixby, Appellant.

Appeal From Abbeville County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 4768
Heard December 17, 2010 – Refiled August 10, 2011

AFFIRMED

Appellate Defender Elizabeth A. Franklin-Best, of Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

THOMAS, J.: Rita G. Bixby appeals her convictions of two counts of accessory before the fact and two counts of criminal conspiracy in connection with the murders of Abbeville County Sheriff's Deputy Danny Wilson and South Carolina Magistrate's Constable Donnie Ouzts. She argues the trial court erroneously admitted certain evidence. We affirm.

FACTS

Rita Bixby and her husband, Arthur Bixby, owned property and a home adjacent to South Carolina Highway 72 in Abbeville County, where the South Carolina Department of Transportation (DOT) had begun work on a project to widen the roadway. On December 4, 2003, DOT Superintendent Glen McCaffrey and two other DOT employees encountered Rita, Arthur, and their son, Steven Bixby. During the encounter, Rita and the other Bixbys threatened that they would shoot anyone entering their property in the future to work on the project, including employees of the Sheriff's Department. Superintendent McCaffrey and DOT Inspector Dale Williams subsequently reported the situation to the Sheriff's Department.

The next day, December 5th, Superintendent McCaffrey phoned the Bixbys at their home to explain that the State owned a legal right of way over the property. Rita answered the telephone and refused to let Superintendent McCaffrey talk with Arthur, demanding Superintendent McCaffrey show her the information in person. Consequently, Superintendent McCaffrey and two other DOT employees went to the Bixby property, and when they arrived, they and the Bixbys engaged in a heated discussion for approximately thirty minutes. Rita maintained the State lied about the right of way and the Sheriff's Department had "no authority" over the family. She further exclaimed the Bixbys had been "waiting for this moment for a long time."

On December 7th, Steven attended a social gathering at the home of Alane Taylor. During separate conversations with Taylor and her daughter, Dana Newton, Steven made numerous statements related to his family's

property dispute with the DOT. Specifically, he said he was angry and would shoot law enforcement. He averred the Bixbys had scheduled a meeting with the DOT and the Sheriff's Department at the Bixby residence. He also stated that "tomorrow is the day," "we have the guns loaded," and "when the shooting starts I will come out alive." Both Newton and Taylor called law enforcement that night after their conversations with Steven. Newton personally called her cousin, a sheriff's deputy, whom she told to contact Taylor. Taylor personally called the home of the chief deputy and left a message with the chief deputy's family. Taylor subsequently received a phone call from the sheriff's deputy whom Newton contacted.

The following day, Deputy Wilson drove to the Bixbys' home after meeting with Superintendent McCaffrey, Inspector Williams, and others from the DOT. He parked in the front yard, and as he approached the house, Steven shot him through the glass panes of the front door. Steven dragged Deputy Wilson into the house, read him Miranda[1] rights, and shackled him with his own handcuffs. Steven then called Rita, who was waiting at Steven's apartment, to tell her the shooting had begun. Rita called the offices of the Governor and the Attorney General to let them know "the trouble had started," and shortly thereafter, Constable Ouzts arrived at the Bixby house, where Steven shot him while he was in the front yard. Responding officers were able to remove Constable Ouzts from the property, but he died of his injuries before he reached the hospital. Deputy Wilson died from blood loss while handcuffed and laying face down in the Bixby house during the shootout.

For the following twelve hours, Steven and Arthur barricaded themselves in their home, exchanging gunfire with police officers. Meanwhile, sheriff's deputies arrested Rita, who refused to help diffuse the situation.

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

Steven eventually surrendered and was arrested, charged with murder, convicted, and sentenced to death.[2] While in prison, he wrote thousands of pages of letters to Taylor. The four letters relevant to this appeal detailed the shootout, admitting Steven handcuffed and Mirandized Deputy Wilson, explaining Steven's alleged reasons for shooting Deputy Wilson and Constable Ouzts, and referencing contemporaneous statements between Steven and Arthur. The letters also alluded to previous conversations between Steven and Taylor.

At Rita's trial, the State offered Steven's letters and his December 7th conversations with Newton and Taylor as statements by a coconspirator. Over Rita's objection, the trial court permitted testimony about both conversations, and Taylor read the letters into evidence. The trial court also contemporaneously instructed the jury that the letters could only be considered as evidence of Steven's guilt as a principal in the murders of Deputy Wilson and Constable Ouzts. Rita was subsequently convicted and sentenced to life without parole. This appeal followed.

ISSUES ON APPEAL

I. Did the trial court err in admitting Steven's December 7th conversations as statements by a coconspirator pursuant to Rule 801(d)(2)(E), SCRE, or holding the admission of such evidence did not violate Rita's Sixth Amendment Right to Confrontation?

II. Did the trial court err in holding the admission of the letters did not violate Rita's Sixth Amendment Right to Confrontation or admitting the jailhouse letters pursuant to Rule 403, SCRE?

III. Did the trial court fail to give adequate limiting instructions about how the jury could consider the conversations and the letters?

[2] For the result of Steven's appeal to our supreme court, see State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010), cert. denied, Bixby v. South Carolina, 131 S.Ct. 2154 (2011).

STANDARD OF REVIEW

"In criminal cases, an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission of evidence is within the discretion of the [trial] court and will not be reversed absent an abuse of discretion." State v. Latimore, 390 S.C. 88, 98-99, 700 S.E.2d 456, 462 (Ct. App. 2010).

LAW/ANALYSIS

I. The December 7th Conversations with Newton and Taylor

a. Statements by a Coconspirator

On appeal, Rita argues Steven's conversations with Taylor and Newton were inadmissible hearsay because they were not made in furtherance of the conspiracy to attack officials who entered the Bixby property. Rita maintains those conversations merely "spilled the beans." We disagree.

At trial, Rita argued Newton's and Taylor's testimony regarding their conversations with Steven were inadmissible because those conversations were not statements of a coconspirator. Generally, "[a] party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." State v. Geer, 391 S.C. 179, 191, 705 S.E.2d 441, 448 (Ct. App. 2010) (citation and internal quotation marks omitted). Although Rita never explicitly claimed the conversations were "hearsay" when making her argument, her argument was sufficiently specific to raise a hearsay objection. The trial court ruled on that objection, and accordingly, the issue is preserved for our review.

Generally, the South Carolina Rules of Evidence prohibit the admission of hearsay, except in specified circumstances. See Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules . . . .").

Hearsay is defined as "a statement, other than one made by the declarant while testifying . . . [,] offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Coconspirator statements, however, are admissible because they are explicitly defined as "not hearsay." See Rule 801(d)(2)(E), SCRE ("A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."); see also State v. Sims, 387 S.C. 557, 564, 694 S.E.2d 9, 13 (2010) ("While hearsay testimony generally is not admissible, an exception is allowed when a statement is offered against a party and is 'a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.'" (quoting Rule 801(d)(2)(E), SCRE)).

For a coconspirator's statement to be defined as "not hearsay," the statement must be made during the conspiracy and operate to further the conspiracy. Rule 801(d)(2)(E), SCRE. Casual statements of culpability or "spilling the beans" do not further a conspiracy's purpose. State v. Anders, 331 S.C. 474, 477, 503 S.E.2d 443, 444 (1998).

The trial court ruled within its discretion that Steven Bixby's conversations with Taylor and Newton were made during and in furtherance of the conspiracy. The Bixbys conspired to lay in wait to ambush unsuspecting officials, and considering the familiar relationships between Bixby, Newton, Taylor, and the law enforcement officers notified of the conversations, the conversations could be used to lure the police or other authorities to the Bixbys' trap. Accordingly, the trial court did not abuse its discretion in holding the conversations were admissible as not hearsay.

b. Confrontation Clause

Next, Rita alleges the admission of the conversations violates the Confrontation Clause. However, this argument is not preserved for review. When the trial court asked Rita to clarify her basis for the objection, she simply said the statements "were not in furtherance of the conspiracy." Although Rita mentioned State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006),

which admittedly discusses the Confrontation Clause, her arguments regarding the admissibility of the conversations addressed the coconspirator objection.

Even if the issue was preserved and the conversations constituted hearsay, Steven's conversations with Taylor and Newton were nontestimonial. See Davis, 371 S.C. at 178, 638 S.E.2d at 61 (finding statements made outside the "investigatory or judicial context" to be nontestimonial). Accordingly, admission of those conversations could not violate the Confrontation Clause. See State v. Ladner, 373 S.C. 103, 115, 644 S.E.2d 684, 690 (2007) ("In sum, the victim's hearsay statement in the instant case was not admitted in violation of [the Confrontation Clause] because it is a nontestimonial statement."); see also Crawford v. Washington, 541 U.S. 36, 68 (2004) ("Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

II. The Jailhouse Letters

a. Confrontation Clause

On appeal, Rita argues the admission of the four jailhouse letters relevant to this appeal violated her Sixth Amendment Right to Confrontation. We disagree. The letters are clearly nontestimonial, and the admission of nontestimonial hearsay does not violate the Confrontation Clause. See Ladner, 373 S.C. at 115, 644 S.E.2d at 690 ("In sum, the victim's hearsay statement in the instant case was not admitted in violation of [the Confrontation Clause] because it is a nontestimonial statement."); see also Davis, 371 S.C. at 178, 638 S.E.2d at 61 (finding statements made outside the "investigatory or judicial context" to be nontestimonial).

b. Rule 403

Rita also claims the trial court erred in admitting the entirety of the four letters relevant to this appeal because they were unduly prejudicial to her and

confusing of the issues to the jury under Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues . . . ."). At trial, Rita moved in limine on Rule 403 grounds to suppress these letters in their entirety. However, the trial court did not grant a preliminary ruling on the motion,[3] and Rita did not subsequently seek a ruling on the motion during the in limine hearing. Moreover, although Rita raised a corresponding objection when the letters were introduced at trial, the trial court again failed to make a Rule 403 ruling as to the entirety of the letters. Therefore, the issue is not preserved. See Geer, 391 S.C. at 191, 705 S.E.2d at 448-49 ("[A]n 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." (citation and internal quotation marks omitted)).

Although Rita failed to preserve a Rule 403 issue as to the four letters' entirety, Rita did raise and receive a ruling on a Rule 403 issue regarding specific portions of these letters that state Steven handcuffed and Mirandized Deputy Wilson. Therefore, we address this issue in turn. See id. (stating an issue is preserved if it was raised to and ruled upon by the trial court).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues . . . ." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest decision on an improper basis. . . . [T]he determination

[3] Rita also objected to the introduction of these letters on hearsay and Confrontation Clause grounds, and the trial court's ruling as to the letters addressed only these two objections. We address the Confrontation Clause issue supra, but our preservation rules preclude us from addressing the hearsay argument. Rita's appellate brief fails to raise this point in its issues on appeal, and the argument section does not cite any authority to support a hearsay argument. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("No point will be considered which is not set forth in the statement of issues on appeal."); State v. King, 349 S.C. 142, 157, 561 S.E.2d 640, 648 (Ct. App. 2002) (providing that an argument is abandoned on appeal when conclusory and without supporting authority).

of prejudice must be based on the entire record, and the result will generally turn on the facts of each case." State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009) (citation and quotation marks omitted). "A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." State v. Caldwell, 378 S.C. 268, 287, 662 S.E.2d 474, 484 (Ct. App. 2008).

Rita argues the portions of the letters stating Steven handcuffed and Mirandized Deputy Wilson were not admissible under Rule 403 for two reasons. First, she maintains the letters were not necessary to show Steven committed murder because Steven's guilt of the murders was not in question. We disagree.

The parties did not stipulate Steven was convicted of either murder.[4] Therefore, evidence Steven murdered Deputy Wilson was necessary to prove Rita's charge of accessory before the fact for Deputy Wilson's murder. See State v. Smith, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993) ("Accessory before the fact of murder requires a showing that the accused: (1) either advised and agreed, urged, or in some way aided some other person to commit the offense; (2) was not present when the offense was committed; and (3) that some principal committed the crime."). "South Carolina law defines murder as the killing of any person with malice aforethought, either express or implied." State v. Zeigler, 364 S.C. 94, 103, 610 S.E.2d 859, 864 (Ct. App. 2005) (citation and internal quotation marks omitted). "Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." Id. Here, the letters were key evidence explicitly establishing Steven shot Deputy Wilson. Moreover, the letters' references to

[4] During opening argument, Rita stated, "We do not contest—we admit that Steven . . . and [Arthur] committed a murder." However, counsel's opening arguments and statements regarding the facts of a case are not evidence. Cf. State v. Charping, 333 S.C. 124, 133 n.7, 508 S.E.2d 851, 856 n.7 (1998) ("A solicitor's closing argument is not evidence."); see also Ex parte Morris, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence.").

Steven handcuffing and Mirandizing Deputy Wilson are evidence Steven intended to kill Deputy Wilson when he was shot; Steven's conduct showed he intended to prevent Deputy Wilson from escaping to safety and medical relief while he was still alive. Thus, these references are evidence of malice aforethought and are relevant to establish Steven murdered Deputy Wilson.

Second, Rita contends the jury necessarily considered the letters for an improper purpose, i.e., as evidence Rita was involved in a conspiracy to commit murder.[5] Again, we disagree.

The trial court instructed the jury that the letters could be considered only for whether Steven in fact murdered Deputy Wilson and Constable Ouzts, and that question had a direct bearing upon whether Rita was an accessory before the fact. Although a risk exists in every trial that the jury might consider evidence for an improper purpose, that risk does not require an appellate court to presume the jury disregarded limiting instructions addressing that evidence. Cf. State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2009) ("Generally, a curative instruction is deemed to have cured any alleged error."). The facts of this case do not necessarily indicate the jury disregarded the trial court's instruction as to the letters in convicting Rita of conspiracy. The record contains a bounty of evidence suggesting Rita was involved in a conspiracy to lay in wait and murder officials who entered the Bixby property. Emphasizing our standard of review, therefore, we find the trial court did not abuse its discretion in admitting the portions of the letters in question under Rule 403.

III. Limiting Instructions

Finally, Rita argues the trial court erred in failing to give her requested limiting instructions as to the letters and the conversations with Newton and Taylor. However, her argument is conclusory and fails to cite legal authority. Therefore, she has abandoned this issue. See King, 349 S.C. at 157, 561

[5] This argument is based upon the allegation the letters could not be used to show Rita was part of a criminal conspiracy because Steven wrote the letters after he was arrested and while in jail.

S.E.2d at 648 (stating an argument is abandoned on appeal when conclusory and without supporting authority).

CONCLUSION

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

AFFIRMED.

FEW, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Preston D. Wannamaker, Appellant,

v.

Katherine Thomas Wannamaker, Respondent.

Appeal From Richland County
Deborah Neese, Family Court Judge

Opinion No. 4848
Heard November 4, 2010 – Filed June 29, 2011
Withdrawn, Substituted, and Refiled August 11, 2011

AFFIRMED IN PART AND REVERSED IN PART

April P. Counterman, of Chester, for Appellant.

C. Cantzon Foster, II, of Columbia, for Respondent.

LOCKEMY, J.: In this domestic action, Preston D. Wannamaker (Husband) appeals the family court's award of alimony to Katherine Thomas Wannamaker (Wife) and the court's valuation of the parties' retirement accounts. We affirm in part and reverse in part.

FACTS

Husband and Wife were married in December 1991, and no children were born as a result of the marriage; however, Wife had two children from a previous marriage. During the first seven years of the parties' marriage, Husband was the primary provider and earned approximately $30,000 per year. Wife did not work outside the home.

Subsequently, Husband lost his job, returned to school, and earned an undergraduate and two master's degrees. After completing his education, Husband secured employment as an instructor at Midlands Technical College and earned approximately $60,000 per year between 2002 and 2006. When Husband lost his job, Wife secured employment with the State of South Carolina, earning approximately $30,000 per year. Wife's income was the parties' primary, but not the sole, means of support while Husband completed his education. Although Wife attended college in the mid-1970s, she never finished her undergraduate degree. The parties separated in January of 2006, and Husband initiated this action for divorce in March 2006.

In June 2006, the family court issued a temporary order providing: "In lieu of alimony to be paid [Wife], Husband is hereby ordered to continue paying $50.00 per month to the Department of Mental Health" for drug abuse treatment for Wife's son. The temporary order did not otherwise mandate alimony. Wife received the sole and exclusive use of the marital home, and Husband was ordered to pay the first mortgage, while Wife was ordered to pay the second mortgage.

After a final hearing, the family court issued a final decree of divorce declaring the parties divorced. The family court awarded Wife $500 per month in permanent periodic alimony beginning in May 2008. Although Husband presented expert testimony establishing the present day value of the parties' accounts, the family court used the date of filing valuation. To effectuate a fifty-fifty equitable division of the marital estate, the family court awarded Wife $42,977 from Husband's account. Husband also received credit for all payments he made on the first mortgage pursuant to the temporary order.

Wife filed a 59(e), SCRCP, motion requesting the family court reconsider its decision to not award her attorney's fees and credit her the payments she made on the second mortgage. Husband also filed a 59(e) motion maintaining the family court erred in awarding permanent periodic alimony and valuing the parties' retirement accounts.

After a hearing, the family court amended the final decree of divorce. The amended order awarded Wife credit for the second mortgage payments she made pursuant to the temporary order. The family court also awarded Wife retroactive alimony and required Husband to pay Wife $500 for each month from the date of the temporary order through April 2008.[1] The order further provided the retroactive alimony payment was due upon the sale of the marital home and was to be deducted from Husband's portion of the net proceeds from the sale. This appeal followed.

STANDARD OF REVIEW

"In appeals from the family court, this Court reviews factual and legal issues de novo." Simmons v. Simmons, Op. No. 26970 (S.C. Sup. Ct. filed May 9, 2011) (Shearouse Adv. Sh. No. 16 at 29). Accordingly, this court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Lewis v. Lewis, Op. No. 26973 (S.C. Sup. Ct. filed May 9, 2011) (Shearouse Adv. Sh. No. 16 at 42, 51). However, we recognize that the family court is in a superior position to determine the credibility of the witnesses and the weight of the evidence. See id. at 51. The burden is on the appellant to demonstrate the family court's findings are against the preponderance of the evidence. Id.

[1] This totaled $12,500.00.

LAW/ANALYSIS

I. Permanent Periodic Spousal Support

Husband argues the family court abused its discretion because it improperly weighed several factors in awarding Wife permanent periodic spousal support. We disagree.

Alimony is a substitute for the support normally incident to the marital relationship and should put the supported spouse in the same position, or as near as is practicable to the same position, enjoyed during the marriage. Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001). If an award of alimony is warranted, the family court has a duty to make an award that is fit, equitable, and just. Id. The family court may grant alimony in such amounts and for such a term as it considers appropriate under the circumstances. Davis v. Davis, 372 S.C. 64, 79, 641 S.E.2d 446, 454 (Ct. App. 2006). The family court must consider the following factors: (1) duration of the marriage, (2) the physical and emotional health of the parties, (3) educational background of the parties, (4) employment history and earning potential of the parties, (5) standard of living during the marriage, (6) current and reasonably anticipated earnings of the parties, (7) current and reasonably anticipated expenses of the parties, (8) marital and nonmarital property of the parties, (9) custody of the children, (10) marital misconduct or fault, (11) tax consequences, (12) prior support obligations, and (13) any other factors the family court considers relevant. S.C. Code Ann. § 20-3-130(C) (Supp. 2010). However, "[t]he family court is only required to consider relevant factors." King v. King, 384 S.C. 134, 142, 681 S.E.2d 609, 613 (Ct. App. 2009); see also Epperly v. Epperly, 312 S.C. 411, 415, 440 S.E.2d 884, 886 (1994) (remanding for consideration of all relevant factors in section 20-3-130(C)).

Husband maintains the family court improperly weighed several factors in awarding Wife permanent periodic alimony. The record reflects the family court considered the relevant statutory factors, but it is difficult to determine how the family court applied those factors because the final decree of divorce merely lists the factors considered without making specific findings of fact

and conclusions of law. When an order of the family court violates Rule 26(a), SCRFC, by failing to set forth specific findings of fact and conclusions of law, this court may remand the matter to the family court or make its own findings of fact in accordance with the preponderance of the evidence if the record is sufficient to allow such a review. Griffith v. Griffith, 332 S.C. 630, 646-47, 506 S.E.2d 526, 535 (Ct. App. 1998). We find the record in the instant case is sufficient to allow such a review.

Here, the parties were married for sixteen years. Nothing in the record indicates the parties have any physical or mental health issues. Husband has a bachelor of science degree in mathematics and master's degrees in computer resources and information systems management and business administration. Wife is a high school graduate and attended college classes in the 1970s. Husband's current and reasonably anticipated earnings are approximately $60,000 per year while Wife's are approximately $30,000 per year. The parties current and reasonably anticipated expenses are approximately equal. However, Husband's personal credit card debt is substantially higher than Wife's. The parties each have retirement and stock accounts in their own names, though some portion of each may be marital property. The parties stipulated that Husband's stock account was non-marital. Because no children were born of the parties' marriage, custody is not an issue. Although Wife alleged Husband may have committed adultery, the parties stipulated to a divorce on grounds of one year's continuous separation. Additionally, the record does not reveal any tax consequences or prior support obligation owed by either party.

In sum, the parties have been married for sixteen years. Husband has the ability to pay $500 per month from his $5,392 gross monthly income and neither party is more at fault than the other in the breakdown of the marriage. Further, Wife's education and age appear to cap her future earning potential at approximately $30,000 per year. See Patel v. Patel, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004) (finding when awarding permanent periodic alimony the three important considerations are "(1) the duration of the marriage; (2) the overall financial situation of the parties, especially the ability of the supporting spouse to pay; and (3) whether either spouse was more at fault than the other."). Based on a preponderance of the evidence in the record and

the statutory factors, we hold the award of permanent periodic alimony is proper.

II. Retroactive Alimony

Husband argues the family court abused its discretion in awarding retroactive alimony. We agree.

Initially, the primary thrust of Husband's argument is that the family court erred in increasing his spousal support obligation retroactively without a showing of changed circumstances pursuant to section 20-3-170 of the South Carolina Code (1985).[2] Husband's argument misconstrues the family court's order. The family court did not issue an order modifying a prior support obligation. Rather, the family court issued an order amending its final decree of divorce pursuant to Rule 59(e) motions filed by the parties. Accordingly, section 20-3-170 is inapplicable, and Wife was not required to show a change in circumstances.

Husband further argues the family court erred in amending the final decree of divorce to award Wife retroactive alimony when no such request was made. Here, Wife filed a Rule 59(e) motion requesting the family court reconsider its failure to award her attorney's fees and credit for the second mortgage payments she made pursuant to the temporary order. Although Wife attempted to justify her entitlement to the credit by arguing there was no award of temporary alimony, Wife never requested the family court reconsider its decision not to award her retroactive alimony in the final decree of divorce. After the Rule 59(e) hearing the family court issued an order amending the final decree of divorce to award Wife retroactive alimony and credit for the second mortgage payments.

The family court lacks the authority to alter or amend a judgment on its own initiative once the judgment is more than ten days old. Heins v. Heins, 344 S.C. 146, 157, 543 S.E.2d 224, 230 (Ct. App. 2001). Here, the final decree of divorce was filed on August 7, 2008. Wife filed a motion to alter

[2] Section 20-3-170 provides that a prior award of alimony is modifiable upon a showing of changed circumstances.

or amend the judgment on August 20, 2008, and a hearing was held on September 3, 2008. The order amending the final decree of divorce and awarding Wife retroactive alimony was filed approximately two months after the final decree of divorce on October 6, 2008. Because the family court awarded Wife retroactive alimony on its own initiative more than ten days after the final decree of divorce, we find the family court erred in awarding Wife retroactive alimony.

III. Equitable Distribution

Husband argues the family court abused its discretion in determining the value of the parties' retirement accounts. According to Husband, the family court erred because it disregarded the testimony of his expert witness establishing the present cash value of the parties' retirement accounts. We disagree.

Husband presented expert testimony at trial to establish the present cash value of the parties' retirement accounts. However, Wife requested the family court value the accounts based upon the actual contributions and interest as of the date of filing. The family court opted to value the parties' retirement accounts based upon the amount of contributions and interest as of the date of filing. Because marital property subject to equitable distribution is valued as of the date the marital litigation is filed, we find the family court did not err in using the date of filing to determine the value of the parties' retirement accounts. See Gardner v. Gardner, 368 S.C. 134, 136, 628 S.E.2d 37, 38 (2006) (holding marital property subject to equitable distribution is valued as of the date the marital litigation is filed or commenced).

CONCLUSION

For the foregoing reasons, we affirm the family court's decisions regarding permanent periodic alimony and equitable distribution. However, we reverse the family court's award of retroactive alimony.

AFFIRMED IN PART AND REVERSED IN PART.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Brian Garris, Appellant.

Appeal From Clarendon County
George C. James, Jr., Circuit Court Judge

Opinion No. 4859
Submitted May 1, 2011 – Filed August 10, 2011

AFFIRMED

Appellate Defender LaNelle C. DuRant, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia, and Solicitor Ernest A. Finney, III, of Sumter, for Respondent.

SHORT, J.: Brian Garris appeals his convictions of armed robbery, assault and battery with intent to kill (ABWIK), and possession of a firearm during the commission of a violent crime. Garris argues the trial court erred in denying: (1) his motion to dismiss the case or declare a mistrial pursuant to Rule 5, SCRCrimP, or Brady v. Maryland[1]; (2) his motion to suppress a gun found in the jail after his arrest on an unrelated charge; (3) his request to call an expert to rebut the State's expert's opinion testimony when the opinion was not contained in the expert's report; and (4) his Batson v. Kentucky[2] motion and motion to set aside the jury because the State's peremptory challenges were racially motivated and eliminated all African-American males from the jury. We affirm.[3]

FACTS

At approximately 10 p.m. on April 15, 2006, Martha Santiago picked up her teenage daughter from a restaurant where her daughter was employed. Immediately after her daughter entered the passenger side of Santiago's van, a man opened Santiago's door, pointed a gun at her, and demanded money. He shot her in the eye when she told him she had no money. Santiago tried to shut the van door, but the man opened the door and shot her in the arm. Santiago's daughter gave the man the forty dollars she had earned from working that evening, and he fled. Santiago was taken to a hospital, and doctors removed a bullet from her arm. Deputy Rick Elms, the lead investigator in the case, took photographs of Santiago's injuries while she was in the hospital. Santiago also provided officers with a description of the assailant for a composite sketch. Approximately one hour after Santiago's shooting, officers spotted Garris and his brother, Quentin Garris, near their residence "about three blocks" from the restaurant.

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[1] 373 U.S. 83 (1963).

[2] 476 U.S. 79 (1986).

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

Almost two weeks later, police arrested Garris on an unrelated offense.[4] Upon his arrival at the jail, officers conducted a pat down search of Garris and placed him in a vacant holding cell. A short time later, a fellow inmate working at the jail found a small caliber revolver while emptying Garris' food tray. The bullet retrieved from Santiago's arm matched the gun found on Garris' food tray. Additionally, an officer obtained samples from Garris' hands at the time of his arrest, and a gunshot residue analysis revealed gunshot residue on both his hands.

A grand jury indicted Garris for armed robbery, ABWIK, and possession of a firearm during the commission of a violent crime. Prior to trial, Garris moved to suppress the gun found at the jail, arguing the jury's knowledge about the unrelated charge would be prejudicial and improperly considered against him. The court denied Garris' motion, finding the probative value of the gun was not substantially outweighed by any prejudicial impact. At trial, when the gun was admitted into evidence, Garris' counsel said: "I object, but go ahead."

During trial, Elms testified he spoke to Santiago's daughter after the incident, and he obtained her statement of the events and a description of the assailant. Because officers saw Garris in the area immediately after the incident, Elms testified he prepared a photographic lineup that included Garris' picture. Santiago's daughter identified Garris in the lineup as a customer she had served in the restaurant that evening. Elms testified that when he showed the same photographic lineup to the daughter nearly a month later, she positively identified Garris as the person who robbed her and shot her mother, but Santiago was never able to identify anyone.

While Elms was on the stand, the State moved to admit the photographs he took of Santiago in the hospital. Garris objected, arguing the photographs were not relevant, and the prejudicial effect outweighed any probative value. The court overruled Garris' objections and admitted the photographs into evidence.

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[4] Garris was arrested for burglary, but was eventually found not guilty of that charge.

Elms testified on cross-examination about partial handprints that police recovered from Santiago's van. He testified the results showed the prints from the van did not match Garris' prints, and he admitted the evidence had come out for the first time in trial that day. On redirect, when asked if there was "anything you can tell this jury" about the fingerprint analysis, he explained, "I was told the [assailant] never actually touched the van. We just processed the van to be on the safe side, and that's to preserve evidence in case he did touch it as he ran away from the scene." He said the likelihood of finding fingerprints are "slim to none" in these types of cases. However, Elms added the daughter told him at the scene that the assailant touched the van.

In his investigation, Elms also spoke to Garris' friends. Elms testified that Andrew McBride and Freddie White told him Garris had a small handgun the evening before the robbery. White also testified he saw Garris with a gun the night of the incident. White told Elms he saw Garris around 10:30 or 11:00 p.m. the night of the incident, and Garris was out of breath and sounded like he had been running. Additionally, White told Elms that Garris had two twenty-dollar bills in his possession the day after the incident.

At the conclusion of the State's case, Garris made a motion to dismiss the case or declare a mistrial pursuant to Rule 5, SCRCrimP, and Brady v. Maryland[5], arguing evidence was presented at trial that was not presented in discovery, and he was not aware of the evidence until "in the midst of the court proceeding." Specifically, Garris argued the State did not provide him with the photographs Elms took of Santiago in the hospital, inform him Santiago was shown a photographic lineup that contained Garris' picture, or give him the fingerprint analysis results of the prints from Santiago's van. Garris also renewed his motion for a mistrial at the close of his case, which the court denied.

The jury found Garris guilty as charged, and the court sentenced Garris to consecutive terms of twenty years' imprisonment for armed robbery and

[5] 373 U.S. 83 (1963).

ABWIK, and five years' concurrent imprisonment for possession of a firearm during the commission of a violent crime. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Thus, on review, the appellate court is limited to determining whether the trial judge abused his discretion. Id. An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. State v. Garrett, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002).

LAW/ANALYSIS

I. Motion to Dismiss or Declare a Mistrial

Garris argues the trial court erred in denying his motion to dismiss the case or declare a mistrial pursuant to Rule 5, SCRCrimP, or Brady v. Maryland[6] because the State did not provide him with the results of the fingerprint analysis, photos of Santiago's injuries, or the photographic lineup shown to Santiago. We disagree.

The decision to grant or deny a mistrial is within the sound discretion of the trial court. State v. White, 371 S.C. 439, 443, 639 S.E.2d 160, 162 (Ct. App. 2006). The trial court should only grant a mistrial in cases of manifest necessity and with the greatest caution. Id. at 444, 639 S.E.2d at 162. It is within the trial court's discretion, however, to determine whether such necessity exists under all the circumstances of each case. Id. The trial court should first exhaust other methods to cure possible prejudice before declaring a mistrial. Id. The defendant must show error and resulting prejudice to

[6] 373 U.S. 83 (1963).

receive a mistrial. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999).

On appeal, this court will not overturn the court's decision absent an abuse of discretion that amounts to an error of law. White, 371 S.C. at 443, 639 S.E.2d at 162. South Carolina courts favor the trial court's exercise of wide discretion in determining the merits of such a motion in each individual case. Id. at 443-44, 639 S.E.2d at 162. Thus, this court will intervene and grant a new trial only in cases when an abuse of discretion results in prejudice to the defendant. Id. "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Kelsey, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998).

At trial, Garris made a motion to dismiss the case or declare a mistrial based on a violation of Rule 5, SCRCrimP, or Brady v. Maryland[7] regarding the fingerprint analysis because he was not aware of the analysis or the results until he questioned Elms during cross-examination. Garris also asserted the State had not given him the pictures of Santiago's injuries or a copy of the photographic lineup, and he was not even informed Santiago had

[7] Rule 5 provides that upon request by a defendant, the prosecution must permit the defendant to inspect and copy any books, papers, documents, photographs, tangible objects, results or reports of physical or mental examinations, or scientific tests or experiments, or copies or portions thereof, that are within the possession, custody, or control of the prosecution, or the existence of which is known, or by the exercise of due diligence may become known to the prosecution, and that are material to the preparation of defendant's defense or are intended for use by the prosecution as evidence in chief at the trial. Rule 5(a)(1)(C)-(D), SCRCrimP. The Brady court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

been shown a photographic lineup until the day of trial.[8] Garris asserted his first attorney, who was a public defender, made a Rule 5/Brady motion, and the fact that he subsequently hired private counsel did not negate the motion. The solicitor responded that she gave Garris' new counsel everything that she had given to his first attorney, but she conceded Garris did not receive a copy of the pictures of Santiago's injuries. At that time, the court held Garris' motion for mistrial in abeyance, and when Garris renewed the motion at the close of his case, the court denied his motion.

Garris now argues he was prejudiced by the fact that he did not know prior to trial that the prints on Santiago's van did not match his prints because had he known, he could have developed questions for cross-examination or hired his own expert to develop the issue. Garris also argues that had he known about the photographic line-up that was shown to Santiago, he could have used it in his pretrial hearing when he made a motion to exclude Santiago's daughter's photographic line-up identification of Garris.[9]

We find the omission of Santiago's photos was not material because nothing indicates Garris was unaware of the extent of Santiago's injuries. Additionally, Garris' objection to the photos at trial was based on relevance and prejudicial impact.[10] Thus, although Garris objected to the introduction of the photos, he did not specifically object on the ground that he had not previously received a copy of the photos. As a result, we find this issue is not preserved for our review. See Staubes v. City of Folly Beach, 339 S.C. 406,

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[8] Garris objected to the introduction of the photos of Santiago's injuries when the State sought to introduce them into evidence; however, he only objected to them on the ground of relevance. The court said: "Do you have an objection to [the] photos?" Garris' counsel responded: "Yes, sir. In the course of the – I don't have both pictures in my discovery package. But my objection would be relevance. My argument is prejudicial and a prejudicial [e]ffect far [outweighs] the probative value." The court then overruled Garris' objection, finding the prejudicial impact did not substantially outweigh the probative value.

[9] During the hearing, the court admitted the photographic line-up.

[10] Garris does not raise this issue on appeal.

412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.").

Garris also asserts he was unaware until the day of trial of the fingerprint analysis or the results finding the prints did not match his prints. Elms testified officers processed Santiago's van for prints as part of their normal procedure to preserve evidence and found partial handprints on the van. Elms said the prints taken from the van had been in the case file since the day of the incident. The prints were then tested and compared to Garris' prints, and they did not match. Elms did not think the prints were left by the assailant.

Garris argues on appeal that had he known the prints found on the van did not match his prints, he could have "hired an investigator to possibly learn who the fingerprints belong to which could have raised the potential of identifying someone else as the assailant at least to the point of creating a reasonable doubt for the jurors." However, Garris did not object to Elms' testimony on the ground that he had not previously been given the fingerprint evidence until after the State rested its case. Therefore, we find this issue is not preserved for our review. See State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."); State v. Burton, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct. App. 1997) ("Failure to object when the evidence is offered constitutes a waiver of the right to object.").

Additionally, Garris asserts on appeal that he did not receive a copy of the photographic lineup shown to Santiago, and if he had known about the lineup, he could have used the information in his pretrial motion to exclude the lineup that was shown to Santiago's daughter. However, Garris did not make a contemporaneous objection to Elms' testimony about the lineup that was shown to Santiago. Garris did not make his objection to the testimony on the ground that he had not previously been given the lineup evidence until after the State rested its case; thus, we find this issue also is not preserved for our review. See Hoffman, 312 S.C. at 393, 440 S.E.2d at 873 ("A

contemporaneous objection is required to properly preserve an error for appellate review."); Burton, 326 S.C. at 609, 486 S.E.2d at 764 ("Failure to object when the evidence is offered constitutes a waiver of the right to object.").

II. Motion to Suppress Gun

Garris argues the trial court erred in denying his motion to suppress the gun found in Garris' jail cell after his arrest on an unrelated charge. We disagree.

Garris made a pretrial motion to suppress a gun found at the jail while he was incarcerated on an unrelated burglary charge. He argued it was more prejudicial than probative because he was ultimately found not guilty of the unrelated charge, and it might prejudice the jury. The trial court found the probative value of the gun substantially outweighed the prejudicial impact. Before admitting the testimony regarding the seizure of the gun, the court gave the jury a limiting charge that Garris had been in jail for dismissed charges, and they were not to consider that against Garris. Garris objected when the gun was admitted into evidence, but he did not object to the court's limiting instruction. On appeal, Garris argues he was prejudiced by the admission of the gun because the jury knew he was arrested for a different charge and there was a reasonable probability the jury would believe he had a propensity to commit crimes.

Evidence is relevant if it has "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. All relevant evidence is admissible. Rule 402, SCRE. However, even if 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." Rule 403, SCRE. The admission of evidence is left to the sound discretion of the trial court, whose decision will not be reversed on appeal absent an abuse of discretion.

State v. Howard, 384 S.C. 212, 220, 682 S.E.2d 42, 47 (Ct. App. 2009). To warrant reversal based on the admission of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. Id. at 221, 682 S.E.2d at 47. "[E]vidence which is 'logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime.'" State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (quoting State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973)).

At the time of his arrest for the unrelated burglary, officers obtained samples from Garris' hands, and a gunshot residue analysis later revealed gunshot residue on both hands. Elms testified he received the bullet that doctors removed from Santiago's arm and took it to the South Carolina Law Enforcement Division (SLED) for comparison to the gun found on Garris' food tray at the jail while he was incarcerated for the burglary charge.[11] SLED determined the gun found at the jail fired the bullet that doctors removed from Santiago's arm. Additionally, Elms spoke to Garris' friend who told him that Garris had a small handgun the evening before the robbery. Thus, the gun found at the jail linked Garris to the charges in this case and was logically relevant to the case. See State v. Stokes, 381 S.C. 390, 405, 673 S.E.2d 434, 441 (2009) (finding a gun from a subsequent shooting was

[11] When Garris was arrested for the unrelated burglary, he was taken to the jail. Upon his arrival at the jail, officers conducted a pat down search of him. Garris then requested to use a bathroom, and officers allowed him to use the bathroom in a vacant holding cell. The cell's bathroom had a door that Garris closed, and he was alone in the room. After Garris finished using the bathroom, his clothes were taken from him, and he was placed back in the same unoccupied holding cell. A short time later, a fellow inmate found a gun while emptying Garris' food tray. An officer at the jail removed the gun from the trash, placed it in an evidence bag, and gave it to the director of the jail. The director then turned the gun over to the sheriff's office.

logically related to the instant case when the forensic evidence positively showed the same gun was used in a prior break-in because a bullet found in the bedroom where the victim was shot also matched the gun, and this connection was highly probative on the issue of the identity of at least one of the intruders because the victims in the instant case were unable to identify their attackers). Moreover, the court gave the jury a limiting charge. Therefore, we find the trial court did not err in denying Garris' motion to suppress the gun.

III. Expert Testimony

Garris argues the trial court erred in denying his request to call an expert to rebut the reply testimony given by the State's expert about what type of gun the residue came from because his opinion was not contained in his report.[12] We disagree.

"[O]rdinarily, the admission of reply testimony is within the sound discretion of the trial court." State v. Farrow, 332 S.C. 190, 194, 504 S.E.2d 131, 133 (Ct. App. 1998). Reply testimony should be limited to rebuttal of matters raised in defense; however, the improper admission of reply testimony will only result in reversal if the admission of such testimony is found to be prejudicial. Id.

Garris took the stand and testified he did not have or handle a gun the day he was arrested. He did testify that he fired a rifle the day before. In

[12] The State argues this issue is not preserved for appeal because no proffer was made by Garris. Generally, when testimony is excluded, "a proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been." State v. Santiago, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct. App. 2006). In this case, however, Garris did not have an expert to proffer, and he was unable to explain what his expert witness' testimony might have been because he did not have one at the time. Therefore, we address the merits of this issue.

response, at the close of Garris' case, the State called in reply John Roberts, a SLED agent who performed a gun residue analysis on samples taken from Garris' hands.

In proffered testimony, Roberts testified he found gun residue on the front and back of both of Garris' hands. As a result, he proceeded with the second level of testing, which required a microscope. At the second level, he found residue on Garris' right palm, but the left palm was inconclusive. Therefore, Roberts concluded either Garris had fired a weapon in the six hours before the test, or he had been near the weapon when it was fired. The court asked Roberts if he had an opinion as to whether the weapon that was fired was a pistol or a rifle. Roberts stated that in his opinion, not with any reasonable degree of certainty, it was a pistol. Garris objected to Roberts' opinion because it was not in Roberts' report, and Garris had just learned about it during Roberts' testimony. Therefore, Garris asserted Roberts' opinion was prejudicial and not relevant. However, the court allowed Roberts' testimony to be presented to the jury to rebut Garris' testimony that he did not own a pistol or fire one.

During Roberts' testimony before the jury, the State asked him if he had an opinion as to whether Garris shot a pistol or a rifle. In response, Roberts stated he could form an opinion based on the amount of residue found, and in this case, his opinion was it most likely was a pistol. Garris objected, and the court overruled his objection. At the close of the reply testimony, Garris asked for an opportunity to rebut Roberts' opinion by calling his own expert. The court denied his request.

On appeal, Garris argues the court prevented him from presenting a complete defense by not allowing him to call his own expert to rebut Roberts' testimony. He asserts he was prejudiced by the inability to call his own expert because Roberts' opinion was not in his report.

The State put Roberts on the stand in reply to rebut Garris' testimony that he did not own a pistol and had not shot one the day of the incident. Thus, Roberts' testimony was properly limited to a reply to Garris' testimony,

and Garris cannot claim he did not have an adequate opportunity to contest the evidence. See Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 438, 319 S.E.2d 695, 700 (1984) (holding the limited nature of the rebuttal evidence did not substantiate appellant's claim that it was without an adequate opportunity to contest such evidence because the issues addressed in rebuttal were the identical issues identified and pursued by appellant's own witness). Additionally, Garris was able to cross-examine Roberts about his opinion.

Therefore, we find Garris has failed to demonstrate how he was prejudiced by not being permitted to call his own expert to rebut Roberts' testimony, and the trial court did not err in denying Garris' request to call an expert to rebut the State's expert's testimony.

IV. Jury Strike

Garris argues the trial court erred in denying his Batson v. Kentucky[13] motion and refusing to set aside the jury because the State's peremptory challenges were racially motivated and eliminated all African-American males from the jury. We disagree.

In Batson, the Supreme Court of the United States held that the Equal Protection Clause forbids a prosecutor from challenging "potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially [sic] to consider the State's case against a black defendant." Id. at 89; see State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007) ("The Equal Protection Clause of the Fourteenth Amendment to the Constitution prohibits the striking of a venire person on the basis of race or gender."). However, a solicitor can strike a potential juror based on his or her demeanor and disposition. State v. Wilder, 306 S.C. 535, 538, 413 S.E.2d 323, 325 (1991).

[13] 476 U.S. 79 (1986).

In Evins, our supreme court explained the proper procedure for a Batson hearing:

> After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation. Once the proponent states a reason that is race-neutral, the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race were seated on the jury or that the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment.

373 S.C. at 415, 645 S.E.2d at 909. "The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike." Id. The trial court's findings regarding purposeful discrimination are given great deference and will not be set aside by this court unless clearly erroneous. Id. at 416, 645 S.E.2d at 909-10. "It is within the discretion of the trial judge to determine purposeful discrimination based on the 'totality of relevant facts,' including the credibility of the solicitor." Wilder, 306 S.C. at 538, 413 S.E.2d at 325. A defendant has no right to trial by a particular jury, and the right to serve on a jury and not be discriminated against because of race or gender belongs to the potential juror, not a litigant. Evins, 373 S.C. at 416, 645 S.E.2d at 910.

During jury selection, the State exercised four peremptory strikes against four African-Americans – two males and two females. Immediately after jury selection, Garris made a motion to set aside the jury based on a Batson violation. On appeal, Garris argues two of the State's peremptory challenges were racially motivated, and the court erred in refusing to set aside the jury. Garris alleges the State's reasons for striking jurors number 116 and 50, both African-American males, were pretexual.

The State explained it struck juror number 116 because the juror said he could not read or write well and sometimes he had trouble understanding things. The solicitor found the juror's comment troubling "because this is a very complex case with lots of witnesses and it's – it really will be like putting a puzzle together. He's got to figure out that this person testified to this because down the line it relates to this. And I just think it would be too complex for him." Garris argued the State's reason was pretexual; however, he agreed with the trial court that no other jurors were similarly situated.

The State explained it struck juror number 50 because he was close in age to Garris and was from Manning; therefore, the solicitor assumed that the juror and Garris went to school together. Garris argued this reason was also pretextual because "just because he's young, lives here in Manning doesn't necessarily mean he knows Mr. Garris," "doesn't mean he has some connection or affiliation with Mr. Garris," and "he didn't say he knew Mr. Garris . . . when the question was posed to the jury panel." Garris also pointed out that the State did not strike a white male who was also close in age to Garris. The State responded that juror lived in Turbeville.

The court stated the strike of juror number 50 gave him pause, but that he was required to look at the totality of the circumstances and the burden was on Garris to prove the strike was used in a racially-biased manner. The court then denied Garris' motion and seated the jury as selected. The State's reasons for striking jurors do not have to be reasonably specific or legitimate. State v. Easler, 322 S.C. 333, 350, 471 S.E.2d 745, 755 (Ct. App. 1996). The reason need only be race neutral. Id. We do not find the court's rulings regarding purposeful discrimination were clearly erroneous based on the totality of relevant facts. Accordingly, we find the trial court properly determined the solicitor's stated reasons for striking the jurors were race-neutral, and Garris' Batson motion was properly denied.

CONCLUSION

Accordingly, Garris' convictions of armed robbery, ABWIK, and possession of a firearm during the commission of a violent crime are

AFFIRMED.

KONDUROS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

V.E. Amick & Associates, LLC, Respondent,

v.

Palmetto Environmental Group, Inc., Appellant.

Appeal From Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 4860
Heard May 4, 2011 – Filed August 10, 2011

AFFIRMED

Charles E. Carpenter, Jr., Carmen V. Ganjehsani, and Edward M. Woodward, Jr., all of Columbia, for Appellant.

Wesley D. Peel, of Columbia, for Respondent.

GEATHERS, J.: In this breach of contract action, Palmetto Environmental Group, Inc. (Palmetto) argues (1) the trial court erred in denying Palmetto's motion for a directed verdict because Palmetto's performance was excused due to V.E. Amick & Associates, LLC's (Amick's) failure to hire a Department of Health and Environmental Control (DHEC) qualified engineer to certify Palmetto's work and (2) the trial court erred in denying Palmetto's motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial nisi remittitur because Amick will receive $137,650 in future contract payments from DHEC, and this amount should have been offset from the jury's verdict. We affirm on both points.

FACTS/PROCEDURAL HISTORY

Amick is a DHEC certified company that performs remediation construction projects to rectify environmental contamination caused by petroleum products. Palmetto is also an environmental contracting company that remediates soil and groundwater contamination caused by petroleum products. Jimmy Cooper, Palmetto's owner and principal shareholder, was formerly employed by David Jordan and David Snodgrass, the owners of a large construction enterprise including Amick, L-J Incorporated, and Environmental Engineering. After Cooper was fired, he formed Palmetto and began bidding for DHEC remediation projects through Amick.

Cooper assembled bids for three remediation projects (the Huse site, the Cromer's Grocery site, and the Lakeside Market site) so that Amick could submit the bids to DHEC for approval. Amick would mark up Palmetto's estimates by 10% and submit the bid to DHEC in exchange for furnishing Palmetto with performance bonds[1] required by DHEC. DHEC awarded Amick all three contracts, and Amick subcontracted 100% of the DHEC contracts to Palmetto. All of the contracts between Amick and Palmetto were oral.

[1] DHEC required a performance bond for each contract to guarantee Amick would be completing the work. If for any reason Amick failed to complete the work, DHEC could collect the entire amount of the bond.

During trial, Cooper testified Palmetto submitted invoices and was paid by Amick on a percentage basis once the company reached each reduction milestone set by DHEC. Cooper explained DHEC set four separate target level milestones of 25%, 50%, 75%, and 100% relating to the percentage of reduction of petroleum in the groundwater. Cooper agreed to reach 100% of the ultimate clean-up target levels set by DHEC in exchange for 90% of the DHEC contract with Amick. Once Palmetto met a certain milestone, DHEC would pay Amick, and Amick would in turn remit 90% of the DHEC payment to Palmetto.

Palmetto reached the 75% target level milestone on all three contracts at issue before the company ceased working. Cooper claimed Palmetto actually completed each project to between 95% and 98% of the ultimate target levels, but he admitted that he submitted no more invoices to Amick after reaching the 75% milestone. Cooper conceded the biggest reason he failed to meet the ultimate target levels for the reduction of petroleum was that his company ran out of money and could no longer operate. Cooper also admitted Palmetto was paid for all the invoices it submitted to Amick.

After Palmetto ceased working on the three sites, Amick hired Carolina Technical Services, Inc. (CTSI) to complete the groundwater remediation contracts. Bill Wood, a CTSI employee, testified at trial on Amick's behalf and was qualified as an expert in groundwater assessment and remediation. Wood testified the estimated cost to complete the Lakeside Market contract would be $88,297. Wood further testified it would cost an estimated $121,059 to complete remediation on the Huse site. Finally, Wood noted it would cost an estimated $78,037 to complete remediation on the Cromer's Grocery site.

Wood testified Amick was paying CTSI on a "time and materials" basis, unlike the Amick contract with Palmetto. Specifically, Wood explained CTSI was receiving progress payments on a rolling basis, and the company did not have a contract with Amick to complete the projects to 100% of DHEC's ultimate target levels.

Hugh Wilson, an employee of L-J Incorporated, testified DHEC was aware Amick had hired CTSI to complete the three projects after Palmetto

failed to do so. Wilson also testified regarding Amick's damages and explained "the way we look at it is what we spent today on the project plus the estimated cost of completion furnished by CTSI and crediting back the amount of the Palmetto subcontract . . . ." Wilson testified the total amount needed to complete all three jobs and make Amick whole, after subtracting payments from DHEC intended for Palmetto, would be "a little over $391,000."

Wilson noted this amount represented the total payments to Palmetto and CTSI to date, plus the estimated cost for CTSI to complete remediation, less 90% of the amount of the original contract between Amick and DHEC (for specific damages amounts, see charts in Section II of this opinion). In other words, Wilson took the total amount Amick would end up paying both subcontractors on the three contracts with DHEC and subtracted the total amount Amick would have paid to Palmetto had Palmetto fully performed its contract with Amick. Palmetto's counsel did not question the accuracy of any of the stated figures during Wilson's cross-examination.

At the close of Amick's case, Palmetto moved for a directed verdict on multiple grounds, including the contention that it "would have been illegal until Amick . . . hired another [professional licensed engineer] as an employee to continue to certify completion to DHEC." The trial court denied Palmetto's directed verdict motion, noting:

> [A]ll that stuff about the regulation about having a qualified person doesn't matter. DHEC accepted those things, correspondence, all that stuff in there. They can hire somebody to certify it. [Cooper] tried to get his brother one time. But anyway, no evidence that anything was ever kicked out because it was not certified. [Cooper] admittedly got paid 75 percent. And in the light most favorable to him, he had done 95 percent of the work and they've got 25 percent of the money. The fact that DHEC now wants a pristine situation, which it probably can't do, indicates that the job was underbid to start with.

Palmetto did not present any evidence in its own defense.

The trial court charged the jury as follows regarding the law of damages:

> In the event of a failure to complete performance of a contract according to its terms, including a construction contract or subcontract, the injured party is entitled to such compensation which would leave it as well off as it would have been had the contract been fully performed. Measure of damages ordinarily is the reasonable cost of completion of the same work if completion is possible and does not involve unreasonable economic wait.

The jury returned with a verdict for Amick in the amount of $391,209.21. Palmetto's counsel moved for a judgment notwithstanding the verdict, or in the alternative, a new trial nisi remittitur. The trial court noted, "It is actually too much money, isn't it?" The trial court further stated, "I don't think they could have, in fairness, issued that whole amount against him when he was deducting the 25 percent. But I didn't see the figures. Maybe they did." Finally, the trial court suggested "$391,000 is too high, but it can stand if it was there. It should be something less than that. If he had completed the job he would have only gotten much less . . . ."

The trial court encouraged the parties attempt to settle the case, and gave them a week to do so. The trial court also denied all post-trial motions except the motion for a new trial nisi remittitur. During the post-trial hearing, Palmetto's attorney argued frustration of purpose because Amick's only engineer left the company in 2001, leaving no one to certify Palmetto's work to DHEC. Palmetto also argued the amount of damages presented during trial was speculative because it included future payments to CTSI. The trial court noted, "Unfortunately, sufficient evidence presented during the trial sustains the verdict. It's pretty high considering what he was paid and what's left to be done, but I have no way of cutting it down to a figure that anybody can live with." The trial court denied Palmetto's new trial nisi remittitur

motion and entered a judgment for the full amount of the jury's verdict. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in denying Palmetto's motion for a directed verdict because Palmetto's performance was excused due to Amick's failure to hire a DHEC-qualified engineer to certify Palmetto's work?

2. Did the trial court err in denying Palmetto's motion for a judgment notwithstanding the verdict or a new trial nisi remittitur because Amick will receive $137,650 in future contract payments from DHEC, and this amount should have been offset from the jury's verdict?

LAW/ANALYSIS

I. Directed Verdict

Palmetto argues the trial court erred in denying its directed verdict motion on the grounds of frustration of purpose and impossibility. Palmetto contends its performance was excused because Amick failed to employ another registered engineer as required by DHEC regulations after Eugene Amick retired due to illness. We disagree.

"In ruling on directed verdict or [judgment notwithstanding the verdict] motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." Id. "This Court will reverse the trial court only when there is no evidence to support the ruling below." Id. "Further, a trial court's decision granting or denying a new trial will not be disturbed unless the decision is wholly unsupported by the evidence or the court's conclusions of law have been controlled by an error of law." Id.

"A party to a contract must perform its obligations under the contract unless its performance is rendered impossible by an act of God, the law, or by a third party." Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 593, 493 S.E.2d 875, 879 (Ct. App. 1997). "Impossibility must be real and not a mere inconvenience." Id. "A party to a contract cannot be excused from performance on the theory of impossibility of performance unless it is made to appear that the thing to be done cannot by any means be accomplished, for if it is only improbable or out of the power of the obligor, it is not deemed in law impossible." Id. (internal quotation marks and citation omitted). "A party claiming impossibility of performance has the burden of proving the defense." Id.

Palmetto argues performance was impossible because after Eugene Amick retired from Amick, Amick did not employ a full-time engineer or geologist to sign and certify Palmetto's submissions. In support of its argument, Palmetto cites a DHEC regulation relating to the qualifications for certified site rehabilitation contractors and contends Amick did not comply with this regulation. See 25A S.C. Code Ann. Regs. § 61-98 (Supp. 2010) (listing the qualifications for an applicant to become certified as a site rehabilitation contractor and noting one method of becoming certified is for a company to employ a full-time permanent employee who is registered as a professional engineer or geologist in the State of South Carolina and who has at least three years of applicable experience).

The DHEC regulation Palmetto relies upon did not make performance of the contracts impossible as a matter of law. At best, the evidence yields more than one inference or its inference is in doubt. See Sabb, 350 S.C. at 427, 567 S.E.2d at 236 (noting a trial court must deny a directed verdict motion when the evidence yields more than one inference or its inference is in doubt). Section IV(A)(4) of regulation 61-98 relates to the requirements for a site rehabilitation contractor to become certified. Section V(A)(3) of the same regulation lists actions that permit DHEC to decertify a previously certified contractor. Finally, section V(A)(10) allows DHEC to make exceptions for a decertified or suspended contractor to continue working on a particular site on a case-by-case basis. Therefore, DHEC had the responsibility to decertify or suspend Amick's certification if the company failed to maintain proper qualifications pursuant to section IV(A)(4) or to

make an exception for Amick to complete its contracts pursuant to section V(A)(10). Until DHEC determined decertification or suspension was necessary, performance of these contracts remained possible. Hawkins, 328 S.C. at 593, 493 S.E.2d at 879 ("A party to a contract cannot be excused from performance on the theory of impossibility of performance unless it is made to appear that the thing to be done cannot by any means be accomplished, for if it is only improbable or out of the power of the obligor, it is not deemed in law impossible.").

Even viewing the evidence in the light most favorable to Palmetto, it was merely an inconvenience, and not an impossibility, for Palmetto to continue to work and be paid after Eugene Amick retired from the company. See Hawkins, 328 S.C. at 593, 493 S.E.2d at 879 ("Impossibility must be real and not a mere inconvenience."). Bill Wood, CTSI's employee, testified none of the reports submitted by CTSI on behalf of Amick to DHEC had been rejected, even though the geologist who submitted the reports was not an Amick employee. Furthermore, Amick presented evidence that DHEC continued to certify CTSI's submissions and make progress payments after Eugene Amick retired. Amick entered one of CTSI's reports into evidence without objection.[2] The record reflects that a CTSI employee signed the report and submitted it to DHEC on Amick's letterhead. Finally, Cooper admitted that the reason Palmetto ceased working on these projects and failed to reach the 100% milestone was because his company ran out of money, not because of impossibility of performance.

Evidence in the record supports the trial court's ruling because the evidence yields more than one inference or its inference is in doubt. See Sabb, 350 S.C. at 427, 567 S.E.2d at 236 (noting a trial court must deny a directed verdict motion when the evidence yields more than one inference or its inference is in doubt); id. (stating an appellate court will reverse the trial court's decision to deny a directed verdict motion only when no evidence

[2] The portion of the trial in which this evidence was actually entered is not included in the record on appeal. However, the trial court noted on the record that Palmetto made no objection when Amick entered into evidence three notebooks full of invoices and reports relating to the three disputed contracts. Furthermore, these materials were included in the record on appeal.

supports the ruling below). Accordingly, we affirm the trial court's denial of Palmetto's directed verdict motion.

II. Judgment Notwithstanding the Verdict/New Trial Nisi Remittitur

Palmetto argues it is entitled to a judgment notwithstanding the verdict (JNOV) or a new trial nisi remittitur because the jury's award of damages in the amount of $391,209.21 did not take into account $137,650 in future contract payments from DHEC to Amick. We disagree.

"[A] motion for JNOV under Rule 50(b), SCRCP[,] is a renewal of a directed verdict motion." Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006). "In ruling on a motion for [JNOV], the trial court must view the evidence and its inferences in the light most favorable to the nonmoving party." Hawkins, 328 S.C. at 592, 493 S.E.2d at 879. "The court must deny the motion if either the evidence yields more than one reasonable inference or its inferences are in doubt." Id. "The verdict will be upheld if there is any evidence to sustain the factual findings implicit in the jury's verdict." Id. at 592-93, 493 S.E.2d at 879 (emphasis added).

"When the jury's verdict is inadequate or excessive, the trial judge has the discretionary power to grant a new trial nisi." Id. at 600, 493 S.E.2d at 883. "The denial of a motion for a new trial nisi is within the trial judge's discretion and will not be reversed on appeal absent an abuse of discretion." Id. at 600-01, 493 S.E.2d at 883. However, the trial court must provide compelling reasons for invading the province of the jury. Green v. Fritz, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003). "The consideration of a motion for a new trial nisi requires the trial judge to consider the adequacy of the verdict in light of the evidence presented." Hawkins, 328 S.C. at 600, 493 S.E.2d at 883. "The trial judge, who heard the evidence and is more familiar with the evidentiary atmosphere at trial, possesses a better informed view of the damages than [an appellate] court." Id. "Accordingly, great deference will be given to the trial judge." Id.

We first address Palmetto's JNOV motion. The record contained evidence to sustain the factual findings implicit in the jury's verdict. See Hawkins, 328 S.C. at 592-93, 493 S.E.2d at 879 ("The verdict will be upheld

if there is any evidence to sustain the factual findings implicit in the jury's verdict.") (emphasis added). Specifically, Wilson's testimony concerning damages appears to account for future payments from DHEC to Amick. Wilson noted he subtracted 90% of the entire original contract amount on all three contracts to offset payments issued by DHEC when he calculated the total amount needed to make Amick whole on these projects. This calculation was proper as Palmetto was only entitled to 90% of the original contract price. "Above and beyond what we would have paid [Palmetto]," Wilson estimated the total cost to make Amick whole on all three contracts would be a little over $391,000. The actual jury verdict was $391,209.21, which is slightly over $391,000. Therefore, we affirm the trial court's decision to deny Palmetto's JNOV motion.

We next address Palmetto's new trial nisi remittitur motion. The following chart lists all of the damages figures presented during trial:

	Lakeside Market Site	**Cromer's Grocery Site**	**Huse Site**	**Total for all three contracts:**
Amick's Past Payments to CTSI	73,001.94	51,073.11	103,626.01	227,701.06
Amick's Estimated Future Payments to CTSI	88,297	78,037	121,059	287,393
Amick's Past Payments to Palmetto	105,975	166,657.50	99,022.50	371,655

Amount of the DHEC Contract Apportioned to Palmetto[3]	(141,300)	(222,210)	(132,030)	(495,540)
TOTAL DAMAGES:	126,273.94	73,557.76	191,677.51	**391,509.21**

In the alternative, the jury could likewise have calculated the verdict of $391,209.21 by tallying Amick's total payments to CTSI ($515,094.06), and then subtracting 90% of $137,650, representing the future payments from DHEC to Amick ($515,094.06 – $123,885 = $391,209.06). This figure reflects the difference in the total amount Amick will pay to CTSI as a result of Palmetto's breach and the amount Amick would have paid to Palmetto on the remaining milestone had the original contract been fulfilled. This verdict also takes into account the remaining 25% that DHEC will pay to Amick on the unfinished portion of all three contracts ($137,650 = 25% of $550,600). Therefore, the verdict was a reasonable measure of the cost to complete the contracts after Palmetto failed to do so.

The following chart of damages reflects this second possible method by which the jury could have reached its verdict given the evidence presented at trial:

	Lakeside Market Site	**Cromer's Grocery Site**	**Huse Site**	**Total for all three contracts:**
Amick's Past Payments to CTSI	73,001.94	51,073.11	103,626.01	227,701.06

[3] This row represents 90% of the original contract amount between Amick and DHEC, which would have been apportioned to Palmetto. These amounts were subtracted from the damages figures in reaching the final damages estimation.

Amick's Estimated Future Payments to CTSI	88,297	78,037	121,059	287,393
Remaining Unpaid Portion of original DHEC Contract Apportioned to Palmetto	(35,325)	(55,552.50)	(33,007.50)	(123,885)
TOTAL DAMAGES:	125,973.94	73,557.61	191,677.51	**391,209.06**

The actual jury verdict was $391,209.21, which is virtually identical to the figure generated by this second feasible calculation method.[4]

Because the record contains adequate evidence to support the jury's verdict, we conclude the trial court did not abuse its discretion in denying Palmetto's motion for a new trial nisi remittitur. See Hawkins, 328 S.C. at 600, 493 S.E.2d at 883 ("The consideration of a motion for a new trial nisi requires the trial judge to consider the adequacy of the verdict in light of the evidence presented."); id. at 600-01, 493 S.E.2d at 883 ("The denial of a motion for a new trial nisi is within the trial judge's discretion and will not be reversed on appeal absent an abuse of discretion.").

CONCLUSION

We affirm the trial court's decision to deny Palmetto's directed verdict motion, JNOV motion, and motion for a new trial nisi remittitur.

[4] We recognize the fifteen-cent discrepancy in these two figures, but we find this minor error in calculation was harmless as it was a nominal sum.

AFFIRMED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marcus Moeller, Respondent,

v.

Anna Brooke Moeller, Appellant.

Appeal From Greenwood County
Deborah Neese, Family Court Judge

Opinion No. 4861
Heard June 8, 2011 – Filed August 10, 2011

REVERSED AND REMANDED

William Norman Epps, III, of Anderson, for Appellant.

Christopher Lance Sheek, of Greenwood, for Respondent.

Adam S. Bacot, of Greenwood, for Guardian ad Litem.

PER CURIAM: Appellant Anna Brooke Moeller (Mother) seeks review of the family court's award of child custody to Respondent Marcus

Moeller (Father). Mother argues the family court placed an improper emphasis on her extra-marital affair when there was no evidence this relationship had any detrimental effect on the parties' children. Mother also argues the family court abused its discretion in separating Mother's oldest child from the parties' two younger children because the separation was against the children's best interests. We reverse and remand this matter to the family court for a custody exchange.

FACTS/PROCEDURAL HISTORY

When the parties married in 2002, Mother had a ten-month-old daughter from a prior relationship. At that time, the parties lived in Mother's home in Anderson while Mother attended college. On March 8, 2003, a daughter was born of the marriage.

During the marriage, Father had difficulty maintaining stable employment. Mother worked at various jobs while she was in college and used her student loan proceeds to support the family. In August 2005, Mother began her teaching career in Anderson. In September 2005, Father began working in Greenwood. Mother agreed to move to Greenwood to reduce Father's commute time. On September 27, 2005, another daughter was born of the marriage.

The parties presented conflicting versions of their marital troubles and the timing of their separation. Mother complained about Father's tendency to cause their daughters to be late for school when he was assigned responsibility for their transportation. Mother also complained about Father's alleged drug use and emotional abuse of her throughout the marriage. On the other hand, Father complained about Mother's alleged uneven temperament and her emotional outbursts in front of the children.

According to Mother, she told Father in May 2007 that she wanted to leave the marital home. However, she did not reveal her plan to file for a divorce because she was afraid of his reaction. According to Father, the parties had discussed moving the whole family to Anderson because Mother

was unhappy in Greenwood. Father believed their plan was for him to keep his job in Greenwood and commute from Anderson.

In July 2007, Mother met Russell Mullinax (Mullinax), with whom she later became romantically involved. In August 2007, Mother took the children, left the marital home in Greenwood, and moved into an apartment in Anderson. On August 2, 2007, Father learned Mother had not planned on him joining her in Anderson. When Father asked Mother for a key to the apartment she was leasing, she informed him that she considered them to be separated. She also suggested some time apart to see if it would help their relationship.

Approximately one week later, Father became suspicious Mother was having an affair. Mother had left an old cell phone at the marital home, and Father noticed that the phone continued to receive text messages. Several sexually explicit text messages were being delivered from the phone number belonging to Mullinax.[1] On August 27, 2007, Father filed a complaint seeking a divorce on the ground of adultery and custody of the parties' two daughters.[2] The family court granted temporary custody of the parties' daughters to Mother.

During the following several months, Mullinax bought a house in Anderson County, and Mother entered into an agreement with him to lease the house.[3] While the children were living in this home with Mother, they

[1] Mother testified that the text messages were part of a running joke and were not meant in a literal sense.

[2] Although Father had considered adopting Mother's oldest daughter before the parties' separation, he has not sought custody of the child in this action.

[3] After Mother and her children moved into the house, Mullinax continued to list this residence on his driver's license, voter registration, and county tax assessment. However, both Mullinax and Mother insisted that he did not live there and that when he stayed in the home overnight, the children were away on visitation with Father. They also maintained that Mullinax, who worked from 6:30 p.m. to approximately 6:30 a.m., would stop by the house after he

made several friends in school and in their neighborhood, and they became involved in multiple extracurricular activities, such as piano lessons and gymnastics. Mother was very involved with the children's school activities and extracurricular activities, and she stayed in contact with the children's teachers at least once a week. All three of Mother's children were very attached to one another. Father struggled financially during this time. As a result, the marital home became the subject of foreclosure proceedings.

At the final hearing, the guardian ad litem (GAL) indicated that the children's relationship with Mullinax was good. She also testified concerning her suspicions that Mother allowed Mullinax to stay overnight with her while the children were present.[4] The GAL hired a private investigator to conduct surveillance of Mother's residence during the night of April 23, 2009, through the following morning. The GAL also presented the private investigator as a witness.[5]

The GAL also testified that Mother was not forthcoming as to her relationship with Mullinax. The GAL stated it appeared that the children had been coached by Mother to say that Mullinax was not staying overnight at their home. The GAL expressed concern that Mother and her witnesses had

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finished work to administer eye drops to Mother's large Weimaraner. Both claimed Mullinax stayed out of Mother's way while she was getting the children ready for school. They also claimed the children did not know Mullinax was at the home in the mornings.

[4] Father admitted to his own post-separation adultery. However, little emphasis was placed on Father's romantic relationships during this action.

[5] The investigator testified that at 12:06 a.m. on April 24, 2009, he observed the grill of a Ford F-150, which is the type of vehicle Mullinax drove, in the back yard of Mother's residence. Shortly after 7:09 a.m., the investigator was able to photograph the truck behind the residence. The investigator also testified that he observed Mullinax's truck leaving the neighborhood at 8:08 a.m. Mullinax's co-workers refuted the private investigator's placement of Mullinax at the house at 12:06 a.m. by placing him at his work location at that time.

gone to great lengths to deceive her about Mother's relationship with Mullinax and his presence around the children. The GAL indicated that Mother's behavior in this regard could negatively impact the children and their values. Although the GAL expressed concern over separating the children, she declined to make a recommendation as to child custody based on this factor alone.

The family court issued a final decree granting the parties a divorce on the ground of one year's separation and awarding custody of both children born of the marriage to Father. In its order, the family court found that the great lengths taken by Mother to deceive the GAL, the family court, and others about her relationship with Mullinax was "troublesome not only as to her credibility but also as to her lack of judgment, lack of mature reasoning, and ability to contrive and scheme for her own purposes." The family court expressed concern that the children were not "entirely open with the Guardian, as some of their responses appeared to have been given to protect the mother or coaxed by her." The family court also found that Mother "knowingly placed the children in the middle of her relationship with [Mullinax] and, by doing so, acted contrary to their best interests."

The family court denied Mother's motion for reconsideration. This appeal followed.

ISSUES ON APPEAL

1. Did the family court place an improper emphasis on Mother's relationship with Mullinax when there was no evidence that this relationship had any detrimental effect on the parties' children?

2. Did the family court err in separating Mother's oldest child from the parties' two younger children when the separation was against the best interests of the children?

STANDARD OF REVIEW

This court may review both factual and legal issues de novo. Simmons v. Simmons, 392 S.C. 412, ___, 709 S.E.2d 666, 667 (2011); see also Nasser-Moghaddassi v. Moghaddassi, 364 S.C. 182, 189, 612 S.E.2d 707, 711 (Ct. App. 2005) ("In appeals from the family court, this Court may find facts in accordance with its own view of the preponderance of the evidence."). However, the court's broad scope of review does not relieve the appellant of the burden of proving to this court that the family court committed error. Id. at 190, 612 S.E.2d at 711; see also Lewis v. Lewis, 392 S.C. 381, ___, 709 S.E.2d 650, 655 (2011) (holding that the family court's factual findings will be affirmed unless the appellant satisfies this court that the preponderance of the evidence is against those findings).

LAW/ANALYSIS

I. Mother's conduct

Mother argues the family court placed an inappropriate emphasis on her relationship with Mullinax because there was no evidence the relationship had any detrimental effect on the parties' children. We agree.

In all child custody controversies, the controlling considerations are the child's welfare and best interests. Cook v. Cobb, 271 S.C. 136, 140, 245 S.E.2d 612, 614 (1978). In determining custody, the family court "must consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child." Woodall v. Woodall, 322 S.C. 7, 11, 471 S.E.2d 154, 157 (1996) (emphasis added). Because all relevant factors must be taken into consideration, the family court should also review the "psychological, physical, environmental, spiritual, educational, medical, family, emotional and recreational aspects" of the child's life. Id. In other words, the totality of circumstances unique to each particular case "constitutes the only scale upon which the ultimate decision can be weighed." Parris v. Parris, 319 S.C. 308, 310, 460 S.E.2d 571, 572 (1995).

Here, rather than considering the totality of the circumstances unique to this case, the family court narrowly focused on (1) the GAL's speculation that Mother's perceived dishonesty would inevitably result in the children developing the same trait; and (2) the GAL's and Father's characterization of Mother as having an uneven temperament and overly emotional responses to everyday situations. Initially, we view as mere conjecture the GAL's testimony that she suspected the children had been coached by Mother to say Mullinax did not stay overnight at their house.

Even if the family court's perception of Mother's character traits is accurate, the record does not show that these traits have substantially affected the children's welfare.[6] Therefore, they cannot, by themselves, serve as a basis for denying Mother custody of her children. See Davenport v. Davenport, 265 S.C. 524, 527, 220 S.E.2d 228, 230 (1975) (holding that in a child custody dispute, a parent's morality is limited in its force to what relevancy it has to the welfare of the child); see also Clear v. Clear, 331 S.C. 186, 190, 500 S.E.2d 790, 792 (Ct. App. 1998) (stating that the record contained no evidence that a mother's topless dancing occupation adversely affected her ability to parent the parties' children and, thus, the mother's occupation was not relevant to the family court's custody decision); Stroman v. Williams, 291 S.C. 376, 380, 353 S.E.2d 704, 706 (Ct. App. 1987) (holding that a child custody award may not be used to penalize or reward a parent for his or her conduct); cf. Baer v. Baer, 282 S.C. 362, 366, 318 S.E.2d 582, 584 (Ct. App. 1984) ("A single act of misconduct by the custodial parent toward the noncustodial parent that does not substantially affect the children's welfare provides no basis for changing custody from one to the other."); Stroman, 291 S.C. at 379, 353 S.E.2d at 705 (noting that a father's claim that his child was "substantially affected" by the mother's lesbian relationship was not supported by any specific citation to the record and in fact there was nothing in the record showing that the child's welfare was being adversely affected in any substantial way); Baer, 282 S.C. at 365-66, 318 S.E.2d at

[6] Notably, counsel for Father conceded at oral argument that Mother's relationship with Mullinax did not harm the children.

584 (holding that a mother's attempt to deceive the father as to where she and the parties' children were to be moving had no significance in the family court's child custody determination because it in no way harmed the children).

Further, the family court overlooked the psychological, educational, emotional, and recreational aspects of the children's lives, such as school, neighborhood, and community ties as well as the traumatic effect of separating the two girls from their half-sister (see Issue II below). While in Mother's care, the children were well-adjusted in school, they had many friends from school and their neighborhood, they were involved in multiple extracurricular activities, and they enjoyed the companionship of their half-sister at home. Mother participated in the children's school activities and extracurricular activities, and she diligently attended to their medical needs. However, the family court did not address how a transfer of custody to Father would affect these positive aspects of the children's lives.

Moreover, the family court failed to address the precarious circumstances in which the children would find themselves under Father's care. By the time of the final hearing, Father's financial struggles resulted in the marital home becoming the subject of foreclosure proceedings. Neither Father nor the family court expressed concern for where the children would live in the event that Father could not prevent foreclosure on the marital home. Therefore, the children would face the threat of losing their home to foreclosure, with no plan for an alternative living arrangement. Counsel for Father conceded at oral argument that Father's lack of such a plan was troubling.

Additionally, we do not believe Father's lack of financial management skills is something that can be cured by child support payments to him from Mother, as was implied by Father in his testimony. The record reflects Father's trouble maintaining stable employment throughout the marriage and his continued reliance on Mother to pay for most of the children's expenses, including medical care and school expenses. Father's inability to provide

financial stability for the children is a critical factor that the family court overlooked in determining child custody.

In sum, the family court placed an undue emphasis on Mother's relationship with Mullinax and her perceived deceptiveness regarding this relationship. The record demonstrates Mother's temporary custody of the girls provided a stable home environment for them and positively influenced their lives. The totality of the circumstances set forth in the record indicates that it was in the children's best interests to remain in Mother's custody because she is better able to take care of their needs. See Parris, 319 S.C. at 310, 460 S.E.2d at 572 (holding that the totality of circumstances unique to each particular case constitutes the only scale upon which the ultimate decision on child custody can be weighed). Therefore, Mother has carried her burden of proving the family court committed error in awarding custody to Father.

II. Children's Separation

Mother maintains the family court erred in separating her oldest child from the parties' two younger children because the separation was against her children's best interests. We agree.

Preserving sibling relationships is an important factor in determining the best interests of the children. See Patel v. Patel, 359 S.C. 515, 528-29, 599 S.E.2d 114, 121 (2004) ("[D]ivided custody should only be awarded where there are exceptional circumstances."); In re Guardianship of BJO, 165 P.3d 442, 446 (Wyo. 2007) (noting the importance of keeping siblings together and holding that the strong public policy toward preservation of sibling relationships is equally applicable whether the children are full siblings, half-siblings, or step-siblings); id. at 445 (requiring trial court to be explicit in placing on the record the reasons supporting its determination to separate siblings so as to assure that a comprehensive evaluation of all relevant factors occurred prior to the award of custody). The separation of siblings should be avoided unless there are "exceptional circumstances" present:

> Divided custody (also known as split custody) is disfavored because it separates siblings by giving each parent physical custody of one or more of the children. It cannot be awarded absent exceptional circumstances, such as a high level of conflict/hostility between children or the inability of one parent to care for all the children. A forced separation from their siblings can have a traumatic impact on children whose lives are already disrupted by the divorce experience.

Roy T. Stuckey, Marital Litigation in South Carolina 465 (4th ed. 2010).

Here, the separation of the half-sisters is troubling. Equally troubling is the fact that the family court did not address this separation in its order. We find no exceptional circumstances in the record that require the separation of the parties' children from their half-sister. Further, Father did not adopt Mother's oldest child when he had the opportunity to do so. As a result, he found himself in a position unfavorable to seeking custody of this child. Therefore, it was in the best interest of all three children to stay in Mother's care.

Based on the foregoing, Mother has carried her burden of convincing this court that the family court erred in separating the parties' children from their half-sister.

CONCLUSION

Accordingly, the family court's child custody award is **REVERSED** and the case is **REMANDED** for the entry of an order requiring a custody exchange to occur as soon as practicable.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

5 Star, Inc., Respondent,

v.

Ford Motor Company, Appellant.

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 4862
Heard April 5, 2011 – Filed August 10, 2011

REVERSED

Curtis L. Ott and David C. Marshall, both of Columbia, for Appellant.

Thomas R. Goldstein, of Charleston, for Respondent.

FEW, C.J.: 5 Star, Inc. filed this product liability action against Ford Motor Company alleging that negligence in the design of a speed control deactivation switch caused a fire that burned a 1996 Ford F-250 pickup truck.[1] However, 5 Star presented no expert witness to testify that Ford was

[1] 5 Star made no claim for strict liability or breach of warranty.

negligent in designing the switch, nor any other evidence that Ford breached its duty of care at the time the switch was designed and manufactured. We hold the trial court erred in denying Ford's motion for a directed verdict. We reverse.

I. Facts and Procedural History

5 Star is a lawn maintenance and pressure washing company owned by Stan Shelby. In February of 2005, 5 Star bought a 1996 Ford F-250 pickup truck with 227,000 miles for $1,500.00. On September 24, 2005, Shelby parked the truck for the weekend in 5 Star's North Charleston warehouse, which also housed tractors, trailers, lawn mowers, and other equipment related to the business. When Shelby returned two days later he discovered that a fire had occurred. The truck was destroyed, and the building and several other pieces of equipment were severely damaged. There were no personal injuries. Before suit was filed and before Ford was given an opportunity to inspect the truck, Shelby had the truck towed from his property and crushed.[2]

At trial, 5 Star called five witnesses. Benjamin Norris, the City of North Charleston Fire Department's Chief Fire Investigator, testified that when he arrived at 5 Star's warehouse he observed "a Ford pickup truck sitting in the middle of the building. It was extensively burned." Norris testified that the most significant damage to the building was directly above the truck's engine compartment, which indicated to him that the engine

[2] Ford asked the circuit court to dismiss the case as a sanction for spoliation of evidence based on the destruction of the truck. The circuit court declined to dismiss the case but charged the jury that it could draw a negative inference from the plaintiff's actions. Ford appeals this ruling. While we are troubled by the intentional destruction of the truck under any circumstances, particularly without notice to Ford and before Ford was given a chance to inspect it, we do not reach the question of whether the circuit court abused its discretion in ruling on the motion. We also do not reach two other arguments Ford raises on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (recognizing that an appellate court need not address remaining issues when resolution of one issue is dispositive).

compartment was the area of origin of the fire. Norris explained, "I believe the cause of the fire was a defective speed control deactivation switch because in that area that's the only thing that will produce heat at that time." Norris did not testify to any facts or opinions related to Ford's conduct in the original design of the truck or any of its component parts.

Leonard Greene testified as an expert for 5 Star in fire cause and origin and electrical engineering. Greene explained that burn patterns shown by a photograph of the pickup truck indicated that the "origin of the fire appears to be right where the switch would have normally been present. And in my opinion, the cause of the fire was a malfunction of the switch." Greene testified "it's a bad design" and explained that "it would have been inherently safer to have designed it so that it only had power on it when the ignition was on." However, Greene did not testify to any facts or opinions related to Ford's conduct in the original design of the truck or any of its component parts.

5 Star's other three witnesses included a captain in the North Charleston Fire Department, who testified as to his observations at the scene of the fire, and Shelby, who testified to his observations and to the damages caused by the fire. Neither testified to any facts or opinions related to Ford's conduct in the original design of the truck or any of its component parts. The other witness called by 5 Star was John Olson, a representative of Ford, whose testimony is discussed below.

Ford made a motion for a directed verdict at the conclusion of the plaintiff's case and renewed it at the close of all evidence. The trial court denied the motion and submitted the case to the jury exclusively on the claim for negligent design. The jury returned a verdict in favor of 5 Star for $41,000.00 in actual damages.

II. Proving Negligent Design

"'When we review a trial judge's . . . denial of a motion for directed verdict or JNOV, we reverse only when there is no evidence to support the ruling or when the ruling is governed by an error of law.'" Watson v. Ford

Motor Co., 389 S.C. 434, 455, 699 S.E.2d 169, 180 (2010) (quoting Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010)). In this case, there is no evidence that Ford was negligent in the design of the speed control deactivation switch and thus, no evidence to support the ruling denying Ford's motion for a directed verdict and for JNOV. Accordingly, we reverse the jury verdict in favor of 5 Star and enter judgment in favor of Ford Motor Company.

In 1985, this court held that in addition to the three elements common to all product liability claims, a plaintiff asserting a negligent design theory of recovery must prove that the defendant manufacturer's conduct in designing the product breached its duty of due care. Madden v. Cox, 284 S.C. 574, 579-80, 328 S.E.2d 108, 112 (Ct. App. 1985). Since at least that time, a plaintiff has been required to prove four elements in order to recover for negligent design in a product liability case: (1) he was harmed by the product; (2) the product was in essentially the same condition as when it left the defendant; (3) the harm occurred because the product was in a defective condition unreasonably dangerous to the user; and (4) the manufacturer breached its duty to exercise reasonable care in designing the product. Id.; see also Branham v. Ford Motor Co., 390 S.C. 203, 210, 701 S.E.2d 5, 8-9 (2010); Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 15, 677 S.E.2d 612, 614-15 (Ct. App. 2009). 5 Star was required to present some evidence of each of the four elements above in order survive Ford's motion for a directed verdict. On appeal, Ford contends 5 Star presented no evidence as to elements two and four.

We focus our analysis on the fourth element. In order to satisfy this element in a negligent design case, the plaintiff must prove negligent conduct on the part of the defendant in the design of the product at or before the time of manufacture. Branham, 390 S.C. at 227, 701 S.E.2d at 17 ("[T]he judgment and ultimate decision of the manufacturer must be evaluated based on what was known or 'reasonably attainable' at the time of manufacture." (citations omitted)); see also Madden, 284 S.C. at 580, 328 S.E.2d at 112 ("This burden may be met by showing that the manufacturer was aware of the danger and failed to take reasonable steps to correct it."). In Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995), this court explained the requirements of the fourth element as follows:

> [U]nder a negligence theory [of recovery], the plaintiff bears the additional burden of demonstrating the defendant . . . failed to exercise due care in some respect, and, unlike strict liability, the focus is on the conduct of the . . . manufacturer, and liability is determined according to fault.

"The focus [in a negligence action] is upon the action of the defendant. The mere fact a product malfunctions does not demonstrate the manufacturer's negligence . . . ." Sunvillas Homeowners Ass'n v. Square D Co., 301 S.C. 330, 333, 391 S.E.2d 868, 870 (Ct. App. 1990).

In this case, Ford concedes the switch was defective. However, as we explained in the cases cited above, the focus of the fourth element is on the defendant's conduct, not on the product. Therefore, mere evidence of defect is not sufficient to satisfy 5 Star's burden of proof as to this element. Rather, 5 Star was obligated to offer evidence that Ford was negligent in its conduct. 5 Star not only failed to present any evidence that Ford's conduct in designing the switch was negligent, 5 Star failed to present any evidence of Ford's conduct whatsoever. Neither Norris nor Greene testified to a single fact or event at or before the manufacture of this truck and this switch. Neither witness was qualified as an expert in automotive design or any other area of expertise that would enable them to offer opinions as to whether Ford's conduct was negligent.

The only other witness who could have testified as to Ford's conduct in designing the truck or the switch was John Olson, a design analysis engineer with Ford Motor Company. The trial court qualified Olson as an expert, but only in the field of "fire cause and origin and in particular as to vehicles." Olson offered no facts or opinions related to Ford's conduct in the original design of the truck or any of its component parts. Counsel for 5 Star asked Olson about his investigation of the fire, how the speed control deactivation switch operates, and other subjects that have no relation to Ford's conduct in designing the switch. However, counsel did not ask Olson a single question about the process of designing the switch, about what Ford knew or did not know at the time regarding its safety, or about anything that occurred in 1996 or earlier. The only mention in the entire trial of what Ford knew or did not

know about the switch before 1996 was Greene's admission that he knew nothing on the subject.

The limited evidentiary presentation by 5 Star allows us only a scant understanding of the design and operation of a speed control deactivation switch. From what little testimony there is in this record, however, we are able to determine that the switch serves as a mechanism to deactivate the cruise control when the driver presses the brake pedal. The switch is wired into the brake light circuit, which, for safety reasons, must remain energized at all times. Keeping this circuit energized allows the brake lights to be illuminated by pressing the brake pedal even when the vehicle is turned off. The switch is "redundant," meaning it serves as a back-up in case the primary deactivation switch malfunctions. The allegedly defective quality of the switch is that it allows brake fluid, which is flammable, to remain in dangerous proximity to the energized electrical circuit, separated only by a thin membrane. Greene's explanation of how this can start a fire was "the protective device [apparently a fuse] is not coordinated with the switch. The switch is rated for two amperes. The protective device is rated for 15 amperes. So the switch can really overheat and start a fire before the 15-ampere fuse would ever blow."

In order to gain more than this limited understanding of the operation of the switch, and in particular, in order to understand whether 5 Star met its burden of proving that the design of the switch was negligent in 1996, a jury, the trial court, and this court on appeal would need the benefit of expertise in several subjects that are not included in this record. In other words, this is precisely the type of "design defect claim" our supreme court recently stated "necessarily involve[s] sophisticated issues of engineering, technical science, and other complex concepts that are quintessentially beyond the ken of a lay person." Watson, 389 S.C. at 444, 699 S.E.2d at 174. When the plaintiff in a product liability case bears the burden of proof as to any issue within a subject matter beyond the common knowledge and understanding of lay jurors, that plaintiff must present expert witness testimony in order to meet its burden. 389 S.C. at 445, 699 S.E.2d at 175 ("Expert testimony . . . is necessary in cases in which the subject matter falls outside the realm of

ordinary lay knowledge.").[3] Because 5 Star failed to present any expert testimony on the design of the speed control deactivation switch and whether the design was negligent in 1996, the trial court erred in not directing a verdict in favor of Ford.[4]

REVERSED.

THOMAS and KONDUROS, JJ., concur.

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[3] We recognize that Watson was decided two years after the trial of this case. However, the requirement of presenting expert testimony to meet the burden of proof on subjects beyond the knowledge and understanding of lay jurors is by no means new. See, e.g., Green v. Lilliewood, 272 S.C. 186, 192, 249 S.E.2d 910, 913 (1978) (holding that unless the subject is a matter of common knowledge, expert testimony is required to establish that a defendant failed to conform to a required standard of care in a medical malpractice case); see also Kemmerlin v. Wingate, 274 S.C. 62, 65, 261 S.E.2d 50, 51 (1979) (holding in public accounting malpractice action: "Since this is an area beyond the realm of ordinary lay knowledge, expert testimony usually will be necessary to establish both the standard of care and the defendant's departure therefrom.").

[4] In Duncan v. Ford Motor Co., 385 S.C. 119, 128, 682 S.E.2d 877, 881 (Ct. App. 2009), we affirmed a jury verdict that Ford was negligent in the design of a speed control deactivation switch in a 2000 Ford Expedition. However, this case is distinguishable because the plaintiff in Duncan presented expert testimony that Ford was aware of the defect at the time of manufacture and Ford breached its duty to exercise reasonable care. 385 S.C. at 129-30, 682 S.E.2d at 882.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

White Oak Manor, Inc. and
White Oak Manor-York, Inc., Respondents,

v.

Lexington Insurance Company,
Caronia Corporation, and
Certain Underwriters at Lloyd's
London, subscribing to
Certificate No.
UP02US382030, Defendants,

of whom Lexington Insurance
Company is the Appellant.

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 4863
Submitted November 1, 2010 – Filed August 10, 2011

REVERSED AND REMANDED

Peter H. Dworjanyn, Christian Stegmaier, and Amy L. Neuschafer, all of Columbia, for Appellant.

Joshua Matthew Henderson, of Spartanburg, for Respondents.

THOMAS, J.: Respondent White Oak Manor, Inc. (White Oak) owns and operates a nursing home in York County. In 2005, White Oak filed a declaratory judgment action against its insurer, Appellant Lexington Insurance Company (Lexington), to adjudicate the contractual obligations between the two. Lexington did not answer within thirty days and was declared to be in default. The trial court denied Lexington's motion to set aside the entry of default, and Lexington appeals. We reverse and remand.[1]

FACTS AND PROCEDURAL HISTORY

Lexington is a corporation licensed to do business in South Carolina and organized and existing under the laws of the State of Delaware. In 2001, Lexington issued an insurance policy to White Oak, providing coverage from September 30, 2001, until May 13, 2002. From May 13, 2002, until March 31, 2003, there was a gap in coverage with Lexington, during which White Oak was insured by another carrier. Lexington resumed coverage from March 31, 2003, until March 31, 2004.

On November 3, 2001, a White Oak resident sustained an injury from the improper application of a feeding tube by a White Oak employee. On January 10, 2002, White Oak notified Caronia Corporation (Caronia), the third-party administrator approved by Lexington to receive notice, of the incident. On March 27, 2003, a malpractice lawsuit on behalf of the injured resident was filed against White Oak.

A mediation in the malpractice action was planned for August 2004. In anticipation of this mediation, counsel for White Oak sent a letter to Lexington's attorneys informing them of the scheduled mediation. In response, on August 5, 2004, Lexington's counsel sent a letter to White Oak's counsel asking whether White Oak was seeking coverage, the date and form

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

of the first demand against White Oak, and the date and form of any notice White Oak sent to any other insurers. During the following two months, attorneys for White Oak had two conversations with counsel for Lexington regarding this letter.

In December of 2004, counsel for Lexington again sent a letter to White Oak's attorneys discussing coverage issues. White Oak replied, and subsequently White Oak and Lexington had a telephone conversation regarding notice to Caronia of the claim against White Oak. White Oak later settled the malpractice action.

On April 22, 2005, White Oak instituted the current action. The policy in question contains a "service of suit clause" that reads: "It is further agreed that service of process in such a suit may be made upon Counsel, Legal Department, Lexington Insurance Company, 200 State Street, Boston, Massachusetts 02109 or his or her representative."

On May 16, 2005, White Oak mailed the summons and complaint, return receipt requested, with delivery restricted to the addressee, to "Lexington Insurance Company, 200 State St., Boston, MA 02109, ATTN: LEGAL DEPARTMENT." The return receipt was dated May 20, 2005. The signature on the return receipt appeared to be from an individual unknown to Lexington. According to Lexington's internal mail log, however, the pleadings were received on May 20, 2005, and personally delivered to Lexington's claim counselor on May 27, 2005; however, according to Lexington, neither the claim counselor nor the individual to whom the claim counselor was to pass such information recalled receiving the pleadings.

On July 7, 2005, White Oak filed an affidavit of default. In an order dated July 15, 2005, the trial court held Lexington in default. On August 11, 2005, White Oak filed a notice of motion and motion for damages pursuant to Rule 55(b), SCRCP. On September 14, 2005, White Oak filed an amended complaint substituting certain defendants who are not parties to this appeal, which it served on Lexington by mail the same day. Attached as an exhibit to this amended complaint was the order of default. Lexington answered the amended complaint on September 26, 2005, and contemporaneously filed a

motion to set aside the entry of default pursuant to Rule 55(c), SCRCP.[2] The trial court denied the motion and Lexington's subsequent motion to alter or amend.

On November 17, 2008, the trial court held a hearing on White Oak's motion for damages. On November 21, 2008, the court filed an order in which it awarded White Oak judgment against Lexington in the amount of $153,266. Lexington then filed this appeal.

STANDARD OF REVIEW

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." Sundown Operating Co. v. Intedge Indus., 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009). "The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." Id. "An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Id. at 607, 681 S.E.2d at 888.

LAW/ANALYSIS

Lexington argues that the South Carolina Code provides for the exclusive method of service upon a foreign insurance company and that White Oak was therefore required to serve notice pursuant to statute regardless of the service of suit clause. We agree.

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[2] In its motion to set aside the default, Lexington did not expressly argue that because it filed an answer to the amended complaint only twelve days after the filing of the amended complaint, it was never actually in default. Moreover, in both its motion to alter or amend and its brief to this court, Lexington does not argue that it timely responded to the filing and service of the amended complaint. See Rule 15(a), SCRCP ("A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading, whichever period may be the longer, unless the court otherwise orders.").

Section 38-5-70 of the South Carolina Code (2002) provides in pertinent part as follows:

> Every insurer shall, before being licensed, appoint in writing the director and his successors in office to be its true and lawful attorney upon whom all legal process in any action or proceeding against it must be served and in this writing shall agree that any lawful process against it which is served upon this attorney is of the same legal force and validity as if served upon the insurer and that the authority continues in force so long as any liability remains outstanding in the State.

In addition, the legislature has imposed the following requirement regarding service on insurance companies:

> The summons and any other legal process in any action or proceeding against it must be served on an insurance company . . . by delivering two copies of the summons or any other legal process to the Director of the Department of Insurance, as attorney of the company . . . . A company shall appoint the director as its attorney pursuant to the provisions of section 38-5-70. This service is considered sufficient service upon the company.

S.C. Code Ann. § 15-9-270 (2005) (emphasis added).

In response to Lexington's argument that valid service requires delivery of copies of the summons and complaint to the Director of the Department of Insurance, the trial court held that the parties were free to agree to another form of service and that Lexington, through the inclusion of the service of suit clause in its policy, waived its right to insist on service pursuant to section 15-9-270. We hold this ruling was based on an error of law.

According to section 15-9-270, the service of pleadings in a lawsuit against an insurance company "must" be accomplished by delivering two copies of the pleadings to the Director of the South Carolina Department of Insurance. See Equilease Corp. v. Weathers, 275 S.C. 478, 484, 272 S.E.2d 789, 792 (1980) ("Clearly, in such a case where jurisdiction has not yet been acquired over an insurance company, service under the applicable substituted service statute is the proper and exclusive method of obtaining jurisdiction over the insurance company."). Whereas statutes prescribing methods of service on other legal entities include a proviso that the prescribed manner of service is not the only means or even the required means of service, section 15-9-270 does not allow service to be accomplished by other methods.[3] The absence in section 15-9-270 of a provision allowing alternate methods of service on insurers is consistent with the Supreme Court's interpretation of what is now section 38-5-70. See Murray v. Sovereign Camp, WOW, 192 S.C. 101, 108, 5 S.E.2d 560, 562 (1939) (holding that "service on foreign insurance companies as provided for in Section 7964 of the Code of 1932

[3] See, e.g., S.C. Code Ann. § 15-9-210(d) (2005) (regarding service of process on domestic corporations); S.C. Code Ann. § 15-9-240(c) (2005) (regarding service of process on foreign corporations authorized to transact business in South Carolina); S.C. Code Ann. § 15-9-245(f) (2005) (regarding service of process on foreign corporations not authorized to do business in South Carolina).

Service of process on unauthorized insurers can be accomplished through service on "the Secretary of State or his successor in office," service on"the Chief Insurance Commissioner or some person in apparent charge of his office," or service on "any person within this State" performing certain activities on the unauthorized insurer's behalf. S.C. Code Ann. §§ 15-9-280(a), 15-9-285(b), and 15-9-290 (2005). The statutes prescribing these methods do not "abridge[ ] the right to serve any process, notice, or demand upon any insurer in any other manner permitted by law," but litigants are not explicitly allowed to use alternative methods in lieu of the means set forth in sections 15-9-280, 15-9-285, and 15-9-290. S.C. Code Ann. § 15-9-300 (2005).

[now section 38-5-70] is exclusive, and that service made in any other way upon such corporations is invalid").

Service of the pleadings on the Director of the South Carolina Department of Insurance "is considered sufficient service upon the company." S.C. Code Ann. § 15-9-270 (2005). Upon receiving the pleadings, the Director "shall immediately forward by registered or certified mail one of the duplicate copies prepaid directed toward the company at its home office . . . ." Id. This is more than a ministerial task. Rather, it is consistent with other statutory responsibilities entrusted to the Director, including duties to (1) "see that all laws of this State governing insurers or relating to the business of insurance are faithfully executed[,]" (2) "report to the Attorney General or other appropriate law enforcement officials criminal violations of the laws relative to the business of insurance or the provisions of this title which he considers necessary to report[,]" and (3) institute civil actions when appropriate. S.C. Code Ann. § 38-3-110 (2002). In order to perform such duties, the Director needs to be informed when an insurer's misconduct is alleged to be sufficiently serious to warrant litigation. Requiring the aggrieved party to serve the Director as a prerequisite to acquiring jurisdiction over the insurer is a reasonable and efficient way to achieve this objective. Based on this reasoning, we hold that service on the Department of Insurance of the pleadings in any lawsuit against an insurance company is a right granted to the Department to enable it to fulfill the responsibilities with which it has been charged. The service of suit clause in Lexington's policy was ineffective to waive a right that was not Lexington's to waive. The trial court therefore erred as a matter of law in holding that the service of suit clause in Lexington's policy operated as a waiver of the right to be served according to section 15-9-270.

CONCLUSION

We hold that the service of suit clause did not absolve White Oak of the responsibility to comply with the requirement in section 15-9-270 that it deliver two copies of its summons and complaint to the Director of the Department of Insurance in order to serve process on Lexington. We therefore reverse the trial court's denial of Lexington's motion to set aside the entry of default, vacate the judgment, and remand the matter to the trial court

so that Lexington can file an answer within thirty days once service of process has been accomplished according to section 15-9-270. Because our determination of this issue is dispositive of this appeal, we do not address Lexington's other challenges to the validity of the service of process. See Futch v. McAllister Towing of Georgetown, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling that because the determination of a particular issue was dispositive of the appeal, the appellate court did not need to review the remaining issues).

REVERSED AND REMANDED.

PIEPER and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Beverly S., individually and as Guardian Ad Litem for Mandy S., Appellant,

v.

Kayla R., Respondent.

Appeal From Sumter County
R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 4864
Heard November 4, 2010 – Filed August 10, 2011

AFFIRMED

John Richard Moorman, of Sumter, for Appellant.

David Cornwell Holler, of Sumter, for Respondent.

FEW, C.J.: In this appeal from an automobile accident case, Beverly S. claims the trial judge erred in not charging the jury on the loss of use of a vehicle as an element of recoverable property damages when the vehicle is a

total loss. We find Beverly has failed to provide an adequate record for appellate review, and accordingly, we affirm.

I. Facts and Procedural History

On August 9, 2006, Beverly's daughter, Mandy, drove Beverly's 1995 Nissan Altima to school. While Mandy was attempting to leave the school's parking lot after class, Mandy was involved in two nearly simultaneous collisions: (1) she was hit from behind by a car driven by Kayla R., and (2) Mandy hit the car in front of her. The Altima sustained significant damages to its front end and minor damages to the rear end.

Beverly filed suit against Kayla claiming Kayla was negligent in hitting Mandy from behind, which in turn caused the Altima to hit the car in front. Beverly sought actual damages for Mandy's personal injuries and for property damage to and loss of use of the Altima. She also sought punitive damages. Before trial, the parties settled all claims except those for property damage and loss of use.

Beverly's counsel asked the trial judge to charge the jury that loss of use damages are recoverable as an element of property damages even if the vehicle was a total loss. The judge denied the request. The jury returned a $120 verdict in favor of Beverly.

II. Failure to Prepare an Adequate Record on Appeal

We do not reach the issue Beverly attempts to raise on appeal because it is not adequately presented for appellate review. An appellate court will not consider an issue that has not been preserved for appellate review. Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006). Issue preservation requires a party to preserve an issue both at trial and in presentation of the issue on appeal. S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 659, 667 S.E.2d 7, 15 (Ct. App. 2008) (stating "if an issue is preserved at the trial court level, it must still be properly raised and argued to the appellate court").

Beverly failed to present the issue on appeal in two important respects. First, she failed to include her request to charge in the Record on Appeal. An appellate court cannot review a trial court's refusal to give a requested charge where the appellant fails to include the requested charge in the record. Kline Iron & Steel Co. v. Superior Trucking Co., 261 S.C. 542, 550, 201 S.E.2d 388, 392 (1973); see also Bonaparte v. Floyd, 291 S.C. 427, 444, 354 S.E.2d 40, 50 (Ct. App. 1987) (stating the appellant bears the burden of providing a record on appeal sufficient for intelligent review); Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal.").

Second, Beverly failed to present the issue on appeal by not including the entire jury charge in the Record on Appeal. An appellate court reviewing a jury charge for error must review the charge as a whole. Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999); see also Fairchild v. S.C. Dep't of Transp., 385 S.C. 344, 352, 683 S.E.2d 818, 822 (Ct. App. 2009) (stating an error in a jury charge must be shown to be prejudicial to warrant reversal). Here, Beverly included in the Record only one page of the transcript of the charge. That page does not even include the entire charge on damages.

III. Conclusion

Because Beverly failed to provide an adequate record for appellate review, the jury verdict is

AFFIRMED.

SHORT, J., concurs.

CURETON, A.J., dissenting: Because I am firmly convinced Beverly properly preserved the issue of the failure of the trial court to charge loss of use, I am compelled to dissent.

At trial, counsel for Beverly inquired whether the trial court would "charge the loss of use provisions." The court responded that it would charge Beverly could recover loss of use only if the jury found her car was economically repairable.[1] The court's actual charge follows:

> If repairing the vehicle would put it in as good a condition as before the accident, then the measure of damages would be the cost of the repair plus any amount by which the value of the vehicle was decreased due to its involvement in the collision. This is also called depreciation.
>
> If the vehicle cannot be repaired, the measure of damages would be the value of the vehicle immediately before it was struck minus any salvage value.
>
> A plaintiff may also be entitled to recover for the loss of use of a vehicle during the time the plaintiff was unable to use it.
>
> Actual damage for this purpose would be measured by determining what if any it would cost the plaintiff to rent a similar vehicle while the plaintiff's own vehicle was being repaired.

After the court charged the jury, Beverly renewed her objection to the charge, stating "[t]he plaintiff still maintains their objection to not being able to charge the jury that total loss is recoverable. Loss of use is recoverable in the event the car is a total loss—thank you."

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[1] While Beverly's written request to charge and the court's entire charge are not included in the record on appeal, the record contains four pages of the colloquy between the court and counsel concerning whether to charge loss of use. Moreover, the relevant portion of the court's charge is included in the record.

Quite candidly, in her brief, Kayla does not take the position that the issue is not preserved for our review. Instead, Kayla concludes: "Although loss of use may be recoverable when a vehicle is destroyed or not economically repairable, [Beverly] offered no evidence that she was entitled to an exception to the general rule. The trial court properly denied [Beverly]'s request to submit loss of use as an element of damages in this case."

I believe the issue of whether or not a plaintiff may recover loss of use of a totally destroyed or non-repairable vehicle is a novel issue in this state and should be decided on the merits. Furthermore, Beverly argues she suffered prejudice from the deficient charge, in that she might have received a substantially higher damages award if the jury had considered loss of use. See Hughes v. W. Carolina Reg'l Sewer Auth., 386 S.C. 641, 646, 689 S.E.2d 638, 641 (Ct. App. 2009) (permitting reversal of a trial court's decision declining to give a particular jury charge when the decision is both erroneous and prejudicial). Inasmuch as I believe Beverly was entitled to the requested charge, I would reverse and remand for a new trial.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mildred H. Shatto
Employee/Claimant, Respondent,

v.

McLeod Regional Medical
Center and Key Risk
Management Services, Inc.,
Employer/Carrier, Appellants,

and

Staff Care, Inc., and Travelers
Insurance, Employer/Carrier, Respondents.

Appeal From Richland County
Appellate Panel, Workers' Compensation Commission

Opinion No. 4865
Submitted March 1, 2011 – Filed August 10, 2011

REVERSED AND REMANDED

Walter H. Barefoot and Carmelo B. Sammataro, of Columbia, for Appellants.

Blake A. Hewitt and Margaret Miles Bluestein, of Columbia, for Respondent Mildred H. Shatto; Candace G. Hindersman, Richard B. Kale, and Michael W. Burkett, all of Columbia, for Respondent Staff Care.

WILLIAMS, J.: On appeal, McLeod Regional Medical Center (McLeod) argues the Appellate Panel of the Workers' Compensation Commission (Appellate Panel) erred in concluding (1) Mildred H. Shatto (Shatto) was an employee of McLeod and (2) Shatto's fall was compensable and not idiopathic in nature. We reverse and remand.[1]

FACTS

On March 26, 2007, Staff Care, Inc. (Staff Care), a temporary medical service staffing company located in Irving, Texas, entered into an agreement (the Staffing Agreement) to provide temporary medical services for McLeod Physician Associates.[2] Pursuant to the Staffing Agreement, Staff Care acted as a placement agent for McLeod and was required to use its best efforts in identifying temporary health care professionals acceptable to McLeod. In addition, the Staffing Agreement required Staff Care to verify the health care providers' medical licenses, arrange and complete travel and housing accommodations, provide malpractice insurance, and pay health care providers on behalf of McLeod.

Shatto, a certified registered nurse anesthetist (CRNA), contacted Staff Care after finding a posting on the internet. Shatto was unaware that Staff Care was going to assign her to McLeod. Shatto sent Staff Care her resume, copies of her licenses and medical certifications, her health record, and references. On October 10, 2007, Shatto entered into a Provider Services Agreement (the Provider Agreement), which specifically indicated Shatto was an independent contractor with Staff Care. The next day, Shatto signed an independent contractor declaration form, stating Staff Care "does not have

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

[2] McLeod Physician Associates is listed as the Client in the Staffing Agreement. For ease of reference, we refer to McLeod Physician Associates and McLeod Regional Medical Center as McLeod throughout this opinion.

the right to direct or control the manner in which I practice my profession." Additionally, the independent contractor declaration form provided that Shatto was not an employee of Staff Care; Shatto was responsible for paying local, state, and federal taxes; and Shatto was not entitled to unemployment and workers' compensation benefits from Staff Care. On October 24, 2007, Staff Care sent Shatto a confirmation letter regarding her assignment to provide temporary medical services as a CRNA for McLeod from November 2007 to February 2008. The letter also indicated Staff Care agreed to pay an hourly rate of $95 and a $25 per diem. Additionally, Shatto chose which shift she wanted to work while at McLeod.

On the first day of her assignment, Shatto reported to Keith Torgerson, the chief CRNA of McLeod, and received an orientation of the layout of the operating and supply room. During her assignment, Shatto underwent a McLeod employee drug screening and employee health assessment, received an identification badge, and signed several forms, including McLeod's health employee validation form, dress code, parking, and corporate integrity program policies. Shatto acknowledged she received a copy of her job description and completed a temporary employee emergency information sheet, a medical history form, and a mandatory Occupational Safety and Health Administration Respirator Medical Evaluation Form. McLeod also furnished Shatto with scrub suits, disposable paper hats, paper booties, anesthesia machines, monitoring equipment, blood pressure cuffs, pulse oximeters, a stethoscope, drape clamps, laryngoscopes, and blades.

On December 21, 2007, Shatto fell on the operating room floor while assisting in the anesthetization of a patient. She did not recall tripping over any items but believed she tripped over either the bed cords or an I.V. pole. Shatto was treated in McLeod's emergency room and diagnosed with a contusion to the right eye. At the end of December 2007, Shatto's assignment with McLeod was terminated.

On April 30, 2008, Shatto filed a Workers' Compensation Commission Form 50 (Employee's Notice of Claim and/or Request for Hearing) against McLeod and Staff Care. Shatto filed an amended Form 50 on June 2, 2008. Shatto's requests for a hearing against McLeod and Staff Care were consolidated, and a hearing was held on August 21, 2008. The Workers'

Compensation Commissioner (the Single Commissioner) concluded Shatto was entitled to workers' compensation benefits as a result of her fall.

The Single Commissioner found an employer-employee relationship existed between McLeod and Shatto and further held (1) McLeod controlled the details of Shatto's work; (2) McLeod furnished Shatto with equipment; (3) McLeod fired Shatto; (4) McLeod was responsible for paying Shatto; and (5) Shatto sustained an injury by accident while in the course of employment. Additionally, the Single Commissioner concluded Shatto was a "borrowed servant" under the borrowed servant doctrine and found (1) a contract, even if it was implied, existed between Shatto and McLeod; (2) Shatto was contracted to provide specific health care services as a CRNA, and McLeod is a general hospital healthcare provider with nurse anesthetists; and (3) McLeod controlled the details of Shatto's work. McLeod appealed the Single Commissioner's decision, and the Appellate Panel affirmed the Single Commissioner. This appeal followed.[3]

STANDARD OF REVIEW

The existence of an employment relationship is a jurisdictional issue for purposes of workers' compensation benefits and is reviewable under a preponderance of the evidence standard. Brayboy v. WorkForce, 383 S.C. 463, 466, 681 S.E.2d 567, 568 (2009).

LAW/ANALYSIS

Under settled law, the determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically, whether the purported employer had the right to control the claimant in the performance of his or her work. Wilkinson ex. rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009). In evaluating the right of control, the court examines four factors that serve as a means of analyzing the work relationship as a whole: (1) "direct

[3] Pursuant to a statutory modification of section 42-17-60 of the South Carolina Code (2010), injuries occurring on or after July 1, 2007, are appealed directly to this court.

evidence of the right or exercise of control"; (2) "furnishing of equipment"; (3) "method of payment"; and (4) "right to fire."[4] Id.

A. EMPLOYER-EMPLOYEE RELATIONSHIP

At the outset, McLeod contends Shatto's employment did not create an employer-employee relationship because the only contract of employment in this case was the Provider Agreement between Staff Care and Shatto.

Despite McLeod's argument, we find the existence of an employer-employee relationship is not conclusively based on the existence of a contract of employment. See Spivey v. D.G. Constr. Co., 321 S.C. 19, 22, 467 S.E.2d 117, 119 (Ct. App. 1996) ("[An employment] contract may be oral or written, and also may be implied from the conduct of the parties. It is enough if the circumstances show unequivocally that the parties recognize the relationship."). Because the crucial question is the right to control, we find the dispositive question is whether the four-factor test from Wilkinson is satisfied.

1. Direct evidence of the right or exercise of control

In deciding whether McLeod had the right to exercise direct control over Shatto, the Appellate Panel found (1) Shatto did not have control over which patients she would anesthetize or the order in which she would

[4] In analyzing the right to control factors, the Appellate Panel's decision cited to Dawkins v. Jordan, and noted that "any single factor is not merely indicative of, but, in practice, virtually proof of, the employment relation; while, in the opposite direction, contrary evidence is as to any one factor at best only mildly persuasive evidence of contractorship, and sometimes is of almost no such force at all." 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000). This proposition was expressly overruled by our supreme court in Wilkinson. The Wilkinson court stated, "We overrule Dawkins' analytical framework, for it most assuredly skews the analysis to a finding of employment. We return to our jurisprudence that evaluates the four factors with equal force in both directions." Wilkinson, 382 S.C at 300, 676 S.E.2d at 702 (footnote omitted). Therefore, in determining whether Shatto was an employee of McLeod, we apply the standard enunciated in Wilkinson.

anesthetize patients because she received her assignments from her supervisor; (2) Shatto was required to report to Torgerson or the head CRNA on duty; (3) Torgerson had to sign Shatto's time sheet before she submitted it to Staff Care; (4) Shatto had to administer anesthesia and manage patients after surgery per McLeod's standards; (5) Shatto provided instruction and education to McLeod's student nurse anesthetists; (6) Shatto was required to attend at least 50% of departmental and information meetings; (7) Shatto was required to begin work at 9:00 a.m.; and (8) Shatto was required to sign a statement acknowledging that she understood her job description at McLeod and would comply with McLeod's dress code, corporate integrity program, confidentiality, parking, and name tag policies.

McLeod argues the right to control factor does not favor an employment relationship with Shatto because its control over Shatto was mandated by law. Shatto does not dispute that McLeod was required by law to give Shatto a job description, conduct a drug screening and orientation, and provide Shatto with an identification badge. Nevertheless, Shatto contends McLeod's control over Shatto exceeded the amount required by law because Shatto provided instructions to student nurse anesthetists, McLeod presented Shatto with a dress code, and McLeod had to sign Shatto's time sheets. We find Shatto's argument unpersuasive based on our review of the preponderance of the evidence.

We are aware that hospitals are subject to an array of legal and governmental regulations to ensure proper medical standards for healthcare professionals providing optimal patient care. However, because McLeod's control over Shatto was, in substantial part, derived by law, we find the right to control factor does not favor an employer-employee relationship based on the preponderance of the evidence in the record. See Wilkinson, 382 S.C. at 302, 676 S.E.2d at 703 (noting that requiring a worker to comply with the law is not evidence of control by the putative employer).

First, we find Shatto was required to comply with McLeod's anesthesia standards during her assignment. See S.C. Code Ann. § 40-33-20(20) (2011) (stating a CRNA shall practice pursuant to approved written guidelines within the facility where practice privileges have been granted). McLeod was also legally required to provide Shatto with a job description and an

identification badge. See S.C. Code Ann. § 40-33-34(H)(2)(b)(ii) (2011) (stating a CRNA must be provided a copy of the job description); see also S.C. Code Ann. § 44-7-3430 (Supp. 2010) (stating all clinical staff, clinical trainees, medical students, interns, and resident physicians of a hospital shall wear badges clearly stating their names, their department, and their job or trainee title).

Moreover, McLeod was required to provide Shatto with an orientation and to ascertain Shatto's health history and health status, as well as her educational and training background pursuant to the Minimum Standards for Licensing Hospitals and Institutional General Infirmaries regulations under the South Carolina Code of Regulations. See 24A S.C. Code Ann. Regs. 61-16 § 204(A) (1976) (stating applications for employment at a hospital or institutional general infirmaries shall contain age, education, training, experience, health, and personal background of each employee); 24A S.C. Code Ann. Regs. 61-16 § 204(B) (Supp. 2010) (stating all new employees and volunteers who have contact with patients shall have a physical examination within one year prior to employment including a tuberculin skin test no more than three months prior to employment, unless a previously positive reaction can be documented); 24A S.C. Code Ann. Regs. 61-16 § 204(C) (1976) (stating all new personnel shall be oriented to acquaint them with the organization and environment of the facility, their own specific duties and responsibilities, patients' needs, and the emergency/disaster plans of the facility).

Furthermore, even though Torgerson, McLeod's chief CRNA, signed Shatto's time sheets, Staff Care required a McLeod representative's signature on the provider invoices for payment and malpractice documentation. Shatto testified she was told to take the provider invoice to Torgerson. Specifically, in a November 13, 2007 letter to Shatto, Staff Care stated, "[Staff Care] cannot present your Provider Invoice for payment without [the Client Representative] signature." Staff Care's requirement that a McLeod representative sign a provider invoice does not equate to the right of control.

Additionally, we note Shatto was treated differently from McLeod's CRNA employees. In contrast to CRNAs employed by McLeod, Shatto was never "on call" for work and was only permitted to work in the operating

room. Torgerson testified McLeod CRNAs are allowed to work in the main operating room, cardiac area, obstetrics department, the emergency room, radiology suites, and the catheterization lab. Due to safety concerns and the complexity of different medical environments at McLeod, Torgerson testified contract workers like Shatto were prohibited from working in these areas. Accordingly, we find McLeod did not have the right to control Shatto.

2. Furnishing of Equipment

McLeod contends it was legally required to provide certain medical equipment to Shatto and, as a result, McLeod asserts the furnishing of equipment factor does not favor an employment relationship with Shatto. We agree.

The Appellate Panel found McLeod furnished Shatto with anesthesia and monitoring equipment, blood-pressure cuffs, pulse oximeters, thermometers, scrub suits, disposable paper hats, and paper booties. Further, the Appellate Panel stated:

> There is no indication in any of the exhibits, deposition, or hearing testimony that [Shatto] was required to bring her own anesthetics, needles, syringes, tourniquets, inhalation anesthetic masks, tubing, rubber gloves, or other instruments required to perform her duties as a nurse anesthetist, as all of these materials were supplied by McLeod.

During the workers' compensation hearing, Shatto indicated she never owned an anesthesia machine, and temporary CRNAs do not bring anesthesia equipment while on assignment. Shatto estimated McLeod's anesthesia equipment weighed approximately five hundred pounds or more. Shatto further testified she was required to wear scrubs in the operating room and that Torgerson informed her that she did not need to bring a stethoscope, clamps for the drape, laryngoscopes, and blades because McLeod had "plenty." According to Torgerson, a CRNA on assignment has never brought anesthesia equipment because the law mandates McLeod is responsible for

anesthesia equipment. Torgerson also indicated that individuals are required to wear scrubs prior to entry into the operating room.

We find McLeod's furnishing of equipment does not favor an employment relationship with McLeod. Pursuant to the Staffing Agreement, McLeod was required to supply Shatto with customary equipment and supplies according to her specialty. Moreover, the regulations governing the minimum standards for hospitals require McLeod to maintain anesthesia equipment in operable condition. See 24A S.C. Code Ann. Regs. 61-16 § 901 (1976) ("An institutional structure, its components parts, facilities, and all equipment, such as sterilizers, anesthesia machines . . . shall be kept in good repair and operating condition.").

Further, the fact McLeod provided Shatto with sterile clothing prior to entering the operating room is in tandem with the regulatory scheme's emphasis on maintaining a sterile environment in the operating room. See 24A S.C. Code Ann. Regs. 61-16 § 606.2 (1976) ("The operating rooms shall be separated from non-sterile areas and shall be located so as not to be used as a passageway between, or subject to contamination from, other parts of the hospital."). Based on the foregoing, we find McLeod did not provide Shatto's equipment for purposes of creating a employer-employee relationship.

3. Method of Payment

Additionally, McLeod contends the method of payment factor does not favor an employment relationship with Shatto. Particularly, McLeod argues Staff Care (1) directly deposited Shatto's hourly wages; (2) provided Shatto with a per diem, a rental car, and medical malpractice insurance; and (3) paid Shatto overtime wages. McLeod further argues it did not provide Shatto with any employee benefits such as group health insurance, vacation and sick days, or a 401K retirement plan. We agree.

During the hearing, Shatto testified Staff Care deposited her hourly wages into her account and provided a per diem, malpractice insurance coverage, a rental car, and housing. In regard to McLeod's employee benefits, Shatto acknowledged McLeod did not provide her with group health insurance, vacation and sick days, or a 401K retirement plan. Torgersen

testified McLeod employees receive benefits, including vacation time, group health insurance, a 401K retirement plan, continuing education, and medical malpractice insurance. Further, Torgerson indicated McLeod reimbursed Staff Care for Shatto's lodging during her assignment, rental car expenses, medical malpractice insurance coverage, and Shatto's hourly wages. Ms. Diane Bryant of McLeod's payroll department testified a search of McLeod's payroll records did not reveal any payment of wages or earnings directly from McLeod to Shatto.

The Appellate Panel found the method of payment factor favored an employment relationship between McLeod and Shatto and specifically held:

> Although McLeod did not directly pay [Shatto], McLeod was ultimately responsible for payment of [Shatto's] salary and expenses per the terms of the [Staffing] Agreement which states [McLeod] shall provide or directly reimburse [Shatto] through [Staff Care] for cost of housing outside [McLeod's] facility, local transportation, en route lodging, en route meals, and reasonable transportation costs to and from [McLeod's] location.

Despite Staff Care paying Shatto's hourly wages and expenses relating to her rental car and lodging, McLeod issued several checks for "contract labor" to Staff Care for payment of Shatto's wages, housing, and rental car expenses. McLeod's payment is consistent with the Staffing Agreement provision which states, "[McLeod] shall provide or directly reimburse [Shatto] through [Staff Care] for cost of housing outside [McLeod's] facility, local transportation, en route lodging, en route meals, and reasonable transportation costs to and from [McLeod's] location." Notwithstanding McLeod's payment to Staff Care for Shatto's services, transportation, and housing expenses, the preponderance of the evidence necessitates our finding that Shatto was not an employee of McLeod.

In reaching this conclusion, we find it particularly noteworthy Shatto did not receive employee benefits. Additionally, Staff Care provided Shatto with a 1099 form indicating her nonemployee compensation of $13,916 from

Staff Care. Shatto filed a 2007 1040 Profit or Loss From Business (Sole Proprietorship) Schedule C form and listed her nonemployee compensation income of $13,916, $3,168 for car and truck expenses, and $1,342 for supplies. Shatto expended $94 for continuing education courses, $595 for dues and subscriptions, $50 for a registration fee, $130 for licenses and permits, $192 for uniforms, and traveled 6,532 business miles. Consistent with Shatto's tax filings as a sole proprietor, Shatto indicated she never thought of herself as an employee of Staff Care but only as an "independent locums looking for a job." As noted above, Shatto submitted a 1099 form, which lends support that she was not an employee of McLeod. See Wilkinson, 382 S.C. at 303, 676 S.E.2d at 704 (finding method of payment did not bear any indicia of an employment relationship when claimant was furnished with 1099 tax forms and filed as a sole proprietorship). Based on the foregoing, we conclude the method of payment factor does not favor an employment relationship.

4. Right to Fire

Pursuant to Wilkinson, McLeod argues the right to fire factor tilts in favor of finding Shatto was not an employee of McLeod because the agreement between McLeod and Staff Care only granted McLeod a right to terminate. We agree.

In finding McLeod had the right to fire Shatto, the Appellate Panel stated the following:

> McLeod had the right to fire [Shatto] if they did not find her services to be appropriate. According to the [Staffing Agreement], McLeod had 48 hours in which to notify Staff Care of its intention to accept [Shatto's] services . . . . McLeod ultimately fired [Shatto] on December 28, 2007.[5]

[5] The Appellate Panel finding is based on section B.4 of the Duties of Client section of the Staffing Agreement, which provides that McLeod must notify Staff Care of its intention to accept or not to accept Shatto's services within 48 hours after her presentment to McLeod.

In determining whether McLeod had the right to fire, we find Wilkinson provides guidance on this issue. Initially, our supreme court noted in Wilkinson that the right to fire factor was the most difficult to evaluate because the parties did not confront this issue. Wilkinson, 382 S.C. at 304, 676 S.E.2d at 704. Nonetheless, our supreme court recognized a right to terminate in some form exists in an independent contractor arrangement. Id. However, in analyzing the right to fire factor, our supreme court stated, "[t]he critical inquiry is the term 'fire,' for it embraces the employment relationship." Id. The court then examined the contractural terms between Wilkinson and Palmetto and concluded Palmetto did not have a right to fire. Id. Specifically, the court noted either party could terminate the contract upon thirty days' notice, and the contract stated, "[i]n the event either party commits a material breach of any term of this Agreement . . . the other party shall have the right to terminate this Agreement immediately and hold the party committing the breach liable for damages." Id.

In this case, Torgerson testified Shatto's assignment was terminated because McLeod hired full-time employees, which obviated the need for temporary CRNAs. Shatto admitted Torgerson informed her around the end of November or beginning of December 2007 her services would no longer be needed after the holidays because McLeod hired full-time CRNAs who were slated to start working in the beginning of 2008.

The cancellation section of the Staffing Agreement and the Termination section of the Provider Agreement governed the parties' right of termination. Section C.2 of the cancellation section of the Staffing Agreement provided:

> [McLeod] may terminate this AGREEMENT or the services of . . . [Shatto] at any time in writing, subject to the limitations included below in Section D.6,[6] provided once [McLeod] has accepted [Shatto]

[6] Section D.6 provided, "[McLeod] agrees that it will not seek to terminate [Shatto's] placement, nor will it refuse [Shatto's] service, for a discriminatory reason, including [Shatto's] race, sex, national origin, religion, age, disability, marital status, veteran status, or any other protected classification."

> through verbal or written communication, termination by [McLeod] shall not be effective until 30 days after written notice of termination was received by [Staff Care], [McLeod] will be invoiced, in accordance to the rates agreed upon in the ORDER, for all scheduled time through the effective date of termination. Upon termination, [McLeod] also remains obligated for any and all fees and expenses that are due and owing to [Staff Care] under this AGREEMENT, as well as any other fees, expenses or other charges in connection with services performed by [Shatto] through the effective date of termination.

(emphasis in original)

Section C.3 provided in pertinent part:

> If, at any time during the course of this AGREEMENT . . . [McLeod] does not reasonably find the performance of [Shatto] to be appropriate; [McLeod] shall provide written notice of such determination to [Staff Care] and [Staff Care] shall attempt to replace [Shatto]. [McLeod] shall be solely responsible for terminating [Shatto] due to [her] poor performance, including, but not limited to intentional or unintentional dereliction of duties, gross negligence, or loss of hospital privileges, as determined by [McLeod] in its sole discretion. [McLeod] may request that [Staff Care] on [McLeod's] behalf deliver a notice of termination to [Shatto], but under no circumstances shall [Staff Care] have the unilateral right or authority to terminate [Shatto's] assignment.

(emphasis in original).

Section 3.02(a) of the termination section of the Provider Agreement, which Shatto initialed and signed, provided in pertinent part:

> Either party may terminate this Agreement and [Shatto] or [McLeod] may terminate an assignment with or without cause by giving at least thirty (30) days prior written notice; provided, however, Staff Care shall not have the right to terminate an assignment for [McLeod] for which [Shatto] is performing services.

Section 3.02(d) of the Provider Agreement stated:

> [McLeod], at its sole discretion, will have the right to terminate the services of [Shatto] for any assignment if [McLeod] does not reasonably find the services of [Shatto] to be appropriate; provided, however [McLeod] will be liable to [Shatto] for payment for services performed by [Shatto] prior to termination. [Shatto] will not be entitled to payment for any scheduled services not actually performed by [Shatto] as a result of the termination of an assignment.

Similar to the employer in Wilkinson, we hold McLeod did not have a right to fire and the parties' right of termination was controlled by the Staffing and Provider Agreements, respectively.[7] Therefore, we find the "right to fire" factor favors McLeod.

[7] The record does not contain a written notice of McLeod's termination of Shatto as prescribed by the Staffing Agreement and the Provider Agreement. In Wilkinson, the court concluded the contract's language only granted the parties the right to terminate the contract. 382 S.C at 304, 676 S.E.2d at 704. Therefore, even though there is no written notice in the record, the Staffing Agreement and Provider Agreement provided a right of termination, rather than a right to fire. Additionally, Shatto testified Torgerson informed her around the end of November 2007 that McLeod hired four CRNAs who were

Based on the foregoing analysis, we find Shatto was not an employee of McLeod. Because we find Shatto was not an employee of McLeod, we need not address whether Shatto was a borrowed servant because McLeod did not control Shatto's work. Moreover, because we find Shatto was not an employee of McLeod, we need not address whether Shatto's fall was idiopathic in nature. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

CONCLUSION

Based on the foregoing, we reverse the Appellate Panel's decision that Shatto was an employee of McLeod and remand for further proceedings on the issue of whether Shatto was an employee of Staff Care.

Accordingly, the Appellate Panel's decision is

REVERSED and REMANDED.

GEATHERS and LOCKEMY, JJ., concur.

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scheduled to begin employment in January 2008. Shatto testified Torgerson told her that he had to give her thirty days' notice before termination.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

The State, Respondent,

v.

Eddie Lindsey, Appellant.

Appeal From Anderson County
J. Michael Baxley, Circuit Court Judge

Opinion No. 4866
Submitted June 1, 2011 – Filed August 10, 2011

AFFIRMED

Appellate Defender M. Celia Robinson, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, all of Columbia; and Solicitor Christina T. Adams, of Anderson, for Respondent.

WILLIAMS, J.: Eddie Lindsey (Lindsey) was indicted for and convicted of armed robbery and assault and battery with intent to kill (ABWIK). The trial court sentenced Lindsey to concurrent sentences of thirty years' imprisonment for armed robbery and twenty years' imprisonment for the ABWIK charge. Lindsey appeals, arguing the trial court erred in admitting (1) hearsay that improperly bolstered the officer's testimony and (2) Lindsey's written statement into evidence. We affirm.[1]

FACTS/PROCEDURAL HISTORY

Lindsey proceeded to trial on charges arising from the robbery of King's ABC Liquor Store (the liquor store). Three days after the robbery, Investigator John Zamberlin (Investigator Zamberlin) interviewed Lindsey after receiving an anonymous tip.[2] During the first interview, Lindsey was advised of his Miranda[3] rights, signed a voluntary waiver of his rights, and provided an oral statement denying any knowledge of the crime. At the conclusion of the first interview, Lindsey provided Investigator Zamberlin a signed authorization allowing the police to collect blood, hair, and saliva samples for analysis (the DNA swab).

Several hours later, Lindsey requested to speak with Investigator Zamberlin. During the second interview,[4] Lindsey asked Investigator Zamberlin if the liquor store clerk identified him as the perpetrator. Investigator Zamberlin informed Lindsey the South Carolina Law Enforcement Divison (SLED) was conducting a forensic evaluation on a pair of Lindsey's tennis shoes the police believed were worn during the commission of the robbery. At this point, Lindsey informed Investigator Zamberlin and Lieutenant David Creamer (Lieutenant Creamer) that he "just snapped" while in the liquor store and committed the crime. During this interview, Lindsey consented to provide a written statement but requested

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

[2] Lindsey was under arrest for a probation violation at the time of the interviews.

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

[4] Investigator Zamberlin testified Lindsey was advised that his Miranda rights were still in effect from the interview held earlier in the morning.

Investigator Zamberlin write the statement as he detailed the robbery. As a matter of course, Lieutenant Creamer contemporaneously took handwritten notes (Creamer's notes) while Investigator Zamberlin questioned Lindsey and typed Lindsey's statement.

According to the written statement, Lindsey went into the liquor store to purchase a bottle of gin and saw the store clerk counting some money. The store clerk asked Lindsey for payment. At this point, Lindsey "just snapped" and hit the store clerk with a sock that contained a rock in it. Lindsey smashed the cash register against the floor and collected $120 and ran out of the liquor store. Lindsey purchased some new tennis shoes and pants with the money. In addition, Lindsey washed his Adidas tennis shoes and discarded a pair of pants because they had blood on them from the robbery.

Creamer's notes recounted the following:

> [I] [a]dvised Lindsey that his rights were still in effect. Lindsey wanted to know if the man had identified him. Lindsey was told that his shoes had been recovered and would be checked for blood. Lindsey said he did it, that he robbed the man at the liquor store. Lindsey went to the liquor store to buy some gin. The man [was] behind the counter counting money. He asked the man for a bottle of gin. The man set the bottle on the counter and asked him for five dollars and something. He just snapped and hit the man with a rock that was inside a sock. He smashed the cash register out on the floor. He got about a hundred and twenty dollars from the cash register. He ran out of the store. He dropped some money in the parking lot. He bent down and picked up the money. He ran down West Reed Street and went to a house, but no one was at home. Spent all the money. Spent some of it on some clothes. The man in the liquor store did nothing to make him hit him. He just snapped.

The State moved to introduce Creamer's notes detailing the second interview and Lindsey's written statement obtained by Zamberlin into evidence. Lindsey objected to Creamer's notes, arguing they were inadmissible hearsay. In addition, Lindsey objected to the written statement and denied he ever made the statement.[5] The trial court allowed both Creamer's notes and the written statement into evidence over Lindsey's objections. A jury found Lindsey guilty of armed robbery and ABWIK. The trial court sentenced Lindsey to concurrent sentences of thirty years' imprisonment for armed robbery and twenty years' imprisonment for the ABWIK charge. This appeal followed.

STANDARD OF REVIEW

In criminal cases, this court reviews errors of law only and is bound by the trial court's factual findings unless the findings are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "On appeal, the trial [court's] ruling as to the voluntariness of the confession will not be disturbed unless so erroneous as to constitute an abuse of discretion." State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004). Likewise, rulings on the admission of evidence are within the trial court's discretion and will not be reversed absent an abuse of discretion. State v. Stokes, 381 S.C. 390, 398, 673 S.E.2d 434, 438 (2009).

LAW/ANALYSIS

A. Lieutenant Creamer's Notes

I. Hearsay

Lindsey argues the trial court erred in admitting Creamer's notes regarding Lindsey's second interview and subsequent written statement because the notes were inadmissible hearsay that improperly bolstered Lieutenant Creamer's testimony. In response, the State contends the

[5] Lindsey's written statement reflects that Lindsey initialed the statement three times and signed the statement once. In addition, Investigator Zamberlin and Lieutenant Creamer were present and signed the statement as witnesses.

testimony was admissible under Rule 803(5), SCRE,[6] because the rules of evidence allow a hearsay exception for a witness's memorandum about a matter which he once had knowledge. We agree with Lindsey but find this error to be harmless.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. See Rule 801(c), SCRE; State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994). The rule against hearsay prohibits the admission of evidence of an out of court statement to prove the truth of the matter asserted unless an exception to the rule applies. See Rule 802, SCRE; State v. Lewis, 293 S.C. 107, 110, 359 S.E.2d 66, 67 (1987).

Here, Lieutenant Creamer testified he took notes contemporaneously while Investigator Zamberlin typed Lindsey's written statement, but the notes were never utilized to refresh his memory. Lieutenant Creamer recalled the details of the second interview with ease, had no trouble remembering the event, and testified to what he observed during the interview. Lieutenant Creamer gave direct testimony about Lindsey's second interview, and the State never established the proper foundation to admit the exhibit under the exception to the hearsay rule. Accordingly, the trial court violated Rule 803(5), SCRE, by allowing Creamer's notes to be read into evidence and received as an exhibit to prove he robbed the liquor store.

Although the testimony was improperly admitted, Lindsey has not demonstrated reversible error. See State v. Mitchell, 286 S.C. 572, 573, 336

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[6] Rule 803(5), SCRE, states:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

S.E.2d 150, 151 (1985) (holding improper admission of hearsay evidence is reversible error only when the admission causes prejudice); State v. Carmack, 388 S.C. 190, 202, 694 S.E.2d 224, 230 (Ct. App. 2010) ("An error without prejudice does not warrant reversal."). Generally, a conviction will not be set aside by the appellate court when error by the trial court is insubstantial and does not affect the result of the trial. State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006). Accordingly, when guilt has been conclusively proven by competent evidence, an insubstantial error not affecting the result of the trial is harmless. Id.

A review of the record reveals Creamer's notes regarding the details of the second interview were merely cumulative to Investigator Zamberlin's testimony, Lindsey's written statement, and Lieutenant Creamer's own testimony. See Price, 368 at 499-500, 629 S.E.2d at 366; see also State v. Haselden, 353 S.C. 190, 196-97, 577 S.E.2d 445, 448-49 (2003) (finding an admission of improper evidence is harmless when the evidence is merely cumulative to other evidence); State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (finding any error in the admission of testimony that is merely cumulative is harmless). But see State v. Whisonant, 335 S.C. 148, 156, 515 S.E.2d 768, 772 (Ct. App. 1999) ("Improper corroboration testimony that is merely cumulative to the victim's testimony, . . . cannot be harmless, because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." (emphasis in original)).[7] The State's first witness, Investigator Zamberlin, testified Lindsey confessed to the armed robbery and subsequently provided a written statement. In addition, Lindsey's written statement providing specific details about the armed robbery and the weapon used to assault the liquor store clerk is virtually identical to Creamer's notes taken contemporaneously with Lindsey's admission. Moreover, Lieutenant Creamer's own testimony recounting the details of the second interview and stating he witnessed

[7] In Whisonant, the testimony of the victim's step-mother was the only evidence corroborating the victim's testimony. Id. at 156, 515 S.E.2d at 772. Here, unlike the situation in Whisonant, the improperly admitted evidence was corroborated by multiple sources, including Investigator Zamberlin's testimony, Lindsey's written statement, and Lieutenant Creamer's own testimony at trial. Accordingly, Whisonant is distinguishable from the present case.

Lindsey sign the written statement is sufficient notwithstanding his notes being admitted into evidence. Despite the improper admission of Creamer's notes, the verdict was based on an abundance of competent evidence from which Lindsey's guilt was properly established. See State v. Simmons, 384 S.C. 145, 171-72, 682 S.E.2d 19, 33 (Ct. App. 2009) (holding any error in admitting eye witness testimony was harmless because it was cumulative to other overwhelming evidence that established defendant's guilt); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (finding the admission of improper evidence is harmless when the evidence is merely cumulative to other evidence). Therefore, we find Lieutenant Creamer's notes were cumulative and insubstantial and did not affect the result of the trial. Accordingly, we find no reversible error on this issue.

II. Presentation of Statement to Jury

In addition to contending Creamer's notes were inadmissible hearsay, Lindsey argues it was error for the trial court to allow Creamer's notes to be admitted into evidence as an exhibit upon the State's motion and given to the jury during its deliberations based upon the plain language of Rule 803(5), SCRE.[8] We find this argument is not preserved for our review.

After the charge to the jury and closing arguments, the following exchange occurred:

> The Court: All right. Are the exhibits in order? Both sides agree? What says the State?
>
> Ms. Huey: Yes, sir, Your Honor.
>
> The Court: And Defense?
>
> Mr. Robinson: Yes sir, Your Honor.

[8] Rule 803(5), SCRE, provides in pertinent part: "If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party."

As evidenced by this colloquy, Lindsey did not object to the admission of Creamer's notes as an exhibit. Therefore, this issue is not preserved for our review. See State v. Johnson, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996) (holding a contemporaneous objection is required at trial to preserve an issue for appellate review); State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (stating an issue which is not properly preserved cannot be raised for the first time on appeal).

B. Lindsey's Written Statement

I. Substantial Evidence

Lindsey contends the trial court erred in admitting his written statement because the State failed to prove Lindsey made the statement. We find this argument abandoned on appeal.

An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority. State v. Howard, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009); see also State v. Jones, 344 S.C. 48, 58-59, 543 S.E.2d 541, 546 (2001) (stating an argument is deemed abandoned on appeal when conclusory and without supporting authority).

Lindsey's issue statement contends he never made the written statement. The body of his brief is a mere recitation of the facts presented at trial, without legal argument. Lindsey provides no legal authority regarding the State's failure to prove he made the statement. Accordingly, we find Lindsey's argument is abandoned and decline to address the merits of this issue.

II. Handwriting Analysis

Additionally, Lindsey argues the trial court erred in basing its ruling to admit the written statement into evidence, at least in part, on its own comparison of Lindsey's handwriting exemplars. We find this issue is not preserved for our review.

A contemporaneous objection is typically required to preserve issues for appellate review. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (citing Johnson, 324 S.C. at 41, 476 S.E.2d at 682) (noting a contemporaneous objection is required to preserve an issue for appellate review). Here, Lindsey not only failed to object when the trial court questioned if there were any previous exemplars of Lindsey's signature, but affirmatively placed two sentencing sheets into evidence that contained his signature. Moreover, Lindsey failed to object to the trial court's handwriting analysis during the Jackson v. Denno[9] hearing. Because this argument was never presented to the trial court, it is not preserved for our review. See State v. Russell, 345 S.C. 128, 134, 546 S.E.2d 202, 205 (Ct. App. 2001) (finding evidentiary argument was not preserved for review because the issue was never raised to or ruled upon by the trial court).

III. Inadmissible Hearsay

Lindsey also argues the trial court's ruling to admit Lindsey's written statement explicitly relied on inadmissible hearsay. Although Lindsey identified the inadmissible hearsay in his statement of issues on appeal, he failed to address it in his brief, precluding consideration on appeal. See Wright v. Craft, 372 S.C. 1, 21, 640 S.E.2d 486, 497 (Ct. App. 2006) (holding an issue listed in statement of issues on appeal but not addressed in brief is abandoned); see also Howard, 384 S.C. at 218, 682 S.E.2d at 45 (holding argument abandoned when defendant failed to cite any authority in specific support of his assertion that the trial court erred in denying his motion for a mistrial). Therefore, we find this issue is abandoned on appeal.

CONCLUSION

For the aforementioned reasons, the rulings of the trial court are

AFFIRMED.

HUFF and THOMAS, JJ., concur.

[9] 378 U.S. 368 (1964).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jonathan K. Hill, Appellant.

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

Opinion No. 4867
Heard February 8, 2011 – Filed August 10, 2011

REVERSED AND REMANDED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Mark R. Farthing, Office of the Attorney General, all of Columbia; Solicitor William W. Wilkins, III, of Greenville, for Respondent.

WILLIAMS, J.: Pursuant to Anders v. California[1], Jonathan K. Hill (Hill) appeals his convictions for two counts of armed robbery, two counts of conspiracy to commit armed robbery, and one count of resisting arrest.[2] After review, this court ordered the parties to brief the issue of whether the circuit court erred in denying Hill's motion for a new trial after the jury mistakenly received two statements made by Hill during deliberations that were not admitted into evidence during trial. We find the circuit court erred and accordingly reverse.

FACTS

On the evening of January 31, 2002, and the early morning hours of February 1, 2002, the La Quinta Inn and the Hampton Inn (the motels) were both robbed in Greenville County. Hill and his co-conspirators, Damian Taylor (Taylor) and Melvin Warren (Warren), were arrested after fleeing from police pursuit. A grand jury indicted Hill for two counts of armed robbery, two counts of conspiracy to commit armed robbery, and one count of resisting arrest. Taylor and Warren pled guilty and agreed to testify against Hill in exchange for a deal on pending charges.

Hill proceeded to trial from February 3-5, 2003. At a pre-trial Jackson v. Denno[3] hearing, the State admitted two written statements made by Hill to the Simpsonville Police Department and the Greenville County Sheriff's Office. In his statements, Hill admitted to being a passenger in a Ford Escort (the vehicle) that was used to commit the armed robberies. Hill explained he lived in the same neighborhood as Taylor and Warren and knew they had a reputation for committing robberies. Hill also indicated Taylor and Warren wanted him to ride with them and to "work with them." Hill stated he remained in the vehicle while Taylor and Warren went inside the motels.

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[1] 386 U.S. 738 (1967).

[2] In 1998 or 1999, Jonathan Hill changed his name to Jonathan Green. However, because the initial case caption referred to Appellant as Jonathan Hill, we refer to his former name for purposes of this appeal.

[3] 378 U.S. 368 (1964).

The circuit court held Hill's written statements were voluntarily given at the Jackson v. Denno hearing. However, the State did not offer Hill's statements into evidence at trial.

The State presented several witnesses during its case-in-chief. Marvin Somarriba, an employee of the La Quinta Inn, testified he heard a "noise at the door" and "two guys running" on the evening of January 31, 2002. Somarriba testified that one of the robbers placed a gun against his head and took $30 and credit cards from his wallet, and that the other robber took approximately $120 from the cash drawer. Furthermore, Somarriba stated the robbers wore dark clothing and dark ski masks.

Rangar Borei, an employee of the Hampton Inn, testified two men wearing dark ski masks and dark clothing entered the Hampton Inn during the early morning hours of February 1, 2002. Borei stated one of the robbers placed a gun against his nose. The robbers took approximately $178 from the cash drawer as well as Borei's wallet, which contained $15, credit cards, and Borei's driver's license and Social Security card.

Officer William Kennedy of the Mauldin Police Department was on patrol when he heard a robbery had occurred over the Simpsonville Police Department's scanner. Subsequently, Officer Kennedy observed the vehicle speeding with its bright headlights on, prompting him to activate his blue lights and follow the vehicle to a Bi-Lo parking lot. Officer Kennedy stated the vehicle did not completely stop, the occupants in the vehicle were "rummaging around," and the occupant in the rear seat of the vehicle appeared to be wearing a red shirt. Shortly after the vehicle entered the parking lot, Officer Kennedy stated the vehicle accelerated "very fast" and made a left turn onto West Butler Road. At this point, Officer Kennedy pursued the vehicle. During the pursuit, the vehicle "slid off" into a dirt area, and the three occupants exited the vehicle and ran into the woods. Officer Kennedy identified Taylor as the driver of the vehicle and Warren as the front passenger and further indicated that Taylor and Warren were wearing dark clothing.

Officer Brian Lewis of the Mauldin Police Department assisted Officer Kennedy in the police chase. He testified that Taylor, the driver of the vehicle, and the vehicle's front passenger were wearing dark clothing; whereas, the passenger in the rear seat was wearing a red shirt. However, Officer Lewis testified Taylor was wearing black baggy pants and no shirt when he was captured. Officer Harold Harris of the Greenville County Sherriff's Office arrested Warren and testified that Warren had a black ski mask, Borei's wallet, driver's license, and credit cards in his pockets.

In addition, Officer Robert Smith of the Greenville County Sheriff's Office testified his canine tracked Hill to a creek bed. In the process of tracking Hill, Officer Smith discovered a white t-shirt that appeared to be covered in blood, a black tennis shoe, and a New York Yankees hat. Smith noted Hill was wearing a red t-shirt while hiding in the creek bed and that "a wad of unfolded loose cash" was retrieved after Hill was searched. On cross-examination, Officer Smith indicated that Hill did not have a black ski mask in his possession after he was arrested.

Officer Ralph Bobo of the Simpsonville Police Department testified he took photographs of the contents inside the vehicle, which included a black coat and a white shirt located in the rear seat. Officer Bobo also stated that he took photographs of the ski mask and Borei's wallet that were found on Warren after his arrest. Officer Bobby Alexander of the Greenville County Sheriff's Office conducted an inventory search of the vehicle. Officer Alexander noted that a black hooded leather coat, a gray fleece sweatshirt, a football jersey, and a dark colored ski mask were located in the back seat of the vehicle.

Co-conspirators Taylor and Warren testified on behalf of the State. Taylor stated that he drove the vehicle and that Hill and Warren agreed to ride to a drug area with the intention of robbing a drug dealer; however, they were unsuccessful. At this point, Taylor stated they changed their plans and agreed to go to the La Quinta Inn with the intent of robbing the motel.[4] Taylor testified he remained in the vehicle while Hill and Warren robbed the

[4] Taylor stated, "[We did] not actually discuss[] [robbing the La Quinta], but it was understood by each one of us what was going to go on."

motels. During cross-examination, Hill questioned Taylor regarding his written police statement in which Taylor indicated that Hill was unaware of the armed robbery plan and thought they were just riding around. Taylor clarified his statement and claimed he told Hill about the robbery plans after Hill entered the vehicle. According to Warren, Hill agreed to participate in the robbing of the motels. Warren stated Hill accompanied him inside both of the motels and participated in the robberies while Taylor remained in the vehicle. Warren also testified he took off his black coat while in the woods and that Hill wore the black coat that was located in the rear seat of the vehicle. On cross-examination, Warren admitted he lied in his police statement when he told the police that he remained in the vehicle while Taylor and Hill robbed the motels. Both Taylor and Warren testified Hill wore a black ski mask and gloves.

After the State's case-in-chief, Hill testified in his own defense. Hill stated he agreed to ride with Taylor and Warren on the belief that they were going to a party and to meet some girls. According to Hill, Taylor parked the car by the La Quinta Inn. Hill stated Taylor and Warren subsequently entered the La Quinta Inn. Soon thereafter, Taylor and Warren returned to the vehicle, and Warren came back with a credit card. After leaving the La Quinta Inn, Hill testified they went to a mall, and Warren unsuccessfully attempted to purchase clothing and jewelry with the credit card stolen from the La Quinta Inn. After leaving the mall, Warren drove to a gas station and purchased gas and beer. Upon leaving the gas station, Hill claimed Taylor parked near a wooden fence and informed him that he and Warren "would be back." Again, Hill asserted he remained in the vehicle and Taylor and Warren returned approximately four to five minutes later. Hill also claimed he did not observe Taylor and Warren with any ski masks or weapons upon exiting the vehicle. During his testimony, Hill averred he did not agree to commit nor have any knowledge of the robbery plans. Hill stated Taylor and Warren threw clothes in the rear seat and he remembered seeing a black coat in the vehicle that belonged to Warren; however, Hill denied observing any ski masks in the rear seat. Hill also indicated that Taylor and Warren did not tell him about the robberies, and he was only aware that the police were pursuing the vehicle. However, Hill acknowledged on cross-examination that he was aware Taylor and Warren had committed robberies in the past, but repeatedly denied having knowledge about their plans to rob the motels.

The jury found Hill guilty of two counts of armed robbery, two counts of conspiracy to commit armed robbery, and one count of resisting arrest. The circuit court sentenced Hill to concurrent sentences of thirty years, five years, and five years, respectively.

After the jury was dismissed and Hill was sentenced, the circuit court judge went into the jury room to speak with the jurors. According to the circuit court judge, the foreman informed him that Hill's written statements were submitted to the jury during deliberations, and the jury considered these statements as important evidence. The circuit court judge questioned the bailiff and was shown the exhibits, which included Hill's two written statements. Soon thereafter, the circuit court informed the parties about the error, and Hill moved for a new trial.

On February 20, 2003, the circuit court conducted a hearing on Hill's motion for a new trial and took the matter under advisement. On June 11, 2003, the circuit court conducted a second hearing on Hill's motion for a new trial. In explaining the inadvertent submission of Hill's statements, the circuit court judge stated, "Apparently what happened is the State's Exhibits that I just referred to got mixed in with the evidence that had been admitted and was submitted back into the jury room not the first day when they deliberated but on the second morning." The circuit court judge orally denied Hill's motion for a new trial during the second hearing and applied a harmless error analysis to consider if the admission of Hill's statements contributed to the guilty verdict. The circuit court concluded the admission of Hill's written statements was harmless because "[Hill's] [in-court] testimony essentially tracks what's in the statement. There's really not [anything] significant in the statement that wasn't in his testimony." Additionally, the circuit court concluded that it would have admitted Hill's statements into evidence if the State sought to introduce this evidence at trial. The circuit court filed a written order denying Hill's motion for new trial on February 9, 2007.[5]

[5] Hill filed an application for post-conviction relief (PCR) based on his trial counsel's failure to file a notice of appeal. On April 7, 2005, Judge Larry Patterson conducted a PCR hearing. Judge Patterson denied and dismissed the application without prejudice because Hill had a pending motion for a

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Martucci, 380 S.C. 232, 246, 669 S.E.2d 598, 605-06 (Ct. App. 2008). This court is bound by the circuit court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). This court does not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the circuit court's ruling is supported by any evidence. State v. Moore, 374 S.C. 468, 473-74, 649 S.E.2d 84, 86 (Ct. App. 2007).

LAW/ANAYLSIS

Hill contends the circuit court erred in denying his motion for a new trial because the jury considered his written statements during deliberations. Hill alleges the submission of his written statements was prejudicial and improperly influenced the jury because (1) all twelve jurors were exposed to his statements; (2) no curative instructions were given because the error was only discovered after the jury verdict; (3) the weight of the evidence against Hill was not overwhelming; and (4) Hill did not confess to the crime at trial. We agree.

It is well settled that the grant or refusal of a new trial is within the sound discretion of the circuit court. State v. Taylor, 348 S.C. 152, 159, 558 S.E.2d 917, 920 (Ct. App. 2001). Where there is no evidence to support a conviction, an order granting a new trial should be upheld. State v. Smith, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993). However, where there is competent evidence to sustain the jury's verdict, the circuit court may not substitute its judgment for that of the jury. State v. Prince, 316 S.C. 57, 63, 447 S.E.2d 177, 181 (1993)

The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors. State v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 104

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new trial for which a written order had not yet been filed by the circuit court judge.

(1998). In a criminal prosecution, the conduct of the jurors should be free from all extraneous or improper influences. Unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict. Id. Relevant factors a court should consider in determining whether outside influences have affected the jury are the number of jurors exposed, the weight of the evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice. Id. at 141-42, 502 S.E.2d at 104.

In State v. Rogers, 96 S.C. 350, 80 S.E. 620 (1914), our supreme court confronted a similar factual situation concerning the discovery of the jury's receipt of incompetent evidence after the jury rendered its verdict and was dismissed from service. Rogers was convicted for willful and malicious injury to the cars and engine of the Atlantic Coast Line Railroad Company and endangering the lives of the train's passengers and crew. Rogers, 96 S.C. at 351, 80 S.E. at 620. During trial, the State offered an affidavit signed by Rogers' wife. Id. Rogers objected to the affidavit, and the trial court sustained the objection finding the affidavit inadmissible. Id. at 351-52, 80 S.E. at 620. After all the evidence was presented and the case went to the jury, the trial court inadvertently submitted the affidavit to the jury when he handed the indictment to the foreman. Id. at 352, 80 S.E. at 620.

Rogers was convicted and sentenced by the circuit court. Rogers, 96 S.C. at 352, 80 S.E. at 620. After the trial court adjourned, the State and Rogers discovered that the inadmissible affidavit was inadvertently submitted to the jury. Id. Rogers appealed his conviction. Id. On appeal, our supreme court reversed and granted Rogers a new trial. Id. at 353, 80 S.E. at 621. In regard to the specific issue relating to the submission of the inadmissible affidavit to the jury during its deliberations, our supreme court stated:

> The affidavit got to the jury after his honor had ruled it incompetent, without any explanation on the part of the court that it was incompetent, and to be disregarded, not denied by the father, who was alleged to have attempted to improperly influence Hattie Rogers' testimony, and unexplained by him or the defendant, and we cannot say that, taken with all

> of the evidence in the case, it was not prejudicial to the defendant; but, on the contrary, the jury might have arrived at the conclusion that they did by the incompetent testimony, and we have no doubt, if it had been discovered before his honor adjourned the court what had transpired, but that he would have set the verdict aside, and granted a new trial.

Id.

In addition to Rogers, we note the Washington Supreme Court's opinion in State v. Pete, 98 P.3d 803 (Wash. 2004), also provides guidance on the issue presented in this case. Although not controlling, the Washington Supreme Court addressed the issue of whether a jury's exposure to extrinsic evidence during deliberations warranted a new trial where a police report contradicted the defendant's written statement to the police.

In Pete, two Seattle police officers responded to an alleged assault and observed what appeared to be the defendant attempting to take a case of beer from the victim's hand. Id. at 804. After the police officers parked their car, they observed the defendant taking the beer from the victim. Id. The defendant was subsequently arrested, and the police found two beers in the defendant's pocket and a case of beer close to where the defendant was standing. Id. While in transport to the police station, the defendant told an officer that "he only took some beer" from the victim and that the co-defendant assaulted the victim. Pete, 98 P.3d at 805. After arriving at the police station, the defendant signed a written statement that indicated the victim offered him a beer as the co-defendant arrived. Id. The defendant further explained the victim "handed" him the rest of the beer and instructed him to walk away. Id. at 805. At this point, the defendant indicated he walked away from the victim and did not look back to ascertain what the co-defendant and the victim "were doing." Id. at 805, 807.

At a pre-trial hearing, the trial court held the police officer's report, which contained the defendant's oral statement that "he only took some beer," and the defendant's written statement that the victim offered him a beer and "handed" him the rest of the beer were admissible. Pete, 98 P.3d at 805. However, the police report and the defendant's written statement were not introduced into evidence at trial. Id.

After the jury reached a verdict, but before the verdict was rendered, the trial court informed the parties the police report and the defendant's written statement were mistakenly sent to the jury room. Pete, 98 P.3d at 805. After this discovery, the bailiff retrieved the officer's statement and "grabbed" a second document. Id. However, the second document had been properly admitted into evidence. Id. Upon this discovery, the bailiff returned the second document, retrieved the other piece of unadmitted evidence, and instructed the jury to disregard the police report and the defendant's written statement. Id. After the trial court explained the course of events, the State and the defendant both agreed the verdict should be received and the jury should be polled about their knowledge concerning the police report and the defendant's written statements. Id. at 805.

During polling, the jurors indicated the bailiff told them to disregard the police report and the defendant's written statement. Pete, 98 P.3d at 806. Nonetheless, some members of the jury panel stated they saw and/or read the police report and the defendant's written statement. Id. The defendant was convicted of second-degree robbery. Id.

The defendant made a motion for a new trial and argued the mistaken submission of the police report and his written statement to the jury was prejudicial. Pete, 98 P.3d at 806. The trial court denied the motion and held the error was harmless because the documents were in the jury room for a brief period of time, the jury was instructed to disregard the documents, and the statements in the police report and the written statement were exculpatory. Id. Division One of the Washington Court of Appeals affirmed and held there was no reasonable ground to believe that the defendant was prejudiced by the nonadmitted documents and the evidence presented at trial was sufficient to sustain the conviction. State v. Pete, No. 50404-5-I, 2003 WL 21387208, at *3 (Wash. Ct. App. June 13, 2003).

On appeal, the Washington Supreme Court reversed the court of appeals' decision and granted the defendant's motion for a new trial. Pete, 98 P.3d at 807. The State argued the inadvertent submission of the police report and the defendant's written statement to the jury was harmless error because the evidence was "very strong" to sustain the conviction. Id. Namely, the State argued (1) two police officers caught the defendant and the co-defendant robbing the victim; (2) the victim's statements corroborated the

police officers' observations; (3) the victim's inconsistent statement at the scene compared to his in court testimony did not absolve the defendant from any criminal activity because the victim stated "he thought [the defendant and co-defendant] wanted to rob him;" and (4) the police report and the defendant's written statement were exculpatory in nature. Id.

In reversing the court of appeals' decision, the Washington Supreme Court noted the police officers' testimony regarding their observations that the defendant and co-defendant were in the act of robbing the victim was to some extent refuted. Pete, 98 P.3d at 807. At trial, the victim testified he "gave" beer to the defendant and the co-defendant so they would leave him alone. Id. Moreover, the court concluded the police report was not completely exculpatory because the defendant informed the officer that "he only took some beer." Id. This statement, according to the court, "may be considered inculpatory because it indicates that the defendant participated in taking property from [the victim] while [the victim] was being assaulted by [co-defendant]." Id. Additionally, the court further stated, "[W]hen the two unadmitted statements are viewed together, they are harmful to [the defendant] in the sense that they are contradictory and could suggest to a jury that [the defendant] is a liar who cannot be believed." Id.

In analyzing whether the defendant was prejudiced by the inadvertent submission of the police report and his written statements, the court noted (1) the defendant denied any wrongdoing; (2) the defendant did not testify and instead relied on the victim's testimony that the defendant did not speak or touch the victim, and the victim voluntarily gave beer to the defendant; and (3) the victim had problems remembering the events on the night in question. Pete, 98 P.3d at 807. Based on the facts of the case, the court concluded the submission of the police report and the defendant's written statement "seriously undermined [the defendant's] defense and nothing short of a new trial can correct the error." Id.

Furthermore, the Washington Supreme Court observed that even though the evidence was deemed admissible at a pre-trial hearing, the State did not offer or admit the evidence at trial. Pete, 98 P.3d at 808. The court pronounced:

> The jury's receipt of this extrinsic evidence after the close of its evidence presented a "no win" situation

> for [the defendant] because he was not able to object to or explain the extrinsic evidence. Furthermore, his counsel was unable to cross-examine either the transport officer or the officer who took [the defendant's] statement. The fact that the bailiff instructed the jurors to not consider the extrinsic evidence does not, in our view, mitigate the harmfulness of the error. Even if the trial court had given the instruction, which would be the appropriate practice, the same can be said.

Id.

In the present case, we conclude the improper submission of Hill's two written statements to the jury is reversible error. Although the circuit court ruled Hill's written statements were voluntarily given, the State did not introduce Hill's statements into evidence at trial. Thus, the entire jury panel was exposed to evidence that had not been admitted during trial, thereby unduly prejudicing Hill.

Nevertheless, the State contends despite any error in the inadvertent submission of Hill's statements, such error is harmless based on the evidence presented at trial. In support of its argument that the admission of Hill's written statements was harmless error, the State argues (1) Taylor and Warren's testimony indicated that Hill actively participated in the commission of the armed robberies; (2) Hill was seen in the back seat of the fleeing vehicle after an officer attempted to stop the vehicle; (3) officers found a ski mask along with a black coat linked to Hill; and (4) Hill fled from the police and was discovered hiding in a creek bed. We disagree.

Whether an error is harmless depends on the circumstances of the particular case. State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010). No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Id. Error is harmless when it "could not reasonably have affected the result of the trial." Id. "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, [an appellate] court should not set aside a

conviction because of errors not affecting the result[]." State v. Kirton, 381 S.C. 7, 25, 671 S.E.2d 107, 115-16 (Ct. App. 2008) (citation omitted).

A comparison of Hill's trial testimony and Hill's written statements implicates Taylor and Warren's direct involvement in the commission of the robberies of the motels and that Hill remained in the vehicle. Specifically, Hill's written statement given to the Simpsonville Police Department provides in pertinent part:

> I know [Taylor and Warren] have been jacking (robbing) people or places. I have heard they have robbed the Motel 6 where [Warren's] girlfriend works there. [Warren] had a .380 pistol. [Taylor and Warren] said it was stolen. They have tried to get me to ride with them before. About nine p.m. [Taylor] and [Warren] came to my girlfriend's house. They wanted me to go ride with them. They said if I wanted to go to work to work with them . . . . We went to the La Quinta Inn and [Warren] went to some white boys and bought a beer. They let them in the side door. Both [Taylor] and [Warren] robbed the motel and we left and went to a mall . . . . [Warren] attempted to use a credit card that was taken and it did not work. We left in a white car. I thought we were going home. We drove to Simpsonville and stopped at the gas station. . . . We parked in a white motel near the Hampton Inn. [Warren] and [Taylor] got out of the car and went around a gate and went into the Hampton Inn. They later came back and [Warren] said that he had went back and got him. This meaning [Warren] had went back behind the counter and robbed the clerk. [Warren] had the billfold which was taken from the clerk at the Hampton Inn. [Taylor] was driving away. Then the police got behind us. He pulled over [to] stop[] briefly. Then [Taylor] pulled onto the road again. We later went off the road and I was later arrested by the police. I am sorry that these places were robbed.

(emphasis added).

Hill's statement to the Greenville County Sheriff's Office provides in pertinent part:

> I have decided that I wanted to clear all this up and get everything in the open. I told [Officer] Bobo about how I was involved in the robbery at the Hampton Inn and who I was with. I also told him about a robbery at the La Quinta Inn on 85 . . . . [Warren] and [Taylor] are involved with some other people who are going around catching likcs (sic) on people. Catching licks means robbing people or stealing something. Anything to come up with money quick. Lately [Warren] and [Taylor] have been robbing motels and that's who [I] was with when the Hampton Inn got robbed. Before we went to the Hampton Inn we went to the La Quinta Inn . . . . I was sitting in the back seat of the car we were in. It was a white Ford Escort. [Warren] got out of the car and he walked up on a group of white guys in the parking lot. [Warren] walked back to the car and said let me get a dollar so he could buy a beer from one of the white guys. [Warren] walked back over and one of the white dudes opened the back door, like on the end of the hallway, and let them in. [Warren] went in with the white guys and came back a few minutes later and got [Taylor] and [Warren and Taylor] went back into the motel. [Warren] and [Taylor] were in there not even five minutes and they came running to the car. I didn't see no money or gun but they had a wallet. [Warren] said we got to go to the mall, we got to go to the mall. We went over to Haywood Mall. We went to a store upstairs. It was a clothing store. [Warren] tried to buy a hooded sweatshirt with a credit card out of the wallet, but it was declined. Then we went over to a jewelry stand and [Warren] tried to buy something there. I walked off and

> [Taylor] came over there by me. I was saying that they were getting greedy and stop being greedy. [Warren] couldn't buy anything at the jewelry store . . . . They went to the Hampton Inn in Simpsonville and hit it and we ran . . . . This group that is hitting things is mainly [Warren] and [Taylor] and whoever they could get to go with them.

Hill's statement to the Simpsonville Police Department reveals his knowledge that Taylor and Warren wanted him to "ride with them" and to "work with them." This phrase, in conjunction with the context of Hill's statement to the Simpsonville Police Department, indicates that Taylor and Warren wanted Hill to ride with them to participate in an armed robbery. However, at trial, Hill testified he was unaware of any robbery plans and explicitly denied any involvement in the robberies. In fact, Hill specifically stated he rode with Taylor and Warren on the belief that they were going to a party and going to meet some girls.

When viewed together, Hill's statement to the Simpsonville Police Department and his trial testimony are contradictory and undermine Hill's credibility to the jury. Because Hill's credibility was impermissibly impugned by evidence not admitted at trial, this contradiction strongly suggested to the jury that Hill was untruthful during his testimony and could not be believed. Due to the gravity of this error, we conclude Hill's entire defense was prejudiced because his credibility was substantially damaged. See State v. Outlaw, 307 S.C. 177, 180, 414 S.E.2d 147, 148 (1992) ("[E]rror which substantially damages the defendant's credibility cannot be held harmless where such credibility is essential to his defense.") (citation omitted); see also Pete, 98 P.3d at 807 (noting the inadvertent submission of contradictory evidence not admitted at trial suggested to the jury that defendant was a liar).

Additionally, unlike many South Carolina cases in which a circuit court may issue a curative instruction to cure the prejudicial effect of the jury's consideration of extrinsic evidence, the circuit court was unable to issue a curative instruction due to the timeframe when the error was discovered. Moreover, this error was furthered compounded because the foreman of the jury informed the circuit court that the jury considered Hill's statements to be

important evidence. Nevertheless, we note the holding in Rogers provides guidance on the appropriate remedy. See Rogers, 96 S.C. at 353, 80 S.E. at 621 (noting the jury's receipt of incompetent evidence without a curative instruction could have caused the jury to rely on the improper testimony in reaching its conclusion and thus a new trial was the appropriate remedy). Under the circumstances of this case, the absence of a curative instruction, in conjunction with the jury's belief that Hill's statements were considered important evidence, precludes us from being able to unequivocally ascertain whether the jury's verdict rested on the evidence presented at trial or whether the verdict was improperly affected by Hill's written statements. See State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) ("A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission.") (citation omitted); see also State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006) ("Jurors are sworn to be governed by the evidence, and it is their duty to consider the facts of the case impartially.") overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

Finally, at the second motion for a new trial hearing on June 11, 2003, the circuit court judge indicated that it would have admitted Hill's written statements at trial. However, the written statements were solely admitted into evidence for purposes of the Jackson v. Denno hearing. Because the written statements were not admitted at trial, and the jury was exposed to Hill's written statements during its deliberations, Hill was denied the opportunity to object to or explain his written statements. See Pete, 98 P.3d at 808 (noting defendant was not able to object to or explain the extrinsic evidence when the jury received the evidence after the close of evidence). Additionally, Hill was unable to cross-examine Officer Bobo and Officer Smith regarding his written statements.[6] Pete, 98 P.3d at 808 (finding defendant was denied the right to cross-examination when the jury received extrinsic evidence after the close of all the evidence). Based on the foregoing, we conclude the circuit

[6] Officer Wes Smith of the Greenville County Sheriff's Office took Hill's written statement and testified at the Jackson v. Denno hearing. However, Officer Smith did not testify at trial. Officer Bobo's testimony was limited to his actions in taking photographs at the scene where Hill, Taylor, and Warren were arrested in the early morning hours of February 1, 2002.

court abused its discretion in denying Hill's motion for a new trial as to his convictions for armed robbery and conspiracy to commit armed robbery.

CONCLUSION

Accordingly, the circuit court's decision is

REVERSED and REMANDED.

GEATHERS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Linda J. Keefer, Appellant,

v.

Rodney A. Keefer, Respondent.

Appeal From Sumter County
George M. McFaddin, Jr., Family Court Judge

Opinion No. 4868
Submitted May 4, 2011 – Filed August 10, 2011

AFFIRMED

Harry C. Wilson, Jr., of Sumter, for Appellant.

Richard C. Jones, of Sumter, for Respondent.

SHORT, J.: In this action for divorce, Linda Keefer (Wife) appeals from the family court's order directing that the qualified domestic relations order (QDRO) be prepared using the shared plan method, arguing the court should have directed that the order be prepared using the separate plan method to determine her portion of Rodney Keefer's (Husband) pension plan. We affirm.[1]

FACTS

Husband and Wife were married in 1974 in Sumter, South Carolina, and two children were born of the marriage. The parties officially separated in 1991.[2]

In March 2007, Wife filed for divorce in the Sumter County Family Court, seeking permanent periodic alimony; equitable division of the marital assets and debts; permanent health insurance coverage; and attorney's fees and costs. Husband filed an answer, seeking a divorce based on the ground of desertion; equitable division of the marital assets; possession of the marital home; and possession of four vehicles. Husband also asserted Wife was not entitled to alimony due to her abandonment of the marriage; requested both parties be barred from claiming any interest in each other's retirement and/or pension plans; and requested each party be responsible for their own debts, health and life insurance, and attorney's fees.

On March 3, 2008, the parties reached an agreement on all issues relating to property, separation, and support. That day, the family court granted Wife a divorce on the ground of one-year's continuous separation and incorporated the agreement into the divorce decree. After the divorce decree was filed, the parties began preparing the QDROs concerning Husband's 401(k) and pension plan. The parties reached an agreement as to the 401(k),

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

[2] While Husband and Wife were married for seventeen years before they separated, the parties lived together for less than three years.

but not as to the pension plan.[3] The QDRO form provided by Husband's employer for his pension plan could be prepared using one of two methods: the shared plan or the separate plan. Under the shared plan, Wife's payments from the plan would begin when Husband began drawing from the fund, but Wife would lose benefits on her death and the benefits would revert to Husband. Additionally, Husband's death would terminate Wife's benefits.

Under the separate plan, which Wife preferred, Wife could elect to draw payments before Husband's retirement, and the benefits would survive the death of Husband and/or Wife. The parties disagreed about which method the QDRO should use to determine Wife's benefits under Husband's pension plan, and as a result, Wife filed a motion for court intervention. On March 27, 2009, the family court filed an order, directing the QDRO be prepared using the shared plan method. Wife filed a motion to reconsider, which the court denied. This appeal followed.

STANDARD OF REVIEW

On appeal from the family court, this court reviews factual and legal issues de novo. Simmons v. Simmons, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011); Lewis v. Lewis, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). Although this court reviews the family court's findings de novo, we are not required to ignore the fact that the trial court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Lewis, 392 S.C. at 388, 709 S.E.2d at 653. The appellant bears the burden of convincing this court that the family court erred in its findings. Id. at 391, 709 S.E.2d at 655.

[3] Two QDROs were required. One order was to allow a trustee-to-trustee transfer of $50,000 from Husband's 401(k) to Wife. This QDRO is not at issue in this case. The other order was required so that Wife could share in Husband's pension plan, which was separate from Husband's 401(k).

LAW/ANALYSIS

Wife argues the family court erred in directing that the QDRO be prepared using the shared plan method. She maintains the court should have directed that the order be prepared using the separate plan method to determine her portion of Husband's pension plan. We disagree.

The construction of a separation agreement is a matter of contract law. Nicholson v. Nicholson, 378 S.C. 523, 532, 663 S.E.2d 74, 79 (Ct. App. 2008). "The court's only function with an agreement that is clear and capable of legal construction is to interpret its lawful meaning and the intention of the parties as found within the agreement and to give them effect." Id. If the agreement is ambiguous, the court should seek to determine the parties' intent. Id. at 533, 663 S.E.2d at 79. "An ambiguous contract is one capable of being understood in more ways than one, an agreement obscure in meaning through indefiniteness of expression, or having a double meaning." Id. (quoting Davis v. Davis, 372 S.C. 64, 76, 641 S.E.2d 446, 452 (Ct. App. 2006)). If a marital agreement is unambiguous, the court must enforce it according to its terms.[4] Id. at 532, 663 S.E.2d at 79. However, if the agreement has been merged into the court's decree, as it was in this case, "the decree, to the extent possible, should be construed to effect the intent of both the judge and the parties." Id. By merging an agreement into a divorce decree, the court transforms it from a contract between the parties into a decree of the court. Emery v. Smith, 361 S.C. 207, 214, 603 S.E.2d 598, 601 (Ct. App. 2004). "With the court's approval, the terms become a part of the decree and are binding on the parties and the court." Id. (quoting Moseley v. Mosier, 279 S.C. 348, 353, 306 S.E.2d 624, 627 (1983)). "Thereafter, the agreement, as part of the court order, is fully subject to the family court's authority to interpret and enforce its own decrees." Id. at 214, 603 S.E.2d at 601-602; see Terry v. Lee, 308 S.C. 459, 462, 419 S.E.2d 213, 214 (1992)

[4] In their briefs, both Husband and Wife maintain the agreement is unambiguous. Additionally, in its order denying Wife's motion for reconsideration, the court adopted Husband's return to Wife's motion, which asserted the agreement is unambiguous.

(stating the family court has exclusive jurisdiction to determine the rights of the parties under an agreement incorporated into a family court decree).

The separation agreement at issue in this case, which the court merged into the divorce decree at the parties' request, provides in pertinent part:

> (ii) Pension/Retirement Benefits: *Upon the Husband's retirement*, the Wife shall be entitled to share in the Husband's International Paper retirement pension fund, which is separate and different from the 401(k) fund, in that percentage share as calculated consistent with the formula set out below:
>
> Step One: 19.5 (Years of Service through March/07) ??? (Husband's Total, Actual # of Years Service w/ International Paper Co./Union Camp at the date of his actual retirement)
>
> Step Two: The above result is multiplied by 40% (percent).
>
> Step Three: The Wife receives the resulting *percentage of each monthly pension*, consistent with the above calculation, *at the time the Husband begins to draw payment* from his International Paper retirement pension fund. (Emphasis added in italics).

Wife asserts the family court should have ordered the QDRO be prepared using the separate plan because it allows Wife to elect to draw her share of the payments from the plan before Husband's actual retirement date. The separate plan also allows the benefits to survive the death of Husband and/or Wife, and Wife can designate a beneficiary to receive her share of the benefits upon her death. In contrast, under the shared plan, Wife cannot receive any benefits until Husband retires and begins to draw from the fund.

Additionally, Husband's death will terminate Wife's benefits, and if Wife predeceases Husband, Wife's benefits will terminate upon her death and the benefits will revert to Husband. Wife argues the agreement provides that she will receive forty percent of the marital portion of Husband's pension benefits and there is no mention in the agreement that she would lose these rights upon her or Husband's death.

As the family court judge noted in his order on Wife's motion for court intervention, "[w]hen the parties reached their agreement, to include Husband's retirement, the parties had not discussed which QDRO model to use. The dispute about which QDRO model to use arose only after the plan administrator (International Paper or IP) informed the parties and lawyers of the two QDRO models." Thus, the judge concluded, "it is not correct to say that this court is saddled with determining the intent of the parties regarding which QDRO to use before the two models were revealed." The judge determined it was the role of the court to "determine which QDRO model most accurately reflects the parties' agreement."

In its review of the agreement, the family court noted the agreement provides, "[u]pon the Husband's retirement," "[t]he Wife receives the resulting percentage of each monthly pension," and "at the time the Husband begins to draw payment." Thus, the court determined "that Wife's share of the retirement benefits would start and be received on a monthly basis," and "she would not be able to elect to receive her share before Husband's monthly retirement payments or benefits started." Additionally, the court noted, "there is no 'survivorship' provision in the agreement similar to such language in the separate plan," "[t]he agreement states . . . Wife's portion is that percentage of each of Husband's monthly benefit[s] or payment[s]," and "the agreement states that Wife 'shall share' in Husband's retirement account." Furthermore, the court noted the agreement did not contain language "that reflects that Wife would have certain options that are provided in the separate plan." As a result, the court found the agreement language more closely mirrored the shared plan QDRO model. Additionally, both parties submitted multiple versions of the QDRO to the plan administrator, and the version accepted twice by the administrator was the shared plan model.

Therefore, based on the family court's authority to interpret and enforce its own decrees and our review of the evidence, we find the evidence supports the family court's determination.

CONCLUSION

Accordingly, the family court's order directing that the QDRO be prepared using the shared plan method is

AFFIRMED.

FEW, C.J., and GEATHERS, JJ., concur.