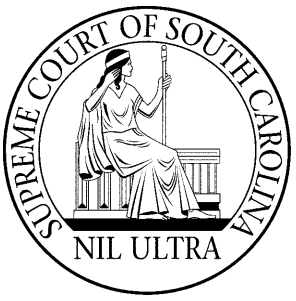

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31
August 6, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Patricia Brouwer, Appellant,

v.

Sisters of Charity Providence Hospitals; South Carolina ENT, Allergy and Sleep Medicine, P.A.; Robert Puchalski, M.D.; Francine K. Moring, M.D.; Jane Does and John Does, Defendants,

Of whom South Carolina ENT, Allergy and Sleep Medicine, P.A.; Robert Puchalski, M.D.; and Francine K. Moring, M.D. are, Respondents.

Appellate Case No. 2012-213231

Appeal From Kershaw County
The Honorable Alison Renee Lee, Circuit Court Judge

Opinion No. 27427
Heard March 5, 2014 – Filed August 6, 2014

REVERSED AND REMANDED

Daryl G. Hawkins, of Law Office of Daryl G. Hawkins, L.L.C., of Columbia, for Appellant.

William H. Davidson, II and Andrew F. Lindemann, both of Davidson & Lindemann, P.A., and William O. Sweeny, III and Benson Hall Driggers, both of Sweeny Wingate & Barrow, P.A., of Columbia, for Respondents.

JUSTICE BEATTY: In this direct appeal, Patricia Brouwer challenges the circuit court's order dismissing her medical malpractice case for failure to file an expert witness affidavit with her Notice of Intent to File Suit ("NOI") pursuant to section 15-79-125 of the South Carolina Code.[1] Brouwer contends she is exempt from filing an expert witness affidavit because section 15-36-100(C)(2)[2] does not require an affidavit where the alleged negligent act "lies within the ambit of common knowledge and experience." We agree as this Court recently held that section 15-79-125(A) incorporates section 15-36-100 in its entirety, including the common-knowledge exception codified in 15-36-100(C)(2). *Ranucci v. Crain*, Op. No. 27422 (S.C. Sup. Ct. filed July 23, 2014) (Shearouse Adv. Sh. No. 29 at 49). ("*Ranucci II*"). Additionally, we conclude that Brouwer successfully invoked this exception and, thus, was not required to file an expert witness affidavit with her NOI. Accordingly, we reverse the decision of the circuit court and remand the case for further proceedings.

I. Factual / Procedural History

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[1] Section 15-79-125 provides, in part, as follows:

> Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, *the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements established in Section 15-36-100*, in a county in which venue would be proper for filing or initiating the civil action.

S.C. Code Ann. § 15-79-125(A) (Supp. 2013) (emphasis added).

[2] Section 15-36-100 states in pertinent part:

> (C)(2) The *contemporaneous filing requirement of subsection (B)* is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

S.C. Code Ann. § 15-36-100(C)(2) (Supp. 2013) (emphasis added).

On January 9, 2009, Brouwer was admitted to Sisters of Charity Providence Hospital ("Hospital") for a uvulopalatopharyngoplasy, a procedure used to treat sleep apnea. During the surgery, Brouwer suffered an allergic reaction that required her to be treated in the Intensive Care Unit ("ICU"). Brouwer attributed the reaction to her latex allergy that was disclosed to medical personnel on Brouwer's forms for "Pre-Anesthesia Evaluation" and "Consent to Operation, Anesthetic and Other Medical Services." Prior to surgery, the Hospital issued Brouwer a wrist band that identified the latex allergy.

On December 29, 2011, Brouwer filed an NOI and a Summons and Complaint, wherein she asserted a medical malpractice claim against the Hospital, the medical practice, the operating physician, the anesthesiologist, and other unnamed medical personnel. On January 4, 2012, Brouwer filed an Amended NOI to correct a scrivener's error as to a named defendant. Brouwer did not file an expert witness affidavit with her NOI because it was her "good faith belief" that her allergic reaction to latex "lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the Defendants." If the circuit court deemed its submission necessary, Brouwer requested additional time to procure and file an expert witness affidavit.

Respondents moved to dismiss Brouwer's NOI and Complaint pursuant to Rule 12(b)(6), SCRCP. In support of the motion, Respondents alleged Brouwer's failure to file an expert witness affidavit with her NOI violated the mandatory provisions of section 15-79-125. Brouwer opposed the motion, but conceded the Complaint was prematurely filed as the parties had not yet engaged in mediation.[3]

After a hearing, the circuit court denied Respondents' motion to dismiss Brouwer's NOI on the ground the common-knowledge exception codified in section 15-36-100(C)(2) was applicable. The court, however, dismissed the Summons and Complaint without prejudice.

Subsequently, Respondents filed a motion to alter or amend pursuant to Rule 59(e), SCRCP. In support of its motion, Respondents relied on the recently issued decision of the Court of Appeals in *Ranucci v. Crain*, 397 S.C. 168, 723 S.E.2d

[3] *See* S.C. Code Ann. § 15-79-125(C) (Supp. 2013) (stating, "[w]ithin ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit, the parties shall participate in a mediation conference unless an extension for no more than sixty days is granted by the court based upon a finding of good cause").

242 (Ct. App. 2012) ("*Ranucci I*"), wherein the court found "section 15-79-125(A) invokes only the provisions of section 15-36-100 governing the preparation and content of the affidavit." *Id.* at 176, 723 S.E.2d at 246. The court explained, "The plain language of section 15-36-100, which ties the filing of affidavits under that statute to a complaint or other initial pleading, prevents the remaining provisions from applying to affidavits filed pursuant to section 15-79-125." *Id.* at 177, 723 S.E.2d at 246. Based on this holding, Respondents asserted "the common knowledge exception found in § 15-36-100 does not apply to the requisite prelitigation procedures mandated in § 15-79-125 and cannot be used to obviate the requirement that there be an expert affidavit filed with the Notice of Intent."

Finding *Ranucci I* dispositive, the circuit court granted Respondents' motion to dismiss Brouwer's NOI. Following the denial of her Rule 59(e) motion, Brouwer appealed to the Court of Appeals. This Court certified the appeal pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

II. Standard of Review

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* (internal quotations omitted). The Court may sustain the dismissal when "the facts alleged in the complaint do not support relief under any theory of law." *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003).

III. Discussion

A. Arguments

Brouwer contends the circuit court erred in granting Respondents' motion to dismiss the NOI for her failure to contemporaneously file an expert witness affidavit. In support of this contention, Brouwer disputes the propriety of *Ranucci I* on the ground the decision is inconsistent with the rules of statutory construction. Because section 15-79-125(A) clearly references section 15-36-100, Brouwer claims all of the affidavit requirements enunciated in section 15-36-100, including the common-knowledge exception in subsection (C)(2), are applicable to an NOI. Brouwer explains that to construe these statutes separately would lead to an absurd

result where the common-knowledge exception would apply to the actual filing of a medical malpractice complaint but not to the filing of an NOI. Stated another way, Brouwer claims "prelitigation [would] require[] an expert witness affidavit regardless of whether the subject matter is within the ambit of common knowledge and experience, but actual litigation [would] not require an expert witness affidavit." Brouwer argues that such a conclusion violates public policy as it makes "access to the legal system more expensive and more difficult."

Alternatively, Brouwer contends that even if the NOI did not comply with the statutory requirements, Respondents' claim regarding the insufficiency of the NOI became moot when the parties engaged in mediation as Respondents were apprised of the specifics of the underlying medical malpractice claim.[4]

B. Analysis

Recently, this Court overruled the decision of the Court of Appeals in *Ranucci I*. *Ranucci v. Crain*, Op. No. 27422 (S.C. Sup. Ct. filed July 23, 2014) (Shearouse Adv. Sh. No. 29 at 49). ("*Ranucci II*"). In so ruling, we specifically held that section 15-79-125 incorporates section 15-36-100 in its entirety. Thus, the common-knowledge exception of section 15-36-100(C)(2) may operate to eliminate the need to file an expert witness affidavit with the NOI under section 15-79-125(A). Consequently, we hold the circuit court erred in finding that Brouwer could not invoke the common-knowledge exception when she filed her NOI. This decision, however, does not end our analysis as we must consider whether Brouwer's case fell within this exception.

---

[4] In her brief to this Court, Brouwer's argument on this point is conclusory and is not supported by any authority. Moreover, the circuit court did not rule on this issue. Thus, we find this issue is not preserved for the Court's review. *See First Sav. Bank v. McLean,* 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal); *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review."); *see also Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding an issue must have been raised to and ruled upon by the trial court in order to be preserved for appellate review).

To establish a cause of action for medical malpractice, the plaintiff must prove the following facts by a preponderance of the evidence:

> (1) The presence of a doctor-patient relationship between the parties;
>
> (2) Recognized and generally accepted standards, practices, and procedures which are exercised by competent physicians in the same branch of medicine under similar circumstances;
>
> (3) The medical or health professional's negligence, deviating from generally accepted standards, practices, and procedures;
>
> (4) Such negligence being a proximate cause of the plaintiff's injury; and
>
> (5) An injury to the plaintiff.

27 S.C. Jur. *Med. & Health Prof'ls* § 10 (2014) (footnotes omitted); *Smith v. United States*, 119 F. Supp. 2d 561 (D.S.C. 2000). "A plaintiff in a medical malpractice case must establish by expert testimony both the standard of care and the defendant's failure to conform to the required standard, unless the subject matter is of common knowledge or experience so that no special learning is needed to evaluate the defendant's conduct." *Carver v. Med. Soc'y of S.C.*, 286 S.C. 347, 350, 334 S.E.2d 125, 127 (Ct. App. 1985); *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006). "The application of the common knowledge exception in proving negligence in a case involving medical malpractice depends on the particular facts of the case." *Hickman v. Sexton Dental Clinic, P.A.*, 295 S.C. 164, 168, 367 S.E.2d 453, 455 (Ct. App. 1988). "When expert testimony is not required, the plaintiff must offer evidence that rises above mere speculation or conjecture." *Id.*

Here, Brouwer conceded her claim involves medical malpractice, thus, her cause of action cannot be construed as one of ordinary negligence. *See Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 758 S.E.2d 501 (2014) (distinguishing between cases involving medical malpractice and ordinary negligence). Accordingly, she must either present expert witness testimony or establish that the negligent act alleged in her NOI "lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." S.C. Code Ann. § 15-36-100(C)(2) (Supp. 2013).

We find the substance of Brouwer's allegation, i.e., that the negligent exposure of a patient to latex with a known allergy can result in an allergic reaction in that patient, is a matter within the common knowledge or experience so that no special learning is needed to evaluate Respondents' conduct at the pre-litigation stage. *Cf. Green v. Lilliewood*, 272 S.C. 186, 249 S.E.2d 910 (1978) (holding tubal ligation rendering intrauterine device and other birth control device useless constitutes a matter of common knowledge); *Thomas v. Dootson*, 377 S.C. 293, 659 S.E.2d 253 (Ct. App. 2008) (recognizing expert testimony was not required for claim arising from a surgical drill that burned skin on contact because claim would fall within the common knowledge or experience of laymen); *Hickman v. Sexton Dental Clinic, P.A.*, 295 S.C. 164, 367 S.E.2d 453 (Ct. App. 1988) (holding evidence presented was sufficient for the jury to infer without the aid of expert testimony a breach of duty to dental patient where patient testified an unsupervised dental assistant rammed a sharp object into patient's mouth).

Therefore, we hold that Brouwer did not need to file an expert witness affidavit with her NOI. *See* 70 C.J.S. *Physicians & Surgeons* § 142 (Supp. 2014) ("[I]n a common-knowledge case, whether a medical malpractice plaintiff's claim meets the threshold of merit can be determined on the face of the complaint, and because the defendant's careless acts are quite obvious, the plaintiff need not present expert testimony to establish the standard of care; in such a case, requiring an affidavit of merit is not necessary to weed out meritless lawsuits." (footnotes omitted)). Because Brouwer's NOI was sufficient to satisfy the pre-litigation requirements of section 15-79-125(A), Brouwer's lawsuit remains viable as the statute of limitations has been tolled during the pendency of this appeal. S.C. Code Ann. § 15-79-125(A) (Supp. 2013) ("Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations.").

IV. Conclusion

Having overruled *Ranucci I*, we conclude that Brouwer was permitted to invoke the common-knowledge exception of section 15-36-100(C)(2) in her pre-litigation filings. Because the negligent act alleged by Brouwer fits within this exception, she was not required to file an expert witness affidavit with her NOI to satisfy the pre-litigation requirements of section 15-79-125(A). Accordingly, we reverse the decision of the circuit court and remand the case for further proceedings.

REVERSED AND REMANDED.

KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: For the reasons given in my dissent in *Ranucci v. Crain*, Op. No. 27422 (S.C. Sup. Ct. filed July 23, 2014), I respectfully dissent and would affirm the circuit court's dismissal of appellant's Notice of Intent to File Suit.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former Abbeville County Magistrate George T. Ferguson, Respondent.

Appellate Case No. 2014-001385

Opinion No. 27428
Submitted July 9, 2014 – Filed August 6, 2014

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Billy J. Garrett, Jr., Esquire, of The Garrett Law Firm, PC, of Greenwood, for Respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Judicial Disciplinary Enforcement (RLDE) contained in Rule 502 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand and agrees never to seek nor accept a judicial office in South Carolina without the express written permission of this Court after written notice to ODC. We accept the Agreement and publicly reprimand

respondent, the most severe sanction we are able to impose under these circumstances.[1] The facts, as set forth in the Agreement, are as follows.

Facts

Respondent was indicted on two counts of Misconduct in Office. The first indictment alleged respondent offered and gave Jane Doe #1 money and/or other benefits for the handling and disposition of legal matters involving Jane Doe #1 before him in his official capacity as Magistrate in return for Jane Doe #1 allowing respondent to have sexual contact with her from 1996 to 2009. The second indictment alleged respondent offered and gave Jane Doe #2 money and/or other benefits for the handling and disposition of legal matters involving Jane Doe #2 before him in his official capacity as Magistrate in return for Jane Doe #2 allowing respondent to have sexual contact with her from 2001 to 2011.

On May 16, 2014, respondent entered a guilty plea to Misconduct in Office on the first indictment. He was sentenced to one (1) year imprisonment provided that, upon service of ninety (90) days, the balance would be suspended with probation for a period of five (5) years. On the same day, respondent entered a guilty plea to Misconduct in Office on the second indictment. He was sentenced to one (1) year imprisonment, suspended with probation for a period of five (5) years.

Law

Respondent admits that by his conduct he has violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity and independence of judiciary); Canon 1A (judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that integrity and independence of judiciary will be preserved); Canon 2 (judge shall avoid impropriety and appearance of impropriety in all of judge's activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in manner that promotes public confidence in integrity and impartiality of judiciary); Canon 2B (judge shall not allow social or other relationships to influence judge's judicial conduct or judgment; judge shall

[1] Since respondent no longer holds judicial office, a public reprimand is the most severe sanction which can be imposed. In the Matter of O'Kelley, 361 S.C. 30, 603 S.E.2d 410 (2004).

not lend prestige of judicial office to advance private interests of judge or others; judge shall not convey or permit others to convey impression that they are in special position to influence judge); Canon 3 (judge shall perform duties of judicial office impartially and diligently); Canon 3B(2) (judge shall be faithful to law); Canon 3B(7) (judge shall accord to every person who has legal interest in proceeding, or that person's lawyer, right to be heard according to law; judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to judge outside the presence of the parties concerning pending or impending proceeding); Canon 3E(1) (judge shall disqualify himself in proceeding in which judge's impartiality might reasonably be questioned); Canon 4A(1) (judge shall conduct his extra-judicial activities so as to minimize risk with judicial obligations); Canon 4(A)(2) (judge shall conduct all of his extra-judicial activities so that they do not demean judicial office); and Canon 4A(3) (judge shall conduct all of his extra-judicial activities so that they do not interfere with proper performance of judicial duties).

Respondent also admits he has violated the following Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR: Rule 7(a)(1) (it shall be ground for discipline for judge to violate Code of Judicial Conduct).

Conclusion

We accept the Agreement for Discipline by Consent and issue a public reprimand because respondent is no longer a judge and because he has agreed not to hereafter seek nor accept another judicial position in South Carolina without first obtaining express written permission from this Court after due notice in writing to ODC. As previously noted, this is the most severe sanction we can issue, given the fact that he has already resigned his duties as a judge. See In the Matter of O'Kelley, id. Accordingly, respondent is hereby reprimanded for his conduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Laurance H. Davis, Jr., Mary Jane R. Pike, Eva Marie Reynolds, and Rhoda G. Rentz, individually and in their capacities as the Limited Partners of Parkview Apartments, a South Carolina Limited Partnership, Appellants,

v.

Parkview Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Incorporated, AmReal Corporation a/k/a and f/k/a USS Corporation a/k/a and f/k/a U.S. Shelter Corporation, ISTC Corporation, N. Barton Tuck, Jr., and John Doe, a generic designation for a party or parties whose true identity is unknown, Respondents.

Appellate Case No. 2010-180666

Laurance H. Davis, Jr., Marvin D. McCarthy, James W. Ivey and Erin E. Ivey, individually and in their capacities as the Limited Partners of Palmetto Apartments, a South Carolina Limited Partnership, Appellants,

v.

Palmetto Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Incorporated, AmReal Corporation a/k/a and f/k/a USS Corporation a/k/a and f/k/a USS Corporation a/k/a and f/k/a U.S. Shelter Corporation, ISTC Corporation, N. Barton Tuck, Jr., and John Doe, a generic designation for a party or parties whose true identity is unknown,

Respondents.

Appellate Case No. 2010-180087

Laurance H. Davis, Jr., Rhoda G. Rentz, Mortimer M. Weinberg, Jr., Hodge Land Company, Incorporated, and Anna Trotter, individually and in their capacities as the Limited Partners of Roosevelt Gardens, a South Carolina Limited Partnership, Appellants,

v.

Roosevelt Gardens, a South Carolina Limited Partnership, Apartment Investments and Management Company a/k/a AIMCO, Insignia Financial Group, Incorporated, AmReal Corporation a/k/a and f/k/a USS Corporation a/k/a and f/k/a U.S. Shelter Corporation, ISTC Corporation, N. Barton Tuck, Jr., and John Doe, a generic designation for a party or parties whose true identity is unknown, Respondents.

Appellate Case No. 2010-180086

Carolina Management Corporation of Beaufort, James B. Jackson, Whaley R. Hinnant, Jr., Mary Gasser Rawl, and Rhoda G. Rentz, individually and in their capacities as the Limited Partners of Pinewood Park Apartments, a South Carolina Limited Partnership, Appellants,

v.

Pinewood Park Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Incorporated, AmReal Corporation a/k/a and f/k/a USS Corporation a/k/a and f/k/a U.S. Shelter Corporation, ISTC Corporation, N. Barton Tuck, Jr., and John Doe, a generic designation for a party or parties whose true

identity is unknown, Respondents.

Appellate Case No. 2010-180088

Rhoda G. Rentz, Mary Jane Pike, Eva Marie Reynolds, and Joanne O. Mercy, individually and in their capacities as the Limited Partners of Orleans Gardens, a South Carolina Limited Partnership, Appellants,

v.

Orleans Gardens, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Incorporated, AmReal Corporation a/k/a and f/k/a USS Corporation a/k/a and f/k/a U.S. Shelter Corporation, ISTC Corporation, N. Barton Tuck, Jr., and John Doe, a generic designation for a party or parties whose true identity is unknown, Respondents.

Appellate Case No. 2010-176826

Appeals from Beaufort, Charleston and Orangeburg Counties
Doyet A. Early III, Circuit Court Judge

Opinion No. 27429
Heard November 13, 2012 – Filed August 6, 2014

AFFIRMED

Thomas A. Pendarvis, of Pendarvis Law Offices, P.C., of Beaufort, and Joel D. Bailey, of The Bailey Law Firm, P.A., of Beaufort, for Appellants.

Ellis M. Johnston II, of Haynsworth Sinkler Boyd, P.A., of Greenville, and Calvin Theodore Vick, Jr., of Harper Lambert & Brown, P.A., of Greenville, for Respondents.

CHIEF JUSTICE TOAL: Appellants appeal the circuit court's decision dismissing these related cases and awarding sanctions against Appellants. We affirm.

FACTS/PROCEDURAL BACKGROUND

Appellants are limited partners in five separate limited partnerships and have asserted legal claims in five separate actions against their general partners, Respondents.[1] Each of the limited partnerships owned separate apartment complexes in one of the three counties—Beaufort, Orangeburg, and Charleston. On appeal, each of the cases involves a different grouping of limited partners,[2] different properties, and different facts.

In essence, the limited partnerships were formed in the 1960s to construct and operate the properties at issue, affordable housing projects for low-income citizens in the three counties. Respondents became general partners around 1975, and from that point forward, Appellants took no part in the management or business affairs of the complexes. In 1984, Respondents notified Appellants that they had contracted to sell the properties to Boston Financial Group (BFG). The terms of the sale called for a small amount to be paid upfront but the majority would be paid in 1999 in a "balloon" payment with accruing interest. However, BFG defaulted on the payment, and sold the properties without intervention from the partnerships. All of the claims stem from Respondents' roles in selling the properties and their actions in the aftermath of BFG's default.

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[1] All Appellants and Respondents are successors in interest to either the original limited partners (except for Laurance Davis) or original general partners.

[2] In other words, some of the limited partners held interests in more than one of the limited partnerships, and some held an interest in only one of the limited partnerships, but none of the limited partners held interests in all of the partnerships.

On April 22, 2003, certain Appellants filed the complaint in *Davis v. Parkview Apartments* (the *Parkview* case). On July 7, 2003, Respondents filed various motions, including a motion to dismiss certain claims against certain Respondents and a motion to strike or make more specific allegations contained in Appellants' complaint. The circuit court denied the motions. Appellants filed an amended complaint on March 23, 2004, alleging causes of action at law for damages, including, *inter alia*, breach of fiduciary duty and causes of action for equitable relief. On April 9, 2004, Respondents filed an Answer, setting forth a general denial and affirmative defenses, including, *inter alia*, the statute of limitations. On April 13, 2004, Respondents filed a motion to dismiss and other related motions. By order dated February 11, 2005, the court dismissed one cause of action, styled "bad faith," but denied the motion to dismiss as to the remaining causes of action.

On October 13, 2005, certain Appellants filed complaints in *Davis v. Palmetto Apartments* (the *Palmetto* case) and *Carolina Management Corporation of Beaufort v. Pinewood Park Apartments* (the *Pinewood Park* case), and on October 17, 2005, certain Appellants then filed complaints in *Rentz v. Orleans Gardens* (the *Orleans Gardens* case) and *Laurance Davis v. Roosevelt Gardens* (the *Roosevelt Gardens* case). In each of these cases, the groups of Appellants alleged causes of action at law for damages, including, *inter alia*, a claim for breach of fiduciary duty, and causes of action for equitable relief. Respondents answered on January 17, 2006, setting forth a general denial and affirmative defenses, including the statute of limitations.

By administrative order dated March 7, 2006, all five of the cases were assigned to Circuit Judge Doyet A. Early III "to hear and decide all pre-trial motions and other matters pertaining to these cases, including the trial and post-trial motions." The purpose of assigning the cases to a single circuit court judge was to "promote the effective and expeditious disposition of this litigation by uniform rulings and [to] conserve the resources of the parties, their counsel, and the judiciary." However, these cases have never been consolidated.

The Record in this case is voluminous, and illustrates the complex and, at times, contentious nature of these proceedings. The circuit judge presided over numerous motion hearings and issued numerous orders over the course of this litigation. However, this appeal concerns a final order, dated April 9, 2010, and

entitled "Order Granting Defendants' Two Motions for Sanctions, Finding Plaintiffs in Contempt of Court, and Dismissing the Above-Captioned Actions as Sanctions for Plaintiffs' Contempt" (the Dismissal Order), in which the circuit judge dismissed all of the cases and awarded fees and costs to Respondents as sanctions for Appellants' continued refusal to comply with his previous discovery rulings. In addition, Appellants appeal the judge's failure to disqualify himself at the outset of this litigation and late refusal to recuse himself.

From the outset, the statute of limitations emerged as an important issue in this case. On January 17, 2006, Respondents moved for summary judgment in the *Palmetto*, *Orleans Gardens*, and *Roosevelt Gardens* cases based on the affirmative defense that Appellants' legal claims in these cases were barred by the statute of limitations.[3] In support of the motion for summary judgment, Respondents served

[3] Respondents contend that all of the legal claims alleged in the complaints center on Respondents' business judgment in 1999 when they concluded the properties at issue had no value above the HUD mortgages (with the exception of the *Pinewood Park* case), and that repossessing the apartments was not in the best interests of the limited partnerships. However, Respondents also contend that Appellants allege injury to the limited partnerships as far back as the early 1980s in each case, including, *inter alia*, Respondents' alleged: failure to entertain other offers to purchase the properties in the 1980s, misrepresentations of the purchaser's financial solvency, sale of the properties to an entity created by BFG, instead of BFG, failure to forward appropriate documentation of the sale, failure to properly secure the notes, and undervaluation of the properties in order to acquire various limited partnership interests. Appellants asserted that Respondents were estopped from asserting their statute of limitations argument because all parties agreed to postpone discovery in the *Parkview* case and the filing of additional related cases in an attempt to resolve all of the cases through mediation, including those that had not yet been filed. On the other hand, Respondents contend they agreed to postpone discovery in the *Parkview* case only, but did not agree to stay the statute of limitations applicable in any other cases Appellants had not yet brought. Ultimately, the mediation fell through. Appellants contend that mediation was cancelled because the jointly retained independent appraiser failed to complete the appraisals in time. Regardless of the reason for the failure of the mediation to go forward, Respondents point out in their brief that the mediation and surrounding negotiations fell through as of July 26, 2004, but Appellants did not file the remaining cases until October 2005. Therefore, Respondents contend, whether or

Appellants with Requests for Admission in order to ascertain the point at which Appellants became aware of the alleged injuries that they claimed. On February 13, 2007, the court denied the motion, granting Respondents leave to raise the statute of limitations defense again after the commencement of discovery in the cases.

Respondents again moved for summary judgment with respect to the statute of limitations issue in the *Palmetto*, *Orleans Gardens*, and *Roosevelt Gardens* cases. The judge held a hearing on the motion on November 19, 2007. On June 17, 2008, the circuit court denied Respondents' motion because "a genuine issue exists as to material facts involving the statute of limitations."[4]

On August 28, 2008, Respondents served Appellants with supplemental discovery requests. After granting Appellants additional time to file their responses, on November 6, 2008, Respondents filed a motion to compel Appellants to respond to their discovery requests. Appellants served their initial discovery responses on November 14, 2008, but Respondents chose to proceed with their motion to compel, claiming Appellants failed to answer their discovery requests completely. Respondents specifically sought to compel Appellants to provide full and complete responses to Respondents' interrogatories and the production of all documents in Appellants' possession responsive to Respondents' requests for production. The court held a hearing on the motions on December 9, 2008.

On January 29, 2009, Appellants served their Supplemental Responses to the Discovery Requests, expressly providing that the responses were made only by Appellants in the *Parkview* action, and that Appellants in the other actions would supplement their responses "at a later date." Moreover, the *Parkview* Appellants only additionally produced the financial statements of Appellant Laurance Davis. Much of the remainder of the responses was identical to the previous responses.

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not they were estopped from asserting the statute of limitations during that period, Appellants' claims are still time-barred.

[4] During a later hearing, the circuit judge stated: "[T]here's some significant issues in this case from day one when I first got in it dealing with the statute of limitations problem. And I found that it was an issue of fact. And I still stuggle with that somewhat . . . ."

By order dated March 3, 2009, entitled "Order Granting Defendants' Motion to Compel, dated November 6, 2008" (the Discovery Order), the circuit court granted Respondents' motion to compel, specifically finding that all of the Appellants were required to "provide full and complete responses" and "produce all documents in their possession, custody or control, which [were] responsive to" the discovery requests. The court took issue with Appellants' blanket method of objecting to the requests, "mak[ing] it impossible for [Respondents] to know if responsive information and/or documents [were] being withheld, and, if so, based on which specific grounds." In addition, the court specifically ordered Appellants to provide more information in their answers to interrogatories concerning Appellants' proposed expert witnesses and contents of their testimony. The court also required Appellants to provide sufficient identifying information in their privilege log, so that Respondents could recognize which documents Appellants were withholding on the basis of the attorney-client privilege and assess the applicability of the privilege to those documents. Finally, the court mandated the disclosure of pertinent discovery responses in all five cases (not just the *Parkview* case), and by all of the Appellants, stating "[e]ach and every [Appellant] is required to provide all information reasonably available to him or her, which would be responsive to any of the Interrogatories," and "each and every [Appellant] is required to produce all documents in his or her possession, custody or control, which would be responsive to any of the Requests for Production."[5] The Discovery Order required Appellants' compliance within thirty days.[6] To date, Appellants have not complied with the Discovery Order.

Simultaneous to the discovery response dispute, the parties also disagreed regarding what materials were protected from disclosure by the attorney-client privilege. Approximately one month after the court denied Respondents' summary judgment motion, counsel for Respondents indicated to the court that Appellants failed to produce a complete privilege log. The court allowed Appellants thirty

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[5] By order dated June 16, 2009, the circuit court denied Appellants' Rule 59(e) motion with respect to this ruling.

[6] On the same date the court issued the Discovery Order, it also issued an order, entitled "Order Granting in Part and Denying in Part Plaintiffs' Motion to Compel, Dated July 29, 2005." In that order, the circuit court found that certain of Appellants' discovery requests were overly broad and unduly burdensome and restricted those requests.

days to produce a complete privilege log. On July 28, 2008, Appellants produced a new privilege log (the 7/28/08 privilege log) containing 90 documents, created between 1998 and 2004, for the first time in the litigation. In their 7/28/08 privilege log, Appellants only included a description of the date, author, and recipient of each document, and the classification of each document, *i.e.* fax, letter, or memorandum. At the December 9, 2008, hearing, Respondents also argued for the production of certain documents contained in Appellants' privilege log. Likewise, Appellants took issue with Respondents' claims of privilege.

Therefore, on December 30, 2008, the court, with the consent of all of the parties, ordered Gary Clary to serve as special master for the purpose of conducting an *in camera* review of the so-called "privileged" documents at issue and to "make his ruling as to whether each such document is subject to discovery and production should be compelled."[7] The order required the special master to provide the circuit judge with a report setting forth his findings and conclusions. On December 31, 2008, Appellants provided a more descriptive privilege log (the 12/31/08 privilege log), which forms the basis of the current dispute over privilege.

Upon the special master's issuance of his reports on April 14 and 22, 2009, the circuit judge issued an order on June 2, 2009, adopting the special master's findings *in toto*, yet still permitting the parties to object to the findings and conclusions contained therein by the filing of a Rule 59(e) motion to alter or amend the judgment. Both Appellants and Respondents filed timely Rule 59(e) motions on June 11, 2009, and June 15, 2009, respectively. On July 6, 2009, the circuit judge held a hearing on the motions.

By order dated July 28, 2009, entitled "Order Amending Court's Order Dated June 2, 2009" (the Privilege Order), the circuit judge denied the Rule 59(e) motions in part, granted the motions in part, and amended his order adopting the findings and conclusion of the special master. Specifically, the court ordered Appellants to disclose 96 documents identified in their privilege log. The court found 32 of the allegedly privileged documents were not privileged because they had been disclosed to third parties, and the privilege had been waived with respect to the remaining 64 documents because, by filing suit, Appellants had placed the

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[7] The circuit judge subsequently amended the order twice to increase the number of documents for the special master to review.

statute of limitations at issue in this case. To date, Appellants have still not complied with the court's order.[8]

Due to Appellants' continued noncompliance with the court's discovery orders, Respondents filed a motion for sanctions on July 24, 2009, for failure to comply with the Discovery Order and on August 10, 2009, for failure to comply with the Privilege Order. The circuit court held a hearing on Respondents' motions on August 24, 2009. At the hearing, Appellants represented to the court that they were filing supplemental discovery responses that same day, and that their responses would be in compliance with the courts orders.[9] The court admonished Appellants that their non-compliance, coupled with the looming January 2010 trial date in the *Parkview* case,[10] could elicit the court's dismissal of the case: "It's [the *Parkview* case] going to be tried in January, whenever it's set for. If they don't get the discovery I'm going to throw the case out." In addition, the court noted that the materials were relevant to the statute of limitations issue and Appellants had not produced a legitimate reason for not complying with the Discovery Order.[11] At the

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[8] Respondents were also ordered to produce certain documents previously deemed to be privileged, which they produced on August 3, 2009.

[9]

[The Court:]	As an officer of the court you're telling me it's in full compliance with my order dealing with that area of discovery?
[Appellants' Counsel:]	Correct, your Honor, to the extent this stuff is information known to my clients. We've got it and it's being delivered.

[10] The circuit court had already continued the trial date in the *Parkview* case from its May 2009 trial date due to the ongoing discovery dispute.

[11] In fact, counsel for Appellants at one point went so far as to admit Appellants did not want to disclose the discovery because it went to the statute of limitations issue:

[The Court:]	Mr. Bailey, you don't like it [the Privilege Order] because it's opened up wide open the issue of the statute of limitations.

hearing, counsel for Appellants stated their clients were weighing their options as to whether to appeal the court's rulings. Despite stating that he was strongly leaning towards dismissing the cases, the circuit court decided to hold Respondents' motion in abeyance pending Appellants' decision to appeal, which provided Appellants with even more time to comply with the court's orders.[12]

Upon receipt of Appellants' supplemental responses, Respondents filed another supplemental motion for sanctions on August 27, 2009, claiming that Appellants had still not complied with the Discovery Order. Due to Appellants' attempts to appeal the Privilege Order,[13] the court did not hold a hearing on Respondents' supplemental motion to compel until January 14, 2010, at this point slightly over a week prior to the *Parkview* trial date. Appellants had still not provided Respondents with the discovery information concerning their experts' testimony. However, Appellants stated they were planning to provide the expert information on the day before trial. The court was not satisfied with this response: "This case has been going on for seven years, a long time. And don't hand me this about getting an expert on Friday. This is not an expert-to-be-given-on-Friday case." The court then addressed Appellants' continued noncompliance. One excuse Appellants gave for their failure to disclose the expert information is that they only had preliminary reports from the experts. Again, the court was not satisfied with this answer: "How can you not have a final opinion? . . . . [I]f you wanted to know what my expert's opinion was in a particular case, I would have to tell you. You would expect me to tell you. I expect you to tell them. I've ordered you to tell them, and you refuse to do so."

[Appellants' Counsel:] That's certainly one reason, Judge.

[12] The circuit court never placed this decision in writing.

[13] On September 10, 2009, Appellants filed a Notice of Appeal in the court of appeals. On December 2, 2009, the court of appeals dismissed Appellants' appeal as premature and issued remittitur on December 17, 2009. On November 19, 2009, this Court denied Appellants' petition for writ of prohibition and certiorari after they appealed the court's discovery rulings. In addition, on October 6, 2009, Appellants applied for entry into the Business Courts, which was also denied on November 3, 2009.

On January 25, 2010, *after* the trial date in the *Parkview* case, Appellants served Respondents with their Third Supplemental Responses, which again only addressed the *Parkview* case. Respondents again took issue with the adequacy of Appellants responses, especially as to the responses dealing with the substance of the expert testimony.

On February 22, 2010, Appellants filed a motion for protective order. Under the protective order, Appellants sought to submit the requested discovery under seal, conditioned upon the court allowing them to redact portions Appellants argued were privileged.

Around that time, Appellants began to question their lawyers concerning the judge's impartiality based on disclosures he made throughout the case concerning his social relationships with counsel of record for Respondents and their family members. To substantiate these claims, Appellants sought additional discovery concerning financial information from the judge and records from a resort on Fripp Island, where the judge officiated in the wedding of Ann Ross Rosen, counsel of record for Respondents from 2007–09, to refute claims made by the judge concerning his relationship with Rosen.

At a hearing (granted to discuss Appellants' discovery requests and protective order) on March 29, 2010, the judge disclosed on the record his relationships with Respondents' counsel. Appellants again attempted to argue the reasons the judge should vacate his prior discovery orders and presented reasons the court should not sanction Appellants for failing to comply with these orders. Furthermore, counsel orally moved for the judge to recuse himself, which he denied. The judge memorialized his verbal denial of the recusal motion and reasons in an ensuing order dated October 7, 2010 (the Recusal Order), wherein the judge again outlined his relationships with Respondents' counsel, and decided not to recuse himself, noting that despite the fact that Appellants were "disappointed with some of the rulings of the [c]ourt . . . . such disappointment cannot form the basis for recusal."

Because Appellants still refused to comply with his orders, the court issued the Dismissal Order on April 9, 2010, finding Appellants were in contempt of court. As sanctions for Appellants' continued "willful" noncompliance with his discovery rulings, the court dismissed all five cases with prejudice and found

Respondents were entitled to reasonable attorney's fees and costs incurred in connection with pursuing Appellants' compliance with the court's orders (to be determined at a later date). The court granted Appellants the opportunity to purge the contempt by complying with the Discovery Order and the Privilege Order within 25 days of the date of the Dismissal Order.

On September 16, 2010, the circuit court denied Appellants' Rule 59(e) motion to alter or amend the Dismissal Order. On October 25, 2010, the court denied Appellant's motion for protective order, holding that it was in effect an untimely Rule 59(e) motion disguised as a Rule 26(c) motion because it merely sough to amend the Privilege Order. On November 8, 2010, Appellants filed a Rule 59(e) motion seeking to amend the court's order, claiming they were denied due process because the court signed the proposed order submitted by Respondents, which the court denied.

Appellants served their Notice of Appeal on January 28, 2011, in the court of appeals. By order dated March 9, 2011, this Court certified these cases for review pursuant to Rule 204(b), SCACR.

ISSUES

I. Whether the circuit judge erred in dismissing Appellants' claims and requiring them to pay costs and attorney's fees to Respondents as sanctions for Appellants' noncompliance with the court's discovery rulings?

II. Whether the circuit judge erred in refusing to recuse himself?

ANALYSIS

I. Sanctions

Appellants contend the circuit court erred in making the various discovery rulings in this case.[14] As a matter of procedure, we note that Appellants have only

[14] In addition to arguments concerning the Privilege Order, Appellants take issue with circuit court orders relating to privilege and dated December 17, 2008; March 3, 2009; June 2, 2009; June 16, 2009; July 28, 2009; April 6, 2010; September 16,

appealed the order awarding sanctions to Respondents, the Dismissal Order. As such, the merits of the underlying discovery orders, including the Privilege Order and the Discovery Order, are not before us for consideration.

Throughout the course of the litigation, the circuit court issued numerous discovery rulings. The Record makes clear that Appellants considered an appeal of one or more of those orders, at one time even seeking review of the Privilege Order in the court of appeals, which was held to be interlocutory. However, to challenge the specific rulings of the discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding. *See, e.g.*, *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881–82 (1986) ("An order directing a party to participate in discovery is interlocutory and not directly appealable . . . . Instead of appealing immediately, a non-party has two alternatives. He may either comply with the discovery order and waive any right to challenge it on appeal, or refuse to comply with the order and appeal after he is held in contempt for his failure to comply.") (internal citations omitted). Appellants did not follow that route here. Rather, they continued along in the litigation, attempting to divert the implementation of the court's rulings by providing incomplete responses and causing delay through other tactics while they decided whether or not to surrender to the possibility of being held in contempt of court. However, during this time, Appellants continued to accept the circuit court's formulation of discovery. Right or wrong, these decisions form the law of the case, and Appellants are bound by them now. *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997). Only after Respondents filed a motion for sanctions, and Appellants were found to be in contempt of court as part of those sanctions, did they appeal. While this was a final order for purposes of appellate review, as it ordered dismissal of the case, the merits of the underlying discovery orders are not before this Court on appeal. Thus, despite Appellants' vehement objections to the Privilege Order and Discovery Order, the only reviewable question before this Court is whether the sanctions were properly awarded.[15]

2010; October 22, 2010; and December 11, 2010. Moreover, Appellants base their other discovery arguments on the Discovery Order, and other related discovery orders issued by the circuit court and dated December 17, 2008; March 3, 2009; March 3, 2009 (granting in part, denying in part); and April 6, 2010.

[15] While the parties certainly mention the Privilege Order and Discovery Order and the various intermediate orders on which they are based in their brief, Appellants

"The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987). Therefore, an appellate court will not interfere with "a trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters" unless the court abuses its discretion. *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997) (citation omitted). "An 'abuse of discretion' may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law." *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (citation omitted). The appealing party bears the burden of demonstrating that the lower court abused its discretion. *Id.* (citation omitted).

Appellants argue the circuit court abused its discretion in awarding unduly harsh sanctions in this case. Specifically, Appellants contend the court abused its discretion by dismissing these cases under the facts, particularly because (1) less "draconian" punishments were available to the court; (2) Appellants agreed to receive a less harsh sanction and "took extraordinary steps to avoid dismissal"; (3) the judge consistently espoused Respondents' arguments as evidence constituting a factual basis to support his decisions; and (4) the judge deviated from South Carolina law to effect dismissal.

Rule 37(b)(2)(C), SCRCP, provides:

> If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . .
>
> > An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof,

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only raise general issues with those orders. Without specific objections to each item of discovery deemed discoverable by the circuit judge, the specific discovery findings are unreviewable on appeal.

> or rendering a judgment by default against the disobedient party.

However, "when the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999) (citing *Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996)). Thus, "[w]here the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." *Id.* at 198–199, 511 S.E.2d at 718–19 (citing *Baughman v. AT & T Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991)); *see also Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997) (stating when deciding the severity of sanctions "for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice") (citations omitted).

We disagree with Appellants' claim that the sanctions imposed here were unduly harsh. With respect to the discovery orders regarding privileged documents, the circuit court made every effort to ensure that no privileged documents were compelled, and Appellants refused to comply merely because these rulings had adverse implications on their cases. We also note that the circuit judge provided Appellants ample opportunity to amend their discovery responses both before and after he issued the Discovery Order, and Appellants willfully and repeatedly failed to comply with the circuit court's orders in any meaningful way. Thus, in our view, Appellants' failure to comply with the various orders of the court was willful and deliberate and caused unnecessary delay of this case and prejudice to Respondents. Accordingly, we hold the circuit court did not err in issuing the Dismissal Order as a sanction for Appellants' noncompliance with the court's orders.[16]

II. Disqualification and Recusal

Appellants argue that the circuit judge was not legally qualified to accept or retain his assignment to preside over these cases at the time the cases were

[16] We note that Appellants have the opportunity to purge the contempt by complying with the court's discovery rulings.

assigned to him. Specifically, Appellants contend that the judge violated his duty to fully disclose the full nature of his and his family's long-term relationships with Respondents' counsel, Ellis Johnston, and members of his family. Moreover, Appellants argue that the circuit judge violated his continuing duty to fully disclose additional relationships between him and members of his family with Johnston and members of his family, which developed following his acceptance of the assignment of this case, and the full nature of his relationships with attorneys Anne Ross Rosen and Marvin Infinger after they became counsel of record for Respondents. Thus, Appellants contend, this Court should vacate the order assigning the circuit judge to preside over these cases, and reassign them to a fair and impartial judge. Appellants contend that because a judge must disqualify himself and recusal motions are rare and unlikely to be overturned on appeal, an atmosphere exists "whereby, as in the present appeal, judges recognize the probable outcome of a recusal request and take advantage of that reality, to the undeserving prejudice of litigants with legitimate grounds for recusal." We disagree and find that the circuit judge was not disqualified from hearing this case and had no duty to recuse himself.

Pursuant to Canon 3(E)(1) of the Judicial Code of Conduct, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." Canon 3(E)(1), Rule 501, SCACR. The judicial canons provide direction as to when disqualification may be necessary, including but not limited to, instances where: (1) the judge holds personal bias or prejudice towards a litigant or counsel or has personal knowledge of evidentiary facts in dispute in the proceeding; (2) the judge either worked on the case as a lawyer, a lawyer with whom the judge previously practiced law worked on the case while the judge was associated with the lawyer's firm, or the judge has been a material witness concerning the case; (3) the judge "knows" that he or a member of his family (spouse, parent, or child) has more than a *de minimus* economic interest in the litigation and the litigation will "substantially affect[]" that interest; or (4) the judge or his spouse or a person within the third degree of relationship to them (or the spouse of such a person) is either a party or the officer, director, or trustee of a party, is a lawyer in the case, known to have more than a *de minimus* interest that could be substantially affected by the litigation, or, to the judge's knowledge, is likely to be a material witness in the proceeding. Canon 3(E)(1)(a)–(d).

"Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." *Patel v. Patel*,

359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004) (citation omitted); *Simpson v. Simpson*, 377 S.C. 519, 522, 660 S.E.2d 274, 276 (Ct. App. 2008); *see also Ellis v. Procter & Gamble Distrib. Co.*, 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993) ("In cases involving a violation of Canon 3, this Court will affirm a trial judge's failure to disqualify himself only if there is no evidence of judicial prejudice.") (citations omitted). Appellate courts "accord great weight to the trial judge's assurance of his own impartiality." *Id.* It is the movant's responsibility to provide some evidence of the existence of the judge's impartiality. *Lyvers v. Lyvers*, 280 S.C. 361, 367, 312 S.E.2d 590, 594 (Ct. App. 1984) (citation omitted).

At the hearing on Appellants' recusal motion on March 29, 2010, and in the ensuing Recusal Order, the circuit judge revealed the following information concerning his relationships with Respondents' counsel of record:

(1) Johnston's wife's ex-husband was a fraternity brother of the judge 40 years ago;

(2) Infinger spent the night at the judge's lake house 30 years ago after both attended the wedding of another Haynsworth shareholder who is not affiliated with this case;

(3) the judge's son and Johnston's son were fraternity brothers in college 14 years ago, went to Europe together 13 years ago, and have stayed in contact since then;

(4) the judge and his son accepted an invitation to go fishing with Johnston's brother;

(5) the judge officiated at Rosen's wedding in 2007, and the Rosen family provided him with accommodations at Fripp Island for the wedding;[17]

(6) Rosen's father, a surgeon, performed a medical procedure on the

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[17] As stated, *supra*, Appellants subpoenaed the Fripp Island resort where the wedding was held to determine the length of the judge's stay.

judge;

(7) Rosen's parents once lived in Bamberg, South Carolina, but the judge did not see them socially; and

(8) the judge has been a member of a social club that holds an annual white tie dance for approximately ten years, and in 2009, Johnston was invited to join the club.[18]

The court found that the mere fact that Appellants were "disappointed with some of the rulings of the [c]ourt . . . . such disappointment cannot form the basis for recusal." Moreover, the court stated:

> Plaintiffs have no evidence proving bias or prejudice against them or for the Defendants. Instead, they argue that the [c]ourt ruled against them on several motions without basis in law or fact, and reason that the [c]ourt's relationship with [d]efense counsel is the sole cause of these rulings. Their Motion for Recusal is made without basis or justification, with the sole purpose of polluting the record and intimidating me into recusal. I refuse to comply. I have addressed this issue repeatedly, openly, and unabashedly, and though Plaintiffs continue to harass and prod me to recuse myself, the law does not justify said action, and thus I refuse to do so.
>
> This litigation is now over five years old. Many, many hours have been devoted by the judiciary and court personnel in getting this case ready to try and both sides [] have incurred substantial attorney's fees. To start a new [sic], absent any bias or prejudice, would be a colossal waste of time, effort[,] and expense.
>
> If I thought for one moment my prior involvement with any of the lawyers had an influence on any of my decisions, I would step aside. I practiced law for thirty years, attended school in South

[18] The judge disclosed his relationship with Rosen and that he had been on the fishing trip with Johnston's brother when the case was assigned to him. He disclosed his son's relationship with Johnston's son via conference call on February 13, 2008.

> Carolina, have been active in social, civic, family and bar organizations, clubs and events all of my adult life and thankfully have formed many types of relationships with many people, a lot who are lawyers who practice in my court on an everyday basis. I am cognizant of these relationships, but if I recused myself when that happened, I could not hold court.

Accordingly, the court denied Appellants' motion for recusal.[19]

None of the disqualification situations outlined by Canon 3(E) were present here. Rather, Appellants' allegations concern mere social relationships between the circuit judge or his family members and Respondents' counsel of record or their family members. Some of these relationships, such as Rosen's father's physician-patient relationship with the judge, are tenuous. Thus, we find that, under the Rules, the circuit judge was not required to disclose any of these relationships with counsel, nor recuse himself. *See* Commentary, Canon 3(E) ("A judge *should* disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." (emphasis added)).

If anything, the judge's decision to disclose these relationships during the course of the litigation demonstrates his sensitivity to assuaging any concerns about his impartiality. *See Simpson*, 377 S.C. at 525, 660 S.E.2d at 277 (finding the judge's "remarks about her concern for not disclosing the information at the beginning of the hearing do not show any bias or prejudice but instead show her sensitivity to any apprehension each side might have in her ability to make a fair and impartial ruling in the case"); *Doe v. Howe*, 367 S.C. 432, 441, 626 S.E.2d 25, 29 (Ct. App. 2005) ("Because Doe made no showing of actual prejudice, we find no abuse of discretion in the trial judge's refusal to disqualify himself. If anything, the trial judge demonstrated sensitivity toward any concerns Doe might have had

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[19] At the March 29, 2010, hearing, the judge revealed that he has known Appellants' attorney, Joel Bailey, for 36 years and they have "shared a lot of social time together over the years." Furthermore, the judge stated on the record he "maintained what I considered to be a very cordial social relationship" with Appellants' counsel, Thomas Pendarvis. Both of the judge's sons worked with Pendarvis at another law firm while they were in school, and both maintained friendships with him.

regarding his impartiality by voluntarily making full disclosure of his and his law clerk's contacts with Howe and Howe's counsel."). Furthermore, if friendship or social interactions became the standard for disqualification, then as the judge stated in the Recusal Order, members of the judiciary would rarely be able to hold court in this state.[20] Obviously, there could be circumstances where an extremely close friendship could rise to the level of disqualification, as the Canons do not limit disqualification to the scenarios listed under Canon 3(E)(1). However, under the facts of this case, the relationships and interactions that occurred in this lawsuit did not require the judge's recusal.

Importantly, Appellants have also failed to prove that they suffered any prejudice as a result of the judge's refusal to recuse himself in this case. Other than adverse rulings, Appellants have not presented any evidence of prejudice or bias against them. *See Mortg. Elec. Sys., Inc. v. White*, 384 S.C. 606, 616, 682 S.E.2d 498, 503 (Ct. App. 2009) ("The fact [that] a trial judge ultimately rules against a litigant is not proof of prejudice by the judge, even if it is later held the judge committed errors in his rulings.") (citation omitted). Mere conjecture cannot support a recusal motion. *See* 46 Am. Jur. 2d *Judges* § 208 (1994) ("Allegations of facts that are merely frivolous or fanciful will not support a motion to disqualify on the ground of prejudice, nor will conclusory statements, conjecture, or innuendo be sufficient to support a motion for disqualification."). If anything, the trial judge bent over backwards to provide Appellants an opportunity to be heard, from denying Respondents' motion for summary judgment early in the case, to providing Appellants numerous opportunities to cure their noncompliance and allowing for numerous hearings on discovery matters.

In addition, the Record supports all of the court's orders in this case, including the Discovery Order and the Privilege Order. *See Burgess v. Stern*, 311 S.C. 326, 331, 428 S.E.2d 880, 884 (1993) (finding "an objective view of the record and circumstances surrounding the convoluted proceedings in [that] case lead[] to the conclusion that [the judge's order], and the ensuing orders [were]

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[20] As the judge stated at the hearing on the matter, "[F]rom day one, because I had 30 years of practice practically every lawyer that come[s] before me . . . I have socialized with, I have been friends with . . . and I have never ever allowed any personal friendships, past acquaintances, children's relationships with other people's children to influence anything that I've done."

supported by the evidence" and concluding that no prejudice arose from the alleged impartial acts); *Ellis*, 315 S.C. at 285, 433 S.E.2d at 857 (finding a judge's impartiality might reasonably be questioned "when his factual findings are not supported by the record" and holding that the judge's factual findings in that case were not supported by the record). Thus, Appellants have not proven they suffered any prejudice from the judge's alleged bias again them.

Finally, the timeliness of the motion is questionable. *See Duplan Corp. v. Milliken*, 400 F. Supp. 497, 510 (D.S.C. 1975) ("Timeliness is essential to any recusal motion. To be timely, a recusal motion must be made at counsel's first opportunity after discovery of the disqualifying facts.").The Appellants were well-aware that the judge planned to issue the Dismissal Order when they raised their concerns regarding the judge's impartiality and moved for recusal on the eve of the Dismissal Order, nearly two years after the judge disclosed the bulk of these relationships. Therefore, the recusal motion appears to be nothing more than a last-ditch effort to delay the Court's filing of that order. Thus, we also find Appellants' motion for recusal untimely.

Based on the foregoing, we hold that the judge was not required to recuse himself under the circumstances. Furthermore, the frivolous nature and questionable timing of this motion only serve to lend further support to the sanctions imposed in the Dismissal Order.[21]

CONCLUSION

In conclusion, we make clear that we do not hold Appellants' able, competent, and experienced counsel at fault for Appellants' discovery abuses. Appellants' counsel diligently and professionally pursued these claims on behalf of

[21] Appellants further argue the circuit court erred in failing to ensure that Appellants received a fair and impartial forum in which to litigate their claims, thereby depriving them of their right to due process of law under the United States and South Carolina constitutions. Because this issue is tied to whether or not the court erred in refusing to recuse himself and we find that he did not, we need not reach this issue. *See Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 307, 676 S.E.2d 700, 706 (2009) (appellate court need not discuss remaining issues when determination of prior issue is dispositive).

their clients. Unfortunately, Appellants have brought about the dismissal of their claims by their continued refusal to comply with the court's orders, and they have only themselves to blame for this harsh result.

Therefore, for the foregoing reasons, we affirm the circuit court's dismissal of this case and remand this case to the circuit court for further proceedings.

AFFIRMED.

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

JUSTICE PLEICONES: I concur in part and dissent in part. I concur in the majority's affirmance of the recusal ruling but dissent from its affirmance of the contempt/sanctions issue. In my view, this appeal requires we review the merits of the Privilege Order as well as the Dismissal Order. As explained below, I find the Privilege Order is affected by an error of law and would reverse the Dismissal Order's contempt findings related to that order. Further, I would hold the findings of fact cited in the Dismissal Order in support of the conclusion that appellants were in contempt of the Discovery Order are woefully inadequate and would therefore reverse that contempt holding. Finally, I would reverse the Dismissal Order's sanctions as the contempt findings cannot stand.

I begin with the majority's erroneous limitation of the scope of appellant's appeal. The Dismissal Order begins:

> This matter comes before the Court on [Respondents'] two Motions for Sanction . . . For the reasons set forth below, the Court grants [Respondents'] motions. The Court finds and hereby declares that [Appellants] are in contempt of court as a result of their willful failure to comply with the Court's order dated July 28, 2009 [the Privilege Order] and dismiss each of the above captioned actions with prejudice as sanctions for such contempt . . . The Court further finds and declares that [Appellants] are in contempt of court for the separate and additional reason that they have willfully disobeyed the Court's Order dated March 3, 2009 [the Discovery Order].

It is well-settled that a *party*[22] can obtain review of the merits of a discovery order only after refusing to comply and being held in contempt. On appeal from the contempt order, the contemnor may argue that the contempt finding must be reversed because the underlying discovery order was itself improper. *E.g. Grosshuesch v. Cramer*, 377 S.C. 12, 659 S.E.2d 112 (2008).

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[22] I note the majority cites the non-party discovery appeal rule from *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881 (1986).

The majority acknowledges that appellants have done exactly what is required of them but concludes that our review is somehow limited. I quote from the majority's opinion:

> Throughout the course of the litigation, the circuit court issued numerous discovery rulings . . . [T]o challenge the specific rulings of the discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding . . . Only after Respondents filed a motion for sanctions and Appellants were found to be in contempt of court as part of those sanctions, did they appeal. While this was a final order for purposes of appellate review, as it ordered dismissal of the case [sic], the merits of the underlying discovery orders are not before this Court on appeal.

The majority is simply wrong to hold that appellants are now foreclosed from arguing that the discovery orders upon which the Dismissal Order's contempt findings and sanctions rest were erroneous. Further, I disagree with the majority's representation that appellants have only raised a general challenge to the Privilege and Discovery Orders. *See* fn. 15, *supra*. Each of the five appellants' briefs argue the merits of the Privilege Order and the Discovery Order. In each brief, the argument regarding the flaws in the Privilege Order begins on page 12, and of those in the Discovery Order begins on page 27. Appellants' ability to challenge the specifics of the Discovery Order is limited by the circuit court's inadequate factual findings.

I fundamentally disagree with the majority's decision to limit its review of these consolidated appeals.

A. Privilege Order

Appellants contend, and I agree, that the circuit court erred in finding them in contempt for violating the Privilege Order. The Privilege Order was largely predicated on the circuit court's determination that appellants had waived

their attorney-client privilege, applying the test for waiver derived from *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975). The circuit court found the statute of limitations "was a major issue in this case" and held that by putting the statute in issue, appellants "implicitly waived their claims of privilege with respect to documents dated (i.e. created) more than three years prior to the filing of this lawsuit."

Appellants contend the circuit court erred in adopting the *Hearn* "at-issue" waiver theory in the Privilege Order and that this error requires that we reverse the contempt findings that are based on *Hearn* as well as the sanctions in the Dismissal Order. I agree.

In my view, the circuit court erred in adopting the *Hearn* at-issue waiver test because this test substantially diminishes the attorney-client privilege without regard to the important public interests that privilege is designed to advance.

South Carolina has long recognized the attorney-client privilege. *See, e.g., Clary*

v. Blackwell, 160 S.C. 142, 149, 158 S.E. 223, 226 (1931). The privilege is grounded

> upon a wise public policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to his professional advisor, under the pledge of the law that such confidence shall not be abused by permitting disclosure of such communications.

South Carolina Highway Dept. v. Booker, 260 S.C. 245, 254, 195 S.E.2 615, 619-

20 (1973); *see also State v. James*, 34 S.C. 49, 57, 12 S.E. 657, 660 (1891) ("[T]he rule of evidence which holds as inviolable professional communications between attorney and client is one of the most important, and in all forms must be maintained in all its integrity."). The attorney-client

privilege is not absolute, rather, its traditional contours balance competing public interests. For example, courts have traditionally held it does not extend to communications in furtherance of criminal, tortious, or fraudulent conduct. *Ross v. Medical University of South Carolina*, 317 S.C. 377, 384, 453 S.E.2d 880, 884-85 (1994).

While the client may waive the privilege, *Drayton v. Industrial Life & Health Ins.*, 205 S.C. 98, 108, 31 S.E.2d 148, 152 (1944), the rule in South Carolina has been that such a "waiver must be distinct and unequivocal[,]" and we have held that a claim of implied waiver should be treated with caution. *State v. Thompson*, 329 S.C. 72, 76-77, 495 S.E.2d 437, 439 (1998). Notwithstanding that caution must be exercised in finding waiver, it is widely recognized that a client impliedly waives the privilege when he relies on confidential *communications* with his attorney to make out a claim or defense. *See Savino v. Luciano*, 92 So.2d 817, 819 (Fla. 1957) ("[W]hen a party has filed a claim, based upon a matter ordinarily privileged, the proof of which will necessarily require that the privileged matter be offered in evidence, we think that he has waived his right to insist . . . that the matter is privileged."); *Pennsylvania v. Harris*, 32 A.3d 243 (Pa. 2011) ("In-issue waiver occurs when the privilege-holder asserts a claim or defense, and attempts to prove that claim or defense by reference to the otherwise privileged material."); *see also*, *e.g.*, *Sedco Int'l S.A. v. Cory*, 683 F.2d 1201, 1206 (8th Cir. 1982) (courts find waiver by implication when a client testifies about the attorney-client communication, places the attorney-client relationship at issue, or cites the attorney's advice as part of a claim or defense). *Hearn* alters this traditional implied waiver standard.

Hearn summarized the factors common to the exceptions to the rule of privilege as

> (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied

> the opposing party access to information vital to his defense.

68 F.R.D. at 581. This statement of the factors for finding implied waiver dramatically expands the traditional rule. Because the existence of privilege for attorney-client communications has significance only when the information sought to be protected is relevant to a case, and when the opposing party believes access to the information is vital to his defense, factors two and three operate merely to limit waiver of the privilege to the most sensitive of the client's communications.

The first factor of the *Hearn* test requires that assertion of the privilege be the result of an affirmative act on the part of the person asserting the privilege, such as by filing suit. As used by the *Hearn* court and as applied by the circuit court in this case, this factor expands the circumstances in which a party impliedly waives his attorney-client privilege. Rather than being limited to situations in which the client inserts the privileged *communications* into the controversy, waiver is expanded to situations in which the client raises any *issue* to which the privileged communications are relevant. As explained below, *Hearn* has been rejected by most courts and many commentators.

Adoption of the *Hearn* test virtually eliminates attorney-client privilege in a wide range of cases without taking into account the public policy on which attorney-client privilege is grounded or that the well-settled contours of the attorney-client privilege already balance the competing public interests. *See, e.g., In re County of Erie*, 546 F.3d 222, 227-29 (2d Cir. 2008) discussing *Hearn* and its critics, rejecting the *Hearn* test, and holding that when good faith is asserted as a defense, waiver is implied only when the client relies on privileged advice to establish good faith); Kevin Bennardo, *At Issue Waiver of the Attorney-Client Privilege in Illinois: An Exception in Need of a Standard*, 30 N. Ill. U. L. Rev. 553, 561 (2010) ("By focusing on relevancy and fairness, the Hearn test seeks to remedy the 'problem' caused by the truth-suppressing effect of the attorney-client privilege. The anticipatory waiver test, on the other hand, seeks to address the problem created by one party selectively relying on a privileged communication while attempting to shield

other privileged communications--thereby 'garbling' the truth. It is only in this 'truth-garbling' scenario, rather than the truth-suppressing scenario (a scenario inherent in all privileges), that waiver of the privilege should be found." (internal footnote omitted)); Note, *Developments in the Law: Privileged Communications*, 98 Harv. L. Rev. 1450, 1641-42 (1985) (*Hearn* concept of unfairness refers to incompleteness of evidence rather than traditional concept in privilege context of unfairness as abuse of a privilege; logic of *Hearn* leads to "outrageous" results).[23]

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[23] For additional criticism of *Hearn* and its progeny, see *Remington Arms Co. v. Liberty Mut. Ins. Co*., 142 F.R.D. 408, 413 (D. Del. 1992) ("The core problem,

according to this line of reasoning [criticizing *Hearn*], is that expansive language

for determining implied waiver leads to a type of ad hoc determination that ignores the system-wide role of the attorney-client privilege and undermines any confidence that parties can place in that privilege. These authorities contend that extremely liberal waiver rules increase litigation costs and judicial time spent on discovery disputes, favor the wealthiest litigants, undermine the values served by the privilege rules, and vary according to the identity of the litigants and their purported need for privileged information." (internal citations omitted)); *Trustees of Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc*., 266 F.R.D. 1 (D.D.C. 2010); *United States v. Ohio Edison Co.,* No. C2-99-1181, 2002 WL 1585597 (S.D. Ohio July 11, 2002); *Mortgage Guar. & Title Co. v.*

Cunha, 745 A.2d 156 (R.I. 2000); *Public Service Co. of New Mexico v. Lyons*, 10

P.3d 166 (N.M. Ct. App. 2000); *Wisconsin v. Hydrite Chem. Co.*, 582 N.W.2d 411 (Wis. Ct. App. 1998); *Wardleigh v. Second Jud. Dist. Ct.*, 891 P.2d 1180 (Nev.

Moreover, particularly in the context of a statute of limitations defense, adoption of the *Hearn* test produces the result that

> [i]n virtually every case in which the statute of limitations . . . is pleaded as a defense and the client relies on the discovery rule to overcome the limitation period, the opposing party would be able to inquire of the client's counsel: Did your client tell you anything in confidence about what he or she knew that differs from or contradicts what he or she stated in responses to discovery?

Darius v. City of Boston, 741 N.E.2d 52, 57 (Mass. 2001). I agree with the *Darius* court that "[t]o permit that kind of inquiry would pry open the attorney-client relationship and strike at the very core of the privilege." *Id.* at 56-57.

Because in my view the *Hearn* at-issue waiver rule sweeps far too broadly, eviscerating the attorney-client privilege without regard to the weighty public interest it serves, the circuit court erred in adopting it in the Privilege Order. The circuit court ordered appellants to produce documents that would have been privileged but for the court's application of the *Hearn* at-issue test. It found that appellants had waived attorney-client and "any otherwise applicable privilege" in documents created more than three years before the lawsuit was filed that contained appellants' litigation and trial strategies "through their actions (e.g. the allegations in the . . . Complaints)." The circuit court's determination in the Dismissal Order that appellants were

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1995); *Aranson v. Schroeder*, 671 A.2d 1023 (N.H. 1995); *Rhone-Poulenc Rorer Inc. v. Home Indem. Co*., 32 F.3d 851, 864 (3d Cir. 1994); *Hewlett-Packard Co. v.*

Bausch & Lomb, Inc., 115 F.R.D. 308 (N.D. Cal. 1987); and *Smith v. Kavanaugh, Pierson & Talley*, 513 So.2d 1138 (La. 1987).

contumacious in refusing to produce these documents and that the sanctions of dismissal and attorneys' fees were appropriate depended in part on its determination that appellants had waived all privileges in these documents merely by filing suit. Because the circuit court's ruling was based on an error of law, i.e. *Hearn*, I would reverse and remand for the circuit court to consider whether appellants' other violations of the Privilege Order warrant a finding of contempt. This remand necessarily requires reconsideration of the scope of any sanctions.

B. Discovery Order

Appellants also contend they should not have been found in contempt and sanctioned for violations of the Discovery Order. I agree with appellants that the flaws in the Dismissal Order finding appellants in violation of the Discovery Order require we reverse the Dismissal Order on this ground as well.

I agree with appellants that the trial judge's specifications of deficiencies in their compliance with the Discovery Order are simply too vague, and rely too heavily on mere references to memoranda prepared by respondents' counsel,[24] to support the finding of contempt. Moreover, the decision to dismiss the cases and impose other sanctions for noncompliance with discovery "should be imposed only in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights." *McNair v. Fairfield Cty.*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008) (internal citations omitted). Here, the circuit court's findings that appellants' conduct rose to this level are inexorably tied to its findings regarding disobedience of the wrongfully decided Privilege Order.

I would reverse the Dismissal Order and remand, but affirm the recusal ruling as I find no evidence of judicial prejudice in this record. *State v. Howard*, 384 S.C. 212, 682 S.E.2d 42 (Ct. App. 2009). It is patent that these cases

[24] Each of the five findings of contempt in the Dismissal Order is supported only by citation to a memorandum prepared by respondents. *See Higgins v. Med. Univ. of South Carolina*, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997) (cautioning against reliance on factual statements in memoranda submitted by counsel).

have been pending far too long, and that appellants share in the responsibility for the delay. I am optimistic that the parties and trial judge will work diligently to bring these cases to speedy and appropriate resolutions upon remand.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Interest of Kevin R., A Juvenile Under the Age of Seventeen, Appellant.

Appellate Case No. 2012-212655

Appeal From Richland County
The Honorable Robert E. Newton, Family Court Judge
The Honorable Gwendlyne Y. Smalls, Family Court Judge

Opinion No. 27430
Heard April 16, 2014 – Filed August 6, 2014

AFFIRMED

Appellate Defender Susan Barber Hackett, of South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia, for Respondent.

John S. Nichols, of Bluestein, Nichols, Thompson & Delgado, L.L.C., of Columbia; John D. Elliott, of Law Offices of John D. Elliott, P.A., of Columbia; and Bert G. Utsey, III, of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., of Walterboro; for Amici Curiae, South Carolina Association for Justice, South Carolina Association of Criminal Defense Lawyers, and Lawyers

Committee for Children's Rights.

JUSTICE BEATTY: In a juvenile petition, the State charged Kevin R. ("Appellant") with possessing a weapon on school grounds in violation of section 16-23-430 of the South Carolina Code.[1] Prior to his adjudicatory hearing before a family court judge, Appellant moved for a jury trial on the ground the United States Constitution[2] and the South Carolina Constitution[3] guaranteed him the right to a jury trial. The judge denied the motion and proceeded to hear Appellant's case in a bench trial. Ultimately, the judge adjudicated Appellant delinquent and deferred sentencing until an evaluation of Appellant was completed. The sentencing hearing was conducted before a second family court judge, who sentenced Appellant to an indeterminate period of time not to exceed his twenty-

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[1] S.C. Code Ann. § 16-23-430(A) (Supp. 2013) ("It shall be unlawful for any person, except state, county, or municipal law enforcement officers or personnel authorized by school officials, to carry on his person, while on any elementary or secondary school property, a knife, with a blade over two inches long, a blackjack, a metal pipe or pole, firearms, or any other type of weapon, device, or object which may be used to inflict bodily injury or death.").

[2] U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."); *see* U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[3] S.C. Const. art. I, § 14 ("The right of trial by jury shall be preserved inviolate. *Any person charged with an offense* shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both." (emphasis added)).

first birthday. The judge then suspended the sentence and placed Appellant on probation until his eighteenth birthday.

On appeal, Appellant contends the family court judge erred in denying his motion for a jury trial. Recently, this Court held a juvenile does not have a constitutional right to a jury trial in adjudication proceedings. *In re Stephen W.*, Op. No. 27413 (S.C. Sup. Ct. filed July 16, 2014) (Shearouse Adv. Sh. No. 28 at 29). ("*Stephen W.*"). However, our decision in that case is not dispositive as we have now been presented with additional arguments raised by Appellant and the Amici Curiae. After consideration of these issues, we adhere to our decision in *Stephen W.* Accordingly, we affirm the ruling of the family court.

I. Factual / Procedural History

On October 4, 2011, Richland County Deputy Milton Clark, the school resource officer at Olympia Learning Center, received a call from an employee of the school. Based on this call, Deputy Clark removed Appellant, a sixteen-year-old student at the school, from a classroom and took him to a secure area to question him regarding his alleged possession of a weapon. Appellant admitted that he had a pocketknife in his sock. Deputy Clark then searched Appellant and found a pocketknife with a three-inch retractable blade.

On October 24, 2011, Deputy Clark filed a juvenile petition in Richland County family court, alleging Appellant was a delinquent for carrying a weapon on school grounds. The Honorable Robert E. Newton held an adjudicatory hearing on July 24, 2012. At the beginning of the hearing, Appellant's counsel moved for a jury trial on the ground Appellant was entitled to have a jury adjudicate his case based on the federal and state constitutions. Judge Newton denied Appellant's motion and proceeded with the bench trial. At the conclusion of the hearing, Judge Newton adjudicated Appellant to be delinquent for possessing a weapon on school grounds. Because Appellant was currently being evaluated at the Midlands Evaluation Center, Judge Newton delayed sentencing until the evaluation was completed.

On August 1, 2012, the Honorable Gwendlyne Y. Smalls held a hearing and ultimately sentenced Appellant to an indeterminate period of time not to exceed his twenty-first birthday. She then suspended the sentence and placed Appellant on probation, subject to certain conditions, until his eighteenth birthday. Appellant appealed to the Court of Appeals. This Court certified the case pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

II. Discussion

A. Arguments

1. Appellant

Appellant contends section 63-3-590 of the South Carolina Code,[4] which provides in part that "[a]ll cases of children must be dealt with as separate hearings by the court and without a jury," violates the clear mandate of the South Carolina Constitution that "any person" charged with an "offense" shall be entitled to a jury trial. In support of this contention, Appellant asserts a juvenile is guaranteed the right to a jury trial because (1) a "child" is a "person" as defined throughout the

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[4] Section 63-3-590 provides in full:

> All cases of children must be dealt with as separate hearings by the court and *without a jury*. The hearings must be conducted in a formal manner and may be adjourned from time to time. The general public must be excluded and only persons the judge finds to have a direct interest in the case or in the work of the court may be admitted. The presence of the child in court may be waived by the court at any stage of the proceedings. Hearings may be held at any time or place within the county designated by the judge. In any case where the delinquency proceedings may result in commitment to an institution in which the child's freedom is curtailed, the privilege against self-incrimination and the right of cross-examination must be preserved. In all cases where required by law, the child must be accorded all rights enjoyed by adults, and where not required by law the child must be accorded adult rights consistent with the best interests of the child.

S.C. Code Ann. § 63-3-590 (2010) (emphasis added); *see* Rule 9(a), SCRFC ("All hearings in the family courts shall be conducted by the court without a jury. Hearings shall be conducted in a judicial atmosphere, with the judge wearing a black judicial robe.").

South Carolina Code,[5] and (2) a juvenile petition charges a child with an "offense."[6]

As to the United States Constitution, Appellant acknowledges the United States Supreme Court's decision in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), in which a plurality of the Court determined that juveniles are not constitutionally entitled to a jury trial in adjudication proceedings. However, Appellant challenges the propriety of *McKeiver* because "[i]n the forty years since *McKeiver*, the purposes and consequences of delinquency proceedings have changed." Specifically, Appellant asserts the South Carolina juvenile justice system is now much like the adult criminal justice system as the focus is punishment of the juvenile offender rather than rehabilitation. For example, Appellant notes that juveniles, who are adjudicated delinquent for enumerated sex offenses, must register for life as sex offenders.[7] Thus, Appellant maintains that

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[5] *See, e.g.*, S.C. Code Ann. § 63-1-40(1) (2010) (generally defining "child" as a "person under the age of eighteen" in the context of the South Carolina Children's Code); *id.* § 63-19-20(1) (defining "child" or "juvenile" to mean "a person less than seventeen years of age" in the context of the South Carolina Juvenile Justice Code).

[6] *See, e.g.*, S.C. Code Ann. § 63-19-360(4) (2010) (providing for juvenile detention services for "juveniles charged with having committed a criminal offense who are found, after a detention screening or detention hearing, to require detention or placement outside the home pending an adjudication of delinquency or dispositional hearing"); *id.* § 63-19-810(B)(1) (requiring officer who takes a child into custody for violating a criminal law or ordinance to include in his or her report "the facts of the offense").

[7] *See, e.g.*, S.C. Code Ann. § 23-3-430(A) (2007) (stating, in part, "*Any person, regardless of age,* residing in the State of South Carolina who in this State has been convicted of, *adjudicated delinquent for,* pled guilty or nolo contendere to an offense described below, or who has been convicted, *adjudicated delinquent,* pled guilty or nolo contendere, or found not guilty by reason of insanity in any comparable court in the United States, or a foreign country, or who has been convicted, *adjudicated delinquent,* pled guilty or nolo contendere, or found not guilty by reason of insanity in the United States federal courts of a similar offense, or who has been convicted of, *adjudicated delinquent* for, pled guilty or nolo contendere, or found not guilty by reason of insanity to an offense for which the person was required to register in the state where the conviction or plea occurred, shall be required to register pursuant to the provisions of this article" (emphasis

"[l]ittle distinguishes delinquency proceedings from criminal prosecutions except the absence of a jury."

2. Amici Curiae

An amicus brief was filed on behalf of the South Carolina Association for Justice, the South Carolina Association of Criminal Defense Lawyers, and the Lawyers Committee for Children's Rights. In this brief, the Amici Curiae reiterate Appellant's arguments that a juvenile should be "allowed to demand" a trial by jury in family court because: (1) a juvenile was entitled to a jury trial at the time of the adoption of the South Carolina Constitution in 1868;[8] and (2) a "child" is a "person" as defined throughout the South Carolina Code and a juvenile petition charges a child with an "offense."

The Amici Curiae supplement Appellant's arguments with policy considerations that were raised during the oral argument of *Stephen W.* Initially, they contend the availability of a trial by jury for a juvenile will "result in more reliable verdicts" because there are several deficiencies in family court bench trials. Specifically, they claim juvenile adjudications are not always accurate or reliable because a family court judge, who is the sole fact-finder, may: (1) be inclined to find guilt due to his or her "professional bias" that "fault must be found and the youngster punished"; (2) apply an erroneous legal standard in determining whether an offense was committed; and (3) reach "erroneous conclusions based on insufficient evidence." Given the significant collateral consequences a juvenile faces as the result of an adjudication of guilt, they maintain a jury trial is necessary to ensure accuracy in fact-finding and to create a complete record for appellate review.

Although the Amici Curiae concede there would need to be certain procedural and logistical changes to accommodate a juvenile's request for a jury trial, they assert these changes are not insurmountable as evidenced by the states

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added)); *id.* § 23-3-490(D)(1) (Supp. 2013) (providing for public disclosure of the identity of juvenile offenders who have been adjudicated delinquent for enumerated sex offenses).

[8] *See Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 773 (2010) ("The right to trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868." (quoting *Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005))).

that currently provide jury trials for adjudication proceedings.[9] For several reasons, they believe South Carolina family courts could join these jurisdictions with minimal disruption to the state's court system. They contend there would be few jury trials conducted as contested adjudications occur infrequently. In addition, they state the venue for conducting these trials "should be relatively simple" as the family court in each judicial circuit has access to a courtroom, either in circuit court or magistrate's court, which contains a jury box. Finally, they posit that assembling a venire for jury selection would not be difficult as the clerks of court throughout the state routinely summon jurors for jury duty in Common Pleas or General Sessions. Thus, jurors could be selected from these jury pools to serve on family court jury trials.

B. Analysis

1. Implication of *In the Interest of Stephen W.*

Recently, this Court held that neither the federal nor the state constitution requires a jury trial in juvenile adjudication proceedings. *In re Stephen W.*, Op. No. 27413 (S.C. Sup. Ct. filed July 16, 2014) (Shearouse Adv. Sh. No. 28 at 29). As noted in *Stephen W.*, the United States Supreme Court's decision in *McKeiver* definitively resolves Appellant's argument with respect to the federal constitution. *Id.* at 31. Moreover, "[m]ost jurisdictions that have dealt with the issue of the continued viability of *McKeiver* have determined that it is still settled law; that is, jury trials in juvenile proceedings may be provided *if a State chooses to do so*, but it is not a mandated right required by concerns of fundamental fairness under the Federal Constitution." *In the Interest of A. C.*, 43 A.3d 454, 461 (N.J. Sup. Ct. 2012) (emphasis added). *See generally* B. Finberg, Annotation, *Right to Jury Trial in Juvenile Delinquency Proceedings*, 100 A.L.R.2d 1241, § 2[a] (1965 & Supp. 2014) (collecting state and federal cases discussing whether a juvenile is entitled to a jury trial in juvenile court proceedings; recognizing that "the individual charged with being a delinquent has no right, under the pertinent state or federal constitution, to demand that the issue of his delinquency be determined by a jury").

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[9] A minority of states have enacted statutes that provide jury trials for juvenile adjudication proceedings. *See* Mass. Gen. Laws. ch. 119, § 55A (2010); Mich. Comp. Laws § 712A.17(2) (2011); Mont. Code Ann. § 41-5-1502(1) (2011); N.M. Stat. Ann. § 32A-2-16(A) (2011); Okla. Stat. Ann. tit. 10A, § 2-2-401 (2011); Tex. Fam. Code Ann. § 54.03(c) (2009); W. Va. Code § 49-5-6 (2011); Wyo. Stat. Ann. § 14-6-223(c) (2011) (amended on Mar. 10, 2014 regarding juror selection).

Furthermore, as analyzed in *Stephen W.*, the General Assembly has created a system for juveniles that is distinctly different from adult offenders based on the premise that "South Carolina, as *parens patriae,* protects and safeguards the welfare of its children." *Harris v. Harris*, 307 S.C. 351, 353, 415 S.E.2d 391, 393 (1992); *see State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007) (noting state's continued recognition of *parens patriae* in juvenile proceedings). The continued recognition of the *parens patriae* doctrine distinguishes South Carolina from those jurisdictions that have found a juvenile is constitutionally entitled to a jury trial.

For example, the Supreme Court of Kansas held that juveniles have a constitutional right to a jury trial in juvenile offender proceedings. *In the Matter of L. M.*, 186 P.3d 164 (Kan. 2008). In so ruling, the court premised its analysis by stating that "the Kansas Legislature has significantly changed the language of the Kansas Juvenile Offender Code (KJOC)." *Id.* at 168. Specifically, the court noted these changes negated the rehabilitative purpose set forth in the KJOC, replaced nonpunitive terminology with criminal terminology similar to the adult criminal code, aligned the sentencing provisions with the adult sentencing guidelines, and removed "the protections that the *McKeiver* Court relied on to distinguish juvenile systems from the adult criminal systems." *Id.* The court explained that "[t]hese changes to the juvenile justice system have eroded the benevolent parens patriae character that distinguished it from the adult criminal system." *Id.* at 170. Unlike Kansas, South Carolina has retained the doctrine of *parens patriae* in juvenile proceedings. Thus, Appellant's reliance on *In the Matter of L. M.* is misplaced.

Moreover, the collateral consequences claimed by Appellant do not entitle a juvenile to a jury trial as the General Assembly has specifically stated that adjudication is not the equivalent of a conviction. *See* S.C. Code Ann. § 63-19-1410(C) (2010) ("No adjudication by the court of the status of a child is a conviction, *nor does the adjudication operate to impose civil disabilities ordinarily resulting from conviction*, nor may a child be charged with crime or convicted in a court, except as provided in Section 63-19-1210(6). The disposition made of a child or any evidence given in court does not disqualify the child in a future civil service application or appointment." (emphasis added)).

Additionally, any assertion that juveniles should be entitled to a jury trial because they are subject to registering as a sex offender if they are adjudicated delinquent for certain sex offenses is without merit as our appellate courts have held that registering as a sex offender is a civil, non-punitive consequence. *See In re Justin B.*, 405 S.C. 391, 747 S.E.2d 774 (2013) (affirming juvenile's guilty plea in family court for criminal sexual conduct with a minor, first degree and

concluding imposition of lifetime electronic monitoring was a civil obligation and not a punishment), *cert. denied*, 134 S. Ct. 1496 (2014); *In re Ronnie A.*, 355 S.C. 407, 585 S.E.2d 311 (2003) (holding requirement that a juvenile, who is adjudicated delinquent for committing criminal sexual conduct with a minor, first degree, to register as a sex offender is non-punitive and does not violate due process).[10] Accordingly, we reaffirm the analysis in *Stephen W.* that addressed the issues raised by Appellant in the instant case.

Our decision in *Stephen W.*, however, is not dispositive as we have now been presented with arguments raised by the Amici Curiae. Initially, we are not persuaded by the assertions of the Amici Curiae regarding the lack of reliability in family court juvenile proceedings and the changes that would be needed to accommodate jury trials in family court. Significantly, they offer no objective evidence that family court bench trials in juvenile proceedings are somehow less reliable than other family court proceedings or proceedings conducted as bench trials in the circuit or probate courts. In all of these contexts, a judge presides as the sole fact-finder regarding cases that implicate a person's liberty interest. *See, e.g.*, S.C. Code § 43-35-45(E) (Supp. 2013) (outlining procedure for family court's determination that someone qualifies as a "vulnerable adult"); *id.* § 44-17-580(A) (outlining procedure for probate court's determination regarding a person's involuntary commitment to a mental health facility).[11] Thus, in the absence of any

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[10] Although the issue is not before the Court, we note the inconsistent positions of the General Assembly to limit the negative civil parameters of adjudication proceedings but permit the consequences of an adjudication to continue for the lifetime of one who is adjudicated delinquent for sex offenses. If this state retains the doctrine of *parens patriae* in juvenile proceedings, then the consequences of these proceedings should expire when the individual reaches the age of twenty-one years old. *See* S.C. Code Ann. § 63-19-1410(A)(5) (2010) (providing that commitment "must be for an indeterminate period but in no event beyond the child's twenty-first birthday").

[11] Some proceedings in probate court may be tried before a jury; however, these cases are extremely limited. *See* S.C. Code Ann. § 62-1-306(a) (Supp. 2013) ("If duly demanded, a party is entitled to trial by jury in any proceeding involving an issue of fact in an action for the recovery of money only or of specific real or personal property, unless waived as provided in the rules of civil procedure for the courts of this State. The right to trial by jury exists in, but is not limited to, formal proceedings in favor of the probate of a will or contesting the probate of a will.").

fundamental distinction,[12] we discern no basis on which to find that a jury trial is warranted in juvenile proceedings.

Moreover, judges are presumed impartial and if a juvenile believes a family court judge has "professional bias," the juvenile may move to recuse that particular judge. *See Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004) ("It is not sufficient for a party seeking disqualification to simply allege bias; the party must show some evidence of bias or prejudice."); *Reading v. Ball*, 291 S.C. 492, 494, 354 S.E.2d 397, 398 (Ct. App. 1987) ("When no evidence is presented other than claimed 'adverse' rulings by the judge, the judge is not required to recuse himself."); *see also* Canon 3(B)(5) of Rule 501, SCACR ("A judge shall perform judicial duties without bias or prejudice.").

Furthermore, a juvenile who objects to the adjudication procedure or ruling has several avenues of recourse as he or she may file an appeal, an application for post-conviction relief, or a petition for a writ of habeas corpus. *See* S.C. Code Ann. § 63-3-640 (2010) ("Post conviction proceedings, including habeas corpus actions, shall be instituted in the court in which the original action was concluded; provided, however, that the family courts shall also have original jurisdiction of habeas corpus actions if the person who is the subject of the action would otherwise be within the jurisdiction of the family court."); *id.* § 63-3-650 ("Any judge shall have the power to issue a writ of habeas corpus to produce any person under the age of seventeen in court where necessary.").

As to the changes that would be necessary to implement a juvenile's right to a jury trial, the Amici Curiae oversimplify what would be required. They contend jurors for a family court trial could be selected from a jury pool that has been summoned for the Court of Common Pleas or the Court of General Sessions. This procedure would defeat the General Assembly's intent to keep juvenile proceedings separate and distinct from adult proceedings. It would also create an inefficient and overlapping system where a circuit court judge qualifies a jury panel and then jurors are selected before a family court judge to serve on a juvenile case. Additionally, this procedure would result in increased expenditures for counties as more jurors would need to be compensated and staff employed.

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[12] Arguably, the difference in the burdens of proof in the proceedings, i.e., beyond a reasonable doubt versus clear and convincing, constitutes a fundamental distinction. However, this distinction is not dispositive as bench trials are routinely conducted in the Court of General Sessions where the burden of proof is beyond a reasonable doubt.

Based on the foregoing, we hold that Appellant has not met his burden to prove that section 63-3-590 violates either the federal or state constitution.[13] *See* 43 C.J.S. *Infant*s § 134 (Supp. 2014) ("Although a jury trial in a juvenile delinquency proceeding may not be a federal nor a state constitutional requisite, in the adjudicative stage of a state juvenile court delinquency proceeding, if, in its wisdom, any state feels that a jury trial is desirable, there is no impediment to its installing a system embracing that feature, but such is the State's privilege and not its obligation."). Consequently, we adhere to our decision in *Stephen W.*

2. Constitutional Concerns Beyond Adjudication Proceedings

While we find a decision to affirm the family court is correct as Appellant's arguments are confined to challenging a juvenile's inability to request a jury trial in *adjudication proceedings*, we recognize a state constitutional conundrum. Under the plain terms of our state constitution, a juvenile charged with a criminal offense has an absolute right to a jury trial. Although the General Assembly may prohibit a juvenile from exercising this right in juvenile adjudications, it cannot legislatively eliminate the right in its entirety.

As the law currently stands, the General Assembly has authorized only the State and the family court to initiate the transfer of a juvenile into a court where the case could be tried by a jury. *See* S.C. Code Ann. § 63-19-1210(4)-(10) (2010) (providing circumstances transferring jurisdiction of a juvenile from family court to a "court which would have trial jurisdiction of the offenses if committed by an adult" based on determination by family court either on its own decision or following the State's request); 21 S.C. *Jur. Children & Families* § 102 (Supp. 2014) (discussing circumstances involving "transfer of a juvenile to adult court"). This procedure is arguably unconstitutional as a juvenile should be able to affirmatively exercise the right to have a jury trial if charged with an offense for which the family court could waive jurisdiction. *See* 47 Am. Jur. 2d *Juvenile Courts* § 94 (Supp. 2014) ("There is no constitutional right to a jury trial in

[13] *See State v. Ross*, 185 S.C. 472, 477, 194 S.E. 439, 441 (1937) ("A court should not declare a statute unconstitutional unless its invalidity is manifest beyond a reasonable doubt, and the burden to show its unconstitutionality rests upon the one making the attack. It does not require citation of authorities to sustain this proposition, for our court has so often announced this principle, in cases which it has been called upon to decide the question of the constitutionality of certain statutes, that this principle has become axiomatic.").

juvenile delinquency proceedings and such right is purely statutory. Some authority, though, holds that a juvenile has a state constitutional right to a jury trial, *or that a juvenile has a right to a jury trial if accused of an act which would be a crime if committed by an adult*." (footnotes omitted) (emphasis added)).[14]

Without question, the South Carolina Children's Code and its adjudication procedure emanate from the State's power and responsibility as *parens patriae*. The State's status as *parens patriae* is substantial and should not be easily dismissed. Concomitant with this status is the responsibility not to arbitrarily abandon it without articulable good cause. Given the significance of abdicating this role, this Court has adopted factors for a family court to evaluate before transferring a juvenile's case to the Court of General Sessions.[15] Nonetheless, the

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[14] Although a juvenile may not initiate the waiver of jurisdiction, we note that he or she may appeal the waiver order or consent to the transfer. *See State v. Rice*, 401 S.C. 330, 737 S.E.2d 485 (2013) (affirming juvenile's plea of guilty in general sessions court and finding that juvenile, by pleading guilty, waived any constitutional challenge to the family court waiver of jurisdiction); *State v. Lamb*, 374 S.C. 346, 649 S.E.2d 486 (2007) (affirming juvenile's conviction for murder and concluding court of general sessions had subject matter jurisdiction to try juvenile after the family court accepted juvenile's consent to transfer jurisdiction). However, these procedures do not equate to an absolute right to affirmatively request a jury trial.

[15] This Court has stated that "[u]pon a motion to transfer jurisdiction, the family court must determine if it is in the best interest of both the child and the community before granting the transfer request." *State v. Pittman*, 373 S.C. 527, 558, 647 S.E.2d 144, 160 (2007). "The family court must consider eight factors, as approved by the United States Supreme Court in *Kent v. United States*, 383 U.S. 541 (1966), in making this determination." *Id.* at 558-59, 647 S.E.2d at 160. The factors are:

> (1) The seriousness of the alleged offense.
>
> (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner.
>
> (3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

State's status as *parens patriae* cannot supplant a juvenile's immutable state constitutional rights.

The apparent tension between the State's power as *parens patriae* and a juvenile's state constitutional right to a jury trial must be reconciled. Reconciliation is found by recognizing that the two are not mutually exclusive and that they are in fact dual tracks for handling juvenile transgressions. Although a juvenile is not entitled to a jury trial in an adjudication proceeding, the juvenile should be permitted to remove his case from the family court to a court of competent jurisdiction where a jury trial may be conducted. However, when this election is made, the juvenile forfeits the benevolent treatment of the *parens patriae* adjudication proceeding.

III. Conclusion

After consideration of the issues raised by Appellant and the Amici Curiae, we adhere to our decision in *Stephen W.* Accordingly, we affirm the family court's denial of Appellant's motion for a jury trial in his adjudication proceedings.

> (4) The prosecutive merit of the complaint.
> (5) The desirability of trial and disposition of the entire offense in one court.
>
> (6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
>
> (7) The record and previous history of the juvenile, including previous contacts with law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation, or prior commitments to juvenile institutions.
>
> (8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available.

Id. at 559, 647 S.E.2d at 160.

AFFIRMED.

HEARN, J., concurs. TOAL, C.J., concurring in part and dissenting in part in a separate opinion. PLEICONES, J., concurring in part and dissenting in part in a separate opinion in which KITTREDGE, J., concurs.

CHIEF JUSTICE TOAL: I join the well-reasoned lead opinion as to Sections I; II(A)(1); II(A)(2); II(B)(1); and III. I decline to join Section II(B)(2) of the lead opinion and dissent therefrom.

JUSTICE PLEICONES: I concur in part and dissent in part. First, I agree that our decision in *Stephen W.*,[16] is dispositive of the only issue properly before this Court: whether a juvenile is entitled to a jury trial in a family court delinquency proceeding. To the extent that the majority addresses matters raised only by the amicus curiae, I dissent. *See* Rule 213 SCACR. I also disagree with any suggestion that a juvenile's "immutable right to a jury trial" requires the Court *sua sponte* create a right allowing the juvenile to waive his case from family court to general sessions. The purported "constitutional conundrum" results from the equation of a juvenile delinquency petition with a criminal charge, a misunderstanding that is wholly at odds with our analysis in *Stephen W.* Further, were this new procedure indeed constitutionally mandated, then I do not understand why we would not remand this appeal to allow Appellant the opportunity to exercise his right to a jury trial in general sessions.

In my opinion, this case is controlled in its entirety by *Stephen W.* Accordingly, I respectfully dissent from any discussion beyond the issue raised by the Appellant, and would hold only that the family court order should be affirmed.

KITTREDGE, J., concurs.

[16] *In re Stephen W.*, Op. No. 27413 (S.C. Sup. Ct. filed July 16, 2014).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Coleen G. Mick-Skaggs, Appellant,

v.

William B. Skaggs, Respondent.

Appellate Case No. 2011-195268

Appeal From Horry County
Wylie H. Caldwell, Jr., Family Court Judge

Opinion No. 5229
Heard January 6, 2014 – Filed May 14, 2014
Withdrawn, Substituted and Refiled August 1, 2014

AFFIRMED

Nicole Nicolette Mace, of the Mace Law Firm, of Myrtle Beach, for Appellant.

William B. Skaggs, pro se, for Respondent.

WILLIAMS, J.: On appeal, Coleen Mick-Skaggs (Wife) claims the family court erred in (1) denying Wife's request for a divorce on the grounds of William Skaggs' (Husband) adultery; (2) denying her request for alimony when Husband failed to prove she committed adultery; (3) improperly admitting certain photographs into evidence; and (4) improperly requiring Wife to pay her own attorney's fees. We affirm.

FACTS/PROCEDURAL HISTORY

Husband and Wife married on February 9, 1991. After approximately eighteen years of marriage, the parties separated in October 2009. Wife then filed for divorce in December 2009 on the grounds of Husband's adultery. Husband timely answered and counterclaimed, accusing Wife of adultery. Husband subsequently amended his pleadings to request a divorce based on one year's continuous separation. At the time of the parties' divorce, Wife was forty-seven years old and Husband was forty-nine years old.

Prior to the final hearing, the family court issued a temporary order requiring Husband to maintain health insurance for Wife and to pay Wife $1,500 in alimony per month. By the date of the final hearing, the parties reached an agreement on the equitable division of marital property and the division of marital debt. The primary issues to be decided at the final hearing were adultery and alimony.

Regarding alimony, Wife claimed she requested alimony because she only received $982 per month for her Social Security disability, but her prescriptions were at least $1,000 per month. Wife stated she and Husband both worked their entire marriage until Wife was forced to retire from her position as a paralegal in September 2008 due to her deteriorating physical condition. Specifically, she testified she suffers from an inoperable spinal tumor, fibromyalgia, degenerative disc disease, chronic pulmonary disease, rheumatoid arthritis, depression, anxiety, peripheral nerve damage, and severe eye damage resulting from a stroke.

Husband questioned the extent of Wife's disability. He highlighted how she continued to ride horses and compete in horse shows after quitting work and applying for disability benefits. Husband presented Wife with certain photographs of her at local horse shows. Wife responded almost all of the pictures were prior to receiving disability benefits, and she continued to be involved in riding and caring for horses because she was "trying to hold on to hope" when dealing with her deteriorating physical condition.

To support his adultery claim, Husband introduced certain text messages sent from Wife's phone. Husband read the following text, which Wife asserted was sent by one of her friends from her phone as a joke. It read:

> I'm at Aynor Bar now. . . . I'm dancing with about half a dozen and French kissing them all down to the floor, and

> they don't kiss like small-mouth brim. They actually know how to kiss. LOL. Got a couple off-duty P.D. officers here, too. Gonna let me (sic) strip search my ass if they want to. . . . I love being single and free. Leaving for Texas for cutting horse congress, and I'm gonna have so much fun roping me a cowboy who knows what a real man is all about. 6-2, thirty-five years old. . . .

Husband also called William Russo, a co-worker and friend of Husband, to support his allegations of Wife's adultery. Russo stated that on the night of Wife's birthday, he arrived at the Cattle Company bar around midnight. Upon walking into the bar, he claimed he saw Wife with a couple and another male. Upon Husband's request, Russo stated he stayed outside the bar for approximately an hour and a half until the bar closed at 1:30 a.m. At that time, Russo observed Wife exit the bar with the same male. Russo stated, "At one point, she had her head in his lap asleep or whatever and, you know, there was certainly some hanging on each other while they were on the front porch. Some affection."

Russo testified Wife eventually took a cab home, and the male followed the cab in his separate vehicle. Russo observed the male enter Wife's home. Russo stated he waited outside Wife's house for approximately twenty-five or thirty minutes, and the male did not leave while Russo was there. Husband corroborated Russo's testimony and stated that on the morning after Wife's birthday, he drove by Wife's home at 5:30 a.m., and an unoccupied car was still parked outside Wife's home.

At the conclusion of Russo's testimony, Husband sought to introduce into evidence several photographs taken by Russo that evening. Wife's counsel objected to the pictures on the grounds they were poor quality and unfairly depicted the scene. The family court admitted the photographs over Wife's objection, ruling, "I think it's admissible, I honestly can't tell what it is, you know. He says what it is, and I'm not -- I'll overrule the objection. [Russo] took the picture. That's what it -- it is what it is."

Mary Katherine Fisher, who boards horses at the parties' barn, corroborated Russo's testimony. She testified she observed Wife kissing the same male outside the Cattle Company bar on the night of Wife's birthday. In an effort to discredit Fisher's testimony, Wife cross-examined Fisher, who admitted to filing two actions against Wife, which were ultimately dismissed, prior to the final hearing.

Husband testified regarding the allegations of his adultery made by Wife. Husband denied cheating on Wife, claiming Wife accused him of having an affair with at least seventeen different women. However, when questioned by Wife's counsel, Husband acknowledged he had feelings for another woman, Destiny Athey, and even stated, "Yeah, the lady I had an affair with . . . ."

In response to Husband's allegations of adultery, Wife recounted the night of her birthday. Wife testified she went to Applebee's Neighborhood Bar and Grill with some friends for dinner and then went to the Cattle Company bar for drinks. She confirmed she "started off with red wine . . . had a couple of beers, and then when [her] other friends got there, they bought [her] a couple of shots." Wife claimed that at the end of the night, she called a cab and went home by herself. She denied the male at the bar stayed at her home that evening.

In support of Wife's allegations against Husband, Wife called Katherine Bujarski, another person who boards horses at Husband and Wife's barn, to testify. Bujarski stated she observed Husband and Debbie Scott (Scott) sitting together at a horse show within the last year. Bujarski testified Husband was rubbing Scott's lower back underneath her shirt. Tamara Tindal, a private investigator, also testified at the final hearing regarding her observations of Husband and Scott. Tindal was hired by a third party, Larry Scott, to conduct surveillance on his wife. Tindal stated she observed Scott and Husband alone on at least five occasions at Husband's barn within the two weeks prior to trial. All of these occurrences were in the evening, with two of these meetings occurring from 11:30 p.m. until 12:59 a.m. and 12:05 a.m. until 12:40 a.m. Tindal stated Husband and Scott were inside the barn[1] during her surveillance, so she did not know whether Husband committed adultery during those times.

At the conclusion of all the testimony, the family court approved the parties' settlement agreement. The court granted the parties a divorce based on one year's continuous separation and stated,

> I'm doing it on these grounds because as I see the evidence, we have evidence of adultery, at least inclination and opportunity on both sides of the case . . . which means that we have, as I see it, uncorroborated

[1] Wife's daughter confirmed that Husband's living quarters were inside the barn.

> evidence of adultery on both sides. For a divorce to be granted on the grounds of adultery, as I understand the law, it needs to be corroborated.

In denying Wife's claim to alimony, the court held, "I don't think adultery as a bar to alimony had to be corroborated as does adultery as a ground for divorce." The court then recounted Russo's testimony and found it to be credible proof that Wife committed adultery and should be barred from receiving alimony. After the family court issued a written order confirming its oral ruling, Wife timely appealed. Husband did not submit a Respondent's brief.

STANDARD OF REVIEW

"In appeals from the family court, [appellate courts] review[] factual and legal issues de novo." *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "[W]hile retaining the authority to make our own findings of fact, we recognize the superior position of the family court judge in making credibility determinations." *Lewis v. Lewis*, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011) (footnote omitted). The burden is upon the appellant to convince the appellate court that the preponderance of the evidence is against the family court's findings. *Id.* "Stated differently, de novo review neither relieves an appellant of demonstrating error nor requires us to ignore the findings of the family court." *Id.* at 388-89, 709 S.E.2d at 654 (italics omitted).

ISSUES ON APPEAL

1. Did the family court err in denying Wife's request for a divorce on the grounds of Husband's adultery?

2. Did the family court err in finding Wife committed adultery, and thus, in barring Wife from receiving alimony?

3. Did the family court err in admitting certain photographs into evidence?

4. Did the family court err in requiring Wife to pay her own attorney's fees?

LAW/ANALYSIS

1. Grounds for Divorce

Wife claims the family court erred in granting the parties a no-fault divorce because she presented sufficient evidence that Husband committed adultery. We agree Wife presented sufficient evidence to establish Husband's adultery, but we find the family court acted within its discretion in awarding the parties a no-fault divorce.

In its final order, the family court held Husband and Wife were entitled to a divorce on the ground of one year's continuous separation. Neither party claims the one year's separation was an improper ground for divorce on appeal; rather, Wife argues the family court should have granted her a divorce based on Husband's adultery. Although Husband and Wife presented evidence at trial that each spouse engaged in extramarital conduct during the course of their marriage, the family court heard this evidence and chose to instead grant the parties a no-fault divorce. Aware of our de novo review, we find the family court was in the best position to assess the parties' and witnesses' testimony as well as the evidence presented in determining which ground for divorce was most appropriate under the circumstances. *See Lewis*, 392 S.C. at 389, 709 S.E.2d at 654 ("[D]e novo review neither relieves an appellant of demonstrating error nor requires us to ignore the findings of the family court."); *see also Lucas v. Lucas*, 279 S.C. 121, 123, 302 S.E.2d 863, 864 (1983) (finding it was within the family court's discretion to deny a divorce on one ground and grant it on another ground).

Further, because the granting of a divorce to Wife on the ground of adultery would not have dissolved the marriage any more completely, we need not alter the family court's decision on this issue. *See Griffith v. Griffith*, 332 S.C. 630, 642, 506 S.E.2d 526, 532 (Ct. App. 1998) (choosing not to modify family court's decision to grant parties a no-fault divorce despite each party's claim of adultery against the other when modifying the basis for the divorce would not dissolve the marriage any more completely); *Smith v. Smith*, 294 S.C. 194, 197, 363 S.E.2d 404, 406 (Ct. App. 1987) (noting husband never contested family court's decision to grant wife a divorce on the ground of one year's separation and upholding family court's denial of husband's counterclaim for a divorce based on wife's adultery when granting the divorce on adultery would not have dissolved marriage any more completely).

2. Wife's entitlement to alimony

Next, Wife contends the family court erred in denying her request for alimony because Husband did not sufficiently demonstrate she committed adultery. We disagree.

In support of its decision to deny Wife alimony, the family court cited to the testimony of Wife, Russo, and Fisher as evidence of Wife's adultery. The family court then held, "The uncorroborated testimony of adultery is sufficient to bar [Wife] from receiving alimony, although insufficient to grant a divorce on the grounds of adultery." Although we agree with the family court's denial of alimony to Wife, we disagree with the family court's statement of the law. Further, we find there is sufficient corroborating testimony.

Corroboration is typically required in divorce actions, but this rule may be relaxed when it is evident that collusion does not exist. *See McLaughlin v. McLaughlin*, 244 S.C. 265, 270, 136 S.E.2d 537, 539 (1964) (stating corroboration is typically necessary in divorce actions but may be relaxed when it is evident that collusion does not exist); *Harvley v. Harvley*, 279 S.C. 572, 574, 310 S.E.2d 161, 162 (Ct. App. 1983) (holding corroboration of testimony is normally required to sustain a ground for divorce, although the requirement can be relaxed when the possibility of collusion is not apparent). In this instance, there was no collusion between the parties as evidenced by the contested nature of the divorce. *See McLaughlin*, 244 S.C. at 271, 136 S.E.2d at 540 (acknowledging some states' adoption of a rule that permits courts to grant a divorce based on the plaintiff's uncorroborated testimony in contested cases and stating that only slight corroboration is necessary in certain contested cases in our state).

Based on our review of the record, we find Husband presented sufficient corroborating testimony. *See RGM v. DEM*, 306 S.C. 145, 149-50, 410 S.E.2d 564, 567 (1991) (finding wife committed adultery for purposes of barring alimony despite family court's finding that each party was entitled to a divorce based on one year's continuous separation). Although we decline to modify the grounds for divorce, we concur with the family court's conclusion that Husband presented a clear preponderance of evidence of Wife's adultery to bar Wife from receiving alimony. We find that based upon the testimony of Russo, Husband, and others that Wife committed adultery on the night of her birthday. While Wife would only admit she went to the bar and consumed a substantial amount of alcohol that evening, several witnesses observed Wife being affectionate with a man throughout the course of that evening. The evidence shows this same man

followed Wife home in the early morning hours, and after being invited inside by Wife, entered Wife's house. We also find Wife's subsequent text messages are circumstantial evidence that indicate a continued disposition to commit adultery. *See Perry v. Perry*, 301 S.C. 147, 150, 390 S.E.2d 480, 481-82 (Ct. App. 1990) (finding circumstantial evidence over an extended period of time indicating wife's infidelity was sufficient to prove wife was disposed to commit adultery because the adultery could be inferred from the circumstances). We hold the foregoing testimony shows inclination and opportunity and is "sufficiently definite to identify the time and place of offense and the circumstances under which it was committed." *See Loftis v. Loftis*, 284 S.C. 216, 218, 325 S.E.2d 73, 74 (Ct. App. 1985).

Accordingly, we affirm the family court's decision to deny Wife alimony. We also affirm the family court's order as it pertains to reimbursement for temporary alimony. *See Griffith*, 332 S.C. at 642, 506 S.E.2d at 532 (holding the establishment of adultery as a defense to alimony is a bar to all alimony and requires the reimbursement of court-ordered temporary alimony).

3. Admission of Photographs

Wife also claims the family court erred in permitting Husband to introduce certain photographs into evidence because they were poor quality and did not accurately portray the scene.[2] We disagree.

To justify reversal based on the admission or exclusion of evidence, the complaining party must establish both error and resulting prejudice. *Divine v. Robbins*, 385 S.C. 23, 37, 683 S.E.2d 286, 293 (Ct. App. 2009).

We find these photographs were relevant to Husband's claim of adultery against Wife. *See* Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the

[2] Wife also argues on appeal the photographs were not properly authenticated pursuant to Rule 901, SCRE, nor were they admissible duplicates as envisioned by Rules 1001 and 1003, SCRE. Wife never raised these grounds to the family court; thus, to the extent she raises these grounds in her brief, we decline to address them on appeal. *See Bodkin v. Bodkin*, 388 S.C. 203, 227, 694 S.E.2d 230, 243 (Ct. App. 2010) (holding an issue may not be raised for the first time on appeal but must be raised to and ruled upon by the family court to be preserved for appeal).

determination of the action more probable or less probable than it would be without the evidence."). Although Wife claims these photographs were unfairly prejudicial in violation of Rule 403, SCRE, we find the statements of Wife's counsel and the family court prove otherwise. Russo, the witness who took these photographs, Wife's counsel, and the family court all acknowledged the quality of the photographs was poor, and it was impossible to discern what the photographs actually depicted. As a result, we fail to see how Wife was prejudiced by the admission of these photographs. Furthermore, this was an action in equity and there was no jury. The likelihood that the family court, as the sole factfinder, was improperly persuaded by the admission of these photographs is negligible. Accordingly, we affirm the family court on this issue.

4. Attorney's Fees

Last, Wife claims the family court erred when it ordered Wife to pay all of her attorney's fees. Wife contends Husband's financial condition was far superior to hers, and as a result, the family court should have ordered Husband to pay her attorney's fees. We disagree.

The family court should first consider the following factors as set forth in *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992), in deciding whether to award attorney's fees and costs: "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) effect of the attorney's fee on each party's standard of living." *Fitzwater v. Fitzwater*, 396 S.C. 361, 370, 721 S.E.2d 7, 12 (Ct. App. 2011). In so doing, the family court should set forth specific findings of fact on the record about each of the required factors from *E.D.M*. *See Griffith*, 332 S.C. at 646, 506 S.E.2d at 534-35 (citing Rule 26(a), SCRFC, and highlighting requirement of family court to make specific findings of fact on the record about each of the required factors from *E.D.M.*, but noting the appellate court may make its own findings of fact in accordance with the preponderance of the evidence if the record is sufficient).

Although the family court failed to set forth findings of fact in support of its decision, we find the family court acted within its discretion in requiring the parties to pay their own attorney's fees. The family court found both parties were entitled to a divorce based on one year's continuous separation. This ruling neither benefits nor harms either party. The family court found Wife was not entitled to alimony,

which we affirm on appeal. Further, because Wife failed to include her attorney's fees affidavit or either party's financial declarations in the record on appeal, we are unable to discern exactly how much she incurred in attorney's fees or how those fees will impact her standard of living or her current financial condition. *See Harkins v. Greenville Cnty.*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (finding it impossible to evaluate the merits of certain issues because the appellant failed to include the relevant material in the record on appeal); *See Perry v. Perry*, 301 S.C. 147, 151, 390 S.E.2d 480, 482 (Ct. App. 1990) (stating the appellant must provide "a sufficient record on appeal from which this [c]ourt can make an intelligent review"). We are aware of Wife's claim that she only receives disability, and she has very few assets from which to pay her attorney's fees. However, without further proof that the family court acted improperly in requiring the parties to pay their own attorney's fees, we affirm the family court's decision on this issue.

CONCLUSION

Based on the foregoing, we affirm the family court's order finding Husband and Wife are entitled to a divorce on the ground of one year's continuous separation. We also affirm the family court's decision to deny Wife's request for alimony, its admission of certain photographs into evidence, and its ruling on each party's entitlement to attorney's fees. Accordingly, the family court's decision is

AFFIRMED.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James D. Fowler, Respondent,

v.

Nationwide Mutual Fire Insurance Company and Andrew Flanagan, Defendants,

Of Whom Nationwide Mutual Fire Insurance Company is the Appellant.

Appellate Case No. 2012-213250

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

Opinion No. 5256
Heard April 9, 2014 – Filed August 6, 2014

REVERSED AND REMANDED

John Robert Murphy and Wesley Brian Sawyer, both of Murphy & Grantland, P.A., of Columbia, for Appellant.

Clinch H. Belser, Jr., Michael Joseph Polk, and H. Freeman Belser, all of Belser & Belser, P.A., of Columbia, for Respondent.

WILLIAMS, J.: After his home was destroyed by fire, James D. Fowler brought this suit against Nationwide Mutual Fire Insurance Company ("Nationwide"),

claiming Nationwide improperly denied his insurance claim. Following a jury verdict in Fowler's favor, Nationwide appealed, arguing the circuit court erred in admitting opinion testimony from a non-expert. We reverse and remand.

FACTS/PROCEDURAL HISTORY

On January 17, 2009, Fowler's home in Oconee County, South Carolina, was destroyed by fire. The Friendship Fire Department, a local volunteer fire department, and its fire chief, David Wright, responded to the emergency call and were responsible for putting out the fire at Fowler's home. When Chief Wright arrived at Fowler's home, the fire had already burned through the roof, and a large beam had fallen, blocking the front door to the home.

After the fire department extinguished the fire, Chief Wright completed a standardized form known as a "Truck Report." According to Chief Wright, state regulations require fire departments to complete a Truck Report after each fire and submit the form to the State Fire Marshal's office. A Truck Report contains basic information about the fire. Chief Wright testified he followed specific instructions from a manual provided to the fire department when he completed the Truck Report.

At the time of the fire, Fowler had a homeowner's fire insurance policy with Nationwide. After an initial meeting with Fowler, Nationwide decided to conduct an independent investigation into the cause of the fire. Nationwide hired a certified fire investigator to examine the cause and origin of the fire. Nationwide also conducted its own investigation into Fowler's financial circumstances at the time of his claim. Relying upon the motive and opportunity created by Fowler's financial difficulties at the time of his claim and its fire investigator's finding the fire was incendiary, Nationwide determined the fire was intentional. Accordingly, Nationwide denied Fowler coverage based upon his policy's intentional acts exclusion.

On June 29, 2009, Fowler brought suit against Nationwide and Andrew Flanagan, Nationwide's local claims adjuster, alleging breach of contract, bad faith of an insurance contract, and slander per se. The case was tried before a jury in Oconee County on November 28 through December 2, 2011.

Prior to the start of trial, Nationwide made a motion in limine to exclude testimony from Chief Wright as to the cause and origin of the fire. Nationwide also objected to the admission of corresponding portions of the Truck Report containing Chief Wright's opinions. Nationwide renewed these objections at trial. Prior to Chief Wright's testimony before the jury, the circuit court allowed both parties to conduct voir dire on Chief Wright and heard further arguments on the admissibility of Chief Wright's opinions and the Truck Report. The circuit court ultimately held Chief Wright was not qualified as an expert and therefore could not give opinion testimony. However, the circuit court admitted the Truck Report into evidence and allowed Chief Wright to testify about the report and his rationale in completing it.

On the version of the Truck Report admitted at trial, Chief Wright provided the following information: (1) in the blank for "Area of Origin," Wright wrote "Living Room"; (2) in the blank for "Cause of Ignition," Wright wrote "Unintentional"; and (3) in the blank for "Equipment involved in Ignition," Wright wrote "Heater." During his testimony, Chief Wright explained his observations of the fire and his rationale for his entries on the Truck Report. He testified that he indicated the "Living Room" was the area of origin because it was the most heavily damaged area in the house. He explained that he wrote "Unintentional" for the cause of ignition because he did not see or smell anything that made him suspect the use of accelerants or arson. Finally, Chief Wright explained that he wrote "Heater" for the equipment involved in ignition because a kerosene heater was at the base of a V-shaped burn pattern on the wall of the living room. Chief Wright testified that when a fire burns up a wall, it spreads out in the shape of a V, and that the "V shape . . . points down to where the fire originated."

The jury returned a verdict in favor of Fowler on the breach of contract and the bad faith claims. The jury returned a defense verdict on the slander per se claim. The jury awarded $501,444 for the breach of contract claim and $3,000 for the bad faith claim.

Following trial, Nationwide moved for a new trial based in part upon the admission of improper opinion testimony from Chief Wright, both during his trial testimony and in the Truck Report. The circuit court denied Nationwide's motion and found Chief Wright's statements at trial were admissible perceptions under Rule 701 of the South Carolina Rules of Evidence. Further, the circuit court found the Truck Report was admissible as a public records exception to hearsay under Rule 803(8) of the South Carolina Rules of Evidence. This appeal followed.

LAW/ANALYSIS

Nationwide argues the circuit court erred in failing to grant a new trial based upon the improper admission of opinion testimony from Chief Wright. Specifically, Nationwide argues the circuit court erred in admitting the Truck Report and Chief Wright's testimony regarding his rationale for completing the report. Nationwide contends this evidence was inadmissible because it contained opinion testimony Chief Wright was not qualified to provide the jury. We agree.

"The admission of evidence is within the [circuit] court's discretion." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000). "The [circuit] court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law." *Id.* "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). "[T]he admission of incompetent evidence having some probative value upon a material issue of fact in the case is ordinarily presumed to be prejudicial." *Mali v. Odom*, 295 S.C. 78, 84, 367 S.E.2d 166, 170 (Ct. App. 1988).

I. Chief Wright's Testimony at trial

Nationwide argues Chief Wright's testimony regarding the cause of the fire was inadmissible opinion testimony from a lay witness. We agree.

At trial, the circuit court found Chief Wright was not qualified as an expert and therefore could not give his opinion on the fire and its origin.[1] The circuit court

[1] The issue of whether the circuit court properly chose to not qualify Chief Wright as an expert is not on appeal, and as a result, we decline to address his qualification as an expert. *See Fields*, 363 S.C. at 25, 609 S.E.2d at 509 ("Qualification of an expert and the admission or exclusion of his testimony is a matter within the sound discretion of the [circuit] court."). Our holding in this case is not intended to suggest volunteer firefighters could not be qualified as expert witnesses if the circuit court, in its discretion, finds the "proffered expert has indeed acquired the

held Chief Wright could only testify as a lay witness. However, the circuit court ruled the Truck Report was admissible and Chief Wright would be able to testify about his entries on the Truck Report. In its order denying Nationwide's motion for a new trial, the circuit court found Chief Wright's statements at trial were admissible perceptions under Rule 701 of the South Carolina Rules of Evidence.

Under Rule 701,

> If the witness is not testifying as an expert, the witness'[s] testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

In *State v. Kelly*, our supreme court considered a similar situation in the context of a police officer testifying about the cause of an automobile accident. 285 S.C. 373, 374, 329 S.E.2d 442, 443 (1985). In *Kelly*, the defendant was convicted in magistrate's court of failing to stop at a stop sign, which resulted in an automobile collision. *Id.* at 374, 329 S.E.2d at 442. At trial, the magistrate's court allowed the investigating police officer, without first being qualified as an expert, to draw conclusions from his direct observations and speculate as to the cause of the accident. *Id.* at 374, 329 S.E.2d at 443. Our supreme court held that a police officer "may only testify regarding his direct observations unless . . . qualified as an expert." *Id.* Because it was "clear that [the police officer's] testimony was an opinion" and "dealt with the ultimate issues at trial," our supreme court reversed and granted a new trial. *Id.* at 374-75, 329 S.E.2d at 443.

In the instant case, we find portions of Chief Wright's testimony were improperly admitted opinion testimony. Specifically, we find his testimony regarding the "V

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requisite knowledge and skill to qualify as an expert in the particular subject matter." *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010).

pattern" as an indicator of the fire's origin[2] and his testimony regarding whether the fire was unintentional[3] were both opinion testimonies. We disagree with the circuit court that Chief Wright's opinions were permissible perceptions under Rule 701. These statements were not mere perceptions observed by Chief Wright, but instead constituted opinions that "require special knowledge, skill, experience or training" to properly be made. *See* Rule 701, SCRE ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which . . . do not require special knowledge, skill, experience or training"). Accordingly, we find Chief Wright should not have been allowed to offer his opinions on these issues during his testimony at trial. *See Kelly*, 285 S.C. at 374, 329 S.E.2d at 443 (finding a lay witness "may only testify regarding his direct observations unless . . . qualified as an expert").

II. Truck Report

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[2] When asked to "explain to the jury what the V factor or V pattern is," Chief Wright stated,

> Ever since I've been in the fire service, the few times I've been around people who do inspections or investigations, they call a V pattern, it's a [V] shape that points down to where the fire originated, and as it comes up a wall, it spreads out like V as it comes up.

When later asked why he indicated the "Heater" was the "Equipment involved in the Ignition," Wright stated, "I put that there because that was at the bottom of the V pattern."

[3] When asked to explain why his report was important, Chief Wright responded, "[W]e're supposed to investigate every fire, not like an investigator, but we're supposed to look at every fire and determine if we need to call SLED or not." He later testified he "didn't see or smell anything that made him think [the fire] was intentional." Finally, when discussing the Truck Report, Chief Wright stated, "The next one says Cause of Ignition, and I've got Unintentional there, because I did not see anything that would make it to me. That's just my opinion. I didn't see or smell anything, like I said before."

Nationwide argues the circuit court erred in finding the Truck Report was admissible as a public records hearsay exception under Rule 803(8) of the South Carolina Rules of Evidence. Nationwide contends the Truck Report should not have been admitted under Rule 803(8) because it contained opinions and conclusions. We agree.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE; *see also R & G Constr.*, 343 S.C. at 439, 540 S.E.2d at 121. The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. *See* Rule 802, SCRE.

Rule 803(8) provides the following exception to the general hearsay rule,

> Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report . . . ; *provided, however,* that investigative notes involving opinions, judgments, or conclusions are not admissible.

Accordingly, reports containing opinions, judgments, or conclusions are outside the scope of Rule 803(8)'s public records exception. *See State v. Morris*, 376 S.C. 189, 207, 656 S.E.2d 359, 368-69 (2008) (affirming the exclusion of a bankruptcy examiner's report because the report contained "a great deal of investigative opinions, legal analysis, and potential conclusions" that rendered the report "outside the scope of the public records and reports exception"); *S.C. Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 147 n.11, 705 S.E.2d 425, 430 n.11 (2011) (noting Rule 803(8), SCRE, provides for the admission of certain public records but still excludes "investigative notes involving opinions, judgments, or conclusions").

We find *Bloomgren v. Fire Insurance Exchange*, 517 N.E.2d 290 (Ill. App. Ct. 1987), to be instructive on this issue as the Appellate Court of Illinois addressed an issue nearly identical to the present case. In *Bloomgren*, the plaintiffs sought to

introduce a report prepared by a local firefighter. *Id.* at 292. This report was completed pursuant to a statutory duty imposed upon local firemen. *Id.* At trial, the firefighter was not qualified as an expert witness. *Id.* at 293. Further, during cross-examination, the firefighter admitted he did not have any training in the investigation of fires or their causes and origins. *Id.* In the report, the firefighter wrote the "ignition factor" was "electrical" and the equipment involved in ignition was "fixed wiring." *Id.* The court held this report was not admissible under Illinois's equivalent of Rule 803(8).[4] *Id.* at 294. In support of this conclusion, the court found the report "clearly contain[ed] an opinion as to the cause of the fire and, as such, was not admissible under the public records exception to the hearsay rule unless the author of the report . . . was qualified as an expert to give such an opinion." *Id.* The court ultimately found "the fire incident report was erroneously admitted" and after concluding its admission was prejudicial and materially affected the outcome of trial, the court remanded the case for a new trial. *Id.* at 294-95.

The facts of the instant case are nearly identical to those in *Bloomgren*. Fowler sought to introduce the Truck Report, which Chief Wright completed as required by state regulations. However, the circuit court specifically found Chief Wright was not qualified as an expert and could not give opinion testimony. Nevertheless, the circuit court admitted a version of the Truck Report that contained the following information: (1) the fire originated in the living room, (2) the fire was unintentional, and (3) the heater was the cause of ignition. We find these three entries constitute opinions or conclusions as to the area of origin, the cause of ignition, and the equipment involved in ignition. *See id.* at 293 (finding statements in a firefighter's report stating the "ignition factor" was "electrical" and the equipment involved in ignition was "fixed wiring" amounted to an opinion as to the cause of the fire). Because Chief Wright was not qualified as an expert who

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[4] Illinois did not adopt a uniform set of Rules of Evidence until 2011. *See* Il. R. Evid. Art. I, Refs & Annos. Prior to that time, evidentiary matters were controlled by case law. Under the controlling case law, public records that "concern causes and effects, involving the exercise of judgment and discretion, expressions of opinion, or the drawing of conclusions are generally not admissible under the public records exception; unless they concern matters to which the official would be qualified to testify about at trial." *Bloomgren*, 517 N.E.2d at 293 (citing *Lombard Park Dist. v. Chicago Title & Trust Co.*, 245 N.E.2d 298, 301-02 (Ill. App. Ct. 1969)).

was capable of forming these opinions, the Truck Report fails to fall under the public records exception created by Rule 803(8). *See id.* at 294 (finding a firefighter's report containing opinion is "not admissible as an exception to the hearsay rule [under an equivalent to Rule 803(8), SCRE] because [the firefighter] was not a qualified expert who was capable of giving an opinion as to the origin of the fire"). Accordingly, we find the circuit court erred in admitting the Truck Report.

III. Prejudice

Nationwide argues that the improper admission of Chief Wright's testimony and the Truck Report prejudiced Nationwide at trial. We agree.

The admission of improper evidence is prejudicial if "there is a reasonable probability the jury's verdict was influenced by the challenged evidence." *Fields*, 363 S.C. at 26, 609 S.E.2d at 509. "[T]he admission of incompetent evidence having some probative value upon a material issue of fact in the case is ordinarily presumed to be prejudicial." *Mali*, 295 S.C. at 84, 367 S.E.2d at 170. In the instant case, we find there is a reasonable probability the improper admission of the opinion testimony influenced the jury's verdict.

Chief Wright testified that his opinion, formed at the scene, was that the fire was unintentional and caused by the heater in the living room. This opinion goes to the ultimate issue in this case. During the course of trial, Fowler made repeated references to Chief Wright and his Truck Report. Fowler outlined Chief Wright's testimony in his opening statement. Fowler used the Truck Report during his questioning of all the expert witnesses testifying at trial. Fowler repeatedly referred to Chief Wright and the Truck Report during his closing statement.[5]

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[5] During his closing argument, Fowler repeatedly referred to Chief Wright's testimony and the Truck Report as sources of independent information supporting his position the fire was unintentional. In the opening remarks of his closing argument, Fowler mentioned Chief Wright's report on the day of the fire, "that the fire started near the [kerosene] heater, and his note that it was unintentional." Later in this argument, Fowler stated,

> Now Chief David Wright has been attacked as being not a competent fire expert. They praised him for being a

Ultimately, Fowler inferred the jury should rely upon Chief Wright and the Truck report by stating, "[Chief Wright] has plenty of common sense, he has plenty of experience to do his job, plenty of common sense and experience to answer the key question in this case."

We find a reasonable probability exists that the jury's verdict was influenced by the admission of Chief Wright's testimony and the Truck Report. Accordingly, we find the circuit court's error in admitting Chief Wright's testimony and the Truck Report prejudiced Nationwide. *See id.* ("[T]he admission of incompetent evidence having some probative value upon a material issue of fact in the case is ordinarily presumed to be prejudicial."). Thus, we reverse and remand this case for a new trial. *See Fields*, 363 S.C. at 26, 609 S.E.2d at 509 ("To warrant reversal based on the admission . . . of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence . . . .").

CONCLUSION

Based on the foregoing, we find the circuit court improperly admitted the Truck report and Chief Wright's testimony regarding his rationale in completing this report. Accordingly, we reverse and remand this case for a new trial. [6]

> nice guy, which he is a nice guy; they praised him for being an experienced firefighter, which is true; but they completely disregard and disrespect him as a person with any experience to identify and observe what the State Marshal requires him to observe.
>
> But I suggest if you think about what he said, and look at what the evidence in the case is, he has plenty of common sense, he has plenty of experience to do his job, plenty of common sense and experience to answer the key question in this case.

[6] Nationwide raises the following four additional grounds as error in its appeal: (1) the failure to award a setoff for prior payments made on Fowler's behalf; (2) the failure to grant a new trial when the jury verdict was excessive and based upon passion, caprice, or prejudice; (3) the failure to remit the jury verdict; and (4) the failure to grant a Judgment Notwithstanding the Verdict (JNOV) on Fowler's bad

REVERSED AND REMANDED.

KONDUROS and LOCKEMY, JJ., concur.

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faith claim. Due to our disposition of its issue regarding Chief Wright's testimony and the Truck Report, we do not reach Nationwide's remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (recognizing that an appellate court need not address remaining issues when resolution of one issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jefferson Perry, Appellant.

Appellate Case No. 2012-211430

Appeal From Spartanburg County
John C. Hayes, III, Circuit Court Judge

Opinion No. 5257
Heard March 4, 2014 – Filed August 6, 2014

AFFIRMED

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

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

GEATHERS, J.: Appellant Jefferson Perry was convicted of committing a lewd act on a minor. Appellant challenges his conviction, arguing the trial court erred in: (1) charging the jury that time is not a material element of committing a lewd act on a minor; and (2) admitting into evidence a DVD recording of the minor victim's two interviews with a forensic examiner. We affirm.

FACTS/PROCEDURAL HISTORY

During the week of Christmas 2007, Victim, who was nine years old, stayed with her father, a few relatives, and family friends at her uncle's mobile home in Inman, South Carolina. At some point during the week, Appellant and his cousin, Brad, slept overnight at the mobile home. Victim returned to the home she shared with her mother and stepfather in early January 2008. Later that month, Victim disclosed to her mother that Appellant had touched her inappropriately one night while she was sleeping at the mobile home.

As a part of the subsequent police investigation, Victim twice interviewed with forensic interviewer Wiley Garrett at the Children's Advocacy Center in Spartanburg, South Carolina. During the first interview, on February 7, 2008, Victim disclosed that she was sleeping on her uncle's living room floor when she awoke to find Appellant with his hand down her pants. According to Victim, the alleged incident occurred "after my Daddy Jimmy's birthday and Christmas." Victim indicated that at the time of the alleged incident, her cousin, Brittany, who was also staying at the mobile home, had recently given birth to a baby boy. At the second interview, on February 14, 2008, Victim made a similar disclosure of sexual touching. Victim, however, did not identify Brittany as one of the individuals present in the mobile home at the time of the alleged incident.

The grand jury indicted Appellant on one charge of committing or attempting to commit a lewd act upon a child under the age of sixteen.[1] The case proceeded to trial on April 10-12, 2012. At the start of trial, the trial court held an in camera hearing to determine the admissibility of a DVD recording of both forensic interviews. During the in camera hearing, Garrett provided a detailed description of his approach to questioning a child who may have been sexually abused. Following Garrett's testimony, the recording was played for the court. Defense counsel objected to the admission of the recording on the ground that it would bolster Victim's testimony. The trial court determined the recording was admissible under section 17-23-175 of the South Carolina Code (2003), which allows the admission of out-of-court statements by a child under the age of twelve when certain requirements are met.

[1] Appellant was indicted pursuant to section 16-15-140 of the South Carolina Code (2003), which was repealed on June 18, 2012 by 2012 Act No. 255 § 14.

Victim, who was thirteen years old at the time of trial, testified in detail concerning the alleged incident. She asserted the alleged incident occurred on December 29, 2007. When questioned by the solicitor how she knew the exact date, Victim replied that the alleged incident happened "a day or two before" her father's birthday on December 31. Victim identified several people who were present at the mobile home on the night of the alleged incident. She stated: "It was me, [my uncle] Bryan, [my cousin] Bryanne, my dad, my Nana, my dad's girlfriend, and [my cousin] Paul."

Victim's mother, Stacy Gregory, testified Victim had a scheduled visitation with her father during the week of Christmas 2007. Gregory stated she picked Victim up from the mobile home sometime around New Year's Day 2008. According to Gregory, on January 29, 2008, Victim disclosed to her that Appellant had inappropriately touched her.

The State also presented the testimony of Wiley Garrett, who was qualified as an expert in forensic interviewing. Garrett testified he conducted two fact-finding interviews with Victim and one joint interview with Victim's mother and stepfather. The trial court admitted into evidence the DVD recording of Garrett's two forensic interviews with Victim, which was played for the jury. On cross-examination, Garrett confirmed that during one of the interviews Victim told him "Brittany that . . . just had a baby" was present in the mobile home on the night of the alleged incident.

Appellant testified he stayed at the mobile home "only once." Although Appellant could not recall the exact date he spent the night at the mobile home, he indicated it was a few days after Brittany delivered her baby. Appellant admitted that he had about four or five beers that night; however, he denied he was drunk. Appellant adamantly denied touching Victim inappropriately.

Appellant's cousin, Elizabeth Blackwell, testified she was in a relationship with Victim's uncle and had previously invited Appellant to stay at the mobile home. According to Blackwell, Victim and Appellant were present in the mobile home at the same time on only one occasion. Blackwell claimed that on this occasion her daughter, Brittany Fowler, was also present in the mobile home, along with Brittany's then-newborn son. Blackwell indicated her grandson was born in early January 2008. Brittany Fowler corroborated Blackwell's testimony regarding the

timeframe. Additionally, Fowler presented her son's birth certificate, which was admitted into evidence.

After the completion of testimony, defense counsel moved for a directed verdict, arguing that it was impossible for the incident to have occurred on either of the dates listed on the indictment.[2] Specifically, defense counsel pointed to the fact that Brittany Fowler's son was born in early January 2008. The State countered that the only contradictory evidence concerned whether Appellant touched Victim. Additionally, the State argued the case did not involve a time-specific incident. In response, defense counsel noted that Victim stated in one of the forensic interviews that Brittany had already had her baby at the time of the alleged incident. The trial court denied defense counsel's motion, reasoning the timing issue went to Victim's credibility.

During the charge conference, the State requested the trial court instruct the jury that time is not a material element of the offense of committing a lewd act with a minor. Defense counsel objected to the requested instruction, and engaged in the following colloquy with the trial court:

> Mr. Hall: [W]e have a specific date alleged. They presented it several times. The child testified, if I'm not mistaken, that it occurred the weekend before my daddy's birthday. Daddy's birthday was [December 31st]. Very specific and I think to do that is giving, carving out another special consideration for a child victim that cuts in the rights of my client. So, Your Honor, I would oppose that.
>
> The Court: I will charge it, but you know that the other interesting wrinkle about this particular issue is that the mother, Mrs. Gregory, testified that she picked up, [Victim], on New Year[']s Day. So --.
>
> Mr. Hall: That -- picked [Victim] up, yes, sir.

[2] The indictment listed the lewd conduct as occurring "between the dates of" December 29 and December 30, 2007.

> The Court: Right. Which is before Brittany had her baby.
>
> Mr. Hall: This - - yes, sir, that's another thing that I believe, on my side, is physically impossible for it to have happened beforehand, yes, sir.
>
> The Court: Well, that's your argument to the jury.

Thereafter, the trial court gave the requested instruction. The trial court also charged the jury on its duty to consider the credibility and believability of the witnesses.

The jury ultimately found Appellant guilty of committing a lewd act on a minor. Defense counsel moved for a new trial. The trial court denied the motion and sentenced Appellant to five years' imprisonment, suspended on the service of three years' probation. The trial court also required Appellant to enroll in the registry of child abuse and neglect, and to enroll in sex offender counseling. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in charging the jury that time is not a material element of committing a lewd act on a minor?

2. Did the trial court err in admitting into evidence a DVD recording of Victim's two interviews with the forensic examiner?

LAW/ANALYSIS

I. Jury Charge

Appellant contends the trial court erred in charging the jury that time is not a material element of the offense of committing a lewd act on a minor because he centered his defense strategy on attacking inconsistencies in the evidence regarding the timing of the alleged incident. He further argues the charge was "gratuitous" and "unfairly prejudicial." We disagree.

"'In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.'" *State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)). "'A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.'" *Id.* (quoting *Adkins*, 353 S.C. at 318, 577 S.E.2d at 464). "A jury charge that is substantially correct and covers the law does not require reversal." *Id.*

"The trial court is required to charge only the current and correct law of South Carolina." *Id.* at 479, 697 S.E.2d at 583. "'The law to be charged must be determined from the evidence presented at trial.'" *Id.* (quoting *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). "'A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused.'" *Id.* (quoting *State v. Austin*, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989)).

In support of his argument that the trial court erred in instructing the jury that time is not a material element of committing a lewd act on a minor, Appellant cites to *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001). The trial court in *Jones* indicated during a charge conference that it would charge the jury that reasonable doubt meant a doubt which would cause a reasonable person to hesitate to act. 343 S.C. at 576, 541 S.E.2d at 820. Defense counsel specifically incorporated the "hesitate to act" language in his closing argument, telling the jury that "when you go through this testimony and this evidence in this case, you're gonna hesitate." *Id.* at 576–77, 541 S.E.2d at 820–21. The trial court subsequently, upon request from the solicitor, removed the "hesitate to act" language from the jury charge. *Id.* at 577, 541 S.E.2d at 821. On appeal, our supreme court found: "Appellant *reasonably relied* upon the judge's representation that he intended to give that charge to the jury. The decision to alter the charge, *after the argument*, was fundamentally unfair." *Id.* at 578, 541 S.E.2d at 821 (emphases added). Thus, *Jones* requires a defendant to reasonably rely on the trial court's ruling to his or her detriment in order for a subsequent change to impact the fundamental fairness of the defendant's trial.

In the instant case, the trial court made its ruling at the charge conference before closing arguments. Appellant does not contend his strategy of pointing out the inconsistent evidence concerning the timing of the alleged offense was made in reliance on any prior ruling by the trial court. Because Appellant does not argue

that an altered ruling impaired his trial strategy, we find Appellant's reliance on *Jones* is misplaced.

Additionally, we find the trial court's charge adequately covered the law and was consistent with our existing jurisprudence. The crime of committing or attempting a lewd act on a minor is set forth in section 16-15-140 as follows:

> It is unlawful for a person over the age of fourteen years to willfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child.

In *State v. Tumbleston*, 376 S.C. 90, 100–01, 654 S.E.2d 849, 854–55 (Ct. App. 2007), this court interpreted section 16-15-140 as a part of its evaluation of the sufficiency of an indictment charging the defendant with committing a lewd act upon a minor. The appellant argued the indictment was insufficient because it did not allege the specific time of the offense charged. *Id.* at 94, 654 S.E.2d at 851. In reviewing the indictment, the *Tumbleston* court noted that where an indictment allegedly includes an overbroad period, the court must examine whether time is a material element of the offense. *Id.* at 98, 654 S.E.2d at 853. Consequently, as a part of its analysis, the *Tumbleston* court interpreted section 16-15-140 and concluded "[t]ime is not a material element of . . . committing a lewd act on a minor." *Id.* at 101, 654 S.E.2d at 855. Thus, the *Tumbleston* court recognized section 16-15-140 does not have a specificity requirement as to the timing of the offense of committing a lewd act on a minor.[3] *See United States v. Stuckey*, 220

[3] The absence of a specificity requirement in section 16-15-140 is consistent with our legislature's recognition of the special nature of sexual offenses. *State v. Rayfield*, 369 S.C. 106, 117, 631 S.E.2d 244, 250 (2006) ("In enacting [section 16-3-657, which provides the testimony of a victim need not be corroborated in criminal sexual conduct cases], the Legislature recognized that crimes involving criminal sexual conduct fall within a unique category of offenses against the person. In many cases, the only witnesses to a rape or sexual assault are the perpetrator and the victim. An investigation may or may not reveal physical or forensic evidence identifying a particular perpetrator."). Where the victim is a child, such cases often involve continued offenses over an extended period of time

F.3d 976, 982 (8th Cir. 2000) ("Time is not a material element of a criminal offense *unless made so by the statute creating the offense*." (emphasis added)).

The dissent correctly notes that *Tumbleston* is distinguishable from the instant case because it focused solely on the issue of the sufficiency of an indictment. However, the *Tumbleston* court's interpretation of section 16-15-140 is pertinent to the instant matter because the determination of whether a jury charge is proper centers on whether the charge, read as a whole, "contains the correct definition and adequately covers the law." *Mattison*, 388 S.C. at 478, 697 S.E2d at 583 ("A jury charge that is substantially correct and covers the law does not require reversal.").

We further note the charge given in the instant case is consistent with the decision in *State v. Anderson*, 59 S.C. 229, 37 S.E. 820 (1901), which upheld an analogous charge in a case involving larceny. Therein, the trial court charged the jury:

> Time is not what we term of the essence of a crime when a theft or other criminal offense is said to have been committed at a certain time. The gist of the charge does not consist in proving that it was done at the exact time laid in the indictment. The gist is whether or not the crime as alleged was committed, and, if the state proves that it was committed at any time, -the particular charge contained in the indictment prior to the finding of the true bill, -that would be sufficient; but the state must prove the charge as contained in the indictment. It is not necessary, and the state is not required, to prove the exact time laid in the indictment; but, still, it must prove that substantial charge as having been committed at some date, certainly before the finding of the true bill.

Id. at 232, 37 S.E. at 821. In upholding the charge, the *Anderson* court reasoned the trial court's instruction was appropriate because South Carolina does not require the State to prove the exact time of the offense where it is not a material

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or, as in this case, are not reported until sometime after their commission. Thus, a specificity requirement would serve to prevent many prosecutions in child sexual abuse cases.

element of the crime. *Id.* The same is true in the instant case, as *Tumbleston* established that time is not a material element of committing a lewd act on a minor. *See* 376 S.C. at 101, 654 S.E.2d at 855.

In addition to *Anderson*, our more recent jurisprudence addressing jury charges in cases involving child sex crimes suggests the charge in the instant case was not erroneous. In *State v. Rayfield*, the defendant was charged with three counts of criminal sexual conduct with a minor in violation of section 16-3-655 of the South Carolina Code (2003). 369 S.C. 106, 115, 631 S.E.2d 244, 249 (2006). The trial court charged the jury the contents of a related statute, section 16-3-657, which provides "[t]he testimony of the victim need not be corroborated in prosecutions under §§ 16-3-652 through 16-3-658." *Id.* On appeal, our supreme court recognized, "It is not always necessary, of course, to charge the contents of a current statute." *Id.* at 117, 631 S.E.2d at 250. Nevertheless, the court held the instruction did not constitute prejudicial error because "the charge as a whole comport[ed] with the law." *Id.* at 118, 631 S.E.d at 250. In so holding, the court emphasized that along with charging the jury the contents of the statute, the trial judge "thoroughly instructed [the jury] on the State's burden of proof and the jury's duty to find the facts and judge the credibility of witnesses." *Id.*

In the instant matter, it was not required that the trial court charge the jury time is not a material element of committing a lewd act on a minor. However, as in *Rayfield*, this instruction did not constitute reversible error as the charge as a whole comported with the law. The trial court instructed the jury as to the contents of section 16-15-140 along with the State's burden to prove the charges in indictment beyond a reasonable doubt. Thus, the jury was adequately advised of the essential elements of the offense that had to be proven. Moreover, similar to *Rayfield*, the trial court in the instant matter instructed the jury on its duty to consider the credibility of the witness testimony. With regard to credibility, the trial court charged the jury:

> You're not to infer from anything I have said or done or anything I now say or do as indicating an opinion of mine on the facts. Our law does not allow a trial judge to formulate or express to a jury an opinion on the facts. It's simply, solely up to you to examine the evidence and to give to the evidence the effect, the value, the weight, and the truth you believe it should have.

> In doing this, you may believe one witness as opposed to several, several witnesses as opposed to one. You may believe all, part, or none of a witness'[s] testimony. In analyzing the evidence, use your common sense, your sense of logic, your sense of reasoning, and your experiences in life.
>
> As judges of the facts, you must necessarily judge the credibility, that is the believability, of the witnesses who have testified. In assessing credibility, use the things I just talked about. Use the things that you find in your day-to-day life as being indicative of truthfulness in an, in an individual, and you can use certain evaluators, a witness'[s] demeanor, how they act on the stand, are they hesitant or straightforward, is their testimony consistent or inconsistent. Consider the opportunity a witness had to know things to which the witness testified to.
>
> You can consider any bias or prejudice a witness may have. That is, a witness would wish to help or hurt one side or the other, and you can consider whether or not someone has a criminal record in regard to their believability.

In addition to the charge on credibility, the trial court separately instructed the jury as to its duty to assess the believability of a child witness. In its charge, the trial court explained that when a witness is a child "you must determine, as with any witness, whether the testimony is believable." The court further instructed the jury "but as to a child, you may also consider the [child's] age, the child's ability to observe and remember the facts, [and] the child's ability to understand and answer questions."

The dissent argues the circumstances of this case made it improper for the trial court to charge the jury that time is not a material element of the crime of committing a lewd act on a minor. The dissent's argument mirrors the arguments in Justice Pleicones' dissenting opinion in *Rayfield*. In fact, the dissent cites to the *Rayfield* dissent for the proposition that it is not always appropriate for the trial

court to charge a correct point of law to the jury. *See* 369 S.C. at 119, 631 S.E.2d at 251 (Pleicones, J., dissenting) ("Some principles of law, however, are not to be charged to a jury.").

We recognize some principles of law should not always be charged to the jury. However, our supreme court has made clear in at least two instances when a principle of law is not the proper subject of a jury charge. *See State v. Grant*, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980) (holding that it is improper for the trial judge to instruct the jury on the law of flight); *State v. Hammond*, 270 S.C. 347, 356, 242 S.E.2d 411, 416 (1978) (holding that although it is always proper for an attorney in argument to the jury to point out the failure of a party to call a material witness, "such a charge has no proper place in the judge's statement of the law"). To date, the supreme court has not enunciated the "time is not a material element" instruction is erroneous. In fact, in *State v. Schumpert*, 312 S.C. 502, 508, 435 S.E.2d 859, 863 (1993), the court found the trial court's charge including the language "time is not a material element of a sexual assault involving a child" did not prejudice the defendant.

Based on the determination in *Schumpert*, we believe a precedential inference can be drawn that the jury charge in the instant case was not prejudicial. In *Schumpert*, the indictment alleged the defendant raped the minor victim on one occasion between April 13 and May 18, 1990. *Id.* at 507, 435 S.E.2d at 862. At trial, however, the victim testified the rape occurred on either Saturday, April 14 or Saturday, April 21. *Id.* The trial court charged the jury as follows:

> The State is not required to prove that the offense occurred on any exact day between the alleged period of time. But the state is required to prove that the alleged offense did occur sometime during the period of April the 13th, 1990 and May the 18th, 1990. *I charge you that time is not a material element of a sexual assault involving a child*.

Id. at 508, 435 S.E.2d at 862–863 (emphasis added).

On appeal, the defendant challenged the jury charge, arguing "where the State's own proof narrowed the time frame to two Saturdays in April, it was prejudicial to his plea of alibi to allow the jury to find that the offense occurred any time during

the time alleged in the indictment." *Id.* at 508, 435 S.E.2d at 863. The *Schumpert* court found that the defendant was not prejudiced by the trial court's charge regarding the time of the offense. *Id.* In reaching this conclusion, the court reasoned: "Despite the charge allowing the jury to consider a larger time period than that introduced into evidence by the State, appellant produced alibi evidence for every weekend during the entire time period charged." *Id.*

Given the court's reasoning in *Schumpert*, we are not convinced the trial court's charge in the instant matter was prejudicial to Appellant's strategy of highlighting inconsistencies in Victim's statements concerning the time of the alleged incident. At trial, Appellant's defense counsel ably argued these inconsistencies to the jury. In particular, defense counsel noted that Brittany's son, who Victim initially claimed was born just before the time of the alleged incident, was in fact born in January 2008. Defense counsel further contradicted Victim's testimony by offering testimony from Appellant and his cousin, Blackwell. This testimony indicated Appellant visited the mobile home only once and that the visit took place after Brittany had her baby. Moreover, Victim's mother, who was the State's witness, testified she picked Victim up from the mobile home sometime around January 1, 2008, which contradicted Victim's testimony and was consistent with the timeline offered by the defense. Although the trial court instructed the jury that time is not a material element of the offense, defense counsel proceeded with his strategy and presented a defense of factual impossibility. *Cf. Schumpert*, 312 S.C. at 508, 435 S.E.2d at 863 (holding appellant was not prejudiced by charge including the language "time is not a material element of sexual assault involving a child" and allowing the jury to consider a larger time period than that introduced into evidence by the State because "appellant produced alibi evidence for every weekend during the entire time period charged"). Accordingly, we find no prejudice in this case from the charge given.

II. Admission of Forensic Interviews

Appellant argues the trial court erred in admitting the DVD recording of Victim's interviews with the forensic examiner. He contends the content of the recording constituted a prior consistent statement that improperly bolstered Victim's testimony. We disagree.

"Generally, a prior consistent statement is not admissible unless the witness is charged with recent fabrication or improper motive or influence." *State v. Russell*,

383 S.C. 447, 450, 679 S.E.2d 542, 543–44 (Ct. App. 2009) (citing Rule 801(d)(1)(B), SCRE). However, section 17-23-175 of the South Carolina Code (2014) permits the admission of out-of-court statements by a child under the age of twelve when the following conditions are met:

> (1) the statement was given in response to questioning conducted during an investigative interview of the child;
>
> (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means . . . ;
>
> (3) the child testifies at the proceeding and is subject to cross- examination [sic] on the elements of the offense and the making of the out-of-court statement; and
>
> (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

Thus, the legislature has made "specific allowances" for the admission of out-of-court statements by child victims in criminal sexual conduct cases when the requirements of section 17-23-175 are satisfied. *State v. Whitner*, 399 S.C. 547, 558–59, 732 S.E.2d 861, 867 (2012).

Appellant acknowledges that section 17-23-175 has been held by our supreme court to be a valid legislative enactment.[4] However, he contends it is still impermissible to offer testimony bolstering that of an alleged child victim. In essence, Appellant argues that even though *Whitner* permits the admission of a child victim's out-of-court statements, such statements are only admissible if they do not bolster the credibility of the child witness.

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[4] *See Whitner*, 399 S.C. at 559, 732 S.E.2d at 867 (holding section 17-23-175 is a valid legislative enactment); *id.* (recognizing the South Carolina Rules of Evidence allow the legislature to enact evidentiary rules so long as such an enactment does not violate the state or federal constitutions).

In *Whitner*, the appellant challenged the admission of the victim's forensic interview videotape, arguing "it was cumulative repetition of the minor victim's testimony at trial and improper bolstering." 399 S.C. at 558, 732 S.E.2d at 867. The contents of the interview were similar to the underlying allegations the victim first disclosed to her mother, as well as the testimony given by the victim at trial. *Id.* at 551–52, 732 S.E.2d at 863. In spite of the similarities between the victim's out-of-court statements and the victim's trial testimony, the court noted "the forensic interview of the child and mere foundational trial testimony of the interviewer *serve as a model of how the statute is designed to work*." *Id.* at 559, 732 S.E.2d at 867 (emphasis added). In reaching this conclusion, the court emphasized "the forensic interviewer did not improperly lead or influence the victim in any way, and the victim answered the questions on her own accord." *Id.* The court further noted, "the forensic interviewer's testimony was for the limited purpose of laying the proper foundation for the admission of the videotape." *Id.* Consequently, the court concluded that there was no error in the admission of the forensic interview into evidence. *Id.* at 559–60, 732 S.E.2d at 867.

Here, the trial court found the DVD recording of Victim's two forensic interviews met the requirements of section 17-23-175, noting:

> The statements were not elicited by leading questions. There was one question that was a little toward[s] leading, but it was not answered and another question was asked, and - - but I only remember one being somewhat suggestive of an answer. But, in fact, it was not answered and there were no other, by my viewing of it, any other leading questions, and, again, that one was not answered. Another question was asked.

Appellant does not challenge the trial court's ruling that the statutory conditions required for admission of the recording were satisfied. *See Whitner*, 399 S.C. at 565, 732 S.E.2d at 870 (Pleicones, J., concurring) ("[T]here is no basis for an improper bolstering argument when [a child victim's] prior testimony is admitted pursuant to § 17-23-175."). Furthermore, as in *Whitner*, the forensic examiner never stated he believed Victim, and he gave no indication regarding Victim's credibility. Instead, the forensic interviewer offered testimony for the sole purpose of laying the proper foundation for the admission of the recording. Accordingly,

we find the trial court did not abuse its discretion in admitting the recording of Victim's forensic interviews into evidence.

CONCLUSION

For the foregoing reasons, Appellant's conviction and sentence are **AFFIRMED.**

SHORT, J., concurs.

FEW, C.J., concurring in part, and dissenting in part: I concur with the result reached by the majority as to the admissibility of the forensic interviews. I disagree, however, that the jury charge—"time is not a material element of the offense of criminal sexual conduct with a minor"—was proper in this case. Because I would find giving this charge was error that prejudiced Perry, I would reverse.

I. The "Improper Bolstering" Objection

I first address the admissibility of the forensic interviews because my discussion of that issue sets the stage for my explanation of why the jury charge was improper and prejudiced Perry.

Perry objected to the admissibility of the forensic interviews on the basis that the interviews "improperly bolstered" the victim's testimony. However, an objection on the basis of improper bolstering is not a valid objection unless it is based on a specific rule of evidence, which Perry's objection was not. Similarly, Perry's argument on appeal that the interviews "impermissibly bolstered [the victim's] testimony" is of no legal consequence. As a result, Perry presented no valid issue for this court to address regarding the admissibility of the forensic interviews.

The concept of "bolstering" relates to the capacity of testimony or evidence to make other testimony or evidence more credible. Evidence that bolsters other evidence is generally relevant because it makes the existence of disputed facts more probable by enhancing the credibility of the evidence that proves those facts. *See* Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). In this case, the forensic interviews are relevant for the additional reason that they

contain the victim's statements about what happened to her and who committed the crime. Under Rule 402, SCRE, "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." As with any relevant evidence, therefore, a trial court may not exclude evidence that bolsters other evidence unless the exclusion is "provided" for by some constitutional, statutory, or rule-based principle of law.

Historically, trial courts have excluded evidence that bolsters other evidence in two primary circumstances. First, witnesses "may not offer an opinion regarding the credibility of others." *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). In *State v. Taylor*, 404 S.C. 506, 745 S.E.2d 124 (Ct. App. 2013), we explained this basis for excluding evidence that bolsters: "the prohibition against bolstering is for the purpose of preventing a *witness* from *testifying* whether another witness is telling the truth," and "[i]mproper bolstering occurs when a[] . . . *witness* is allowed to give his or her opinion as to whether the complaining witness is telling the truth." 404 S.C. at 514, 745 S.E.2d at 128 (emphasis added); *accord State v. Whitner*, 399 S.C. 547, 559, 732 S.E.2d 861, 867 (2012) (describing bolstering testimony as "to have the forensic interviewer, improperly imbued with the imprimatur of an expert witness, invade the province of the jury by vouching for the credibility of the alleged victim"); *see also* James F. Dreher, *A Guide to Evidence Law in South Carolina* 21 (S.C. Bar 1967) ("The general rule is that unless the credibility of your witness has been attacked, you may not offer proof that his credibility is good."). In *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012), we explained that this basis for excluding evidence for its bolstering effect is now "incorporated into Rule 608(a) of the South Carolina Rules of Evidence." 397 S.C. at 464, 725 S.E.2d at 141; *see also* Rule 608(a), SCRE ("The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to [two] limitations . . . .").

The second circumstance in which courts have excluded evidence that bolsters is when a party offers an out-of-court statement—consistent with a witness's testimony—before the witness is impeached. *See State v. Barrett*, 299 S.C. 485, 486-87, 386 S.E.2d 242, 243 (1989) (stating "when a witness has not been impeached, evidence of prior consistent statements is inadmissible" and calling the violation of this principle "improper bolstering"). This basis for excluding evidence for its bolstering effect is now incorporated into Rule 802, SCRE—the

rule against hearsay—and the non-hearsay provisions of Rule 801(d)(1)(B) and (D), SCRE. *See Whitner*, 399 S.C. at 558, 732 S.E.2d at 867 (citing Rule 801(d)(1) for the proposition that "a prior consistent statement is not admissible unless the witness is charged with fabrication or improper motive or bias").

Under the Rules of Evidence, therefore, the bases on which a trial court may exclude evidence that bolsters other evidence include Rule 608(a) and Rule 802. Conceivably, a trial court could exclude evidence for its bolstering effect under Rule 403, which provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by" considerations listed in the rule.[5] Other than these rules, however, there is no provision under modern evidence law to exclude relevant evidence on the basis of improper bolstering. Thus, neither Perry's objection to the trial court nor his argument to this court that the forensic interviews constituted improper bolstering has any legal import. They are based on an invalid argument under our Rules of Evidence.

Moreover, the trial court admitted the forensic interviews pursuant to section 17-23-175 of the South Carolina Code (2014). This statute reflects our General Assembly's recognition that the central issue in the trial of almost any sexual assault case involving a child—certainly this one—is whether the victim's testimony is truthful and accurate.[6] It represents our General Assembly's policy determination that a forensic interview should be admissible to enhance the credibility of a child sexual assault victim's trial testimony—bolster—if it meets the criteria of the statute. Under section 17-23-175 and the policy underlying it, therefore, the tendency of a forensic interview to enhance the credibility of the victim's testimony is precisely the reason that admission of the interview is proper.

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[5] *See United States v. Bermudez*, 529 F.3d 158, 165-71 (2d Cir. 2008) (Underhill, J., dissenting) (arguing Rule 403 permits the exclusion of evidence that bolsters other evidence). *But see Westfield Ins. Co. v. Harris*, 134 F.3d 608, 613 (4th Cir. 1998) (finding the district court abused its discretion by excluding bolstering evidence under Rule 403).

[6] Section 17-23-175 applies more broadly than just to child sexual assault cases, and thus also represents a broader general recognition of the challenges courts face in dealing with the credibility of children. *See* § 17-23-175(A) (providing the section applies "[i]n a general sessions court proceeding or a delinquency proceeding in family court").

Thus, Perry's objection to the forensic interviews on the basis of improper bolstering and his similar argument on appeal are invalid. They are not only ineffective under the Rules of Evidence, but inconsistent with section 17-23-175, which specifically provides for the admission of these forensic interviews for the very reason Perry contends admission was improper—the interviews bolstered the credibility of the victim.

II. The Jury Charge

In my opinion, the importance of the victim's credibility also made it improper for the trial court to charge the jury as it did. Although it is true "time is not a material element" of the crime of lewd act on a minor, the fact that it is a correct point of law does not make it proper for the trial court to charge it to the jury. *Compare State v. Rayfield*, 369 S.C. 106, 117, 631 S.E.2d 244, 250 (2006) ("It is not always necessary, of course, to charge [a particular point of law]."), *with* 369 S.C. at 119, 631 S.E.2d at 251 (Pleicones, J., dissenting) ("Some principles of law, however, are not to be charged to a jury.").

The primary case upon which the majority relies for the correctness of the charge—*State v. Tumbleston*, 376 S.C. 90, 654 S.E.2d 849 (Ct. App. 2007)—has nothing to do with a jury charge. There were two issues on appeal in *Tumbleston*: (1) whether the trial court erred in denying the defendant's motion for a directed verdict, 376 S.C. at 102, 654 S.E.2d at 855, and (2) whether "the trial court erred in denying [the defendant's] motion to quash the indictments." 376 S.C. at 94, 654 S.E.2d at 851. As to the second issue, the defendant argued "the indictments did not allege the specific time of each offense intended to be charged, and thus, failed to provide him with adequate notice to prepare a defense." 376 S.C. at 92, 654 S.E.2d at 850. Therefore, our statement in *Tumbleston*, "Time is not a material element of . . . lewd act on a minor," 376 S.C. at 101, 654 S.E.2d at 855, related only to whether the indictment sufficiently put the defendant on notice of the charges against him. We stated:

> We reject the notion that a specified time period prevented [the defendant] from adequately preparing his defense to the charges. Reading the indictments objectively from a reasonable person's view, we conclude they contain the necessary elements of the offenses

> charged and sufficiently apprise [the defendant] that he must be prepared to address his conduct toward [the victim] between 2001 and June 2004.

376 S.C. at 102, 654 S.E.2d at 855. We never intended in *Tumbleston* to address when it might be appropriate, or whether it is ever permissible, to instruct the jury as the trial court did in this case.

The majority also relies on *State v. Anderson*, 59 S.C. 229, 37 S.E. 820 (1901). In that case, the defendant was charged with larceny for stealing a cow. 59 S.C. at 230, 37 S.E. at 820. At trial, "the defendant introduced evidence to prove an alibi." *Id.* The trial court charged the jury that "the defendant assumes the burden of proving [his alibi]." *Id.* The definition of alibi then, as now, required the defendant to prove he could not have committed the crime because he was somewhere else *at the specific time* the crime was committed.[7] The court's charge that the burden of proof is on the defendant—an incorrect charge under modern law[8]—demonstrates the reason *Anderson* is not helpful in analyzing the correctness of the charge in Perry's case. To meet the burden the trial court imposed on him of

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[7] *Compare State v. Atkins*, 49 S.C. 481, 481, 27 S.E. 484, 484 (1897) (reciting the following definition of alibi from the trial court's charge: "An alibi means that he was at some place other than where the crime was committed at that time, and, therefore, could not have committed the crime charged" (emphasis removed)), *with Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (stating "an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt").

[8] *See State v. McGhee*, 137 S.C. 256, 260-61, 135 S.E. 59, 60 (1926) (stating the requirement of imposing the burden of proving alibi on the defendant is "illogical," and adopting the concurring opinion of Justice Cothran from *State v. Des Champs*, *infra*); *State v. Des Champs*, 134 S.C. 179, 181, 131 S.E. 420, 420 (1926) (Cothran, J., concurring) ("But it seems to me that the so-called 'affirmative defense' of alibi is not an affirmative defense at all. It is simply evidence adduced by the defendant to sustain his plea of not guilty; that he did not commit the crime for the reason that he was not at the scene of the crime at the time of the occurrence. The burden was upon the state to prove beyond a reasonable doubt that the defendant was present at the scene of the crime and actually committed it.").

proving his alibi, the defendant in *Anderson* had to prove he was somewhere else at the specific time the crime was committed. Because the specific time the crime was committed was not part of the State's burden, the circumstances of that case justified the trial court's charge that time is not an element of the crime.

Finally, the majority relies on *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993). I find *Schumpert* interesting for two reasons. First, the supreme court chose not to address whether giving the charge was error, but only whether the charge caused prejudice. Second, *Schumpert* relies on *State v. Rallo*, 304 S.C. 258, 403 S.E.2d 653 (1991). The *Schumpert* court explained the prejudicial error in *Rallo*:

> In *Rallo* the indictment was amended to allege the offense occurred on February 14. We held the trial judge erred in charging the jury the offense occurred "on or about" February 14 because the indictment alleged February 14 and the defendant had focused on that date in presenting evidence of alibi. Essentially, the defendant in *Rallo* did not have notice of any date other than that alleged in the indictment and it was error to charge the jury with a larger time period.

312 S.C. at 508, 435 S.E.2d at 863. *Rallo* is not controlling, but it demonstrates that a jury charge correct on its face can constitute prejudicial error if it serves to defeat the primary argument the defendant makes in his defense.

Trial courts do not normally charge the jury as to what is *not* an element of the crime. However, under circumstances that justify doing so, such a charge can be proper. *Anderson* is an example of such a circumstance. As another example, it was permissible in certain cases for the trial court to instruct the jury what was not an element of the crime formerly named "assault and battery with intent to kill."[9] In *State v. Foust*, 325 S.C. 12, 15, 479 S.E.2d 50, 51 (1996), our supreme court clarified that to prove a defendant guilty of the crime, the State need prove only a general criminal intent, not a specific intent to kill. In subsequent trials, despite

[9] The name "assault and battery with intent to kill" was misleading because the name suggested one of the elements was a specific intent to kill. *See* S.C. Code Ann. § 16-3-620 (2003) (repealed Act No. 273, 2010 S.C. Acts 1949-50).

Foust, defendants would often argue the State did not prove a specific intent to kill. In such a circumstance, and certainly others, the trial court could properly instruct the jury on what elements the State did not have to prove.

There are no circumstances in this case that justify the trial court's instruction to the jury that time is not an element of lewd act on a minor. In fact, the circumstances of this case made the instruction improper. Perry built his entire presentation to the jury around what he claimed were the striking inconsistencies in the victim's testimony as to when the crime occurred. In particular, Perry argued the victim's testimony as to the time of the offense was inconsistent because: (1) the victim claimed Brittany was present in the home with her baby when the crime occurred, and (2) the victim's mother testified she picked up the victim from her father's house on January 1, two weeks before Brittany's baby was born. The State argues the victim's testimony as to the time of the offense is not inconsistent, and the record contains support for both positions. Nevertheless, Perry's argument—the inconsistency was critical to the jury's evaluation of the credibility of the victim and the State failed to prove the time of the alleged crime—formed the basis of his defense.

This case is not unlike *Rallo*. There, the charge constituted prejudicial error because it defeated the defendant's alibi by enlarging the time the State could prove for the crime. Here, the charge contradicted the defendant's claim that the victim's credibility was suspect because she could not identify the time of the offense. Under the circumstances of this case, it was improper for the trial court to instruct the jury that "time is not a material element" of the crime, and this error prejudiced Perry. For these reasons, I would reverse.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Wayne Stewart Curry, Appellant.

Appellate Case No. 2012-213370

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

Opinion No. 5258
Heard June 11, 2014 – Filed August 6, 2014

REVERSED AND REMANDED

Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Attorney General Julie Kate Keeney, and Assistant Attorney General John Walter Whitmire, all of Columbia, for Respondent.

WILLIAMS, J.: Wayne Curry appeals his conviction for throwing bodily fluids on a correctional officer, arguing the circuit court erred in refusing to charge the jury regarding guilty but mentally ill. We reverse and remand.

FACTS/PROCEDURAL HISTORY

Curry was charged with throwing bodily fluids on a correctional officer in violation of section 24-13-470 of the South Carolina Code (2007) after an incident that occurred while he was incarcerated at Lexington County Detention Center. Officer Frederick Hopkins testified that on August 18, 2010, he was working the first floor of the detention center, which housed inmates with special needs and mental health issues. That morning, Curry submitted an inmate request form to Officer Hopkins for a conjugal visit on the third floor of the detention center. The third floor houses the female inmates at the detention center. Because the prison had a strict policy of prohibiting sexual contact between inmates, Officer Hopkins denied Curry's request. Officer Hopkins stated he returned the request form to Curry, and Curry was "cool, very calm, and . . . made no comment" when Officer Hopkins informed him of the denial.

Later that day, Officer Hopkins returned to Curry's cell so it could be cleaned. He reserved Curry's cell for last because there was a strong smell emanating from his cell, which was later discovered to be a result of Curry "stockpiling feces underneath the sink." After he and another officer looked through the flap in the door and determined it was safe to enter, Officer Hopkins stepped inside Curry's cell, but "in a split second, [Curry] had lobbed with his right hand, like pitching a softball, the fecal matter which hit [Officer Hopkins] square in the abdomen, [and] dribbled down and onto [his] right leg." Officer Hopkins stated Curry did not say anything or have any expression on his face when the incident occurred; specifically, Officer Hopkins said, "Even after he . . . threw feces on me, we never once cursed each other, we never fought each other, never even argued."

Lieutenant James Clawson with the Lexington Count Sheriff's Department removed Curry from his cell after the incident with Officer Hopkins. According to Lieutenant Clawson, when he entered Curry's cell, Curry had feces on his hands, face, and clothing. Lieutenant Clawson stated Curry did not resist in any way or speak to any of the officers as he was transported to the detention center's medical facility.

Dr. William Miles, the onsite doctor at the detention center, stated he examined Curry, who was wearing a suicide gown, following the incident. He stated Curry was calm and did not appear to be agitated. Dr. Miles testified that after he examined Curry, Curry willingly permitted him to cut Curry's abnormally long fingernails, and Curry was then released from the medical facility.

Curry was subsequently interviewed on November 2, 2010, by Dr. Marla Domino, a psychologist with the South Carolina Department of Mental Health (SCDMH). Dr. Domino testified at Curry's pretrial competency hearing as well as at trial for the State. Dr. Domino stated she had seen Curry a number of times for forensic evaluations since 2006 and was well aware of his mental health history and behavioral issues prior to her November 2010 examination.[1] She acknowledged Curry had a history of refusing to take his medications, including at the time of her interview and at the time of trial. According to Dr. Domino, Curry understood the seriousness of the charge, the differences between a guilty and not guilty plea, and the importance of controlling his behavior in the courtroom. She acknowledged Curry did not always give accurate responses to her questions regarding court proceedings.[2] In her clinical opinion, he was feigning his inability to comprehend certain things. She stated he had the capacity to understand the proceedings and assist in his own defense.

Dr. Domino also testified Curry was able to give her a very coherent, logical explanation for his actions. According to Dr. Domino, even if Curry suffered from a mental illness at the time of the offense, his symptoms had to be directly related to the crime he was accused of committing. In Curry's case, she believed he did not lack the capacity to distinguish between right and wrong at the time of the incident. She explained that Curry and Officer Hopkins both described Curry's behavior as calm and cooperative. Based on their separate accounts, she did not believe Curry was experiencing symptoms of a mental illness at the time of the alleged crime. When questioned as to why she believed Curry was malingering during their interview, she stated that individuals who are truly psychotic have disorganized speech, a hard time paying attention, and seem like they are

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[1] During cross-examination, Dr. Domino acknowledged the following: (1) Curry had been in a "special school" from an early age; (2) Curry had a learning disability and was emotionally handicapped; (3) Curry suffered a severe head injury as a result of a car accident when he was eleven or twelve; (4) Curry had received disability payments since 1995 based on his diagnosis of paranoid schizophrenia; and (5) prior to his incarceration, Curry slept under a bed, complained of seeing a bald Hispanic man, and believed his family members had been cloned.

[2] Specifically, Curry stated the prosecutor was his advocate, the trial judge was on his side, and his attorney was "rotten to the core" and wanted to "fry him."

responding to voices on many occasions. Dr. Domino stated, "[Curry] was able to engage in the regular give and take of conversation . . . I could understand his responses. They weren't accurate, but . . . [t]hey were logical."

Curry called Dr. Casandra Means, a mental health professional counselor with SCDMH, to testify at trial. As a counselor at the detention center, she had interacted with Curry prior to the August 2010 incident and stated Curry had a history of mental illness. Although Curry initially interacted with her, as time passed, Dr. Means testified he became more isolated and would not engage or respond to questions. Dr. Means stated she never discussed the August 2010 incident with Curry, but she believed his symptoms were consistent with mania.

Curry also called Dr. Merrie Cherry, a senior psychiatrist with SCDMH and a mental health professional counselor at the detention center, to testify at trial. Dr. Cherry stated she saw Curry "fairly regularly" because he was detained on the first floor and had a significant mental illness. When questioned about her interactions with Curry, Dr. Cherry stated that in the past, Curry would answer her questions but recently had refused to answer any questions. When Curry was more depressed, he would "cocoon" himself by wrapping up in his sheets and blankets and lying on the floor. At those times, she testified he did not want to interact with others or leave his cell and his "affect [wa]s very flat," in that he showed no emotions or expression. Dr. Cherry refused to opine whether Curry understood the significance of his actions at the time of the August 2010 incident, stating she "didn't evaluate him for forensic purposes at that time."

Curry's mother and daughter both testified at trial. Both women confirmed Curry suffered from a long history of mental illness prior to his incarceration. Neither Curry's mother nor his daughter could testify to his state of mind in August 2010.

Curry testified in his own defense. Curry admitted he had received Social Security disability benefits in the past for his mental illness and acknowledged he had received treatment at Aiken Mental Health Center, Gilliam Psychiatric Hospital, and Just Care. Curry reiterated his desire to talk about his constitutional rights, but attempted to assert his Fifth Amendment right to silence when questioned about throwing bodily fluids on Officer Hopkins. When asked about throwing feces on Officer Hopkins, he claimed he did not remember doing that, but he admitted to putting feces on the walls "several times." Curry acknowledged requesting a conjugal visit, which he stated was denied.

At the conclusion of all testimony, the State argued outside the jury's presence that Curry was not entitled to charges on guilty but mentally ill and not guilty by reason of insanity. The State contended Curry failed to prove that his mental illness prevented him from distinguishing between right and wrong on the day of the incident. While the State conceded Curry suffered from a mental illness, it asserted it did not necessarily equate to an inability to be able to distinguish between right and wrong. In response, Curry's counsel stated Dr. Means's testimony that Curry was manic at the time of the incident was sufficient to sustain Curry's burden of proof regarding insanity. The circuit court denied Curry's request, stating:

> There's no question in this case [Curry has] got eccentric behavior or antisocial conduct, but I have not heard any testimony whatsoever in this record that the defendant did not have the ability to distinguish right from wrong. . . . [A]nd we're talking about on the date of the incident and that's what crucial here . . . the Court is not going to charge either of those defenses; that is guilty but mentally ill or not guilty by reason of insanity . . . . The question will be either guilty or not guilty.

The jury returned a verdict of guilty, and the circuit court sentenced Curry to eight-and-one-half years of imprisonment with a recommendation for mental health treatment with the Department of Corrections. This appeal followed.

STANDARD OF REVIEW

"The law to be charged is determined from the facts presented at trial." *State v. Lewis*, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997). This court will not reverse a circuit court's decision to deny a specific request to charge unless the circuit court committed an error of law. *State v. Marin*, 404 S.C. 615, 619, 745 S.E.2d 148, 151 (Ct. App. 2013); *see State v. Commander*, 396 S.C. 254, 270, 721 S.E.2d 413, 421-22 (2011) ("An appellate court will not reverse the [circuit court]'s decision regarding a jury charge absent an abuse of discretion.").

LAW/ANALYSIS

Curry claims the circuit court erred in denying his request to charge the jury on guilty but mentally ill. We agree.

As defined by section 17-24-20(A) of the South Carolina Code (2014),

> A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in [s]ection 17-24-10(A),[3] but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

S.C. Code Ann. § 17-24-20(A) (2014). The guilty but mentally ill statute ensures the jury applies the legal definition of insanity properly by emphasizing that a person may be mentally ill, yet not legally insane. *State v. Hornsby*, 326 S.C. 121, 130, 484 S.E.2d 869, 874 (1997). "The [guilty but mentally ill] verdict clarifies the distinction between a defendant who is not guilty by reason of insanity and one who is mentally ill yet not criminally insane and, therefore, is criminally liable." *Id.*

We find Curry presented sufficient evidence that he lacked the requisite capacity to conform his conduct to the requirements of the law so as to justify a jury charge of guilty but mentally ill. The supreme court's decision in *State v. Hartfield*, 300 S.C. 469, 388 S.E.2d 802 (1990), leads us to this conclusion. In *Hartfield*, the defendant was convicted of trafficking in marijuana and possession of crack cocaine with intent to distribute and sentenced to twenty years' imprisonment. *Id.* at 470, 388 S.E.2d at 802. On appeal to the supreme court, Hartfield contended the circuit court erred in ruling he could not present the defense of insanity or attempt to obtain a verdict of guilty but mentally ill. *Id.* The circuit court based its ruling on an expert's report who evaluated him four separate times. *Id.* at 471, 388 S.E.2d at 803. The expert initially believed Hartfield suffered from psychosis but changed his opinion to conclude Hartfield was malingering after observing Hartfield for an extended time in the state hospital. *Id.* In contrast, a defense expert opined Hartfield was delusional and incapable of standing trial. *Id.* The circuit court refused to permit Hartfield to produce any evidence relative to either not guilty by

[3] A defendant is insane if, at the time of the commission of the act constituting the offense, as a result of mental disease or defect, he lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong. S.C. Code Ann. § 17-24-10(A) (2014).

reason of insanity or guilty but mentally ill, finding Hartfield's insanity was caused by his voluntary use of drugs, and as such, it was not a defense to his crimes. *Id.*

The supreme court reversed, holding that if permanent insanity was caused by the use of drugs and destroyed a defendant's ability to know right from wrong, it could constitute a defense to a crime. *Id.* at 473, 388 S.E.2d at 804. Our supreme court found Hartfield was entitled to present the defense of insanity or attempt to obtain a verdict of guilty but mentally ill because Hartfield presented evidence at his competency hearing that his use of illicit drugs caused permanent brain damage, which manifested as a mental illness. *Id.*

In the instant case, the circuit court focused on the testimony of Dr. Domino and the lack of specific expert or lay testimony that Curry could distinguish right from wrong and conform his conduct to the requirements of the law on the date of the incident. However, we find Dr. Means's opinion that Curry suffered from mania at the time of the incident combined with other lay and expert testimony on Curry's antisocial conduct, odd mannerisms, and isolationist behavior indicate his mental illness may have prevented Curry from being able to conform his conduct to the law at the time of this offense. We also find Curry's affirmative actions of stockpiling his feces under his sink and placing feces on his face and clothing at the time of the offense created a jury question as to whether he truly appreciated the nature of his actions. Arguably, if Curry was willing to keep his feces in his living quarters and even to smear them on himself, the jury could reasonably conclude he lacked the requisite mental capacity to be able to abide by the law.

We are aware that a defendant found guilty but mentally ill "must be sentenced as provided by law for a defendant found guilty." *Hornsby*, 326 S.C. at 126, 484 S.E.2d at 872. Although a defendant's sentence is the same regardless of whether he is merely guilty or guilty but mentally ill, a defendant found guilty but mentally ill "is entitled to immediate treatment and evaluation." *Id.* (citing S.C. Code Ann. § 17-24-70 (Supp. 1995)). The circuit court included a recommendation for mental health treatment when it issued Curry's sentence, but the court did not mandate treatment as is required for a defendant found guilty but mentally ill pursuant to section 17-24-70 of the South Carolina Code (2014).[4] Because evidence was

[4]Section 17-24-70(A) states: "If the sentence imposed upon the defendant includes the incarceration of the defendant, the defendant must first be taken to a facility designated by the Department of Corrections for treatment and retained there until in the opinion of the staff at that facility the defendant may safely be moved to the

presented from which the jury could have concluded Curry was guilty but mentally ill under section 17-24-70, the circuit court's failure to include this jury charge amounted to reversible error.[5]

CONCLUSION

Based on the foregoing, we reverse Curry's conviction and remand for a new trial.

REVERSED AND REMANDED.

KONDUROS and LOCKEMY, JJ., concur.

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general population of the Department of Corrections to serve the remainder of his sentence."

[5] Because the circuit court's failure to charge the jury on guilty but mentally ill necessitates a new trial, we decline to address Curry's arguments regarding his fitness to stand trial and whether the circuit court properly denied Curry's request to charge the jury on not guilty by reason of insanity. *See Hartfield*, 300 S.C. at 473, 388 S.E.2d at 804 (finding the defendant was entitled to present a defense of insanity and attempt to obtain a verdict of guilty but mentally ill, and because this issue required reversal of his conviction and remand for a new trial, the supreme court did not need to address the other issues raised in the defendant's appeal); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (recognizing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Victor A. White, Appellant.

Appellate Case No. 2011-201286

Appeal From Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 5259
Heard May 6, 2014 – Filed August 6, 2014

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, for Respondent.

GEATHERS, J.: Victor White was convicted of murder and armed robbery stemming from a shooting during an arranged marijuana purchase. The incident took place inside of the victim's vehicle at an empty Kentucky Fried Chicken (KFC) parking lot. White appeals his convictions, arguing the trial court erred in

admitting his recorded statement because the statement was the direct product of the impermissible tactic of "question first, give *Miranda*[1] rights later," which has been expressly forbidden by the Supreme Court in *Missouri v. Seibert*, 542 U.S. 600 (2004), and our supreme court in *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010). We affirm.

1. Voluntariness and Admissibility of White's Statement

In both *Seibert* and *Navy*, the courts emphasized that *Miranda*'s warnings requirement cannot be skirted by interrogative tactics that undermine the very purpose of *Miranda*, i.e., unless and until such warnings and waiver are given, no evidence obtained as a result of interrogation can be used against a defendant at trial. *See Miranda*, 384 U.S. at 478–79; *Seibert*, 542 U.S. at 617; *Navy*, 386 S.C. at 303–04, 688 S.E.2d at 842.

Here, there is conflicting evidence as to whether White's statement was taken in violation of our supreme court's holding in *Navy*. By White's testimony, alone, he presents evidence that *Navy*'s forbidden "question-first, give *Miranda* warnings later" tactic was employed in his interrogation. On the other hand, the State points to the testimony of two investigators who stressed they did not elicit any information from White prior to his signing of the *Miranda* rights waiver form. The State argues the investigators' testimony is further corroborated by the waiver form, which indicates White voluntarily waived his rights prior to answering any questions.[2]

Because there is conflicting evidence, the trial court was charged with making a finding that White received *Miranda* warnings and intelligently waived his right to silence prior to making a statement. *See State v. Silver*, 307 S.C. 326, 330, 414 S.E.2d 813, 815 (Ct. App. 1992) ("Where there is conflicting evidence regarding the statements, the court must make a finding as to their validity."). White concedes his statement was given "voluntarily." However, he contests the timing of the *Miranda* warnings, which necessarily implicates *State v. Navy* and the issue of whether he intelligently and voluntarily *waived* his right to remain silent prior to

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

[2] The State also cites both White's and the investigators' testimony stating the initial questioning did not begin until "around midnight," which coincides with the timing listed on the signed *Miranda* rights waiver form (11:55 P.M.).

making a statement. *See State v. Miller*, 375 S.C. 370, 380, 652 S.E.2d 444, 449 (Ct. App. 2007) (finding the "intelligent waiver mandate" is in addition to the voluntariness requirement of *Miranda*).

In the pre-trial *Jackson v. Denno*[3] hearing, the trial court did not make an explicit finding as to whether White's statement was taken in violation of *State v. Navy*. Rather, the trial court simply found White's statement was "freely and voluntarily given and the jury will be able to hear the statement." Because White already conceded the voluntariness of his statement, but challenged the timing of the *Miranda* warnings with the taking of his statement as a *Navy* violation, the trial court was charged with making a factual finding as to this issue, i.e., whether the interrogative procedure through which the statement was obtained comported with *Navy*. Therefore, the trial court erred by not making sufficient findings of fact as to the statement's admissibility.

2. Harmless Error

Even if, as White argues, his statement was admitted in violation of *Navy*, we believe any error in its admission was harmless beyond a reasonable doubt.

In *State v. Creech*, 314 S.C. 76, 441 S.E.2d 635 (Ct. App. 1993), this court reiterated the Supreme Court of the United States' holding in *Chapman v. California*[4] that error of even constitutional magnitude may be deemed harmless if, "considering the entire record on appeal, the reviewing court finds beyond a reasonable doubt that the error did not contribute to the verdict." *Id.* at 86, 441 S.E.2d at 640 (citing *Chapman v. California*, 386 U.S. 18 (1967)); *see also Taylor v. State*, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993). Similarly, in *State v. Easler*, our supreme court intimated that any error in the failure to suppress a statement allegedly taken in violation of *Miranda* is subject to a harmless error analysis. 327 S.C. 121, 129, 489 S.E.2d 617, 621–22 (1997); *see also State v. Newell*, 303 S.C. 471, 477, 401 S.E.2d 420, 424 (Ct. App. 1991) (finding failure to suppress evidence for *Miranda* violation harmless where record contained overwhelming evidence of guilt); *State v. Lynch*, 375 S.C. 628, 636, 654 S.E.2d 292, 296 (Ct. App. 2007) ("The failure to suppress evidence for possible *Miranda*

[3] 378 U.S. 368 (1964) (outlining the procedure for a pre-trial hearing to determine the voluntariness and admissibility of a defendant's contested statement).
[4] 386 U.S. 18 (1967).

violations is harmless if the record contains sufficient evidence to prove guilt beyond a reasonable doubt.").[5] Harmless error rules, even in dealing with constitutional errors, "serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Chapman*, 386 U.S. at 22.

Here, considering the entire record on appeal, we conclude beyond a reasonable doubt that any alleged error in admitting White's statement was harmless. White's appellate counsel insists the admission of White's statement was "devastating" because it allowed police to place White at the crime scene. However, notwithstanding White's statement, cell phone evidence clearly placed Victim and White together at the time and place of the murder. With information "pinged" from Victim's and White's cell phones to nearby cell towers, investigators were able to triangulate Victim's and White's positions and movements leading up to the murder. The data confirmed Victim and White were near the KFC and within close proximity of each other at the time of the murder. Furthermore, the data also revealed that Victim's last answered phone communication was an incoming call from White placed immediately before the estimated time of the murder.

Furthermore, the testimony presented at trial also placed White at the crime scene and overwhelmingly established White's guilt. Reggie Miller, an accomplice, testified he and White agreed to participate in a robbery, under the guise of a marijuana purchase, on the night of the murder. Miller recalled White made a phone call to Victim and arranged a meeting in the KFC parking lot near Benedict College in Columbia, South Carolina. Miller testified that after he and White walked to KFC, Victim pulled into the parking lot in his vehicle.[6] Miller stressed White got in the back seat of Victim's vehicle and he sat in the front passenger seat. Miller testified that seconds after getting into the vehicle, White shot Victim in the back of the head from the back seat. After the murder, Miller claimed White was laughing about it, and White admitted to others that he killed Victim.

In line with Miller's testimony, Demond Sanford, the other accomplice, testified about the details of the murder. Sanford admitted he stood on the street corner and

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[5] *Cf. Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (holding the erroneous admission of an involuntary confession is subject to a harmless error analysis when the defendant's guilt is established beyond a reasonable doubt).

[6] The KFC was closed for the night.

served as "a lookout" during the robbery. Sanford recalled White and Miller got in Victim's vehicle after it pulled into the KFC parking lot, and shortly thereafter "[he] heard a loud pop." Sanford further testified that immediately after Miller walked away from the scene, Miller, in a panicked state, told him that White shot Victim. Conversely, Sanford testified White appeared calm. Once Miller, White, and Sanford regrouped in the dorm room after the shooting, White enlisted Sanford's help to go back to Victim's car to find a scale with which to weigh the stolen marijuana. Sanford testified he took the scale from Victim's side, who was not moving when they returned to the vehicle. When questioned on the stand, Sanford denied White admitted shooting Victim. However, the State impeached Sanford's testimony with a prior statement given to police in which he told investigators White admitted shooting Victim.

Still, other testimony from the trial established White's overwhelming guilt. Jeremiah Henderson—a friend who let White, Miller, and Sanford into his Benedict College dorm room after the murder—testified that White laughed about the incident and repeatedly boasted, "I shot that man [in the robbery]" and "I can't believe [Victim] let me sit behind him." Henderson also testified he saw White with a gun that night. Finally, Nathaniel Jones—roommate of Henderson and an "ear" witness who pretended to be asleep in the dorm room[7]—testified he overheard White brag and laugh about killing somebody.

CONCLUSION

Even though the trial court's *Denno* finding was insufficient, we find the entire record on appeal establishes beyond a reasonable doubt that any error in the admission of White's statement did not contribute to the verdict obtained. Accordingly, the decision of the trial court is

AFFIRMED.

SHORT, J., concurs.

[7] According to Jones, he was awoken when White, Miller, Sanford, and Henderson came into his room around 2:00 A.M., but he pretended to be asleep because he did not want to become involved.

FEW, C.J., dissenting: I agree with the majority that the trial court failed to make sufficient factual findings. From the trial court's conclusory statement, we cannot determine whether the court admitted the statement for the reason the court expressed—the statement was freely and voluntarily given, a point the defendant conceded—or the court actually ruled on the issue raised—whether the police violated the principles set forth in *Missouri v. Seibert*, 542 U.S. 600, 601-02, and *State v. Navy*, 386 S.C. 294, 302, 688 S.E.2d 838, 841 (2010). In my opinion, however, if there was error in admitting the statement, the error was not harmless. I would remand for a hearing and require the trial court to make sufficient factual findings.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jennifer Brown, Appellant,

v.

Baby Girl Harper, a minor under the age of seven, and Holly Lawrence, Respondents.

Appellate Case No. 2014-000977

Appeal From Charleston County
Ronald R. Norton, Family Court Judge

Opinion No. 5260
Heard July 23, 2014 – Filed August 4, 2014

AFFIRMED

John S. Nichols, of Bluestein Nichols Thompson & Delgado, LLC, of Columbia; and Shannon Phillips Jones, of Shannon Jones, Attorney at Law, LLC, of Charleston, for Appellant.

James Fletcher Thompson, of James Fletcher Thompson, LLC, of Spartanburg; and Allison Boyd Bullard, of Harling & West, LLC, of Lexington, for Respondent.

Jon A. Mersereau, of Charleston, Guardian Ad Litem.

PER CURIAM: In this adoption case, we hold the execution of a consent to adopt document must strictly comply with section 63-9-340 of the South Carolina Code (2010). We affirm the family court's determination that the consent document signed by the birth mother was rendered invalid by (1) the failure of the attorney-witness to be present when the birth mother signed the document and (2) the failure of both witnesses to observe the statutorily-required discussion of the provisions of the consent to adopt document.[1]

I. Validity of the Consent to Adopt Document

"Adoption exists in this state only by virtue of statutory authority which expressly prescribes the conditions under which an adoption may legally be effected. Since the right of adoption in South Carolina is not a natural right but wholly statutory, it must be strictly construed." *Hucks v. Dolan*, 288 S.C. 468, 470, 343 S.E.2d 613, 614 (1986) (citation omitted).

Adoptions are carried out pursuant to the South Carolina Adoption Act. S.C. Code Ann. §§ 63-9-10 to -2290 (2010 & Supp. 2013). Under the Act, "Consent or relinquishment for the purpose of adoption . . . must be made by a sworn document, signed by the person . . . giving consent or relinquishment . . . ." S.C. Code Ann. § 63-9-330(A) (2010). Section 63-9-330(A) sets forth a list of items that must be specified in the consent to adopt document. The requirements for executing the document are set forth in section 63-9-340:

> (A) The sworn document . . . must be signed in the presence of two witnesses one of whom must be one of the following:
>
> (1) a judge of any family court in this State;

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[1] We disagree with Lawrence's contention that the underlying order is not immediately appealable. The family court's finding that the consent document was invalid constitutes a final decision that Brown cannot proceed with the adoption of the child. Thus, it is a final order that is immediately appealable. *See Terry v. Terry*, 400 S.C. 453, 456-57, 734 S.E.2d 646, 648 (2012) (defining temporary family court orders as "temporary—they neither decide any issue with finality nor affect a substantial right . . . .").

> (2) an attorney licensed to practice law in South Carolina who does not represent the prospective adoption petitioners;
>
> (3) a person certified by the State Department of Social Services . . . to obtain consents or relinquishments;
>
> . . . .
>
> (B) The persons who witness the signing of the sworn document . . . shall attach to the document written certification signed by each witness that before the signing of the document, the provisions of the document were discussed with the person giving consent or relinquishment, and that based on this discussion, it is each witness' opinion that consent or relinquishment is being given voluntarily and that it is not being obtained under duress or through coercion.

The important facts in this appeal are simple. The attorney-witness was not in the room when the birth mother, Holly Lawrence, signed the consent document, and neither witness observed any discussion with Lawrence before Lawrence signed it.[2] The adoptive mother, Jennifer Brown, concedes the execution of the consent document did not strictly comply with section 63-9-340.

The plain and mandatory language of section 63-9-340 indicates the legislature intended strict compliance. Subsection (A) states the document "*must* be signed in the presence of two witnesses." (emphasis added). Subsection (B) states the witnesses "shall" certify that the provisions of the document were discussed with the person giving consent "*before* the signing of the document." (emphasis added). The requirement in subsection (B) of "certification . . . based on this discussion"

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[2] Lawrence was not married when she delivered the child, and we do not address whether the biological father's consent was required. *See* S.C. Code Ann. § 63-9-310(A)(4), (5) (2010) (setting forth certain requirements that must be met before an unwed father's consent to adopt is required).

indicates the witnesses must have personal knowledge of the discussion based on their observation of it.

Our interpretation of the Act as requiring strict compliance with section 63-9-340 is supported not only by *Hucks*, but also by the Act itself. Section 63-9-20 of the South Carolina Code (2010) provides, "The purpose of this article is to establish fair and reasonable procedures for the adoption of children . . . ." The legislature intended that strict compliance with the procedures set forth in section 63-9-340 be required in order to reduce litigation, promote finality, and ensure consent documents are voluntary. *See McCann v. Doe*, 377 S.C. 373, 390, 660 S.E.2d 500, 509 (2008) ("[P]rotections need to be in place for both biological and adoptive parents to ensure the decision to give a child for adoption is a thoughtful and certain one and not likely to be challenged in a long, arduous, and emotionally-wrenching legal process . . . ."). Because the execution of a consent document must strictly comply with section 63-9-340, the consent document is invalid and the adoption may not proceed. Therefore, Lawrence could not ratify the invalid consent by her subsequent acts.

II. Remaining Issues

We decline to determine whether the Rule 62(a), SCRCP, ten-day automatic stay was applicable to the family court's order because our order granting supersedeas rendered that issue moot. *See Sloan v. Dep't of Transp.*, 379 S.C. 160, 167, 666 S.E.2d 236, 240 (2008) ("This Court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." (internal quotation marks omitted)); *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy."). We do not address the best interest of the child because it is not an issue when the consent document is invalid. Finally, because we are affirming the family court's order in favor of Lawrence, we do not address Brown's request for attorney's fees.

III. Conclusion

For the foregoing reasons, the order on appeal is

AFFIRMED.

FEW, C.J., and WILLIAMS and KONDUROS, JJ., concur.