Judicial Merit Selection Commission

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

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

July 7, 2014

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

The term of office currently held by the Honorable John C. Few, Chief Judge of the Court of Appeals, Seat 5, will expire June 30, 2015.

The term of office currently held by the Honorable Aphrodite K. Konduros, Judge of the Court of Appeals, Seat 6, will expire June 30, 2015.

A vacancy exists in the office formerly held by the Honorable J. Michael Baxley, Judge of the Circuit Court, Fourth Judicial Circuit, Seat 2, upon Judge Baxley's retirement on or before April 15, 2014. The successor will fill the unexpired term of that office, which will expire June 30, 2018.

The term of office currently held by the Honorable Robert E. Hood, Jr., Judge of the Circuit Court, Fifth Judicial Circuit, Seat 3, will expire June 30, 2015.

The term of office currently held by the Honorable Roger M. Young, Judge of the Circuit Court, Ninth Judicial Circuit, Seat 3, will expire June 30, 2015.

A vacancy will exist in the office currently held by the Honorable G. Edward Welmaker, Judge of the Circuit Court, Thirteenth Judicial Circuit, Seat 1, upon Judge Welmaker's retirement on or before May 15, 2015. The successor will fill the unexpired term of that office which will expire on June 30, 2016, and the subsequent full term which will expire June 30, 2022.

The term of office currently held by the Honorable Robin B. Stilwell, Judge of the Circuit Court, Thirteenth Judicial Circuit, Seat 3, will expire June 30, 2015.

The term of office currently held by the Honorable Carmen T. Mullen, Judge of the Circuit Court, Fourteenth Judicial Circuit, Seat 2, will expire June 30, 2015.

The term of office currently held by the Honorable Benjamin H. Culbertson, Judge of the Circuit Court, Fifteenth Judicial Circuit, Seat 2, will expire June 30, 2015.

The term of office currently held by the Honorable W. Jeffery Young, Judge of the Circuit Court, At-Large, Seat 1, will expire June 30, 2015.

The term of office currently held by the Honorable R. Markley Dennis, Jr., Judge of the Circuit Court, At-Large, Seat 2, will expire June 30, 2015.

The term of office currently held by the Honorable Clifton Newman, Judge of the Circuit Court, At-Large, Seat 3, will expire June 30, 2015.

The term of office currently held by the Honorable Edward W. "Ned" Miller, Judge of the Circuit Court, At-Large, Seat 4, will expire June 30, 2015.

The term of office currently held by the Honorable J. Mark Hayes, II, Judge of the Circuit Court, At-Large, Seat 5, will expire June 30, 2015.

The term of office currently held by the Honorable William H. Seals, Jr., Judge of the Circuit Court, At-Large, Seat 6, will expire June 30, 2015.

The term of office currently held by the Honorable J. Cordell Maddox, Jr., Judge of the Circuit Court, At-Large, Seat 7, will expire June 30, 2015.

The term of office currently held by the Honorable David Craig Brown, Judge of the Circuit Court, At-Large, Seat 8, will expire June 30, 2015.

A vacancy exists in the office formerly held by the Honorable Stephanie Pendarvis McDonald, Judge of the Circuit Court, At-Large, Seat 9. The successor will fill the unexpired term which will expire June 30, 2015, and subsequent full term which will expire June 30, 2021.

The term of office currently held by the Honorable James R. Barber, III, Judge of the Circuit Court, At-Large, Seat 10, will expire June 30, 2015.

A vacancy will exist in the office currently held by the Honorable Paul W. Garfinkel, Judge of the Family Court, Ninth Judicial Circuit, Seat 2, upon his retirement on or before August 31, 2014. The successor will fill the unexpired term of that office which will expire June 30, 2019.

The term of office currently held by the Honorable Carolyn C. Matthews, Judge of the Administrative Law Court, Seat 3, will expire June 30, 2015.

The term of office currently held by the Honorable Deborah Brooks Durden, Judge of the Administrative Law Court, Seat 4, will expire June 30, 2015.

The term of office currently held by the Honorable Marvin H. Dukes, III, Master-in-Equity, Beaufort County, Fourteenth Circuit, will expire June 30, 2015.

The term of office currently held by the Honorable Martin R. Banks, Master-in-Equity, Calhoun County, First Circuit, will expire August 14, 2015.

The term of office currently held by the Honorable Charles B. Simmons, Master-in-Equity, Greenville County, Thirteenth Circuit, will expire December 31, 2015.

The term of office currently held by the Honorable Cynthia Graham Howe, Master-in-Equity, Horry County, Fifteenth Circuit, will expire July 31, 2015.

The term of office currently held by the Honorable James B. Jackson, Master-in-Equity, Orangeburg County, First Circuit, will expire August 14, 2015.

The term of office currently held by the Honorable Joseph M. Strickland, Master-in-Equity, Richland County, Fifth Circuit, will expire April 30, 2015.

The term of office currently held by the Honorable Gordon G. Cooper, Master-in-Equity, Spartanburg County, Seventh Circuit, will expire June 30, 2015.

The term of office currently held by the Honorable S. Jackson Kimball, III, Master-in-Equity, York County, Sixteenth Circuit, will expire June 30, 2015.

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

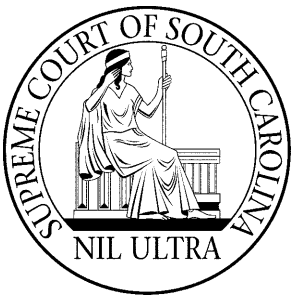
Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6629 (M-Th)

or

Jaynie Jordan, JMSC Administrative Assistant at (803) 212-6623.

The Commission will not accept applications after 12:00 noon on Thursday, August 7, 2014.

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



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 27
July 9, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

In the Matter of George Hunter McMaster, Respondent

Appellate Case No. 2014-001434; Appellate Case No. 2014-001435

ORDER

The Office of Disciplinary Counsel petitions this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver, Peyre T. Lumpkin, pursuant to Rule 31, RLDE.

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

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

IT IS FURTHER ORDERED that Mr. Lumpkin 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. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin 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. Respondent shall promptly respond to Mr. Lumpkin's requests for information and/or documentation and shall fully cooperate with Mr. Lumpkin in all other respects.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow, operating, and/or any other law account(s) of respondent, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin has been duly appointed by this Court and that respondent is enjoined from making withdrawals or transfers from or writing any check or other instrument on any of the account(s).

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Peyre T. Lumpkin, 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. Lumpkin's office.

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

s/ Jean H. Toal C.J.

Columbia, South Carolina

July 2, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ferguson Fire and Fabrication, Inc., Plaintiff,

v.

Preferred Fire Protection, L.L.C., Fair Forest of Greenville, L.L.C., Thomas F. Wong, and Immedion, L.L.C., Defendants,

Of whom Ferguson Fire and Fabrication, Inc. is, Petitioner,

and Immedion, L.L.C. is, Respondent.

Immedion, L.L.C., Third-Party Plaintiff,

v.

Rescom Construction, L.L.C., Third-Party Defendant.

Appellate Case No. 2012-212191

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
The Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 27410
Heard June 12, 2014 – Filed July 9, 2014

REVERSED AND REMANDED

Robert E. Culver, of Charleston, for Petitioner.

Ronald G. Tate, Jr., and Zachary Lee Weaver, both of Gallivan, White & Boyd, P.A., of Greenville, for Respondent.

JUSTICE BEATTY: This Court granted a petition for a writ of certiorari to review the decision in *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Protection, L.L.C.*, 397 S.C. 379, 725 S.E.2d 495 (Ct. App. 2012), in which a supplier of materials ("Ferguson Fire") brought an action for foreclosure of a mechanic's lien against the owner of a data center ("Immedion") and its contractor ("Preferred Fire"). Ferguson Fire contends, and we agree, that the Court of Appeals erred in adding requirements to S.C Code Ann. § 29-5-40 (2007), governing a notice of furnishing, that are not in the statute itself and in concluding Ferguson Fire did not establish an effective lien upon which a foreclosure action could be premised. We reverse and remand.

I. FACTS

This case arises out of Ferguson Fire's efforts to obtain payment for materials it supplied to Preferred Fire for Immedion's data center. An outline of the events leading to Ferguson Fire's mechanic's lien action and the lower courts' rulings follow.

Contracts for Improvements to Immedion's Data Center

In 2007, Immedion, a telecommunications company, hired Rescom, L.L.C. to be the general contractor for improvements planned for its data center on property Immedion leased in Greenville. This contract excluded the performance of part of the fire protection work that was needed. Rescom, in turn, hired Preferred Fire, a fire sprinkler company, as a subcontractor.

In addition, Immedion directly hired Preferred Fire under a separate contract for $30,973.00 to install a special "pre-action" fire suppression system[1] in its data center. To complete this work, Preferred Fire purchased materials from Ferguson Fire. Ferguson Fire began delivering materials to Preferred Fire on August 24, 2007, and the deliveries continued through October 16, 2007.

Notice of Furnishing Labor and/or Materials

On September 21, 2007, while its deliveries were in progress, Ferguson Fire sent a "Notice of Furnishing Labor and Materials" ("Notice of Furnishing") to Immedion advising it in relevant part that it had been employed by Preferred Fire to deliver labor, services, or materials with an estimated value of $15,000.00 to Immedion's premises. The Notice of Furnishing advised that it was being given as "a routine procedure to comply with certain state requirements that may exist," and that it was not a lien, nor any reflection on Preferred Fire's credit standing.

Immedion paid Preferred Fire $15,486.50 of the $30,973.00 contract price for installation of the system *before* receiving Ferguson Fire's Notice of Furnishing on September 21, 2007. *After* receiving the Notice of Furnishing, Immedion issued two additional checks to Preferred Fire totaling $15,486.50 for the unpaid balance of the contract price.

It is undisputed that Immedion paid everything it owed to Rescom, and it also paid its contractor Preferred Fire in full under the separate contract for the fire suppression system. However, Preferred Fire never paid Ferguson Fire for the materials it furnished.

Notice or Certificate of Lien

On January 8, 2008, Ferguson Fire served upon Immedion, Preferred Fire, and others (and later filed) a "Statement and Notice of Mechanic's Lien," which gave notice of the existence of a lien and included a Statement of Account. Ferguson Fire indicated it had supplied $15,548.93 in materials to Preferred Fire for Immedion's premises from August 24, 2007 through October 16, 2007 pursuant

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[1] Pre-action fire suppression systems are multi-step systems designed to prevent accidental activation in areas that are highly sensitive to water damage. *See* "Fire sprinkler system," *available at* http://en.wikipedia.org/wiki/Fire_sprinkler_system.

to an agreement with Preferred Fire that was entered into "with the knowledge and consent and permission and authorization of Immedion." Ferguson Fire stated $15,548.93 was still owing and due, and it asserted a mechanic's lien upon the described premises.

Complaint for Foreclosure of Lien & Summary Judgment Motions

On April 11, 2008, Ferguson Fire filed a complaint and a lis pendens against Preferred Fire, Fair Forest of Greenville, L.L.C., Thomas F. Wong, and Immedion seeking foreclosure of a mechanic's lien as to all defendants, as well as attorney's fees, costs, and interest.[2]

Immedion answered[3] and thereafter moved for summary judgment, maintaining (1) there was no evidence Ferguson Fire had furnished any materials for the benefit of property owned by Immedion, as it was a mere leaseholder; (2) there was no contractual relationship giving rise to liability between Ferguson Fire and Immedion; and (3) Immedion paid in full for all work performed by its contractors, so it had no further liability pursuant to S.C. Code Ann. § 29-5-20(B).

Ferguson Fire filed a cross-motion for summary judgment, arguing (1) under S.C. Code Ann. § 29-5-30 a leasehold interest in property is subject to a materialman's lien; (2) a materialman supplying materials to a contractor has a lien for the value of the materials on the leaseholder's interest under S.C. Code Ann. § 29-5-20, and the value of the lien is limited to the amount due to the contractor

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[2] Ferguson Fire additionally asserted claims for breach of contract and unjust enrichment as to Preferred Fire only. Ferguson Fire obtained a default judgment against Preferred Fire but was unable to collect on it. Ferguson Fire stipulated to a dismissal of Fair Forest and Wong.

[3] In addition, Immedion counterclaimed against Ferguson Fire for attorney's fees, and it instituted a third-party complaint against Rescom for breach of contract. Rescom counterclaimed against Immedion, but the two reached a settlement and dismissed Immedion's third-party complaint when they determined Ferguson Fire's suit did not involve Immedion's contract with Rescom.

by the owner/leaseholder as of the date of notice under sections 29-5-20 and 29-5-40; and (3) Immedion should have been aware of its potential claim because Ferguson Fire gave Immedion the Notice of Furnishing prior to Immedion's full payment to Preferred Fire.

Ferguson Fire asserted since it gave Immedion notice on September 21, 2007 that it was furnishing materials for its premises, under South Carolina's mechanic's lien statutes, it was entitled to a lien up to the amount Immedion paid to its contractor, Preferred Fire, *after* that date, plus attorney's fees and interest.[4] Ferguson Fire noted that the value of the materials it supplied to Preferred Fire was actually greater than the amount of its lien, but acknowledged that under the statutory provisions its lien was limited to the unpaid balance of the contract between Immedion and Preferred Fire as of the date of its Notice of Furnishing.

Decisions of Circuit Court & Court of Appeals

The circuit court granted summary judgment to Immedion and extinguished the mechanic's lien filed by Ferguson Fire. The court stated, "The issue is whether the Notice of Furnishing was sufficient to notify the owner [Immedion] of the lien given by § 29-5-20. Because the Notice explicitly stated that it was not a mechanic's lien and contained no demand for payment, the Notice is ineffective under § 29-5-40 as a Notice of Lien." The court concluded Ferguson Fire had failed to follow the requirements of S.C. Code Ann. § 29-5-40 because all of the materials had not yet been furnished when it issued its notice to Immedion, and it did not identify the final amount of the supplies yet to be delivered.

The Court of Appeals affirmed, finding the Notice of Furnishing was ineffective under section 29-5-40 because it "was sent prior to furnishing all the material, failed to identify the final amounts of the goods delivered, and never made a demand for payment." *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Protection, L.L.C.*, 397 S.C. 379, 386, 725 S.E.2d 495, 499 (Ct. App. 2012). The court concluded "the circuit court did not err in finding the Notice [of

[4] Although Ferguson Fire inadvertently referred to the balance remaining on the notice date as $15,485.50 in some of its materials, this appears to be a scrivener's error as the balance remaining on the notice date, and thus the potential lien, was $15,486.50.

Furnishing] was insufficient to notify Immedion of a lien." *Id.* at 387, 725 S.E.2d at 499. This Court granted Ferguson Fire's petition for a writ of certiorari.

II. STANDARD OF REVIEW

Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted "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."

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 42, 747 S.E.2d 178, 182 (2013) (citation omitted). Determining the proper interpretation of a statute is a question of law, which this Court reviews de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 662 S.E.2d 40 (2008).

III. LAW/ANALYSIS

On certiorari, Ferguson Fire contends the Court of Appeals erred in adding requirements for the timing and form of a Notice of Furnishing under S.C. Code Ann. § 29-5-40; specifically, it erred in determining a Notice of Furnishing could not be delivered to an owner until *after* a materialman delivers all materials to the worksite and that a demand for payment of a specific amount must be included in the notice. We agree. The Court of Appeals has added requirements that are not present in the statute itself and, as a result, erred in concluding Ferguson Fire's lien was ineffective as a matter of law.

A. Overview of Mechanics' Liens Statutes

In South Carolina, mechanics' liens are purely statutory and may be acquired and enforced only in accordance with the terms and conditions set forth in the statutes creating them. *Multiplex Bldg. Corp. v. Lyles*, 268 S.C. 577, 235 S.E.2d 133 (1977); *accord Skiba v. Gessner*, 374 S.C. 208, 212, 648 S.E.2d 605, 606 (2007) (stating "one's right to a mechanic's lien is wholly dependent upon the language of the statute creating it"); *Butler Contracting, Inc. v. Court St., L.L.C.*, 369 S.C. 121, 130, 631 S.E. 252, 257 (2006) (observing mechanics' lien statutes

"must be strictly followed"). The statutory process encompasses several steps, including the (1) creation, (2) perfection, and (3) enforcement of the lien. *See generally* S.C. Code Ann. §§ 29-5-10 to -440 (2007 & Supp. 2013) (governing mechanics' liens).

(1) Creation of Lien

As a general rule, mechanics' liens arise when a contractor, subcontractor, or other person improves real property by furnishing labor and/or materials for a building or structure. 22 S.C. Jur. *Mechanics' Liens* § 2 (1994). "Because the improvements usually attach to and become an inseparable part of the structure, the lien statutes give the persons responsible for the improvements a security interest, or a lien on the improvement to the value of the amount due them." *Id.* § 3 (footnote omitted).

The primary lien statutes are found in sections 29-5-10 and 29-5-20 of the South Carolina Code, and they distinguish between two classes of persons: (1) those with a direct contractual relationship to the owner (or leaseholder, as the case may be), such as contractors, and (2) those who are not in direct privity of contract with the owner, such as subcontractors and materialmen or suppliers. *Id.* § 8; *see* S.C. Code Ann. § 29-5-10 (2007) (creating liens for those with a direct contractual relationship with the owner); *id.* § 29-5-20 (creating liens for those not in direct privity with the owner).

In this case, Ferguson Fire did not contract directly with the leaseholder of the premises, Immedion; rather, it was a supplier of materials to Immedion's contractor, Preferred Fire. This implicates section 29-5-20(A), which provides in relevant part: "Every laborer, mechanic, subcontractor, *or person furnishing material* for the improvement of real estate when the improvement has been authorized by the owner *has a lien thereon*, subject to existing liens of which he has actual or constructive notice, to the value of the labor or material so furnished . . . ." S.C. Code Ann. § 29-5-20(A) (emphasis added).

"The lien arises, inchoate, when the labor is performed or the materials are furnished." *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 26, 336 S.E.2d 488, 489 (Ct. App. 1985). In other words, "when the labor is performed or material is furnished, the right exists but *the lien has not been perfected*." *Butler Contracting*, 369 S.C. at 128, 631 S.E.2d at 256 (emphasis added).

Moreover, if the person furnishing the labor or materials was employed by someone *other* than the owner (such as a contractor), for the lien to attach the person must meet the *additional* requirement of giving written notice to the owner of the furnishing of the labor or material. *Id.* (citing S.C. Code Ann. § 29-5-40; *Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 229 S.C. 619, 93 S.E.2d 855 (1956); *Shelley Constr. Co.*, 287 S.C. at 26, 336 S.E.2d at 490).

Section 29-5-40, entitled "Notice to owner before lien attaches when laborer was employed by someone other than owner," provides in full as follows:

> Whenever work is done or *material is furnished* for the improvement of real estate *upon the employment of a contractor* or some other person than the owner *and such* laborer, mechanic, contractor or *materialman shall in writing notify the owner of the furnishing of such labor or material and the amount or value thereof*, *the lien given by § 29-5-20 shall attach upon the real estate improved* as against the true owner for the amount of the work done or material furnished. But in no event shall the aggregate amount of liens set up hereby exceed the amount due by the owner on the contract price of the improvement made.

S.C. Code Ann. § 29-5-40 (2007) (emphasis added). By its terms, section 29-5-40 requires a supplier to give written notice to the owner (1) "of the furnishing of such labor or material" and (2) "the amount or value thereof."

(2) Perfection & Enforcement of Lien

For an inchoate lien to become valid, the lien must be perfected and enforced in compliance with South Carolina's mechanic's lien statutes. *Preferred Sav. & Loan Ass'n v. Royal Garden Resort, Inc.*, 301 S.C. 1, 389 S.E.2d 853 (1990). To perfect and enforce a lien, one must timely complete the following three steps found in sections 29-5-90 and 29-5-120 of the South Carolina Code: (1) serve and file a notice or certificate of the lien, (2) commence a lawsuit to enforce the lien, and (3) file a lis pendens. *See* S.C. Code Ann. §§ 29-5-90 & -120 (2007); *Butler Contracting*, 369 S.C. at 129, 631 S.E.2d at 256; *see also* 22 S.C. Jur. *Mechanics' Liens* §§ 15 to 19 (1994) (discussing procedures). The trigger for

determining when all three of these events must be performed is the date when the supplier ceases furnishing labor or materials.

(a) Notice or Certificate of Lien. Section 29-5-90 requires that, within ninety days after he ceases to furnish labor or materials for a building or structure, the party asserting a lien must serve upon the owner (or person in possession of the property) and file with the register of deeds or clerk of court a notice or a certificate that includes a statement of the amount due him, together with a description of the property intended to be covered by the lien, the name of the owner of the property, if known, and other required information. S.C. Code Ann. § 29-5-90 (2007); *Butler Contracting*, 369 S.C. at 129, 631 S.E.2d at 256.

(b) Commencement of Lawsuit to Enforce the Lien. Pursuant to section 29-5-120, a party must commence a lawsuit seeking to enforce the lien within six months after ceasing to provide labor or materials for the property. S.C. Code Ann. § 29-5-120 (2007). The lien may be enforced by a petition to the court of common pleas in the county where the building or structure is located. *Id.* § 29-5-140.

(c) Notice of Lis Pendens. Section 29-5-120 further requires a party to file a notice of the pending action (lis pendens) within six months after ceasing to provide labor or materials. *Id.* § 29-5-120.

"If these steps are taken, the person claiming the lien may foreclose against the property to satisfy the debt." *Butler Contracting*, 369 S.C. at 129, 631 S.E.2d at 256. "On the other hand, if he fails to take any one of these steps, the lien against the property is dissolved pursuant to Sections 29-5-90 and 29-5-120." *Id.*

The importance of strictly adhering to the statutory requirements is that, once a party claiming a lien gives the proper notice, he is entitled to be paid in preference to the contractor who procured the labor or materials, and the owner's payment to the contractor *after* receiving the proper notice shall not diminish the amount recoverable by the party asserting a lien. S.C. Code Ann. § 29-5-50 (2007).

B. Application of Statutory Scheme to Ferguson Fire

The current dispute centers on the Court of Appeals's determination that Ferguson Fire never acquired a lien because it gave a Notice of Furnishing to Immedion prior to delivering all of the materials to the worksite and without including a demand for payment of a specific amount. The court's holding turns on its interpretation of section 29-5-40, which imposes written notice upon the owner as a prerequisite for a lien to attach when the supplier is hired by someone other than the owner.

If a statute is ambiguous, the courts must construe its terms. *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 750 S.E.2d 61 (2013). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." *Id.* at 128, 750 S.E.2d at 63 (citation omitted). However, "[w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey,* 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

"What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03, at 94 (5th ed. 1992)). "We are not at liberty, under the guise of construction, to alter the plain language of [a] statute by adding words which the Legislature saw fit not to include." *Shelley Constr. Co.*, 287 S.C. at 28, 336 S.E.2d at 491. "Our duty is to apply the statute according to its own terms." *Id.* at 29, 336 S.E.2d at 491.

Upon reviewing the plain terms of section 29-5-40 and considering its relation to the other mechanic's lien provisions as well as prior case law, we believe Immedion and the Court of Appeals have confused the requirements for a Notice of Furnishing to an owner under section 29-5-40 with the requirements for a notice or certificate of a lien under section 29-5-90.

Application of the mechanic's lien statutes outlined above indicates Ferguson Fire followed the proper timing and sequence of events for (1) creation, (2) perfection, and (3) enforcement of a mechanic's lien. An inchoate lien normally arises upon the furnishing of the labor and materials under section 29-5-20. However, section 29-5-40 additionally provides that, in cases where the person seeking the lien was employed by someone *other* than the owner, the supplier must

notify the owner in writing "of the furnishing of such labor or material and the amount or value thereof" for "the lien given by 29-5-20 [to] attach upon the real estate . . . ." S.C. Code Ann. § 29-5-40. Thus, Ferguson Fire was required to meet the terms of both section 29-5-20(A) and section 29-5-40 for it to have an inchoate lien attach.

In this case, Ferguson Fire gave Immedion written notice on September 21, 2007 that it was supplying materials to Preferred Fire for its premises with an estimated value of $15,000.00. This is all of the information specifically required by the General Assembly in section 29-5-40 for a Notice of Furnishing. Ferguson Fire's Notice of Furnishing correctly indicated that it was *not* then noticing a lien and it did *not* include a demand for payment as it had not yet delivered all of the materials to the premises, and there was no amount delinquent at that time. The cessation of deliveries and a specific demand for payment are elements that are required for a lien notice. In contrast, the Notice of Furnishing under section 29-5-40 was simply to apprise Immedion as the leaseholder of the property that Ferguson Fire was "furnishing . . . labor or material" to its premises.

Once all of the materials had been furnished and Preferred Fire failed to pay the amount due, Ferguson Fire *then* proceeded with the next step in the process under section 29-5-90 to prepare a lien notice that included a Statement of Account. The lien notice indicated that the materials had been furnished and that there was a specific amount then owing and unpaid for which a lien was being pursued.

The Court of Appeals acknowledged that section 29-5-40 "does not prescribe the specific format of the notice," and it "does not contain a time limit for providing written notice to the owner," but stated that "it is impossible for a notice of a lien to precede the actual performance of work that creates the lien." *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Protection, L.L.C.*, 397 S.C. 379, 387, 725 S.E.2d 495, 499 (Ct. App. 2012). We agree with the Court of Appeals that a lien notice could not be prepared until all of the materials were delivered. *See* S.C. Code Ann. § 29-5-90 (providing a notice or certificate of a lien is to be served and filed "after [a person] ceases to labor on or furnish labor or materials for such building or structure"). However, Ferguson Fire provided *both* a Notice of Furnishing and a lien notice, which serve two different purposes, and it did not file its lien notice until after the delivery of all materials.

In *Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 229 S.C. 619, 629, 93 S.E.2d 855, 860 (1956), this Court expressly stated that the Notice of Furnishing statute specifies no time when the notice should be given to the owner, and it could be "given at any time":

> Section 45-254 [now 29-5-40] *specifies no time at which or within which notice of the furnishing of material is to be given to the owner. Such notice may be given at any time*. Cf. Hughes v. Peel, 221 S.C. 307, 70 S.E.2d 353; but of course it will be ineffectual if the other requisites to the perfection and enforcement of the lien, Sections 45-259 and 45-262 [now sections 29-5-90 and 29-5-120], are not met. Delay in giving the notice cannot operate to the detriment of the owner, because his liability under the lien is limited to the balance due by him to the prime contractor at the time he receives the notice.

(Emphasis added.) In *Wood v. Hardy*, 235 S.C. 131, 137-38, 110 S.E.2d 157, 160 (1959), this Court quoted *Lowndes* extensively and reiterated that the General Assembly has set forth no time limit as to the filing of a Notice of Furnishing, so it may be given at any time. However, as noted in *Lowndes*, the lien is limited to the amount of the unpaid balance at the time the owner receives the notice, so the timing of the notice affects the amount of the potential lien. *Id.* at 138, 110 S.E.2d at 160.

The Court of Appeals also recognized the impact of the timing of a Notice of Furnishing upon the potential lien amount in *Stovall Building Supplies*:

> S.C. Code Ann. § 29–5–40 (1976) provides, in pertinent part, that a mechanic's lien will not attach to the owner's property unless the owner is given notice of the claim of a materialman who contracted with a person other than the owner prior to the payment in full of the amount owed the contractor. In addition, the materialman's lien is limited to the amount the owner owes the contractor at the time the materialman gives notice.

Stovall Bldg. Supplies, Inc. v. Mottet, 305 S.C. 28, 32, 406 S.E.2d 176, 178 (Ct. App. 1990) (footnote omitted). More recently, in *Butler Contracting*, this Court again explicitly noted, "Section 29-5-40 does not contain a time limit for providing written notice to the owner when the person asserting the lien is employed by

someone other than the owner." *Butler Contracting*, 369 S.C. at 128 n.3, 631 S.E.2d at 256 n.3 (citations omitted).

Ferguson Fire obviously gave its Notice of Furnishing to Immedion. Once it received the proper notice, Immedion made any additional payments at its own peril. *See generally Lowndes Hill Realty Co.*, 229 S.C. at 629, 93 S.E.2d at 860 (citing the prior codifications of sections 29-5-20 and 29-5-40 and stating there is a "manifest two-fold purpose" for the two statutes, to wit, "(1) [t]he protection of one, not a party to a contract with the owner, who furnishes labor or material in the improvement of the owner's property, by giving him a lien for such labor or material; and (2) the protection of the property owner by limiting his liability and that of his property in respect of all such liens 'to the amount due by the owner on the contract price of the improvement made'" (citation omitted)).

The Court of Appeals has created additional requirements not provided by the General Assembly in section 29-5-40 for a Notice of Furnishing. Ferguson Fire gave proper notice to Immedion that it was furnishing materials to its premises, as well as a separate lien notice that included a demand for the amount due once the materials had actually been supplied and its invoices became delinquent. All of these steps occurred prior to Ferguson Fire's service and filing of its complaint for foreclosure of the mechanic's lien and a lis pendens. As a result, the Court of Appeals erred in holding Ferguson Fire did not establish an effective lien.

IV. CONCLUSION

We conclude Ferguson Fire followed the statutory procedures to establish a mechanic's lien upon which a foreclosure action could be maintained, so summary judgment was improperly awarded to Immedion. We reverse and remand for further proceedings.[5]

[5] In light of our result, the award of attorney's fees to Immedion is likewise reversed.

REVERSED AND REMANDED.

KITTREDGE, J. and Acting Justices D. Craig Brown and Dorothy M. Jones, concur. PLEICONES, Acting Chief Justice, concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Bruce Hill, Appellant.

Appellate Case No. 2011-199807

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

Opinion No. 27411
Heard February 5, 2014 – Filed July 9, 2014

AFFIRMED

Jonathan Micah Hiller, of Hiller & Hiller, PA, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General J. Anthony Mabry, all of Columbia, Solicitor Jimmy A. Richardson, II, of Conway, all for Respondent.

JUSTICE PLEICONES: Bruce Hill (Appellant) challenges two evidentiary rulings by the circuit court and argues that his rights under the Interstate Agreement on Detainers Act (IAD) were violated. We affirm.

FACTS

Appellant was convicted of two murders and first-degree burglary, arising from a home invasion and double homicide in Horry County on the night of April 11, 2005. He received concurrent life sentences for the murders and a concurrent thirty-year sentence for the burglary.

Prior to Appellant's trial, another individual, Richard Gagnon, was tried and convicted of these murders. During Gagnon's trial, the State maintained that there were two perpetrators involved, as there was blood at the scene that could not belong to either victim or to Gagnon.[1]

Four fresh blood droplets were collected from the home where the murders occurred. From these blood droplets, the South Carolina Law Enforcement Division (SLED) developed a DNA profile. The profile did not match either of the victims or Gagnon's, but SLED was able to determine the blood belonged to one person. SLED entered the profile of the unknown individual into the CODIS[2] national data base.

Approximately four years after the murders, the Horry County Police Department (HCPD) was notified in a letter from SLED of a CODIS match for the unknown individual's blood found at the crime scene.[3] The DNA matched Appellant's, who, at that time, was incarcerated in Tennessee. Appellant's DNA had been placed into the CODIS database by the Tennessee Department of Corrections.

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[1] The record reflects that Gagnon was granted a new trial after Appellant's conviction.

[2] CODIS stands for Combined DNA Information System. It is a national database shared by law enforcement offices to assist with criminal investigations.

[3] This letter was published to the jury over the objection of Appellant. Its admission is one of the bases of this Appeal.

HCPD agents travelled to Tennessee to meet with Appellant. These agents obtained a *Schmerber*[4] order from a Tennessee court, and performed a buccal swab[5] on Appellant for further DNA comparison. However, the investigators who obtained this order subsequently left HCPD, and the evidence of the swab was lost.

Arrest warrants were issued charging Appellant with burglary and murder. On August 26, 2010, pursuant to the IAD,[6] Appellant requested the final deposition of the charges pending against him in South Carolina. The solicitor's office and the clerk of court acknowledged receipt of Appellant's request on September 3, 2010, which triggered the IAD 180-day clock to bring trial.[7]

Appellant arrived in South Carolina on October 21, 2010. On March 1, 2011, the last day of the 180-day IAD limit, a hearing on the State's motion for a six-month continuance was held. Appellant opposed the continuance arguing that the State did not meet its burden for obtaining a continuance under the IAD. The circuit court disagreed with Appellant and ruled that there was good cause for granting the State's request. In addition to granting a continuance, the court ordered that a *Schmerber* hearing be conducted the next week.[8] Thereafter, Appellant moved for a continuance, and on June 16, 2011, a three month continuance was granted.[9]

The final pretrial hearing was held on September 1, 2011. The circuit court took up several evidentiary matters which form two of the bases for this appeal. First, the court ruled that neither the State nor Appellant could make any reference to

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[4] *Schmerber v. California*, 384 U.S. 757 (1966).

[5] A buccal swab is a method of obtaining DNA by swabbing the inside of the subject's mouth.

[6] S.C. Code Ann. §§ 17–11–10 *et seq.* (2003).

[7] Under the IAD, once the receiving jurisdiction acknowledges receipt of the prisoner's request for disposition, the receiving jurisdiction has 180 days to bring the prisoner to trial, unless a proper continuance is granted by a court of competent jurisdiction. S.C. Code Ann. § 17-11-10 Art. III (2003). Otherwise, the court will dismiss the charges. *See State v. Holbrook*, 274 S.C. 4, 260 S.E.2d 181 (1979). (holding that the time provisions of the IAD are mandatory and violation of them requires dismissal).

[8] The court ultimately issued a *Schmerber* order, and the results confirmed the CODIS match to Appellant.

[9] The State's six month continuance would have ended on September 1, 2011 approximately two weeks before Appellant's requested continuance would end.

Gagnon's conviction, as it was irrelevant to the determination of Appellant's guilt. Second, the circuit court denied Appellant's motion to suppress any mention of Appellant being in the CODIS database. While ruling that it would not be permissible for the State to discuss why Appellant was in the database, i.e. the Tennessee conviction, the court allowed the State to present background information regarding the CODIS database and the match to Appellant. The circuit court reasoned it was relevant to explain the gap in time between the murders and the arrest. Appellant's trial began on September 12, 2011. He was convicted on all counts, and this appeal followed.

DISCUSSION

Appellant raises three issues in this appeal. First, he challenges the circuit court's suppression of evidence regarding the convictions of Richard Gagnon, the man who was tried and convicted of these murders before Appellant's DNA was linked to these crimes. Second, Appellant challenges the admission of a letter containing a reference to Appellant's DNA being in the CODIS database. Finally, Appellant argues his rights under the IAD were violated by the circuit court's grant of a continuance to the State in March 2011.

1. Did the circuit court err when it prohibited any mention of the prior conviction of Richard Gagnon?

Appellant contends the circuit court erred in holding that evidence of Gagnon's convictions was irrelevant. Appellant argues that he should have been allowed to present testimony or evidence regarding Gagnon's involvement in and conviction of these same crimes. Appellant contends he was prejudiced because he was denied the opportunity to show the State's inability to connect him to Gagnon. We disagree.

The admission of evidence is within the discretion of the trial court and will not be reversed absent a prejudicial abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002).

Appellant misconstrued the circuit court's ruling, and as a result failed to present any evidence of Gagnon's third party guilt. Consequently, he is unable to show prejudice from the court's suppression of Gagnon's convictions.

The circuit court's ruling regarding the admissibility of Gagnon's conviction was:

> I will allow you to examine the witnesses about whether somebody else is present, there's somebody else involved in the matter, what the evidence shows, but I will not allow you to bring up that some other person has been convicted, because that would, in the Court's estimation, lessen the jury's obligation, and lessen in their minds their responsibility to treat this matter separately. . .

The court's ruling permitted evidence that Gagnon had been *involved* in the crimes but not that he had been *convicted* of these crimes. The court did not prevent Appellant from presenting evidence that Gagnon committed these crimes, or evidence that both law enforcement and the solicitor had investigated, arrested, and tried Gagnon.

From Appellant's arguments, it appears he understood the court's ruling as preventing him from even mentioning Gagnon or suggesting that he was involved in these crimes.[10] As a result of this misunderstanding, Appellant never presented evidence, drew out on cross, or argued that someone else committed this crime. Appellant could have presented evidence to this effect, so we disagree with Appellant's contention that he was prejudiced by being denied the opportunity to show a lack of connection between him and Gagnon.

In any case, Gagnon's *convictions* were irrelevant to Appellant's guilt or innocence, and thus, the circuit court did not err in refusing to allow Appellant to present the evidence.

Traditionally, our courts have held that the guilty pleas or the acquittal of a co-defendant are irrelevant to the defendant's guilt or innocence. *State v. Moore*, 337 S.C. 104, 552 S.E.2d 354 (Ct. App. 1999) (holding that co-defendants' guilty pleas were not admissible); *State v. Brown*, 306 S.C. 448, 412 S.E.2d 440 (Ct. App. 1991) (holding that admission of codefendant's guilty plea was irrelevant and therefore inadmissible). While Gagnon was not a co-defendant, the disposition of another individual's charges for the same crimes the defendant is on trial for is irrelevant to the defendant's guilt or innocence. While Appellant was entitled to introduce evidence of third-party guilt and perhaps would have been able to introduce evidence that solicitors had successfully obtained indictments for

[10] For example, Appellant's brief states, "[h]ad Appellant been permitted to explore Richard Gagnon's involvement in the crime, the State would have been forced to focus on the full picture. . . ."

Gagnon, a jury's *verdict* is not relevant to Appellant's guilt. Therefore, the circuit court did not err in refusing to allow evidence of Gagnon's convictions.

2. Did the circuit court err in admitting a letter from SLED to the HCPD which identified the CODIS database?

Appellant contends the circuit court erred when it admitted a SLED letter into evidence because the letter implicitly referenced Appellant's criminal record and therefore highly prejudiced Appellant. While we agree the admission of the letter was error, we hold that this error does not warrant reversal of Appellant's convictions.

The circuit court ruled that the State was allowed to go into background information regarding the CODIS database to explain the delay between the 2005 crime and Appellant's 2009 arrest. Additionally, the court clarified that the State would not be allowed to elicit testimony as to how or why Appellant's DNA was in the database. Appellant does not take issue on appeal with any evidence presented under these rulings, beyond the publication of the letter to the jury. For example, there was testimony regarding the CODIS database and how law enforcement agencies share it for investigative purposes. Additionally, there was testimony that there was a hit generated on the CODIS database from an evidence sample in this case. However, the only error that Appellant contends the circuit court committed is in allowing the letter to be published to the jury as follows:

> Dear Neil Livingston, the short tandem repeat, STRPCR DNA profile developed from item 19 was compared to the Combined [sic] DNA Index System, CODIS. This profile matches the STRPCR DNA profile developed from Bruce Antwain Hill. This information is provided for investigative purposes only. If the suspect is charged, an additional biological specimen must be submitted for court purposes. This search was conducted by Lieutenant David McClure with the South Carolina Law Enforcement Division

The admission of this letter will only constitute reversible error if it was a prejudicial abuse of discretion. *State v. Clasby*, 385 S.C. 148, 682 S.E.2d 892 (2009). While we do not condone the publishing of this letter to the jury, its admission does not amount to reversible error. The evidence contained in this letter was merely cumulative to other evidence of Appellant's DNA being in the CODIS

database. Accordingly, we find that the publication of this letter was harmless in light of the other evidence which was admitted without objection.

Moreover, the State never tried to introduce evidence why Appellant's DNA was in the database, and there was no reference to nor indication of any previous crime Appellant committed. The most that can be said about this letter is that it could have created an inference in a juror's mind that Appellant had a criminal history. This Court has held that such a speculative inference does not amount to prejudicial error. *See State v. Council*, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1998) (noting that an inadvertent vague reference to defendant's prior record will not amount to prejudicial error). Thus, the circuit court's admission of this letter, while error, does not entitle Appellant to reversal of his convictions.

3. Did the circuit court err in granting the State a six-month continuance under the IAD?

Appellant argues that the circuit court's grant of a six-month continuance to the State violated the IAD. We disagree.

The IAD is a compact enabling participating states to obtain custody of prisoners incarcerated in other participating jurisdictions and bring those prisoners to trial. *Reed v. Farley*, 512 U.S. 339, 340 (1994). The central purpose of the IAD is to allow participating states to uniformly and expeditiously dispose of charges pending against prisoners held out of state. S.C. Code Ann. § 17–11–10 (2003); *State v. Adams*, 354 S.C. 361, 370, 580 S.E.2d 785, 790 (Ct. App. 2003). At issue here is Article III, which provides for the resolution of detainers based on untried indictments or complaints against a prisoner. Article III was triggered by Appellant's filing a request for a "final disposition," and under the IAD, that request requires that Appellant be tried within 180-days unless a proper continuance is granted. § 17-11-10.

Appellant argues that the State's continuance was not proper under Article III, which in relevant part provides:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he

> shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided, that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. . .
>
> S.C. Code Ann. § 17-11-10 (2003).

Appellant contends that the circuit court erred in granting the State a continuance on March 1, 2011, the 180th and last day before the limit expired because the State failed to show "good cause," and the continuance was neither "necessary" nor "reasonable." Appellant contends that this late grant of continuance was improper, and therefore, he is entitled to dismissal of all charges. We disagree.

This Court has not addressed the standard of review for determining whether an IAD continuance was granted on "good cause." In South Carolina "[t]he grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record." *Plyler v. Burns*, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007). We see no reason for this to change in the context of the IAD. Thus, we will reverse a circuit court's decision to grant a continuance under the IAD only when it amounts to an abuse of discretion.

In this case, the State presented multiple reasons why a continuance was needed. These included: the complexity of the case, the special preparations required to try a case of this magnitude, i.e. a double murder and a burglary in the first-degree, and the need for a *Schmerber* hearing to be conducted.

Appellant argues that these reasons are insufficient to satisfy the "good cause" requirement for a continuance under Art. III of the IAD. We disagree.

At the hearing, the judge acknowledged that he was very familiar with the complexities of this case, since he was the trial judge for the Gagnon trial, and that he believed this case, like the Gagnon case, would be an extremely complicated proceeding. We find this statement supports the State's position that this trial was going to be a complex and intensive trial. Further, this was a double homicide, and

other courts have considered the magnitude of the crime in determining whether there was good cause for delay. *See State v. Aguero*, 791 N.W.2d 1, 7 (N.D. 2010) (in the context of an IAD continuance, "[in] considering the length of time of the delay, we have said, [t]he allowable delay for a minor street crime is considerably less than that for a more serious and complex charge.") (citations and quotations omitted).

Further, while the State is at least partially at fault for the delay in seeking the new *Schmerber* hearing, it is undeniable that a *Schmerber* hearing was required, as this case depended on matching Appellant's DNA with the DNA found at the scene. Accordingly, with the complexity of this case and the need for a *Schmerber* hearing, we hold that the decision to grant a continuance did not amount to a prejudicial abuse of discretion.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Neal Beckman, Employee, Appellant,

v.

Sysco Columbia, LLC, Employer, and Gallagher Bassett Services, Inc., Carrier, Respondents.

Appellate Case No. 2013-000005

Appeal From The Workers' Compensation Commission

Opinion No. 5205
Heard February 20, 2014 – Filed March 19, 2014
Withdrawn, Substituted and Refilled July 9, 2014

REVERSED AND REMANDED

Frederick W. Riesen, Jr., of Riesen Law Firm, LLP, of N. Charleston, and Stephen Benjamin Samuels, of Samuels Law Firm, LLC, of Columbia, for Appellant.

Joseph Hubert Wood, III, and Kathryn Fiehrer Walton, both of Wood Law Group, LLC, of Charleston, for Respondents.

SHORT, J.: In this appeal from the Workers' Compensation Commission (Commission), Neal Beckman argues the Appellate Panel of the Workers' Compensation Commission (Appellate Panel) erred in finding he was limited to a

disability award for his back as a scheduled member because the evidence showed he should have been awarded disability under the loss of earning capacity statute. We reverse and remand.

FACTS

Beckman, a delivery driver, was injured on March 25, 2010, while loading a hand truck for his employer, Sysco Columbia, LLC (Sysco). Beckman alleged in his Workers' Compensation Form 50 that he pulled muscles in his back, injuring his back, buttocks, both legs, and right foot. Sysco admitted Beckman's back injury, but denied his other injuries. Following the accident, Sysco provided Beckman with authorized medical care and treatment, primarily with Dr. Timothy Zgleszewski. Beckman also underwent an independent medical evaluation with Dr. Scott Boyd.

On March 8, 2012, Sysco filed a Form 21 seeking to terminate temporary compensation and have an award made for permanent disability compensation. Sysco asserted Beckman reached a level of maximum medical improvement on May 2, 2011, per a note by Dr. Zgleszewski, or alternatively, by February 27, 2012, per a note by Dr. Boyd.

During the hearing before the single commissioner, Sysco asserted Beckman was entitled to permanent disability pursuant to section 42-9-30(21) of the South Carolina Code. Beckman asserted any permanency award should be based on a loss of earnings under section 42-9-20.[1] In her order, the single commissioner found Beckman "sustained a 35% permanent loss of use of the spine (encompassing [Beckman's] entire spine and including any alleged radiculitis) pursuant to § 42-9-30(21)." The single commissioner further found Beckman's treating physician assigned a 15% combined impairment rating for Beckman's back and sacroiliac joint (SI joint), and the independent medical examiner assigned an 8% impairment rating. However, the single commissioner also found the greater weight of the evidence showed only Beckman's back was affected by the March 25, 2010 admitted injury by accident. The commissioner ordered Sysco to pay a

[1] The parties stipulated to an average weekly wage of $1,062.94, with a resulting compensation rate of $689.71.

lump sum payment to Beckman representing compensation for 35% permanent loss of use to the back pursuant to § 42-9-30(21), with Sysco being entitled to take credit for all temporary disability compensation paid to Beckman for the period after February 27, 2012.

Beckman filed a Form 30 notice of appeal. After a hearing, the Appellate Panel issued an order affirming the decision of the single commissioner in full. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. *Carolinas Recycling Grp. v. S.C. Second Injury Fund*, 398 S.C. 480, 482, 730 S.E.2d 324, 326 (Ct. App. 2012). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel's decision if the appellant's substantial rights 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 on the whole record." *See* S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2013). "It is not within our province to reverse findings of the Appellate Panel which are supported by substantial evidence." *Hall v. United Rentals, Inc.*, 371 S.C. 69, 79-80, 636 S.E.2d 876, 882 (Ct. App. 2006). Our supreme court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion the Appellate Panel reached. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

LAW/ANALYSIS

Beckman argues the Appellate Panel erred in finding he was limited to a disability award for his back as a scheduled member because the evidence showed he should have been awarded disability under the loss of earning capacity statute in section 42-9-20 of the South Carolina Code. We agree.

"[T]he guiding principle undergirding our workers' compensation system [is] that the Act is to be liberally construed in favor of the claimant." *Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012). In a workers' compensation case, the extent of impairment "need not be shown with mathematical precision." *Linen v. Ruscon Constr. Co.*, 286 S.C. 67, 68, 332 S.E.2d 211, 212 (1985). However, an award "may not rest on surmise, conjecture, or speculation; it must be founded on evidence of sufficient substance to afford it a reasonable basis." *Id.*

Dr. Zgleszewski assigned a 10% medical impairment to Beckman's back and spine, and a 5% medical impairment to his SI joint, for a combined 15% impairment rating. Dr. Zgleszewski also stated Beckman would need two to three SI joint injections over the following two years. Dr. Boyd assigned Beckman with an impairment rating of 8%. The Appellate Panel's order adopted the single commissioner's finding that Beckman's treating physician assigned a 15% combined impairment rating for Beckman's back and SI joint. The Appellate Panel also adopted the single commissioner's finding that the greater weight of the evidence showed only Beckman's back was affected by the March 25, 2010 admitted injury by accident. Furthermore, the Appellate Panel agreed with the single commissioner's finding that there was no objective evidence of radiculopathy, and Dr. Zgleszewski diagnosed radiculitis based on Beckman's subjective complaints.

Beckman argues the Appellate Panel erred in applying the "two body-part rule" set forth in *Singleton v. Young Lumber Co.*, 236 S.C. 454, 114 S.E.2d 837 (1960). In *Singleton*, Singleton suffered a sole injury to a scheduled member, his leg, and no other condition was claimed to have contributed to his disability. *Id.* at 471, 114 S.E.2d at 845. Singleton argued the injury to his leg was so disabling that he should be found totally disabled. *Id.* at 468, 114 S.E.2d at 844. The court held that because the injury was confined to a scheduled member, compensation must be determined under the scheduled injury statute as provided by the legislature. *Id.* at 473, 114 S.E.2d at 846. Thus, an impairment involving only a scheduled member is compensated under the scheduled injury statute and not the general disability statute. *Id.* The court stated that "[t]o obtain compensation in addition to that scheduled for the injured member, [Singleton] must show that some other part of his body is affected." *Id.* at 471, 114 S.E.2d at 845.

In *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 106-07, 580 S.E.2d 100, 103 (2003) (citation omitted), our supreme court summarized its holding in *Singleton*:

> *Singleton* stands for the exclusive rule that a claimant with one scheduled injury is limited to the recovery under § 42-9-30 alone. The case also stands for the rule that an individual is not limited to scheduled benefits under § 42-9-30 if he can show additional injuries beyond a lone scheduled injury. This principle recognizes "the common-sense fact that, when two or more scheduled injuries [or a scheduled and non-scheduled injury] occur together, the disabling effect may be far greater than the arithmetical total of the schedule allowances added together."

Similarly, in *Simmons v. City of Charleston*, 349 S.C. 64, 76, 562 S.E.2d 476, 482 (Ct. App. 2002), this court affirmed the Workers' Compensation Commission's finding that the claimant was entitled to proceed under the general disability statute, as substantial evidence was presented that the claimant suffered additional complications to another part of the body, other than a scheduled member. "The policy behind allowing a claimant to proceed under the general disability § 42-9-10 and § 42-9-20 allows for a claimant whose injury, while falling under the scheduled member section, nevertheless affects other parts of the body and warrants providing the claimant with the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section." *Id.* (quoting *Brown v. Owen Steel Co.*, 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994)). "All that is required is that the injury to a scheduled member also affect another body part." *Id.*

Beckman asserts that although the primary injury was to his back, he also injured his SI joint, and he suffered radiculopathy in his left leg caused by the back injury. He argues that because the evidence shows his injury is not limited to his back, he is entitled to proceed under the loss of earnings capacity statute found in section 42-9-20 of the South Carolina Code. Section 42-9-20 provides:

> Except as otherwise provided in § 42-9-30, when the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as provided

> in this chapter, to the injured employee during such disability a weekly compensation equal to sixty-six and two-thirds percent of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the average weekly wage in this State for the preceding fiscal year. In no case shall the period covered by such compensation be greater than three hundred forty weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall not be deducted from a maximum period allowed in this section for partial disability.

S.C. Code Ann. § 42-9-20 (1976). Thus, he asserts the Appellate Panel erred in only addressing his disability under the medical model found in section 42-9-30(21) of the South Carolina Code. S.C. Code Ann. § 42-9-30(21) (Supp. 2013).

Beckman cites to *Gilliam v. Woodside Mills*, 319 S.C. 385, 461 S.E.2d 818 (1995), as addressing virtually the same issue as in this case. In *Gilliam*, the employer asserted this court erred in holding as a matter of law that the hip is not part of the leg. *Id.* at 387, 461 S.E.2d at 819. The employer contended the only question presented to the court was whether there was substantial evidence to support the Appellate Panel's finding that Gilliam's injury was confined to her leg. *Id.* Our supreme court disagreed with the employer, noting that on appeal from the Appellate Panel, this court may reverse where the decision is affected by an error of law.[2] *Id.* The supreme court stated this court joined several jurisdictions that have held as a matter of law that the hip socket is part of the pelvis and not part of the leg for workers' compensation purposes, and the court did not find error with this view. *Id.* Beckman, therefore, argues *Gilliam* supports his argument that the

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[2] The employer further contended the determination whether the hip is part of the leg is a question of fact instead of a question of law. *Id.* The supreme court found there was no dispute that Gilliam suffered an injury to her hip, resulting in a hip replacement. *Id.* Thus, the supreme court found this court correctly ruled, given the undisputed facts in this case, that it was a matter of law whether the hip socket is part of the pelvis or part of the leg. *Id.*

SI Joint, which is located in the pelvis, is not a part of the back for workers' compensation purposes.

Sysco cites to *Sanders v. MeadWestvaco Corp.*, 371 S.C. 284, 638 S.E.2d 66 (Ct. App. 2006), in support of its position that Beckman's disability for his SI joint is compensated based on his loss of use of his back. In *Sanders*, the Appellate Panel awarded Sanders compensation under section 42-9-30(19) for an injury to his back due to permanent loss of use of his lumbar spine and SI joint. *Id.* at 290, 638 S.E.2d at 69. The employer argued the circuit court erred in affirming an award of benefits for his back based upon impairment to the lumbar spine and SI joint, which are not scheduled for compensation under section 42-9-30. *Id.* at 289-90, 638 S.E.2d at 69. This court found no reversible error, noting a review of the Appellate Panel's order and the record reflected Sanders' injury and subsequent disability was clearly to his back. *Id.* at 290, 638 S.E.2d at 69. Thus, the court did not specifically hold as a matter of law that the SI joint is a part of the back for workers' compensation purposes.

Regardless of whether the SI joint is a part of the back for workers' compensation purposes, we hold the Appellate Panel's finding that Beckman was limited to a disability award for his back as a scheduled member is not supported by substantial evidence. Instead, the evidence in the record indicates Beckman suffered from radiculopathy as a result of his back injury. Although Dr. Zgleszewski's notes from June 7, 2010, state Beckman's "EMG/NCS does not have a radiculopathy in either leg," the note continues that "EMG/NCS can be an imperfect diagnostic tool for determining radiculopathy." In fact, Dr. Zgleszewski's notes from June 7, 2010, and July 9, 2010, state a diagnosis of radiculitis. Dr. Zgleszewski's notes from June 7 and July 9 provide Beckman complained of pain that radiated to his left buttock and left hip. Dr. Zgleszewski noted during his physical examinations of Beckman: "There is tightness noted in the left piriformis muscle(s) today. There is tenderness over the bilateral PSIS's. There is a positive Fortin Finger test bilaterally[.] Neural tension signs are positive in the left leg in the seated slumped position." Dr. Zgleszewski's notes from November 10, 2010, state Beckman was still suffering from pain that radiated to his left buttock and left hip. His physical examination noted: "There is tightness noted in the left piriformis muscle(s) today. Neural tension signs are positive in the left leg in the seated slumped position. . . . There is tenderness over the left Greater Trochanter." Dr. Zgleszewski's notes from March 21, 2011, and May 2, 2011, again provide Beckman continued to suffer pain that radiated to his left buttock and left thigh and down to his left foot.

He also noted the pain radiated to his left hip. Dr. Zgleszewski further noted during his physical examinations: "There is tenderness over the left greater trochanter"; "There is tightness noted in the left piriformis and Gluteals muscle(s) today"; and "Neural tension signs are positive in the left leg in the seated slumped position." Dr. Zgleszewski's statement to the Commission, dated September 2, 2011, states Beckman suffered from "sacroiliitis; lumbar disc injury & radiculopathy." Furthermore, Dr. Boyd's notes from Beckman's independent medical evaluation on February 27, 2012, state Beckman suffered pain that radiated down into his left leg, and he had numbness around his foot.

Therefore, we find the Appellate Panel's order was clearly erroneous in view of the substantial evidence in the record that Beckman suffered from radiculopathy as a result of his back injury. *See* S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2013) ("The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are . . . clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."). As a result, Beckman is entitled to proceed under the loss of earnings capacity statute found in section 42-9-20 of the South Carolina Code.

CONCLUSION

Accordingly, we reverse the Appellate Panel and remand the case to the Commission to address Beckman's eligibility for an award under section 42-9-20 of the South Carolina Code because the Appellate Panel's finding that Beckman's injury is confined to a scheduled member is not supported by substantial evidence.

REVERSED AND REMANDED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Clarence Williams Jenkins, Appellant.

Appellate Case No. 2012-211588

Appeal From Greenville County
The Honorable Edward W. Miller, Circuit Court Judge

Opinion No. 5232
Heard May 6, 2014 – Filed May 21, 2014
Withdrawn, Substituted and Refilled July 9, 2014

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General Melody Jane Brown, all of Columbia; and William Walter Wilkins, III, of Greenville, for Respondent.

GEATHERS, J.: Appellant Clarence Williams Jenkins seeks review of his convictions for kidnapping and murder. Appellant argues the trial court's refusal to

provide the jury with the circumstantial evidence instruction set forth in *State v. Edwards*[1] violated his right to require the prosecution to prove his guilt beyond a reasonable doubt. Appellant also challenges the trial court's failure to strike the testimony of the State's fingerprint expert, or, in the alternative, to grant a mistrial, arguing the prosecution withheld evidence material to the testimony in question. We affirm.

FACTS/PROCEDURAL HISTORY

On the morning of April 7, 2008, Sue Bostic discovered a garbage bag with unknown contents sitting on her front porch and a threatening note under the windshield wiper of her automobile.[2] Bostic contacted the Greenville City Police Department, and Officer Scott Odom responded to the call. Officer Amber Allen also arrived at the scene and spoke with Bostic while Officer Odom took the garbage bag to the back of his vehicle to inspect the bag's contents. Officer Odom discovered a severed human foot and hand and several severed toes. Officer Michael Petersen, who was employed with the forensic division of the Greenville County Department of Public Safety, then arrived to assist in processing the crime scene and collecting the evidence. Officers Allen and Petersen were informed that a similar note and garbage bag containing severed body parts had been left at the residence of Judon Burnside. They later proceeded to this residence to collect the evidence.

Officer Petersen took the garbage bags and their contents to the morgue and rolled fingerprint impressions from the severed hands. Captain Jackie Kellet, of the forensic division of the Greenville County Department of Public Safety, examined the fingerprints processed by Officer Petersen and matched them to fingerprints on file for Mekole Harris (Victim).

On April 10, 2008, police arrested Appellant and his wife, Carmen Jenkins (Wife), for the murder of Victim. On November 18, 2008, the Greenville County Grand Jury indicted Appellant for murder. In December of 2008, the State filed a Notice of Intent to Seek the Death Penalty against Appellant and Wife. In September of

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[1] 298 S.C. 272, 274-76, 379 S.E.2d 888, 889 (1989), *abrogated by State v. Cherry*, 361 S.C. 588, 595-606, 606 S.E.2d 475, 478-82 (2004).

[2] The facts of this case are horrific; however, it is necessary to discuss them to give context to Appellant's arguments regarding circumstantial evidence and to explain the relevance of Appellant's arguments regarding the fingerprint identification of the victim.

2009, Wife advised investigators of the location of Victim's remains in exchange for the State's withdrawal of its Notice of Intent to Seek the Death Penalty against Wife.

On March 9, 2011, Wife entered into a plea agreement with the State, requiring her truthful testimony in Appellant's trial in exchange for the State's subsequent request for a reduction in Wife's sentence. On September 13, 2011, the Grand Jury indicted Appellant for the kidnapping of Victim. On March 27, 2012, Wife pled guilty to the murder of Victim and was sentenced to fifty years of imprisonment. On this same day, the State withdrew its Notice of Intent to Seek the Death Penalty against Appellant.

Appellant's trial took place on April 9 through 13, 2012. Captain Kellet, who had matched the fingerprints from the severed hands to Victim's fingerprints, was qualified as an expert in fingerprint analysis, and she explained the process she went through in identifying Victim's fingerprints. The first step was entering the unknown fingerprints into the Automated Fingerprint Identification System (AFIS), a computerized database maintained by the South Carolina Law Enforcement Division (SLED). She explained that AFIS sends back a list of potential matches, and in this case "we ask for the top 25 people." Here, Victim's "State ID number"[3] was the first number on the list of potential matches. Captain Kellet then pulled a fingerprint card for Victim from agency records and visually compared, point by point, Victim's prints to the unknown prints. Once she determined the known and unknown fingerprints matched, she felt no need to examine any other fingerprints from the AFIS list of potential matches.

The State also presented the testimony of Wife, who testified about Appellant's alleged plan to intimidate a former housemate, Grace Davis, into returning to their home and continuing to live with them. According to Wife, during the time Davis lived with Appellant and Wife, Davis developed an intimate relationship with both of them. Eventually, the Department of Social Services removed Davis's children from the home and notified her that she could not regain custody of her children as long as she was living with Appellant and Wife. Therefore, Davis left the home. A few days later, Appellant told Wife that Davis "needed to come back to [their] relationship because she was a partner in [their] relationship" and "she knew too much about the organization that he was in." Appellant also told Wife "the

[3] The State ID number "is assigned to you by SLED if you've ever been fingerprinted."

organization would kill all of [them] if she didn't come back." Wife testified that she had never heard about this organization until that day.

Appellant began executing his plan to intimidate Davis by mailing threatening letters to her and to members of her family. Next, on the evening of Friday, April 4, 2008, Appellant brought home Victim, a prostitute, and handcuffed her to a bed. Appellant told Victim that he and Wife were police officers and that Victim was "under arrest for prostitution and possession of crack." Appellant also told Victim that the only way she would get out of those "charges" was for her to help Appellant and Wife with a "case." The "case" Appellant referenced was his plan to intimidate Davis into returning to their home.

After Victim agreed to cooperate, Appellant removed the handcuffs. Appellant wrote out a script for Victim to read over the telephone to members of Davis's family. Appellant then handcuffed Victim again and gave the script to her to memorize. Sometime around midnight, Appellant, Wife, and Victim went to a pay telephone at a nearby gasoline station, and Appellant dialed the telephone numbers for Davis's mother, Judon Burnside, and Davis's aunt, Sue Bostic. During each telephone call, Victim recited the material from the script written by Appellant. Appellant and Wife then took Victim back to their home, and Appellant handcuffed Victim to a chair for the remainder of the day on Saturday.

On Saturday night, Appellant crushed up "some Tylenol PM and some other sleeping medicine," mixed it into some ice cream, and gave it to Victim. However, Victim only ate a small amount of the ice cream. On the next day, Sunday, April 6, 2008, Appellant ordered Wife to kill Victim, who was still handcuffed to the chair. Wife attempted to strangle Victim with a cable cord, but as Victim struggled against Wife, Wife lost control of the cord. Appellant then tied the cord to the back of the chair, placed a plastic bag over Victim's head, and suffocated her.

Appellant and Wife took Victim's body to the bathroom and placed her body in the shower. Later that day, Appellant dismembered Victim's body, forcing Wife to participate, and placed the dismembered hands and feet in the couple's freezer. Appellant and Wife disposed of Victim's body near a golf course on Paris Mountain and returned to their residence, where Appellant placed the dismembered parts into two separate garbage bags.

After midnight, Appellant and Wife went to Bostic's apartment. Appellant "dropped [Wife] off right at the entrance of the apartments . . . ." Wife took one of the garbage bags and threw it onto Bostic's front porch. Wife then left a

threatening letter on the windshield of Bostic's car. Next, Appellant drove Wife to Burnside's residence. Wife placed a second threatening letter in Burnside's mailbox and placed the second garbage bag on Burnside's front porch.

Robin Taylor, a SLED employee, also testified at Appellant's trial. Taylor described the DNA analysis she performed on a swab from the severed hand. Taylor matched the DNA from this swab to the DNA from swabs of blood collected from (1) a wall near the ceiling in a bathroom at Appellant's residence; (2) a wall on the right side of the medicine cabinet in Appellant's bathroom; (3) a latex glove found on the floor of Wife's van; and (4) the p-trap of the shower drain in Appellant's bathroom.[4]

The jurors deliberated for over four hours. The foreperson then sent a note to the trial court indicating the jurors were unable to reach a unanimous decision on one of the charges against Appellant. The trial court sent the members of the jury home for the night. The next morning, the trial court provided the jury with an *Allen* instruction before they resumed their deliberations.[5] A little over one hour later, the jury returned a verdict of guilty on both charges against Appellant. The trial court sentenced Appellant to life in prison. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court's refusal to provide the jury with the circumstantial evidence instruction quoted in *State v. Edwards* violate Appellant's right to require the prosecution to prove his guilt beyond a reasonable doubt?

2. Did the trial court err in failing to strike the testimony of Captain Kellet, the State's fingerprint expert, or, in the alternative, to grant a mistrial, where Appellant's counsel did not receive a copy of Captain Kellet's file prior to trial?

3. Did the trial court err in declining to grant Appellant enough recess time to hire an expert to review Captain Kellet's file?

STANDARD OF REVIEW

[4] The record does not indicate when the swabs were taken from Appellant's bathroom and Wife's van.

[5] *See Allen v. United States*, 164 U.S. 492, 501 (1896) (finding no error in a jury instruction admonishing jurors to give due deference to the opinions of their fellow jurors).

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

LAW/ANALYSIS

I. Jury Instruction

Appellant maintains the trial court's rejection of his proposed circumstantial evidence instruction, based on the instruction approved in *State v. Edwards*,[6] violated his right to require the prosecution to prove his guilt beyond a reasonable doubt. Appellant argues the instruction given confused the jury regarding how to evaluate circumstantial evidence. We find no reversible error.[7]

"In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial." *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013) (citation omitted). "A jury charge is correct if, when read as a whole, the charge adequately covers the law. *Id.* at 90-91, 747 S.E.2d at 448. "A jury charge that is substantially correct and covers the law does not require reversal." *Id.* (citation and quotation marks

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[6] 298 S.C. 272, 274-76, 379 S.E.2d 888, 889 (1989), *abrogated by State v. Cherry*, 361 S.C. 588, 595-606, 606 S.E.2d 475, 478-82 (2004).

[7] The State asserts Appellant failed to preserve his argument that the trial court's circumstantial evidence instruction violated a constitutional right. The State argues trial counsel's request to provide the jury with the *Edwards* instruction was based on state law rather than constitutional law. Given the constitutional foundation on which our state's circumstantial evidence jurisprudence is based, it is likely that trial counsel's reference to recent case law developments sufficiently apprised the trial court of the constitutional component of his request for the *Edwards* instruction. Further, any doubt concerning whether Appellant's "reasonable doubt" argument was preserved for review should be resolved in favor of finding the argument preserved. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) (recognizing "it may be good practice for [the appellate court] to reach the merits of an issue when error preservation is doubtful"); *id.* at 333, 730 S.E.2d at 287 (Toal, C.J., concurring) ("[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.").

omitted). "Jury instructions should be considered as a whole, and if as a whole, they are free from error, any isolated portions which may be misleading do not constitute reversible error." *Id.* at 94 n.8, 747 S.E.2d at 449 n.8 (citation omitted). "Generally, the trial judge is required to charge only the current and correct law of South Carolina." *State v. Brown*, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.* at 262, 607 S.E.2d at 95.

In *Edwards*, our supreme court quoted the circumstantial evidence standard "to be charged for use by the jury in its deliberation." 298 S.C. at 275, 379 S.E.2d at 889.

> Under this test, the jury may not convict unless:
>
> every circumstance relied upon by the State be proven beyond a reasonable doubt; and . . . all of the circumstances so proven be consistent with each other and taken together, *point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis*. It is not sufficient that they create a probability, though a strong one and if, assuming them to be true they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

Id. (emphasis added) (quoting *State v. Littlejohn*, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955)). However, in *State v. Grippon*, the court recommended that once a proper reasonable doubt instruction is given, the following instruction be given:

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You

> should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

327 S.C. 79, 83-84, 489 S.E.2d 462, 464 (1997).

In *State v. Cherry*, 361 S.C. 588, 597, 606 S.E.2d 475, 480 (2004), our supreme court held that in cases relying, in whole or in part, on circumstantial evidence, South Carolina courts **must** use the jury charge recommended in *Grippon*. *Cherry* also eliminated the "reasonable hypothesis" language found in the *Edwards* instruction. *Cherry*, 361 S.C. at 601, 606 S.E.2d at 482 ("[T]he reasonable hypothesis charge merely serves to confuse juries by leading them to believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence when, in fact, it is not."). Notably, other language from the *Edwards* instruction was recently reaffirmed, slightly modified, and recommended in future jury instructions. *See State v. Logan*, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013) ("[T]o the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused *beyond a reasonable doubt*. . . . *If these circumstances merely portray the defendant's behavior as suspicious*, the proof has failed." (emphases added)).

Specifically, the *Logan* court set forth the following instruction to be given to the jury, in addition to a proper reasonable doubt instruction, when so requested by a defendant:

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, *all of the circumstances must be consistent with each other*, and when taken together, point conclusively

> to the guilt of the accused beyond a reasonable doubt. *If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed*.
>
> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Id. at 99, 747 S.E.2d at 452 (emphases added). The court hastened to add: "This holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon* and *Cherry*. However, trial courts may not exclusively rely on that charge over a defendant's objection." *Id.* at 100, 747 S.E.2d at 452-53. Nonetheless, the *Logan* court ultimately concluded any error in the trial court's jury instructions was harmless beyond a reasonable doubt because the trial court "clearly instructed the jury regarding the reasonable doubt burden of proof" and its jury instruction, "as a whole, properly conveyed the applicable law." *Logan*, 405 S.C. at 94 n.8, 747 S.E.2d at 449 n.8 (citations omitted).

In the instant case, the trial court gave the following jury instruction on circumstantial evidence:

> Now, there are two types of evidence which are generally presented during a trial. And they are known as direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eye witness [sic]. It is evidence which immediately establishes the main fact sought to be proven. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of the main fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of

> direct evidence. *You should weigh all of the evidence in the case. After weighing all of the evidence, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, then you should find the Defendant not guilty*.

(emphasis added). This instruction is virtually identical to the *Grippon* instruction. 327 S.C. at 83-84, 489 S.E.2d at 464.

The State argues that at the time of Appellant's trial, the "relevant precedent dictated that only the *Grippon* charge be used." The State points out that the *Logan* opinion was published while the appeal in the instant case was pending. In response, Appellant maintains that *Logan* applies retroactively to his trial, citing *State v. Belcher*, 385 S.C. 597, 612-13, 685 S.E.2d 802, 810 (2009) and *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), for the proposition that a new rule for the conduct of criminal prosecutions must be applied retroactively to all cases pending on direct review or not yet final. We agree that *Griffith* requires the application of *Logan* to cases pending on appeal at the time the *Logan* opinion was published. Nevertheless, this court is constrained to affirm the trial court's denial of Appellant's request to give the *Edwards* instruction for two reasons.

First, Appellant's requested instruction contains the following language:

> [Y]ou may not convict a defendant unless . . . all of the circumstances . . . taken together, point conclusively to the guilt of the accused *to the exclusion of every other reasonable hypothesis*. It is not sufficient that the circumstances create a probability, even if it is a strong one. If, assuming the circumstances are true, there is a reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

Our supreme court has excluded the "reasonable hypothesis" language from the circumstantial evidence instruction now required by *Logan*, recognizing that this language is unnecessary. *See Logan*, 405 S.C. at 99-100, 747 S.E.2d at 452-53 (setting forth the instruction to be given by trial courts when requested by a defendant); *id.* at 100, 747 S.E.2d at 452 (citing *Grippon*, 327 S.C. at 83-84, 489 S.E.2d at 463-64.

Second, any error in the omission of other language from the *Logan* instruction was harmless beyond a reasonable doubt because the trial court's instruction, as a whole, properly conveyed the applicable law. *See Logan*, 405 S.C. at 94 n.8, 747 S.E.2d at 449 n.8 ("[E]rroneous jury instructions are subject to a harmless error analysis."). The trial court provided the following instruction as to the State's burden of proof:

> Now, Clarence Jenkins has pled not guilty to these indictments. And that plea puts the burden on the State to provide [sic] the Defendant guilty. A person charged with committing a criminal offense in South Carolina is never required to prove themselves innocent. And I charge you that it is a cardinal and important rule of the law that a defendant in a criminal trial will always be presumed to be innocent of the crime for which an indictment has been issued unless and until guilt has been proven by evidence satisfying you of guilt beyond a reasonable doubt.
>
> Now, reasonable doubt is the kind of doubt which would cause a reasonable person to hesitate to act. And reasonable doubt may arise from the evidence which is in the case or from the lack or absence of evidence in the case. And you, the jury, must determine whether or not reasonable doubt exists as to the guilt of this Defendant. The State has the burden of proving each and every element of a crime beyond a reasonable doubt. And any reasonable doubt that you may have in your deliberations should be resolved in favor of the Defendant.

We find this reasonable doubt instruction to be a correct statement of the law. *See State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 821 (2001) (holding a jury instruction explaining, "A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act" was "a correct statement of South Carolina law."). Further, the trial court's instruction on circumstantial evidence (*see supra*) immediately followed the reasonable doubt instruction. As our supreme court ultimately concluded in *Logan*, we conclude the trial court's instructions in the present case, as a whole, properly conveyed the applicable law. *See Logan*, 405 S.C. at 94 n.8, 747 S.E.2d at 449 n.8 ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the

law to be applied." (citation omitted)); *id.* (concluding any error in the trial court's jury instructions was harmless because the trial court "clearly instructed the jury regarding the reasonable doubt burden of proof" and its jury instruction, "as a whole, properly conveyed the applicable law." (citations omitted)). Therefore, we affirm the denial of Appellant's request to provide the *Edwards* instruction.

II. Withholding of Evidence

Appellant challenges the trial court's refusal to grant him relief based on the prosecution's failure to produce Captain Kellet's file documenting her identification of Victim's fingerprints, citing Rule 5 of the South Carolina Rules of Criminal Procedure. Appellant argues this alleged Rule 5 violation compromised his ability to fully impeach the credibility of Captain Kellet's testimony, and, thus, the trial court should have stricken her testimony or granted a mistrial. We disagree.

Rule 5(a)(1)(C), SCRCrimP states:

> Upon request of the defendant the prosecution shall *permit the defendant to inspect and copy* books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

(emphasis added).

Further, "[t]he admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Tennant*, 383 S.C. 245, 254, 678 S.E.2d 812, 816 (Ct. App. 2009), *modified on other grounds*, 394 S.C. 5, 21, 714 S.E.2d 297, 305 (2011) (citation and quotation marks omitted). Likewise, "[t]he granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court[,] and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000) (citation omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Tennant*, 383 S.C. at 254, 678 S.E.2d at 816 (citation and quotation marks omitted).

To warrant either a mistrial or reversal based on an evidentiary ruling, the complaining party must prove both the error of the ruling and the resulting prejudice. *Id.* at 254, 678 S.E.2d at 816-17 (as to the admission or exclusion of evidence); *Harris*, 340 S.C. at 63, 530 S.E.2d at 628 (as to a mistrial). "To prove prejudice, the complaining party must show there is a reasonable probability that the jury's verdict was influenced by the challenged evidence or lack thereof." *Tennant*, 383 S.C. at 254, 678 S.E.2d at 817 (citation and quotation marks omitted).

According to the solicitor, he conferred with Captain Kellet regarding the contents of her file in response to defense counsel's discovery requests. The solicitor then contacted defense counsel and told him Captain Kellet's file could possibly include some AFIS-related documents. However, defense counsel declined to review them. In fact, for approximately four years prior to trial, Appellant's defense team was aware that fingerprints from the severed hands had been run through AFIS. Moreover, on two occasions prior to trial, defense counsel was accompanied by a representative of the solicitor's office to visit the property and evidence section of the forensic division of the Greenville County Department of Public Safety and was offered the opportunity to visit the latent print section. Yet, nothing in the record indicates that defense counsel attempted to interview Captain Kellet or review any AFIS-related documents prior to trial. Under these circumstances, we find no Rule 5 violation.

Additionally, Appellant did not contest Victim's identity at trial—defense counsel referenced Victim's name several times while cross-examining Wife. Therefore, we find the trial court's failure to grant the requested relief did not result in any unfair prejudice to Appellant.

Based on the foregoing, the trial court properly declined to strike Captain Kellet's testimony or declare a mistrial. *See Tennant*, 383 S.C. at 254, 678 S.E.2d at 816 ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." (citation and quotation marks omitted)); *Harris*, 340 S.C. at 63, 530 S.E.2d at 627-28 ("The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court[,] and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." (citation omitted)).

III. Lengthy Recess

Alternatively, Appellant argues the trial court should have granted him a long recess or short continuance to obtain the assistance of an expert qualified to evaluate the documents in Captain Kellet's file. We disagree.

Because the defense team was aware of Captain Kellet's fingerprint analysis and the possible existence of AFIS-related documents for years prior to trial, the trial court properly declined to grant any further delay in the trial. *See State v. Patterson*, 367 S.C. 219, 230, 625 S.E.2d 239, 245 (Ct. App. 2006) ("The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion.").

CONCLUSION

Accordingly, Appellant's convictions are

AFFIRMED.

SHORT, J., and CURETON, A.J., concur.