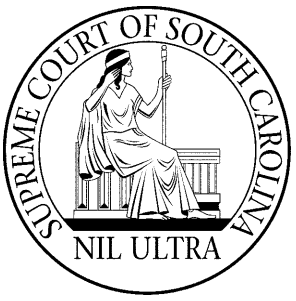

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 34
August 27, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

27420 - Ashley II of Charleston, LLC. v. PCS Nitrogen, Inc.	Pending
27422 - Shannon Ranucci v. Corey Crain	Pending
27423 - Vicki Wilkinson v. East Cooper	Pending
27427- Patricia Brouwer v. Sisters of Charity Providence Hospital	Pending
27429 - Laurance Davis v. Parkview Apartments	Pending
2014-MO-021 - Seyed D. Tahaei v. Sherri L. Tahaei	Pending
2014-MO-022 - Travelers Property v. Senn Freight	Pending
2014-MO-027 - The State v. Jake Antonio Wilson	Denied 8/22/2014
2014-MO-031 - Andreal Holland v. J. C. Witherspoon, Jr.	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5219-Moorhead Construction Inc. et al. v. Pendleton Station et al.	Pending
5232-State v. Clarence W. Jenkins	Pending
5241-Richard A. Fisher v. Shipyard Village Council	Pending
5242-Patricia Fore v. Griffco of Wampee, Inc.	Pending
5243-Kerry Levi v. Northern Anderson County EMS	Pending
5244-Clifford Thompson v. State	Pending
5245-Allegro, Inc. v. Emmett J. Scully et al.	Pending
5246-State v. Jason Alan Johnson	Pending
5247-State v. Henry Haygood	Denied 08/20/14
5248-Demetrius Mack v. Leon Lott	Pending
5250-Precision Walls v. Liberty Mutual Fire Ins.	Pending
5251-State v. Michael Wilson Pearson	Pending
5252-State v. Daisy Lynne Mims	Pending

5253-Sierra Club v. SCDHEC and Chem-Nuclear Systems, Inc.	Pending
5254-State v. Leslie Parvin	Pending
5256-James D. Fowler v. Nationwide Mutual	Pending
5257-State v. Jefferson Perry	Pending
5258-State v. Wayne Stewart Curry	Pending
5259-State v. Victor A. White	Pending
2014-UP-200-Branch Banking and Trust v. Luquire	Pending
2014-UP-203-Helena P. Tirone v. Thomas W. Dailey	Pending
2014-UP-206-State v. Forrest K. Samples	Pending
2014-UP-210-State v. Steven Kranendonk	Pending
2014-UP-215-Yossi Haina v. Beach Market, LLC	Pending
2014-UP-217-State v. Douglas Bret Bishop	Pending
2014-UP-222-State v. James Curtis Tyner	Pending
2014-UP-223-Permanent General v. Karen D. Givens	Pending
2014-UP-224-State v. James E. Wise	Pending
2014-UP-228-State v. Taurus Thompson	Pending
2014-UP-230-State v. Travis N. Buck	Pending
2014-UP-234-State v. Julian C. Young	Pending
2014-UP-235-Rest Assured, LLC v. SCDEW	Pending
2014-UP-241-First Citizens Bank v. Charles T. Brooks, III	Pending
2014-UP-248-SCDOT v. RI CS5, LLC	Pending

2014-UP-250-Xu Dong Sun v. Xiaolan Wang	Pending
2014-UP-255-Loretta Katzburg v. Peter Katzburg	Pending
2014-UP-265-State v. Gregory A. Ivery	Denied 08/20/14
2014-UP-266-Mark R. Bolte v. State	Denied 08/20/14
2014-UP-267-Jane Doe v. Charles Smith	Pending
2014-UP-268-Jones Herring v. Gilbert Bagnell	Pending
2014-UP-270-Progressive Northern Ins. v. Stanley Medlock	Pending
2014-UP-273-Gregory Feldman et al. v. William Casey et al.	Pending
2014-UP-277-Raymond Weatherford v. Shelly Weatherford	Pending
2014-UP-279-Jacqueline Smith v. Horry County Schools	Pending
2014-UP-281-Tina Mayers v. OSI Group	Pending
2014-UP-282-State v. Donald M. Anderson	Pending
2014-UP-284-John Musick v. Thomas Dicks	Pending
2014-UP-288-Gayla Ramey v. Unihealth Post Acute	Pending
2014-UP-292-Keith Roberts v. Randall J. Drew	Pending
2014-UP-299-Lucille Smith v. The Heirs at law of Benjamin Days	Pending
2014-UP-304-State v. Tawanda Allen	Pending
2014-UP-305-Tobacco Merchant v. City of Columbia Zoning	Pending
2014-UP-306-Yadkin Valley v. Oaktree Homes	Pending
2014-UP-307-Desiree Gabriel Brown v. Wendell Brown	Pending
2014-UP-317-Cherry Scott v. Heritage Healthcare	Pending
2014-UP-318-Linda Johnson v. Heritage Healthcare	Pending

2014-UP-323-SCDSS v. Rubi Bertaud-Cabrera Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4909-North American Rescue v. Richardson Pending

4960-Justin O'Toole Lucey et al. v. Amy Meyer Pending

4966-State v. Mahammed Ahamad Atieh Denied 08/21/14

4975-Greeneagle Inc. v. SCDHEC Pending

4979-Major v. City of Hartsville Pending

5008-Willie H. Stephens v. CSX Transportation Pending

5019-John Christopher Johnson v. Reginald C. Lloyd et al. Pending

5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual Pending

5025-State v. Randy Vickery Pending

5031-State v. Demetrius Price Pending

5052-State v. Michael Donahue Pending

5055-Hazel Rivera v. Warren Newton Pending

5072-Michael Cunningham v. Anderson County Pending

5077-Kirby L. Bishop et al. v. City of Columbia Pending

5078-Estate of Livingston v. Clyde Livingston Pending

5084-State v. Kendrick Taylor Denied 08/21/14

5092-Mark Edward Vail v. State Pending

5095-Town of Arcadia Lakes v. SCDHEC Pending

5099-Roosevelt Simmons v. Berkeley Electric Pending

5111-State v. Alonza Dennis	Denied 08/21/14
5112-Roger Walker v. Catherine Brooks	Pending
5114-State v. Teresa Blakely	Denied 08/21/14
5117-Loida Colonna v. Marlboro Park (2)	Granted 08/21/14
5118-Gregory Smith v. D.R. Horton	Pending
5119-State v. Brian Spears	Pending
5126-A. Chakrabarti v. City of Orangeburg	Denied 08/21/14
5131-Lauren Proctor v. Whitlark & Whitlark	Granted 08/22/14
5135-Microclean Tec. Inc. v. Envirofix, Inc.	Granted 08/21/14
5140-Bank of America v. Todd Draper	Pending
5144-Emma Hamilton v.Martin Color Fi	Denied 08/21/14
5151-Daisy Simpson v. William Simpson	Pending
5152-Effie Turpin v. E. Lowther	Pending
5156-State v. Manuel Marin	Pending
5160-State v. Ashley Eugene Moore	Pending
5163-J. Scott Kunst v. David Loree	Denied 08/21/14
5166-Scott F. Lawing v. Univar USA Inc.	Granted 08/21/14
5175-State v. Karl Ryan Lane	Pending
5176-Richard A. Hartzell v. Palmetto Collision, LLC	Pending
5178-State v. Michael J. Hilton	Denied 08/21/14
5181-Henry Frampton v. SCDOT	Pending

5188-Mark Teseniar v. Professional Plastering	Denied 08/21/14
5191-Jacqueline Carter v. Verizon Wireless	Pending
5193-Israel Wilds v. State	Pending
5195-Laura Riley v. Ford Motor Company	Pending
5196-State v. James Anderson	Pending
5197-Gladys Sims v. Amisub	Pending
5198-State v. Julia Gorman and Robert Palmer	Pending
5200-Tynyasha Horton v. City of Columbia	Pending
5201-Phillip Grimsley v. SLED	Pending
5203-James Teeter v. Debra Teeter	Pending
5209-State v. Tyrone Whatley	Pending
5217-H. Eugene Hudson v. Mary Lee Hudson	Pending
5224-State v. Alex Lorenzo Robinson	Pending
5227-State v. Frankie Lee McGee	Pending
5230-State v. Christopher L. Johnson	Pending
5231-Centennial Casualty v. Western Surety	Pending
5260-Jennifer Brown v. Baby Girl Harper	Granted 08/20/14
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2012-UP-078-Seyed Tahaei v. Sherri Tahaei	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending

2012-UP-312-State v. Edward Twyman	Pending
2012-UP-351-State v. Kevin J. Gilliard	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-479-Elkachbendi v. Elkachbendi	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-552-Virginia A. Miles v. Waffle House	Pending
2012-UP-577-State v. Marcus Addison	Pending
2012-UP-600-Karen Irby v. Augusta Lawson	Pending
2012-UP-603-Fidelity Bank v. Cox Investment Group et al.	Pending
2012-UP-608-SunTrust Mortgage v. Ostendorff	Denied 08/21/14
2012-UP-658-Palmetto Citizens v. Butch Johnson	Pending
2012-UP-663-Carlton Cantrell v. Aiken County	Pending
2013-UP-015-Travelers Property Casualty Co. v. Senn Freight	Pending
2013-UP-062-State v. Christopher Stephens	Pending
2013-UP-066-Dudley Carpenter v. Charles Measter	Pending
2013-UP-071-Maria McGaha v. Honeywell International	Pending
2013-UP-081-Ruth Sturkie LeClair v. Palmetto Health	Pending
2013-UP-090-JP Morgan Chase Bank v. Vanessa Bradley	Pending
2013-UP-127-Osmanski v. Watkins & Shepard Trucking	Pending
2013-UP-147-State v. Anthony Hackshaw	Pending

2013-UP-158-CitiFinancial v. Squire	Pending
2013-UP-188-State v. Jeffrey A. Michaelson	Pending
2013-UP-251-Betty Jo Floyd v. Ken Baker Used Cars	Pending
2013-UP-256-Woods v. Breakfield	Denied 08/21/14
2013-UP-257-Matter of Henson (Woods) v. Breakfield	Pending
2013-UP-272-James Bowers v. State	Denied 08/21/14
2013-UP-279-MRR Sandhills v, Marlboro County	Denied 08/21/14
2013-UP-288-State v. Brittany Johnson	Pending
2013-UP-290-Mary Ruff v. Samuel Nunez	Pending
2013-UP-297-Greene Homeowners v. W.G.R.Q.	Pending
2013-UP-310-Westside Meshekoff Family v. SCDOT	Pending
2013-UP-322-A.M. Kelly Grove v. SCDHEC	Pending
2013-UP-358-Marion L. Driggers v. Daniel Shearouse	Pending
2013-UP-393-State v. Robert Mondriques Jones	Denied 08/07/14
2013-UP-424-Lyman Russell Rea v. Greenville Cty.	Pending
2013-UP-428-State v. Oran Smith	Granted 08/21/14
2013-UP-435-State v. Christopher Spriggs	Pending
2013-UP-442-Jane AP Doe v. Omar Jaraki	Pending
2013-UP-459-Shelby King v. Amy Bennett	Denied 08/21/14
2013-UP-461-Ann P. Adams v. Amisub of South Carolina Inc.	Pending
2013-UP-489-F.M. Haynie v. Paul Cash	Pending

2014-UP-013-Roderick Bradley v. The State	Pending
2014-UP-020-Joseph Marshall v. Carrie Marshall	Pending
2014-UP-034-State v. Benjamin J. Newman	Pending
2014-UP-047-State v. Sam Harold Smith	Pending
2014-UP-056-In the matter of the care and treatment of P. Guess	Pending
2014-UP-057-State v. Shawn Reaves	Granted 08/22/14
2014-UP-062-Stoneledge v. IMK Development	Denied 08/21/14
2014-UP-074-Tim Wilkes v. Horry County	Pending
2014-UP-082-W. Peter Buyck v. Williams Jackson	Pending
2014-UP-087-Moshtaba Vedad v. SCDOT	Pending
2014-UP-088-State v. Derringer Young	Pending
2014-UP-091-State v. Eric Wright	Pending
2014-UP-094-Thaddeus Segars v. Fidelity National	Pending
2014-UP-103-State v. David Vice	Pending
2014-UP-113-State v. Jamaal Hinson	Pending
2014-UP-114-Carolyn Powell v. Ashlin Potterfield	Pending
2014-UP-121-Raymond Haselden v. New Hope Church	Pending
2014-UP-122-Ayree Henderson v. State	Pending
2014-UP-128-3 Chisolm Street v. Chisolm Street	Pending
2014-UP-132-State v. Ricky S. Bowman	Pending
2014-UP-143-State v. Jeffrey Dodd Thomas	Pending

2014-UP-159-City of Columbia v. William K. Wilson	Pending
2014-UP-167-State v. David G. Johnson	Pending
2014-UP-172-Willie Rogers v. Charles Carr	Pending
2014-UP-173-Reda Reilly v. Kevin Reilly	Pending
2014-UP-178-State v. Anthony R. Carter	Pending
2014-UP-180-State v. Travas D. Jones	Pending
2014-UP-183-Allison Johnson v. Russell Johnson	Pending
2014-UP-192-Lawrence Terry v. Allen University	Pending

The Supreme Court of South Carolina

The State, Petitioner,

v.

Phillip Wesley Sawyer, Respondent.

Appellate Case No. 2011-201206

ORDER

After careful consideration of the petition for rehearing, the majority of the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. However, we withdraw the original opinion filed June 4, 2014, and substitute the attached opinion. The only change is the removal of a citation to the Court of Appeals opinion in *State v. Gordon*, 2014 WL 1614854, which was withdrawn after our opinion was filed. Accordingly, the petition for rehearing is denied.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ Kaye G. Hearn J.

We would grant the petition.

s/ Jean H. Toal C.J.

s/ John W. Kittredge J.

Columbia, South Carolina
August 27, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Phillip Wesley Sawyer, Respondent.

Appellate Case No. 2011-201206

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27393
Heard November 5, 2013 – Withdrawn and Substituted August 27, 2014

AFFIRMED

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, and Solicitor Barry Joe Barnette, of Spartanburg, for Petitioner.

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Respondent.

JUSTICE PLEICONES: The Court granted the State's petition for a writ of certiorari to review an unpublished Court of Appeals decision that affirmed the

circuit court's suppression of respondent's breath test results and video in this prosecution for driving under the influence (DUI). *State v. Sawyer*, 2011-UP-263 (S.C. Ct. App. filed June 7, 2011). We affirm, holding that a videotape from the breath test site that lacks the audio portion of the reading of Miranda rights and the informed consent law did not satisfy the requirements of S.C. Code Ann. § 56-5-2953(A)(2) (2006).[1]

FACTS

In September 2007, respondent was taken to the Spartanburg County Jail by Deputy Evett, who picked him up following a traffic stop made by Lt. Woodward. Evett, a certified Data Master operator, placed respondent in the "subject test area" which is a room that adjoins the Data Master room. The rooms are separated by a glass panel. The deputy retrieved some forms from the Data Master room and then appeared to read respondent his Miranda rights and the implied consent information. Both respondent and Deputy Evett signed the forms. There are separate audio and video recording devices in both the subject test area and in the breathalyzer room. In this case, the audio device in the subject test area did not function.

Respondent moved to suppress the evidence relating to the breath test site alleging the videotape did not meet the requirements of S.C. Code Ann. § 56-5-2953(A). Section (A) required that a person charged with DUI have his conduct at both the incident site and the breath test site videotaped. Subsection (A)(2) provided:

> The videotaping at the breath site:
>
> > (a) must be completed within three hours of the person's arrest for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 or a probable cause determination that the person violated Section 56-5-2945, unless compliance is not possible because the person needs emergency

[1] Subsection A of this statute was rewritten by 2008 Act No. 201, § 11, effective February 10, 2009 or when new equipment is installed. Essentially, the statute no longer requires the test to be conducted within 3 hours, and eliminates the requirement that the video include the reading of Miranda rights at the breath test site.

> medical treatment considered necessary by licensed medical personnel;
>
> (b) must include the reading of Miranda rights, the entire breath test procedure, the person being informed that he is being videotaped, and that he has the right to refuse the test;
>
> (c) must include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test;
>
> (d) must also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to videotape this waiting period. However, if the arresting officer administers the breath test, the person's conduct during the twenty-minute pre-test waiting period must be videotaped.

The circuit court first held that the videotape itself must be excluded because "the videotape has no audio of the conversations between the testing officer and [respondent] concerning such matters as his Miranda warnings, the explanation of implied consent or other matters that may have been discussed between them." The judge held that evidence other than the videotape could be used, citing § 56-5-2953(B).

On respondent's motion for reconsideration, the circuit court clarified that it was suppressing not only the videotape, but also any evidence or testimony that respondent was offered and/or took a breath test, as well as the results of that test. The court noted the State had supplied an "exigency" affidavit, seeking to invoke the provisions of § 56-5-2953(B) that provides "Failure by the **arresting officer** to produce the videotapes required by this section is not alone a ground for dismissal of any charge . . . if the **arresting officer** submits a . . . sworn affidavit that it was physically impossible to produce the videotape because . . . exigent circumstances existed." (emphasis supplied). The judge held "an exigency" required an emergency situation, or one requiring immediate attention or remedy, and found that since the State did not even know of the audio malfunction for several months

after respondent's test, there was no exigent circumstance here. The court also noted the affidavit was not prepared by the arresting officer, Lt. Woodward, as required by the statute, but rather by Deputy Evett, the breath test administrator.

In the direct appeal, the State argued first that since a videotape was produced, no consideration of Deputy Evett's "exigency" affidavit was necessary.[2] The State also argued that any defects in the audio portion of the tape went to its weight, not its admissibility, and that all the statute required was a video, which it produced. Alternatively, the State argued the trial judge should not have relied on the "exigency" exception, but that instead he should have admitted the evidence based upon a different part of § 56-5-2953(B), which permits the court to consider "other valid reasons" for the lack of a videotape based upon the "totality of the circumstances." This "totality of the circumstances" argument was not preserved for appeal as it was not ruled upon in either the circuit court's original order or in its amended order. *E.g. State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) fn. 3.

Following the Court of Appeals' decision affirming the trial court's suppression of all evidence obtained at the breath test site, the State sought a writ of certiorari. In its petition, the State made two arguments:

> I. The Court of Appeals erred in affirming the trial court's suppression of the video recording of the breath test site, testimony or evidence that a breath test was offered or administered, and the results of Respondent's breath test.
>
> II. The Court of Appeals erred in refusing to reverse the trial court's decision based on the totality of the circumstances pursuant to Section 56-5-2953(B) of the South Carolina Code.

State's petition for a writ of certiorari to the Court of Appeals (filed November 18, 2011) (C-TRACK Appellate Case No. 2011-201206).

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[2] We note that, assuming it was error to consider this affidavit, the State was the party that introduced it. It is well-settled that a party cannot complain of an error it induced. *E.g. State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395 (1984).

On January 9, 2013, the Court granted certiorari on the first question but denied certiorari on the second. S. Ct. Order dated January 9, 2013 (C-TRACK Appellate Case No. 2011-201206).[3]

ISSUE

> Did a breath test site video that did not include audio demonstrating that Miranda warnings were given, that the individual was informed that he was being videotaped, or that he has the right to refuse the breath test meet the requirements of § 56-5-2953(A) as it existed in September 2007?

ANALYSIS

The State argues that the statute only required that the individual's "conduct" be recorded, and that conduct under the statute has been defined by the Court of Appeals as "one's behavior, action or demeanor." *Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011). Thus, the State contends that only video of the individual is necessary to satisfy the statute. We disagree.

In *Murphy*, the incident site video did not capture a full length image of the individual as she attempted field sobriety tests. *Murphy* held that the video adequately reflected the individual's behavior. Here, however, we are concerned not with the defendant's conduct but with the content of the statutorily required warnings. At the breath test site, the videotape must record the individual's conduct during the twenty-minute waiting period [§ 56-5-2953(A)(2)(d)] and the action of the breathalyzer operator conducting the test [§ 56-5-2953(A)(2)(c)]. Silent tape of this conduct would be acceptable under *Murphy*. However, the statute required a videotape not merely of the individual's conduct while being read his Miranda and informed consent rights, but also that it "must include" "the reading of Miranda rights" and "the person being informed that he is being videotaped, and that he has the right to refuse the test." § 56-5-2953(A)(2)(b). A silent video simply cannot meet these statutory requirements.[4]

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[3] While the dissent would find the scope of the circuit court's suppression order too broad, there is no challenge to the breadth of that order on certiorari.

[4] Contrary to the dissent's contention that the video shows respondent being read his *Miranda* warnings, being told the matter was videotaped, and being informed

The State argues that this defect in the videotape goes only to its weight, not its admissibility. Here we are concerned with a statute which governs the admissibility of certain evidence. *Compare e.g.* S.C. Code Ann. § 19-1-180 (Supp. 2012) (certain hearsay statements made by children admissible in family court if statute's terms complied with). In § 56-5-2953(B), the General Assembly specified:

> Nothing in this section may be construed as prohibiting the introduction of other evidence in the trial of a [DUI charge]. Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of [charges] if the arresting officer submits a sworn affidavit certifying that the videotape equipment at the time of the . . . breath test device [sic] was in an inoperable condition, stating reasonable efforts have been made to maintain the equipment . . . and certifying there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the videotape because the person needed emergency medical treatment, or exigent circumstances existed . . . .
> Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape based upon the totality of the circumstances . . . .
>
> Section 56-5-2953(B) (2006).

While defects in evidence do not generally affect admissibility, as the State maintains, the Court has interpreted the statute to require strict compliance with Section (A) as a prerequisite for admissibility, unless an exception in Section (B) applies. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007); *see*

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of his right to refuse, all that the video shows is the officer's lips moving. As for respondent's failure to challenge the contents of the officer's warnings, at this juncture the sole issue before the circuit court was whether the silent video complied with the statute. Further, respondent has not conceded the adequacy of the officer's statements, as reflected in his briefs which refer to the "alleged warnings." Finally, "bad faith" and "bad motive" are irrelevant here.

also State v. Elwell, 403 S.C. 606, 743 S.E.2d 802 (2013). The General Assembly is presumed to be aware of this Court's interpretation of a statute, and where that statute has been amended, but no change has been made that affects the Court's interpretation, the legislature's inaction is evidence that our interpretation is correct. *E.g. McLeod v. Starnes*, 396 S.C. 647, 723 S.E.2d 198 (2012). While the General Assembly has amended § 56-5-2953 following our *Suchenski* decision, nothing in the amended statute alters our holding that failure to comply with the statute's terms renders the evidence inadmissible.[5]

As explained above, we declined certiorari to consider whether the circuit court might have admitted the flawed tape under § 56-5-2953(B)'s "totality of the circumstances" exception, and we have determined this tape did not satisfy § 56-5-2953(A). The Court of Appeals properly affirmed the circuit court's suppression order. *City of Rock Hill v. Suchenski*, *supra*.[6]

CONCLUSION

The Court of Appeals' decision is

AFFIRMED.

HEARN and BEATTY, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

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[5] The dissent maintains that a prejudice analysis is appropriate whenever evidence is obtained without full compliance with statutory requirements, citing *State v. Odom*, 382 S.C. 144, 676 S.E.2d 124 (2009) (actually involving violation of executive agreements); *State v. Huntley*, 349 S.C. 1, 562 S.E.2d 472 (2002); *State v. Chandler*, 267 S.C. 138, 226 S.E.2d 533 (1976); *State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975). As we have explained, these decisions are inapposite since, unlike 56-5-2953, they involve statutes where the General Assembly did not specify the remedy for the State's failure to comply. *Suchenski*, *supra*.

[6] The only arguable error of law was the circuit court's failure to dismiss the charges once it determined that the State did not produce a videotape meeting the requirements of (A) and that it did not meet any of the exceptions in (B). *Suchenski*, *supra*; *Elwell*, *supra*. Respondent, however, did not appeal the circuit court's denial of his request that the charges be dismissed.

CHIEF JUSTICE TOAL: I respectfully dissent. I would hold that the circuit court committed an error of law in suppressing the evidence at issue in this case.

Assuming, without deciding, that the video recording of Respondent's breath test site did not comply with section 56-5-2953,[7] I would apply a harmless error analysis in determining whether the video recording and breath test evidence should have been suppressed. This Court has recognized that the "exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, *at least where the appellant cannot demonstrate prejudice* at trial resulting from the failure to follow statutory procedures." *State v. Chandler*, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976) (emphasis added) (citing *State v. Sachs*, 264 S.C. 541, 566 n.11, 216 S.E.2d 501, 514 n.11 (1975)). In *State v. Huntley*, 349 S.C. 1, 5, 562 S.E.2d 472, 474 (2002), the circuit court suppressed a defendant's breathalyzer results where the simulator test solution did not contain the proper alcohol concentration required by an Act.[8] Despite non-compliance with the Act, this Court held that the circuit court improperly excluded the breathalyzer test results because the defendant was not prejudiced by the violation, as the breathalyzer machine itself was operating properly. *Id.* at 6, 562 S.E.2d at 474. Therefore, the Court determined that evidence of non-compliance with the Act went to the weight, not the admissibility of the defendant's breathalyzer results. *Id.*

Relying on these cases, I would hold that the circuit court committed an error of law in failing to engage in a prejudice analysis upon finding that the video

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[7] The State argues that the video recording satisfied section 56-5-2953 because the video recording captured all conduct and events required by the statute. In addition, the police officer who administered the breath test submitted an affidavit to the circuit court indicating that exigent circumstances existed under 56-5-2953(B) because the audio failure was unknown and out of the officer's control at the time of the test.

[8] The Act amended South Carolina Code Ann. § 56-5-2950(a) to require a simulator test be performed before a breath test is administered to ensure the reliability of the breathalyzer machine results. Act No. 434, 1998 S.C. Acts 3220–23.

recording failed to satisfy the requirements of section 56-5-2953.[9]

Contrary to the majority's assertion, the General Assembly did not specify a remedy in section 56-5-2953 for failure to comply with the statutory requirements. Subsection (B) merely provides that noncompliance with the statute "is not alone a ground for dismissal" *if* the video recording qualifies under an exception in subsection (B). S.C. Code Ann. § 56-5-2953(B); *see also Suchenski*, 374 S.C. at 16, 646 S.E.2d at 881 (finding that failure to produce a video recording in compliance with 56-5-2953 *may* be a ground for dismissal if no exceptions apply). Regardless, in my opinion, a statute's failure to specify a remedy for noncompliance does not preclude a prejudice analysis, as the majority implies. *C.f. State v. Landon*, 370 S.C. 103, 108–09, 634 S.E.2d 660, 663 (finding a prejudice analysis appropriate for an alleged violation of a recordkeeping statute which does not specify a remedy for noncompliance).

In my view, Respondent was not prejudiced by the video recording's lack of audio. Aside from its lack of audio, the video recording complies with the statutory requirements of 56-5-2953 by including the reading of Respondent's *Miranda*[10] warnings, the officer informing Respondent of the video recording and his right to refuse the breath test, and the breath test procedure itself. This Court has stated that "the purpose of section 56-5-2953 . . . is to create direct evidence of a DUI arrest." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011). Despite the malfunctioning of the audio, the video recording nevertheless creates evidence of Respondent's breath test. Significantly, Respondent has challenged neither the validity of the *Miranda* warnings he was given nor any other aspect of the breath test procedure. Respondent has not asserted that bad faith or a bad motive existed on the part of any actor involved in

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[9] The mention of prejudice in *City of Rock Hill v. Suchenski*, 374 S.C. 12, 16, 646 S.E.2d 879, 881 (2007) has no impact on the present case. In *Suchenski*, the Court found that a violation of 56-5-2953, even without a showing of prejudice to the defendant, may result in dismissal of the charges. *Id.* As the majority points out, in this case, Respondent did not appeal the circuit court's denial of his motion to dismiss.

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

the video recording audio failure.

Therefore, I would hold that Respondent was not prejudiced by the omission of audio in the video recording and, consequently, the circuit court erred in suppressing the evidence. Absent a violation of Respondent's constitutional rights—which are not in dispute here—the circuit court should not have excluded the video recording or the evidence surrounding Respondent's breath test without a showing that (1) the video did not comply with section 56-5-2953 *and* (2) Respondent was prejudiced as a result of the video's non-compliance. *See Huntley*, 349 S.C. at 6, 562 S.E.2d at 474; *Chandler* 267 S.C.at 143, 226 S.E.2d at 555.

In my view, nothing in section 56-5-2953 mandates suppression of a defective video recording, nor has this Court ever interpreted the statute as requiring strict compliance for admission of a video recording, as the majority asserts. Defects in evidence generally do not affect admissibility. *See State v. Odom*, 382 S.C. 144, 152, 676 S.E.2d 124, 128 (2009) (citing *Huntley*, 349 S.C. at 6, 562 S.E.2d at 474). As indicated, *supra*, in the prejudice analysis, "exclusion is typically reserved for constitutional violations." *Id.* (citing *Huntley*, 349 S.C. at 6, 562 S.E.2d at 474); *Chandler*, 267 S.C. at 143, 226 S.E.2d at 555. Thus, I would find that the defect in the video recording goes to the weight, rather than the admissibility, of the evidence. *See Odom*, 382 S.C. at 152, 676 S.E.2d at 128.

Likewise, I disagree with the majority's interpretation of *Suchenski*. Specifically, the majority believes *Suchenski* stands for the proposition that strict compliance with section 56-5-2953 is a prerequisite for admissibility of evidence. *Suchenski* merely holds that dismissal of a DUI charge is "*an* appropriate remedy provided by [section] 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions." *Suchenski*, 374 S.C. at 17, 646 S.E.2d at 881 (emphasis added). In fact, the case makes no mention of suppression of evidence, addressing only dismissal of DUI charges as a possible remedy for non-compliance with the statute. *Id.* Because dismissal of Respondent's DUI charges is not before us, this Court may only review the circuit court's suppression order. As a result, the majority's reliance on *Suchenski* is misplaced.

Furthermore, the majority provides no support for upholding the circuit court's suppression of Respondent's breath test results along with all evidence or

testimony related to the breath test.[11] Even if the failure to comply with the statute did, in fact, require suppression of the defective video recording, and assuming the circuit court declined to dismiss the DUI charges, I cannot conceive of a basis, statutory or otherwise, for excluding the breath test results and the related testimony and evidence. To the contrary, section 56-5-2953 provides that "[n]othing in this section may be construed as prohibiting the introduction of other relevant evidence" in the trial for a DUI. S.C. Code Ann. § 56-5-2953(B).

Therefore, because I would hold that the circuit court erred in failing to conduct a prejudice analysis and Respondent demonstrated no prejudice resulting from admission of the evidence, and because at the very least the circuit court erred in suppressing the evidence surrounding the breath test, I would reverse the court of appeals' decision upholding the circuit court's suppression order and remand for a new trial.

KITTREDGE, J., concurs.

[11] I disagree with the majority's contention that there is no challenge to the breadth of the circuit court's suppression order on certiorari. While the State's petition does not use that language, the State argued that the court of appeals erred in affirming the circuit court's suppression of the video recording, the testimony or evidence that a breath test was offered or administered, *and* the results of the breath test. In my opinion, if the State contended the circuit court erred in excluding the video recording only, the State's argument would have only mentioned the video recording.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Stephen C. Whigham, Petitioner,

v.

Jackson Dawson Communications, Employer, and The Hartford, Carrier, Respondents.

Appellate Case No. 2012-212258

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Workers' Compensation Commission

Opinion No. 27440
Heard May 8, 2014 – Filed August 27, 2014

REVERSED AND REMANDED

Douglas A. Churdar, of Greenville, for Petitioner.

Benjamin M. Renfrow and Wesley J. Shull, both of Willson Jones Carter & Baxley, P.A., of Greenville, for Respondents.

JUSTICE HEARN: Stephen Whigham was injured playing kickball during an event he organized for his employer, Jackson Dawson Communications and filed a claim for workers' compensation. The single commissioner denied the claim

because she found the injury did not arise out of or in the course of his employment, and that decision was affirmed by the full commission and the court of appeals. We reverse and remand, holding that under the facts of this case, Whigham is entitled to workers' compensation because he was impliedly required to attend the kickball game he organized, and therefore, his injury arose out of and in the course of his employment.

FACTUAL/PROCEDURAL HISTORY

Whigham was employed as the Director of Creative Solutions at Jackson Dawson, a marketing, advertising, and public relations company. As part of his employment, Whigham attended bi-monthly meetings wherein the managers discussed, among other things, the importance of team-building events. In accordance with the company's desire to cultivate an enjoyable work atmosphere, Whigham conceived the idea of having a company kickball game. He proposed the idea to his superior, Kevin Johnson, who instructed him to move forward with it. Whigham proceeded to contact a rental facility and designed T-shirts for the event. Johnson authorized Whigham to spend $440 of company funds for the rental, the T-shirts, drinks, and snacks.

Once the event was organized, Whigham used the company intranet to promote it and encourage attendance. The game took place on a Friday afternoon at 3:00 with roughly half of Jackson Dawson's employees in attendance. Whigham was injured on the last play when he jumped to avoid being thrown out by the opposing team. He landed awkwardly on his right leg, shattering his tibia and fibula. He was taken away in an ambulance and eventually underwent two surgeries. His doctor later informed him he would need a knee replacement in the near future.

The single commissioner denied compensability on the grounds that the injury did not arise out of or in the course of Whigham's employment. Specifically, she found he was neither required to attend the event, nor was there any benefit beyond general employee morale to the company. The full commission affirmed, essentially adopting the single commissioner's order. The court of appeals affirmed in a memorandum opinion, citing cases involving the substantial evidence standard. *Whigham v. Jackson Dawson Commc'ns*, Op. No. 2012-UP-223 (S.C. Ct. App. filed April 11, 2012). This Court granted certiorari to review the opinion of the court of appeals.

ISSUE PRESENTED

Did the court of appeals err in affirming the denial of workers' compensation because the injury did not arise out of and in the course of Whigham's employment?

STANDARD OF REVIEW

Pursuant to the Administrative Procedures Act, this Court can reverse or modify a decision of the full commission only if the claimant's substantial rights have been prejudiced because the decision is affected by an error of law or is not supported by substantial evidence in the record. *Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 387, 732 S.E.2d 500, 502–03 (2012). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000).

LAW/ANALYSIS

In determining whether a work-related injury is compensable, the Workers' Compensation Act is liberally construed toward providing coverage and any reasonable doubt as to the construction of the Act will be resolved in favor of coverage. *Shealy*, 341 S.C. at 455–56, 535 S.E.2d at 442. Pursuant to Section 42–1–160(A) of the South Carolina Code (Supp. 2013), for an injury to be compensable under the Act, it must "aris[e] out of and in the course of employment." An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury. *Crisp v. SouthCo., Inc.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013). In general, whether an accident arises out of and is in the course and scope of employment is a question of fact for the full commission. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004). However, "[w]here there are no disputed facts, the question of whether an accident is compensable is a question of law." *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007).

In finding a recreational or social activity is within the course of employment, this Court considers whether the activity falls within one of the

following factors established by Professor Arthur Larson:

> (1) [It occurs] on the premises during a lunch or recreation period as a regular incident of the employment; or
>
> (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

Leopard v. Blackman-Uhler, 318 S.C. 369, 370–71, 458 S.E.2d 41, 41 (1995) (citing 1A Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 22.00 (1994) (currently at 2 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 22.01 (2013))).

Whigham contends the court of appeals erred in finding that his injury was noncompensable because it did not arise out of and in the course of his employment. Whigham argues his injury is compensable under both the second and third provisions of Larson's guidelines. We agree that Whigham was impliedly required to attend the kickball game he organized and that it became part of his services; therefore, the event was brought within the scope of his employment. Although the event may have been voluntary for company employees generally, the undisputed facts unequivocally indicate Whigham was expected to attend as part of his professional duties. Accordingly, we hold Whigham's injury arose out of his employment as a matter of law.[1]

The law is clear that when determining whether an employee is required to attend an event a directive is not necessary "if the employee is made to understand that he is to take part in the affair." Larson, *supra* § 22.04[2]. Here, both

[1] Because we find Whigham's injury arose out of and in the course of his employment as he was impliedly required to attend the game, we do not reach the question of whether the company derives a substantial direct benefit from the activity. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

Whigham and his superior plainly considered his presence vital to his job of executing the event. When asked whether Whigham felt the event was voluntary *for him*, he responded: "I think it would have been a reflection of poor management if I decided not to show up." He further stated that "[o]n that particular day" he considered attending the event to be part of his job.

Additionally, during his testimony, Johnson was asked whether he would have been upset if Whigham did not attended the game, and he responded that he "would have been surprised and shocked, because [Whigham] spent all the time planning the thing." When asked if he would have considered it irresponsible of Whigham not to show up, Johnson could barely entertain the suggestion, stating: "I don't know. I would have thought—he wouldn't do that. I'll just say that. He wouldn't do that. . . . It would have been just unexpected, unbelievable. I mean, you don't just plan something and then not show up for it."

We find both Johnson's and Whigham's testimony establish that Whigham's participation was expected rather than voluntary. This fact sets Whigham's participation apart from that of all the other employees. It is undisputed that Whigham felt compelled to go and his boss would have considered it a dereliction of duty to miss it. The only fair reading of Johnson's testimony is that he knew he did not have to expressly direct Whigham to attend the game because Whigham would already feel an obligation to be there.

Furthermore, although the respondents place much emphasis on the fact that this event was Whigham's idea, it is apparent that the company fully embraced the undertaking so as to make it part of his employment. Johnson testified these team-building events are considered desirable to the company as occasions to "promote fun within the business" and "break the stress." Jackson Dawson, as a brand builder itself, strived to be a "non-typical employer" by being a "fun place to work." A fun atmosphere is seen as a means to "retain good employees and keep people happy," which would produce better performing employees. When Whigham brought up the idea of the kickball game to Johnson, his response was "that is a crazy idea, but let's talk more about it." Johnson authorized Whigham to spend company funds on renting the facilities as well as purchasing snacks and T-shirts for the game. Johnson also was aware and supportive of the fact that Whigham used the company intranet to "start the hype machine" to promote the event and encouraged employees to attend even though it occurred during typical business hours. Moreover, Whigham's professional performance evaluations

clearly reflect the kickball game was considered something important that he brought to the company. Whigham indicated on his self-evaluation that a cookout and the kickball game he planned "both had a very positive lifts to the working culture at Jackson Dawson." Johnson's evaluation of Whigham stated that Whigham was a "team player" and specifically noted he "has been instrumental in bringing back a couple of fun events, a cookout and dare I say it, kickball."

Although it may not have been within Whigham's job description to produce any team-building events, it does not appear it was *anyone's* job to do so, but instead reflected the company's desire to place emphasis on developing a certain type of work atmosphere. A specific act need not be designated in an employee's job description to be compensable. *Grant*, 372 S.C. at 201, 641 S.E.2d at 871–72 ("An act outside an employee's regular duties which is undertaken in good faith to advance the employer's interest, whether or not the employee's own assigned work is thereby furthered, is within the course of employment."). Whigham exercised initiative in responding to a need expressed by Jackson Dawson, and the company encouraged him in carrying out his plan. Organizing and attending the game thereby became part of his employment.

CONCLUSION

Accordingly, we hold that under the facts of this case, Whigham is entitled to compensation as a matter of law. While we are mindful of our deferential standard of review, we find the undisputed facts indicate Whigham's injury arose out of and in the course of his employment. We therefore reverse the opinion of the court of appeals and remand for a hearing on disability and other benefits.

TOAL, C.J., and Acting Justice James E. Moore, concur.
KITTREDGE, J., dissenting in a separate opinion in which PLEICONES, J., concurs.

JUSTICE KITTREDGE: I respectfully dissent. While one view of the evidence supports the majority's finding that Petitioner (Whigham) was "impliedly required to attend the kickball game[,]" there is other evidence that supports the decision of the Workers' Compensation Commission (Commission). Take for example the following testimony from Whigham:

> Q: Let me make sure we're clear on this. There was no requirement to be there?
>
> A: There was actually—if you were not there, you were expected to be in the office working.
>
> . . .
>
> Q: Okay. Was there any pressure on you or anybody that you know of that you'd better be playing kickball that day?
>
> A: No, there was not. There was never an ultimatum given to anybody.
>
> Q: I mean, I've had friends who just don't like sports, and if we set up an event or have an event like that, they would choose not to go. I mean, if you just chose to go play kickball, you didn't have to play, correct?
>
> A: No; that's right.
>
> Q: It was totally voluntary?
>
> A: Either that or working.
>
> Q: Okay. But you would agree it was voluntary to go play kickball.
>
> A: Yes. It was not—it was not mandatory.

Because there is conflicting evidence whether Whigham was required to attend the kickball game, the substantial evidence standard of review compels us to affirm, just as the court of appeals did. *See Hill v. Eagle Motor Lines*, 373 S.C. 422, 436,

645 S.E.2d 424, 431 (2007) ("Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached." (citing *Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 159–60, 519 S.E.2d 102, 105 (1999))); *Barton v. Higgs*, 381 S.C. 367, 369–70, 674 S.E.2d 145, 146 (2009) ("When reviewing an appeal from the workers' compensation commission, the appellate court may not weigh the evidence or substitute its judgment for that of the full commission as to the weight of evidence on questions of fact." (citing *Therrell v. Jerry's Inc.*, 370 S.C. 22, 26, 633 S.E.2d 893, 894–95 (2006))).

I add two further comments. First, even were I to accept the majority's version of the facts, Whigham's claim for benefits would fail in any event. The majority conflates attending the event with participation in the kickball game. More to the point, it was Whigham's supervisory role in organizing the event that the majority points to in finding he was "impliedly required to *attend* the kickball game." (emphasis added). Attending the event and participating in the kickball game are entirely different things.

This leads to my second comment. I am concerned with an analytical framework in the workers' compensation recreational or social activity arena that favors supervisors over other employees. The majority notes that its "within the scope of employment" finding is limited to Whigham because he organized the event. Indeed, the majority observes that other employees would likely not be covered, for "the event may have been voluntary for company employees generally[,]" and Whigham's organizational role "sets Whigham's participation apart from that of all other employees." In terms of *participation* in the kickball game, I can find no basis for favoring Whigham over all other employees.

I would affirm the court of appeals.

PLEICONES, J., concurs.

The Supreme Court of South Carolina

The State, Petitioner,

v.

Phillip Miller, Respondent.

Appellate Case No. 2012-212847

ORDER

By order dated June 11, 2014, we granted the State's petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Miller*, 398 S.C. 47, 727 S.E.2d 32 (Ct. App. 2012). The Division of Appellate Defense has notified this Court that respondent is deceased, and on that basis, Appellate Defense moves for this matter to be dismissed as moot. The State opposes the motion, but in the alternative, requests that in the event the matter is dismissed, the Court of Appeals' opinion be vacated. We hereby grant the motion to dismiss and vacate the Court of Appeals' opinion.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
August 6, 2014

The Supreme Court of South Carolina

In the Matter of Donna Seegars Givens, Respondent.
Appellate Case No. 2013-001938

ORDER

Respondent was admitted to the South Carolina Bar in 1988. On February 7, 2011, she was suspended from the practice of law for nine months, retroactive to March 4, 2010, the date of respondent's interim suspension. *In re Givens*, 391 S.C. 427, 706 S.E.2d 22 (2011).

On August 28, 2013, respondent filed a petition for reinstatement. A hearing was held before the Committee on Character and Fitness on March 12, 2014. The Committee issued a Report and Recommendation in which it finds respondent meets the requirements set forth in Rule 31(f) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, and recommends respondent be restored to active status with the South Carolina Bar. Neither respondent nor the Office of Disciplinary Counsel have filed objections to the Report and Recommendation.

We grant the petition for reinstatement and restore respondent to active status with the South Carolina Bar.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
August 21, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Steve Bagwell, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-173947

ON WRIT OF CERTIORARI

Appeal From Greenville County
C. Victor Pyle Jr., Circuit Court Judge
Robin B. Stilwell, Post-Conviction Relief Judge

Opinion No. 5267
Heard June 3, 2014 – Filed August 27, 2014

REVERSED

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

Attorney General Alan McCrory Wilson and Assistant Attorney General Karen Christine Ratigan, both of Columbia, for Respondent.

LOCKEMY, J.: In this appeal from the denial of his post-conviction relief (PCR) application, Steve Bagwell argues the PCR court erred in finding his trial counsel was not ineffective for (1) failing to request DNA testing for blood found on glass recovered at the crime scene and (2) failing to argue a witness's testimony was admissible to show evidence of a victim's bias and motive to fabricate testimony. We reverse and grant Bagwell a new trial.

FACTS

This case involved an alleged burglary at an apartment complex in Greenville County. At trial, Jarrett Armstrong testified he and his roommate Chris Snoddy (collectively, the victims) were on their way home from work one night, when he received a call from a neighbor that caused them to hurry home. Armstrong testified that when they arrived, a large crowd was gathered outside their apartment. According to Armstrong, he entered the front door of the apartment and saw Bagwell, whom Armstrong had known since elementary school, exiting through the back glass patio door, which was shattered. Armstrong stated he did not see Bagwell's roommate, Daryl[1] Spain, inside the apartment and he did not punch Daryl.

Armstrong, however, testified he confronted Bagwell outside Bagwell and Daryl's apartment and punched Bagwell in the face. According to Armstrong, Bagwell's face was scarred with "blood coming down" before Armstrong punched him. The State admitted a photograph of Bagwell taken after the burglary, which shows blood streaming down the left side of his face. On cross-examination, Daryl's counsel asked Armstrong, "This gash that [Bagwell] had on his forehead . . . isn't it true that [Bagwell] received that gash when you hit him on the forehead with a handgun?" Armstrong replied, "No, sir."

Snoddy testified he saw Daryl exiting the apartment through the glass patio door; however, he stated he did not see Bagwell inside the apartment. Snoddy further testified Armstrong and Bagwell began fighting in front of Bagwell and Daryl's apartment. Snoddy also stated Bagwell had "blood or a scratch" down his face before Armstrong punched him.

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[1] Spain's name is spelled "Darryl" throughout the appendix; however, it is spelled "Daryl" on the South Carolina Department of Corrections website. We refer to him as Daryl in this opinion.

Bagwell testified in his defense.[2] According to Bagwell, he was asleep in his apartment at the time of the burglary, and he awoke to find Armstrong "beating on [him]" and accusing Daryl of breaking into Armstrong and Snoddy's apartment. After Armstrong left his apartment, Bagwell called the police and reported that Armstrong had broken into his apartment. Bagwell testified he then looked outside and saw Armstrong beating Daryl and holding a gun to his head. Bagwell further explained that his face was bleeding after the incident because Armstrong attacked him.

During its closing argument, the State asserted,

> Some other testimony that's important for you to remember. If you remember both [Snoddy] and [Armstrong] said that when they went over to [Bagwell]'s apartment and he was out front, when they went over there they both saw a scratch on his top eye and blood. A little blood trail coming down the side of [Bagwell's] face. Now how did he get that? How did [Bagwell] get that? How did he get this right here? How did he get this cut? One way he could have gotten this cut, ladies and gentlemen, one way is if when he ran out, ran through the glass in a hurry, see the arc on this glass? He could have cut his eye when he was running out. When [Armstrong] startled them when they came back.

Subsequently, the jury convicted Bagwell and Daryl of first-degree burglary. The trial court sentenced Bagwell to twenty years' imprisonment and Daryl to fifteen years' imprisonment.

At the PCR hearing, Bagwell's PCR counsel introduced DNA test results indicating blood found on three pieces of glass recovered from the victims' glass patio door did not match Bagwell.[3] Bagwell alleged his trial counsel was ineffective for failing to request DNA testing for the glass prior to trial.

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[2] Daryl did not testify at trial.

[3] The test results do not indicate who the DNA belonged to.

Bagwell testified trial counsel never informed him the State had the blood samples at the time of his trial. Trial counsel admitted she knew the State had the blood samples prior to trial, but she did not request DNA testing. Trial counsel explained the State originally planned to test the samples, but another solicitor took over the case and decided not to follow through with testing. Trial counsel admitted the test results "may have affected" the outcome at trial; however, she stated the test results would not have excluded the possibility of Bagwell's guilt. Trial counsel further stated that during its closing argument, the State "probably" displayed a picture of the broken glass door in front of the jury. Finally, trial counsel asserted Bagwell's trial was essentially a "swearing match" between the victims and defendants.

The PCR court found trial counsel was not ineffective for failing to seek DNA testing of the glass prior to trial. To support its finding, the PCR court noted trial counsel believed the State would be performing a DNA test prior to trial, and she did not learn until "much later" the State would not be doing so. Moreover, it found trial counsel made a reasonable decision to proceed to trial without the DNA test because the results of the test could have damaged Bagwell's defense. Additionally, the PCR court found no prejudice from trial counsel's failure to test the glass because "the fact that DNA from the bloody glass did not match [Bagwell] did not mean[] [Bagwell] could not have been in the victims' apartment on the night in question." After the denial of PCR relief, Bagwell filed a petition for writ of certiorari, which this court granted on July 8, 2013.

STANDARD OF REVIEW

"The petitioner in a PCR hearing bears the burden of establishing his entitlement to relief." *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 146 (2014). "This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law." *Id.* (internal quotation marks omitted).

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove trial counsel's performance was deficient, and the deficient performance prejudiced the applicant's case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show counsel was deficient, the applicant must establish counsel failed to render reasonably effective assistance under prevailing professional norms. *Id.* at 688. To show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial

would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. *Id.* However, "[a] 'reasonable probability' is less than a preponderance of the evidence . . . ." *Weik v. State*, Op. No. 27421 (S.C. Sup. Ct. filed July 23, 2014) (Shearouse Adv. Sh. No. 29 at 42). "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington v. Richter*, 131 S. Ct. 770, 792 (2011).

LAW/ANALYSIS

I. Failure to Investigate

Bagwell contends trial counsel was ineffective for failing to request DNA testing for the pieces of glass prior to trial. He further argues he was prejudiced by trial counsel's deficiency because the State implied to the jury throughout the trial Bagwell cut his face running through the glass patio door and "touted this as the linchpin evidence to place [him] at the crime scene." We agree.

Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. *Strickland v. Washington*, 466 U.S. 668, 691 (1984). Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. *Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (internal quotation marks omitted) (emphasis omitted). "[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions . . . ." *Strickland*, 466 U.S. at 691. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

We hold trial counsel's failure to conduct DNA testing on the glass prior to trial constituted ineffective assistance of counsel. First, trial counsel's decision not to seek DNA testing prior to trial was unreasonable because the State used the glass as circumstantial evidence of Bagwell's guilt. *See Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (stating trial counsel has a duty to conduct a reasonable investigation or to make a reasonable decision that makes investigation unnecessary). Specifically, the State asserted in its closing argument Bagwell "could have cut his eye when he was running out [the victims' glass patio door;]" therefore, the State used the glass as evidence that placed Bagwell at the crime scene. Moreover, the evidence was reasonably available to trial counsel because she knew the State had the evidence prior to trial. *See McKnight*, 378 S.C. at 46, 661 S.E.2d at 360 ("A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State."). Trial counsel's explanation that she did not request DNA testing because she believed the State planned to do so was unreasonable because criminal defense attorneys have a duty "to make an *independent* investigation of the facts and circumstances of the case." *Ard*, 372 S.C. at 331-32, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis added). Her duty to test the blood from the glass was especially important here because the test results could have supported Bagwell's claim that he was asleep in his apartment at the time of the burglary. *See Strickland*, 466 U.S. at 691 (stating counsel's conversations with the defendant may be critical when assessing counsel's investigation decisions). Although this court must give heavy deference to trial counsel's decision not to investigate, we find trial counsel's decision to not seek DNA testing prior to trial was objectively unreasonable. *Cf. Simpson*, 367 S.C. at 597, 627 S.E.2d at 706 (stating counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment).

Additionally, we hold trial counsel's failure to test the blood samples prior to trial was prejudicial to Bagwell. *See Strickland*, 466 U.S. at 687 (stating a PCR applicant must prove trial counsel's performance was deficient and the deficient performance prejudiced the applicant's case to establish a claim of ineffective assistance of counsel). Initially, we note prejudice may be found because trial counsel admitted the results of the DNA test "may have affected" the outcome of Bagwell's trial. *See Pauling v. State*, 331 S.C. 606, 610, 503 S.E.2d 468, 471 (1998) (noting a court may find ineffective assistance of counsel when trial counsel

admitted the testimony of a witness might have made the difference in obtaining an acquittal). Furthermore, the State's case against Bagwell was not strong. As trial counsel explained, Bagwell's trial was essentially a "swearing match" between the victims and defendants. The only direct evidence linking Bagwell to the burglary was Armstrong's testimony that he saw Bagwell exiting the apartment through the glass door. However, the State referenced the broken glass door several times at trial to corroborate Armstrong's testimony and infer Bagwell was inside the victims' apartment. During its opening argument, the State asserted, "The evidence will show that after [Armstrong] entered[, Bagwell] became upset and ran out the patio glass door. The patio glass door which had been shattered moments before." Additionally, the State admitted a photograph that shows Bagwell's face scarred with blood streaming down the left side of his face, and Armstrong and Snoddy testified Bagwell appeared that way before Armstrong punched him. The State also introduced a picture of the broken glass door that the perpetrator ran through and a picture of the broken glass from the shattered patio door. Importantly, the State asserted to the jury in its closing argument,

> Some other testimony that's important for you to remember. If you remember both [Snoddy] and [Armstrong] said that when they went over to [Bagwell]'s apartment and he was out front, when they went over there they both saw a scratch on his top eye and blood. A little blood trail coming down the side of [Bagwell's] face. Now how did he get that? How did [Bagwell] get that? How did he get this right here? How did he get this cut? One way he could have gotten this cut, ladies and gentlemen, one way is if when he ran out, ran through the glass in a hurry, see the arc on this glass? He could have cut his eye when he was running out. When [Armstrong] startled them when they came back.

Although the DNA test results indicating Bagwell's blood was not found on the pieces of glass do not exonerate Bagwell or preclude the possibility of his guilt, we believe the jury more likely than not would have reached a different verdict had this evidence been presented at trial. *See Harrington v. Richter*, 131 S. Ct. 770, 792 (2011) (recognizing *Strickland* prejudice "does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is

slight and matters 'only in the rarest case'"). The evidence would have rebutted the State's theory that Bagwell cut his eye while exiting the victim's apartment through the glass patio door. Furthermore, it would have cast doubt on Armstrong's and Snoddy's testimonies that Bagwell's face was bleeding before Armstrong punched Bagwell. Likewise, the evidence would have supported Bagwell's testimony that he was in his apartment at the time of the burglary and his face was bleeding because Armstrong attacked him.

Considering the lack of evidence other than Armstrong's testimony, the repeated references to the glass by the State, and the importance of witness credibility at trial, we find that but for trial counsel's failure to test the blood samples, there is a reasonable probability the result of Bagwell's trial would have been different.[4] *See Strickland*, 466 U.S. at 694 (stating that to show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different). Accordingly, we hold trial counsel was ineffective for failing to request DNA testing on the glass prior to trial.

II. Failure to Argue Rule 608(c), SCRE

Bagwell argues trial counsel was ineffective for failing to present the proper legal argument to the trial court, so that Daryl's brother, Jerry Spain, could testify Armstrong was angry with Daryl because Daryl revealed to a mutual neighbor that Armstrong was selling marijuana from his apartment. Specifically, Bagwell argues Jerry's testimony was admissible under Rule 608(c), SCRE, to show Armstrong's bias and motive to fabricate the allegations against Bagwell and Daryl. We disagree.

At trial, Daryl's counsel called Jerry to testify about statements Armstrong made to Jerry two days after the burglary. The State objected, arguing Jerry's testimony was inadmissible under Rule 613, SCRE, because Daryl's counsel failed to lay a proper foundation and did not ask Armstrong whether he made these prior

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[4] Bagwell also claims he is entitled to a new trial because the DNA test results constitute after-discovered evidence. Because we reverse the PCR court's finding that trial counsel was not ineffective and grant Bagwell a new trial, we decline to address this argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

statements to Jerry. The trial court sustained the objection, ordered the jury out of the courtroom, and allowed Daryl's counsel to proffer Jerry's testimony.

During the proffer, Jerry testified he went to Bagwell and Daryl's apartment two days after the burglary and found Armstrong standing outside his apartment. Jerry stated he was unaware Bagwell and Daryl had been arrested for burglary, and he asked Armstrong "what went on." Armstrong told him Daryl broke into Armstrong's apartment. According to Jerry, Armstrong became angry when he found Daryl in his apartment and he went over to Bagwell and Daryl's apartment with a gun, "[a]nd [Bagwell] was in the recliner and [Armstrong] said he hit [Bagwell] against the head with the butt of his gun." Jerry further stated Armstrong told him he then went outside the apartment, beat Daryl, and dragged him around the apartment complex parking lot. Finally, Jerry testified Armstrong told him he wanted to kill Daryl and was angry with him because he previously told a resident at their apartment complex that Armstrong was selling marijuana. Thereafter, the trial court ruled Jerry's testimony was inadmissible under Rule 613(b), SCRE.

At the PCR hearing, Bagwell asserted Jerry's testimony that Armstrong was angry with Daryl for telling a neighbor that Armstrong sold marijuana would have provided a motive for Armstrong to fabricate the burglary allegations against Bagwell and Daryl. Trial counsel testified she interviewed Jerry, but she never intended to call him as a witness because there was "some deviation" between his testimony and Bagwell's testimony. Trial counsel further testified she did not argue Jerry's testimony was admissible under Rule 608, SCRE; however, Daryl's counsel argued the testimony was admissible under Rule 613, SCRE.

The PCR court found trial counsel was not ineffective for failing to argue Jerry's testimony was admissible to show Armstrong's bias and motive to fabricate the allegations against Bagwell and Daryl. Specifically, it found Bagwell failed to prove prejudice because Jerry did not testify at the PCR hearing.

We find the PCR court did not err in finding trial counsel was not ineffective for failing to introduce Jerry's testimony at trial. On direct appeal, this court held that any error in excluding Jerry's testimony was harmless because physical evidence

corroborated Armstrong's and Snoddy's testimony,[5] and counsel for Bagwell and Daryl were allowed to cross-examine Armstrong and Snoddy. *See State v. Bagwell*, Op. No. 2007-UP-377 (S.C. Ct. App. filed Sept. 18, 2007). Because this court previously found that any error in excluding Jerry's testimony would be harmless, we find Bagwell has not shown that but for trial counsel's failure to properly argue for the admission of this testimony, there is a reasonable probability the result at trial would have been different. Accordingly, we hold the PCR court properly determined trial counsel was not ineffective as to this issue.

CONCLUSION

In conclusion, we hold the PCR court erred in determining trial counsel was not ineffective for failing to request DNA testing on blood found on glass recovered at the crime scene. We further hold the PCR court properly determined trial counsel was not ineffective for failing to introduce Jerry's testimony at trial. Accordingly, we reverse the denial of PCR and find Bagwell is entitled to a new trial.

REVERSED.

KONDUROS, J., concurs.

WILLIAMS, J.: I concur with the majority's opinion that Bagwell was not prejudiced by his counsel's failure to properly argue for the admission of Jerry Spain's testimony. I also agree with the majority's finding that Bagwell's trial counsel was deficient in failing to request DNA testing on the blood from the broken glass found at the crime scene. However, I disagree with the conclusion that Bagwell was prejudiced by his counsel's failure to request DNA testing on the blood from the broken glass found at the crime scene.

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case." Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356

[5] We note with interest that the only physical evidence linking Bagwell to the crime was the blood on Bagwell's face, which the State argued was from a cut Bagwell received when he exited the apartment. However, the DNA evidence Bagwell presented to the PCR court tends to refute that argument.

(2006); *see also Strickland v. Washington*, 466 U.S. 668, 688 (1984). To show prejudice, the applicant must show that "but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Id.* at 186, 480 S.E.2d at 735; see also Strickland, 466 U.S. at 694.

I do not believe Bagwell has shown his counsel's failure to request DNA testing prejudiced his case. At trial, the State produced witness testimony and photographic evidence that Daryl Spain sustained multiple lacerations on the bottom of his feet on the night of the robbery. Snoddy also testified that Daryl Spain was barefoot when he exited the apartment through the shattered glass door. The cuts on Daryl Spain's feet provide a reasonable alternative explanation for the presence of blood on the glass pieces collected from the scene. In fact, Daryl Spain's lacerations, which were likely inflicted when he attempted to exit the apartment barefooted, are a more plausible explanation for the presence of blood at the scene of the crime than the "scratch on [Bagwell's] top eye." However, the blood on the glass collected from the scene was only tested for a match with Bagwell's DNA; it was never tested for a match with Daryl Spain's DNA. Without also proving the blood does not match with Daryl Spain's DNA, this evidence would not necessarily exonerate Bagwell. Moreover, at his PCR hearing, Bagwell failed to establish the bloody glass pieces later tested for his DNA were collected from the arch of glass remaining in the doorway, which was allegedly depicted in the photograph entered into evidence by the State.[6] The tested glass pieces could have easily been collected from the shattered glass covering the apartment floor, which would have supported the State's version of events presented at trial. Without further information to accompany the DNA testing results, the State's theory of the case is unaffected by the DNA evidence because the bloody glass could still be attributed to Daryl Spain's injuries. Accordingly, I find there is not "a reasonable probability the result of the trial would have been different" if this DNA evidence had been introduced at trial. Johnson, 325 S.C. at 187, 480 S.E.2d at 735.

Ultimately, this case was presented to the jury as a "swearing match" between the victims, Armstrong and Snoddy, and the alleged burglars, Bagwell and Daryl Spain. This case turned on credibility, and the jury found the former to be more

[6] The photograph depicting the shattered glass doorway allegedly showing blood on the remaining glass was not included in the record.

credible than the latter. As noted in the majority's opinion, the DNA testing results do not exonerate Bagwell or preclude the possibility that he participated in the burglary. Further, as explained above, the State's version of events is unaffected by the presence of blood that did not belong to Bagwell at the scene of the crime. Thus, I would find Bagwell failed to establish that if his counsel had introduced the DNA results at trial, there is "a reasonable probability the result of the trial would have been different." Johnson, 325 S.C. at 187, 480 S.E.2d at 735.

Based on the foregoing, I would hold that Bagwell's case was not prejudiced by his trial counsel's errors, and the PCR court properly dismissed his PCR application.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Julie Tuten, Respondent,

v.

David Charles Joel, individually and d/b/a Joel & Associates, P.A. and/or Joel & Associates; David C. Joel, Attorney at Law, P.C.; and Heather A. Glover, Defendants,

Of whom David Charles Joel is the Appellant.

Appellate Case No. 2012-211915

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 5268
Heard April 8, 2014 – Filed August 27, 2014

AFFIRMED

Harvey MacLure Watson, III and Desa Allen Ballard, Ballard & Watson, both of West Columbia; and Stephanie Nichole Weissenstein, of Gilbert, for Appellant.

Tom Griffin Woodruff, Jr., of Aiken, for Respondent.

FEW, C.J.: David Charles Joel appeals from a $275,000 jury verdict against him for legal malpractice in connection with his representation of Julie Tuten. Joel argues the trial court erred in: (1) granting a partial directed verdict for Tuten; (2)

denying his directed verdict motion; and (3) denying his motion for a new trial nisi remittitur. We affirm.

I. Facts and Procedural History

Joel is an attorney licensed in Georgia. Starting at least in 1993, he maintained a personal injury law practice in Atlanta. In 1996, he opened an office in Columbia, South Carolina. He advertised extensively in the yellow pages of phonebooks all over South Carolina under the name Joel & Associates. The ads purported to offer prospective clients "All the Help the Law Allows." Joel was never licensed in South Carolina.

On October 18, 2003, Tuten sustained severe injuries in a motor vehicle accident in Aiken County while riding as a passenger in a car driven by Clifton Still. After she recovered, she saw Joel's ad in the Aiken phone book. Joel was the only attorney named and pictured in the ad. Tuten called the telephone number listed in the ad, and a non-lawyer investigator came to Tuten's home. The investigator interviewed her and provided her a contingency fee agreement, which she signed. The agreement provided, "Client . . . hires Joel & Associates, P.A. . . . to represent us as legal counsel for all purposes in connection with claims for damage arising out of" her accident, and stated, "Client will pay [Joel & Associates] an attorney fee of 33 1/3 % of the total money recovered . . . ." When asked at trial whom she "ultimately decide[d] to hire as a lawyer," Tuten testified, "Joel. Mr. Joel."

On December 15, 2003, Joel's firm sent Tuten two letters on Joel & Associates letterhead, one of which thanked her "for retaining Joel and Associates to pursue a recovery in your claim for personal injury." That letter was signed by Heather Glover, an attorney then licensed in South Carolina whom Joel employed in his Columbia office.[1] There is no evidence Tuten was aware of Glover's involvement in her case until she received this letter.

In May 2006, Joel decided to close his Columbia office. Joel tried to get another attorney to take all his South Carolina cases, but no attorneys were interested.

[1] Glover is no longer licensed to practice law. The supreme court placed her on interim suspension on October 1, 2008, *In re Glover*, 380 S.C. 22, 667 S.E.2d 728 (2008), and disbarred her on January 7, 2011. *In re Glover*, 390 S.C. 643, 704 S.E.2d 347 (2011).

Glover sent Joel an email dated May 14, 2006 stating, "I talked to two other attorneys . . . about taking the cases and neither one of them is willing to take all the cases." She wrote:

> The only way I see this office closing on the 24th like you want is if I keep the cases and work on them on my own. It is not my first choice and I would not be permanently opening an office on my own. But what I am willing to do is take all the current cases and work them to conclusion, giving you 1/3 of the generated fees.

She wrote that unlike the attorneys who declined to take the cases, she could "handle them without having to get permission from the clients." This approach gave them, she explained, "the better chance *we* won't loose [sic] them all together [sic]." (emphasis added). Finally, she offered that if Joel could not "get out of paying the phone bill" for the "1-800" number, "I would take any new cases generated on the same arrangement of giving you 1/3 of any fees generated."

Glover sent Tuten a letter dated May 24, 2006 on Joel & Associates letterhead stating:

> I am sending this letter to let you know that David Joel is retiring from his South Carolina office. Since I have been the attorney handling your case and will continue to handle your case to conclusion, this change should not affect you in any way. The Stat [sic] Bar does require that I send you this letter advising you of the situation and also advising you that Mr. Joel will receive 1/3 of all attorney's fees generated on your case even though he will no longer be open in South Carolina. The split in attorney's fees does not in any way affect the amount of money you will receive.

On October 17, 2006—the final day for filing a claim before the statute of limitations expired[2]—Glover filed a summons and complaint on Tuten's behalf

[2] *See* S.C. Code Ann. § 15-3-535 (2005) (providing a three-year statute of limitations).

against Still in the Aiken County Court of Common Pleas. There is no evidence Joel or Glover served the summons and complaint or took any other action to pursue Tuten's lawsuit. In November 2007, the circuit court dismissed Tuten's case for failure to prosecute.

In October 2009, Tuten sued Joel, his law firm, and Glover for malpractice. Glover, who by that time had left South Carolina, defaulted. Joel's law firm declared bankruptcy before trial and did not participate. At trial, both Tuten and Joel made directed verdict motions. The trial court granted a partial directed verdict in favor of Tuten, and denied Joel's motion. The jury returned a verdict for Tuten in the amount of $275,000. Joel filed post-trial motions for judgment notwithstanding the verdict, new trial nisi remittitur, and new trial absolute, all of which the trial court denied.

II. Tuten's Partial Directed Verdict Motion

To succeed on her legal malpractice claim against Joel, Tuten was required to prove: (1) she and Joel had an attorney-client relationship; (2) Joel breached his duty to her; (3) Joel's breach of duty proximately caused her some damages; and (4) the amount of her damages. *RFT Mgmt. Co. v. Tinsley & Adams LLP*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012). The trial court granted a directed verdict for Tuten on the first three elements. We review the trial court's decision—separately as to each element—by applying the same standard as the trial court. 399 S.C. at 331-32, 732 S.E.2d at 171. We view the evidence and all reasonable inferences in the light most favorable to Joel. *Id.* As to each element, we "must determine whether a verdict for [Joel] would be reasonably possible under the facts as liberally construed in his favor." *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). "[I]f the evidence yields more than one reasonable inference or its inference is in doubt" as to any one of the first three elements, then the trial court should have submitted the issue to the jury and we must reverse. *RFT*, 399 S.C. at 332, 732 S.E.2d at 171; *see also Erickson*, 368 S.C. at 463, 629 S.E.2d at 663.

We hold the trial court correctly granted a partial directed verdict for Tuten. Specifically, we find the evidence yields only one reasonable inference as to each of the first three elements—(1) Joel and Tuten had an attorney-client relationship at the time her lawsuit against Still was filed and when it was dismissed; (2) Joel breached his duty to Tuten; and (3) Joel proximately caused at least some of her damages—and it was not reasonably possible the jury would return a verdict for Joel.

A. Attorney-Client Relationship

The first element Tuten was required to prove was the existence of an attorney-client relationship. *RFT*, 399 S.C. at 331, 732 S.E.2d at 170; *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). We readily conclude the trial court correctly directed a verdict for Tuten on this element.

Joel conceded at oral argument that once Tuten signed the fee agreement with Joel's firm, she entered into an attorney-client relationship with Joel, and therefore he was Tuten's attorney at that time. Joel argues, however, he ended the relationship when he closed the Columbia office and allowed Glover to take Tuten's case. We disagree. An attorney may not end an attorney-client relationship, and thus relieve himself of the duties arising under it, by unilaterally deciding to allow another attorney to take responsibility for fulfilling those duties. Rather, at a minimum, an attorney must communicate to his client his desire to withdraw from their attorney-client relationship in such a manner that the client understands her attorney will no longer represent her.[3] If the attorney does not take such action, the attorney-client relationship continues.

We find no evidence Joel took any action to end his attorney-client relationship with Tuten. To the contrary, the only communication Tuten received came from Glover. Glover's letter informed Tuten "this change should not affect you in any way." Significantly, Glover's letter stated, "Mr. Joel will receive 1/3 of all attorney's fees generated on your case." Glover's letter contains no explanation of how Joel could receive an attorney's fee for *not* being Tuten's lawyer.[4]

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[3] The criteria for withdrawal are stricter after an attorney becomes counsel of record in a lawsuit. *See, e.g.*, Rule 11(b), SCRCP ("An attorney may be changed by consent, or upon cause shown, and upon such terms as shall be just, upon application, by order of the Court, and not otherwise.").

[4] We address below the legal significance of fee-sharing agreements between attorneys. Here, the significance is practical—the effect Glover's letter had on Tuten. Joel argues Tuten necessarily understood from the letter that Joel would no longer be her attorney. However, lay clients like Tuten correctly believe lawyers get paid for fulfilling—not withdrawing from—their responsibilities to their clients. Therefore, apart from the legal significance of a fee-sharing agreement, the practical significance of Glover's statement that Tuten must pay Joel is the opposite

Joel argues Glover's letter informed Tuten that Joel was no longer representing her because it stated, "David Joel is retiring from his South Carolina office." This statement did nothing more than inform Tuten that her attorney—Joel—would be working only out of his Atlanta office. Joel also argues Glover's sentence, "I have been the attorney handling your case and will continue to handle your case to conclusion," indicated Joel was no longer her attorney. We disagree because the sentence relates only to Glover. At most, the sentence indicated Glover was *also* Tuten's attorney. Viewing Glover's entire letter in the light most favorable to Joel, we find the letter did not convey to Tuten that Joel would no longer be her lawyer.

Tuten called retired law professor John P. Freeman as an expert witness. Joel stipulated Professor Freeman was qualified as an expert in numerous specific subjects, including "professional duties in handling litigation for clients" and "duties owed by lawyers when withdrawing from representation." Professor Freeman explained that under basic concepts of professional responsibility, Joel remained Tuten's lawyer. First, he explained that because Joel had an agreement with Glover to receive a portion of the fee generated on Tuten's case, he retained a duty to represent her. He testified:

> My opinion is that he is accountable and I'll explain it this way. . . . You don't get that fee in exchange for nothing. At a minimum you have to assume responsibility for what happens in that case. You want the money? Fine. If something goes bad or there is malpractice, guess what. You've got a problem because you become accountable under our rules and that is—that is absolutely key.

Second, Professor Freeman explained Joel never withdrew from his attorney-client relationship with Tuten. He testified an attorney "can't just walk away" when he wants to cease representation, and Joel "never disavowed that he was her lawyer."

Joel counters Professor Freeman's expert testimony with two arguments, both of which we find disingenuous. First, Joel attempts to deny he had an agreement with Glover to share fees on Tuten's and other cases. Joel testified Glover "mentioned

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of what Joel argues—it is that Tuten necessarily understood Joel would remain her lawyer.

she would pay a third of the fees that she received to us." Following up on this statement, Joel testified on direct:

> Q: Now, you mentioned that [Glover] offered to share her fees with you on the cases that she took over and continued to handle. Would you require her to pay some portion of the fees to you as a condition of her taking those files?
>
> A: No.
>
> Q: Did you, in fact, receive any fees as a result of any of the files that [Glover] took with her?
>
> A: No.
>
> Q: So when a reference is made to a fee-sharing arrangement on the files that transferred out, there wasn't one, was there?
>
> A: No. She suggested that in an e-mail to me. There was never a written agreement about it.
>
> Q: So did you or did you not have a fee-sharing arrangement with Heather Glover - -
>
> A: Nothing - -
>
> Q: On the files that left?
>
> A: Nothing that was enforceable in any way.

A careful examination of the record reveals Joel's testimony—that he had no agreement to share fees with Glover—is not correct. The truth is his law firm, David C. Joel, Attorney at Law, P.C., filed a lawsuit against Wachovia Bank for money Joel claimed Glover misappropriated. The lawsuit was premised on the existence of the very agreement that Joel attempted to deny at trial and continues to deny on appeal. In the "Verified Complaint" Joel filed to initiate the lawsuit, he alleged:

> In . . . May 2006 Joel & Associates . . . entered into an agreement with Glover under which she would continue handling representation of Joel & Associates' remaining South Carolina cases with an agreement to split fees with Joel & Associates.

The verification attached to and filed with the complaint states:

> Personally appeared, David C. Joel, an authorized affiant of David C. Joel, Attorney at Law, P.C., who after being duly sworn, states that the facts alleged in the foregoing Plaintiff's Verified Complaint are true and correct based on my personal knowledge.

On cross-examination, Joel was asked, "And your statement on this lawsuit against Wachovia is that you had a fee sharing agreement with Heather Glover; is that correct?" He answered, "Yes."

Joel's testimony that he did not "receive any fees as a result of any of the files that [Glover] took with her" is likewise false. The truth is Joel received over $100,000 of those fees from the proceeds of his lawsuit against Wachovia. While Joel did not technically receive those funds directly from Glover, he received the funds only because they represented fees Glover owed him pursuant to their fee sharing agreement.[5]

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[5] Joel testified his Columbia office did not try cases, and referred cases they could not settle on their own to one particular trial attorney, Pat McWhirter. Six of the checks Joel alleged Glover misappropriated were written on McWhirter's firm account. One of those six checks was written only three weeks after Joel closed the office. This check conceivably could represent a settlement reached before May 2006, and thus represent fees not covered by the alleged fee-sharing agreement. However, five of the six checks were dated at least two months after Joel closed his Columbia office, and two of the checks were dated in February and March of 2007. Moreover, Joel alleged in his complaint against Wachovia that twenty-four additional checks Glover misappropriated did not come from McWhirter's firm. Those checks were necessarily issued by firms Glover associated, which under Joel's testimony could have occurred only after Joel closed the Columbia office, or were issued directly to the firm by defendants or insurance companies, in which case Joel would have known of the settlement if it occurred

We find that the only reasonable inference to be drawn from the evidence in this case—viewed in the light most favorable to Joel—is he had an agreement with Glover to share fees on Tuten's and other South Carolina cases.

The second argument Joel makes to counter Professor Freeman's testimony is that Joel did not lead Tuten to believe he was still her attorney after he closed his South Carolina office, and if Tuten had such a belief, there was an issue of fact as to whether her belief was reasonable. This argument incorrectly frames the issue.[6] The correctly framed issue is whether Joel took action to end the attorney-client relationship that he concedes existed when Tuten signed the Joel & Associates fee agreement in 2003. On review of the directed verdict ruling that Joel did not end the relationship, the issue is whether there is any evidence in the record upon which a jury could reasonably conclude Joel withdrew from his representation. As we explained, there is no such evidence in this record.

The principle that an attorney may not unilaterally withdraw from an attorney-client relationship without notice to the client is fundamental to the fiduciary nature of legal representation. *See generally Ex parte Strom*, 343 S.C. 257, 263, 539 S.E.2d 699, 702 (2000) ("Strong policy considerations dictate that a client . . . must be unequivocally informed when an attorney intends to withdraw from representing a party, for whatever reason."); *Graham v. Town of Loris*, 272 S.C. 442, 452, 248 S.E.2d 594, 599 (1978) ("An attorney who undertakes the conduct of

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before May 2006. It is indisputable, therefore, that almost all the checks Joel sued to recover came from settlements that occurred after he left South Carolina, and Joel's entitlement to the fees represented by those checks depended upon a valid fee-sharing agreement with Glover. We find nothing to the contrary in the May 14, 2006 email.

[6] Even if this were the correct way to frame the issue, Professor Freeman explained that Joel reasonably indicated to Tuten that he was still representing her by participating in an arrangement with Glover through which Tuten received "false and misleading communications that tricked [Tuten] into believing that David Joel was still her lawyer."

an action impliedly stipulates to carry it to its termination and is not at liberty to abandon it without . . . reasonable notice.").[7]

The contrary position—taken by Joel—that an attorney's uncommunicated choice to withdraw from representation is effective unless the attorney "leads the client to believe he is still the lawyer" is indefensible and fails as a matter of law. The position is so rarely taken that courts have hardly ever been called upon to write about it. In each instance we have been able to find where courts addressed Joel's position, the court held an attorney may not unilaterally withdraw from representation, but at a minimum, must take some action to communicate to the client his intent to withdraw. *See, e.g.*, *Krutzfeldt Ranch, LLC v. Pinnacle Bank*, 272 P.3d 635, 642 (Mont. 2012) (stating an attorney may not unilaterally withdraw from representation, but "remain[s] in an attorney-client relationship"—even after joining another law firm—in the "absence of any affirmative steps" by the attorney to withdraw); *Garrett (formerly Matisa) v. Matisa*, 927 A.2d 177, 178-79, 182 (N.J. Super. Ct. Ch. Div. 2007) (holding "[i]t is well settled that an attorney who wants to withdraw from representing a client must notify the client in advance" and "notify the client of the grounds for withdrawal," even in a situation where a client "effectively disappeared" and her attorney was unable to contact her); *Mobberly v. Hendricks*, 649 N.E.2d 1247, 1249 (Ohio Ct. App. 1994) (stating "an attorney is not free to withdraw from the relationship absent notice to his client" and "[i]n determining when the attorney-client relationship is terminated, the court must point to an affirmative act by either the attorney or the client that signals the end of the relationship"); *Cardot v. Luff*, 262 S.E.2d 889, 892 (W. Va. 1980) (recognizing "[m]ost courts require that before an attorney can unilaterally sever the attorney-client relationship, he must give reasonable notice to his client of his intention to withdraw," and noting "further requirement[s]" are necessary "[i]f the withdrawal involves a matter pending in court"). Joel cites no cases to support his position.

In conclusion, there is no evidence Joel took any action to end his attorney-client relationship with Tuten, and thus no jury could reasonably conclude Joel withdrew from the representation. Rather, the evidence yields only one reasonable inference—Joel remained Tuten's attorney at the time the circuit court dismissed

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[7] In *Strom* and *Graham*, the attorney in question was counsel of record in a pending lawsuit. *Strom*, 343 S.C. at 260, 539 S.E.2d at 700; *Graham*, 272 S.C. at 450, 248 S.E.2d at 598. For purposes of the attorney's duty to communicate his intent to withdraw to his client, that difference from these facts makes no difference.

her lawsuit, and as her attorney, he owed her the duties attendant to that relationship. The trial court correctly granted a directed verdict for Tuten on this element.

B. Breach of Duty

An attorney owes his client fiduciary duties, *Spence v. Wingate*, 395 S.C. 148, 160, 716 S.E.2d 920, 927 (2011), and he must "render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession." *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010) (citation omitted). When an attorney agrees to represent a client for the purpose of filing a lawsuit on the client's behalf, the attorney's fiduciary duty requires him to take action to prosecute the lawsuit.[8] The failure to take any action under the circumstances of this case is a breach of the attorney's duty to the client. There is no evidence Joel took any action to prosecute Tuten's lawsuit. Therefore, the trial court correctly granted a directed verdict in favor of Tuten on this element.

Joel contends it was unnecessary for him to personally take action to prosecute Tuten's case because Glover was handling the case. In his brief, Joel states, "Glover was the attorney who operated the South Carolina office," and while that office was open, "Tuten understood that Ms. Glover worked for Mr. Joel." The legal consequence of Joel's argument is Glover was his agent. *See* 1 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 5:8, at 528 (2014 ed.) ("A principal attorney, typically an owner or managing attorney, is responsible for the . . . conduct of employed attorneys . . . ."). As we explained, Joel remained Tuten's attorney even after he closed his South Carolina office. To the extent Joel claims he continued to rely on Glover to handle Tuten's case, Glover necessarily remained his agent, and Joel remained responsible for her conduct. Joel asserted at trial Glover was negligent as a matter of law, and argues the same position on appeal. Under Joel's agency theory, therefore, he is liable for Glover's breach of duty.

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[8] There are circumstances—not present in this case—under which an attorney may choose not to pursue a lawsuit without breaching his duty to his client, including: (1) the attorney determines there is not good legal and factual ground to support the claim; *see* Rule 11(a), SCRCP (requiring a certificate by an attorney that any pleading has "good ground to support it"); (2) the attorney effectively withdraws in a timely manner; and (3) the client makes an informed decision not to pursue the lawsuit.

C. Proximate Cause

Although proximate cause is ordinarily a jury question, the court may decide proximate cause as a matter of law "when the evidence is susceptible to only one inference." *Pope v. Heritage Cmtys., Inc.*, 395 S.C. 404, 416, 717 S.E.2d 765, 771 (Ct. App. 2011). Here, Joel's failure to take any action to prosecute Tuten's lawsuit against Still indisputably resulted in the dismissal of the lawsuit. Because Joel's failure to fulfill his fiduciary duty to prosecute Tuten's lawsuit was as a matter of law the proximate cause for the lawsuit being dismissed, the trial court correctly granted a directed verdict in favor of Tuten on this element.

Joel argues, however, Tuten was not entitled to a directed verdict on proximate cause because there was disputed evidence regarding whether she could collect a judgment against Still. We find this argument unpersuasive for two reasons. First, our courts have never required a legal malpractice plaintiff to prove collectibility when the malpractice caused the dismissal of an underlying lawsuit. Joel has not cited a single case applying such a requirement.[9]

Second, Tuten conclusively proved she could collect at least some portion of a judgment against Still. Joel conceded at oral argument that Tuten had an automobile insurance policy with uninsured and underinsured coverage. He further conceded the insurance policy would have been available to Tuten had she won a judgment against Still. Thus, had Joel taken some action to prosecute Tuten's claims against Still, Tuten could have recovered some money through her insurance policy.

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[9] Joel cites only a comment from the Restatement (Third) of the Law Governing Lawyers, which provides that in a legal malpractice action, "the lawyer's misconduct will not be the legal cause of loss to the extent that the defendant lawyer can show that the judgment or settlement would have been uncollectible . . . ." Restatement (Third) of The Law Governing Lawyers § 53 cmt. b (2010). The comment continues, "*The defendant lawyer bears the burden of coming forward with evidence that this was so*." *Id.* (emphasis added). Even if South Carolina courts were to recognize a collectibility requirement—which we find is not necessary to decide in this case—the only authority Joel cites to support his position required him to prove a judgment against Still was uncollectible, which he did not do.

Joel also argues Glover was negligent as a matter of law, and her negligence was a "superseding and intervening" event that "interrupted any causation link between any negligence that might have existed on" his part. While it is true Glover was negligent because she failed to take any action to prosecute Tuten's lawsuit against Still, Joel was negligent for the same reason. Thus, Joel's arguments addressing Glover's liability prove Joel is liable to Tuten as a matter of law.

The trial court correctly granted a directed verdict in favor of Tuten on the element of proximate cause because the evidence was susceptible to only one inference—that Joel's negligence proximately caused at least some of Tuten's damages.

III. Joel's Directed Verdict Motion

Joel also made a directed verdict motion on Tuten's legal malpractice claim. For the reasons explained above, we find the trial court correctly denied Joel's directed verdict motion.

IV. New Trial Nisi Remittitur

Finally, Joel argues he was entitled to a new trial nisi remittitur because the evidence presented at trial did not support the jury's award of $275,000 in damages. We disagree and affirm the trial court's denial of remittitur. *See James v. Horace Mann Ins. Co.*, 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006) (stating the trial court has discretionary power to deny a motion for a new trial nisi, and an appellate court will not reverse the trial court's decision absent an abuse of that discretion).

Tuten testified that as a result of the wreck, she suffered a broken vertebra, a collapsed lung, three broken ribs, and a concussion; stayed in the hospital trauma unit for a week; and had to wear a back brace for more than a year. Her medical bills totaled at least $24,571.82, and she was on social security disability due to her injuries. This evidence provided a factual basis for the jury's verdict, and therefore, the trial court acted within its discretion in denying remittitur. *See V.E. Amick & Assocs. v. Palmetto Envtl. Grp.*, 394 S.C. 538, 551, 716 S.E.2d 295, 302 (Ct. App. 2011) (stating the trial court does not abuse its discretion in denying a motion for new trial nisi remittitur when "the record contains adequate evidence to support the jury's verdict"); *Burke v. AnMed Health*, 393 S.C. 48, 57, 710 S.E.2d 84, 89 (Ct. App. 2011) (stating "we employ a highly deferential standard of review when considering the trial judge's [denial of] a new trial [nisi remittitur]" and "as

an appellate court, we sit neither to determine whether we agree with the verdict nor to decide whether we agree with the trial judge's decision not to disturb it").

V. Conclusion

We find the trial court correctly granted Tuten's motion for a partial directed verdict, correctly denied Joel's motion for a directed verdict, and acted within its discretion in denying Joel's motion for a new trial nisi remittitur. We **AFFIRM.**

SHORT, J., concurs.

GEATHERS, J., concurring in a separate opinion: I concur in the majority's conclusion that Joel failed to take the necessary action to withdraw from his representation of Tuten. I further concur in the majority's observation that Joel admitted he had an agreement with Glover to share fees generated from those cases considered "open matters" when Joel closed his Columbia office in May 2006. But I would end the analysis of this matter there and refrain from drawing the conclusion the majority draws regarding Joel's lawsuit against Wachovia, i.e., the lawsuit was premised on the existence of Joel's May 2006 fee agreement with Glover.

Joel's Complaint asserted that Wachovia converted certain checks made payable to Joel & Associates by making payment on them to Heather Glover, who was "not entitled to enforce the instruments or receive payment." While the Complaint undoubtedly references the May 2006 fee-sharing agreement, the record does not substantiate the conclusion that this agreement served as the basis for Joel's asserted right to recover converted funds. It is conceivable that, as Joel indicated in his testimony and Reply Brief: (1) the converted funds were fees generated from cases referred to other firms for litigation before Joel closed his Columbia office; and (2) the Complaint's reference to the disputed fee-sharing agreement served merely as background material explaining how Glover obtained possession of the disputed funds. For this same reason, I also depart from the conclusion that the proceeds of Joel's lawsuit against Wachovia represented fees Glover owed him pursuant to the May 2006 fee-sharing agreement.

Joel testified on redirect examination that the alleged converted funds, which included funds sent by the McWhirter firm, had nothing to do with the approximately seventy-seven open matters Glover took with her when the Columbia office closed. The dates on the McWhirter checks are not, by themselves, inconsistent with this testimony. Further, no other evidence in the record contradicts Joel's testimony. In fact, Glover's May 14, 2006 e-mail to Joel

corroborates Joel's testimony as it indicates that neither McWhirter nor the other two attorneys that Joel and Glover had previously worked with were willing to take any of the seventy-seven open matters without obtaining advance written permission from the clients.

The South Carolina Court of Appeals

Boisha Wofford, alleged surviving spouse, and Kaelyn Wofford, surviving child, on behalf of Brian Wofford, deceased employee, Appellants,

v.

City of Spartanburg, through the South Carolina Municipal Insurance Trust, Respondents.

Appellate Case No. 2014-001269

ORDER

PER CURIAM: This is an appeal from the Workers' Compensation Commission. Respondents have filed a motion to dismiss the appeal on the ground that the notice of appeal does not state the grounds of the appeal or the alleged errors of law as required by section 42-17-60 of the South Carolina Code (Supp. 2013). We deny the motion to dismiss.[1]

This Court reviews decisions of the Commission under the Administrative Procedures Act (APA). S.C. Code Ann. § 1-23-380 (Supp. 2013) ("A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article . . . ."); *Bone v. U.S. Food Serv.*, 404 S.C. 67, 73, 744 S.E.2d 552, 556 (2013) ("The APA establishes the standard for judicial review of decisions of the Commission."); *Rodriguez v. Romero*, 363 S.C. 80, 84, 610 S.E.2d

[1] Respondents also argue the Commission's decision must be affirmed under the two-issue rule. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two[-]issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds . . . ."). We decline to address the two-issue rule until a panel reaches the merits of the appeal.

488, 490 (2005) ("Review of a decision of the workers' compensation commission is governed by the [APA]."). The Legislature intended the APA "to provide a uniform procedure for contested cases and appeals from administrative agencies and to the extent that a provision of [the APA] conflicts with an existing statute or regulation, the provisions of [the APA] are controlling." *See* Act No. 387, 2006 S.C. Acts 3131 (explaining the intent of the 2006 amendments to the APA).

Pursuant to subsection 1-23-380(1), "Proceedings for review are instituted by serving and filing notice of appeal as provided in the South Carolina Appellate Court Rules." Rule 203(d)(2)(B), SCACR—entitled "Notice of Appeal; Filing; Appeals from Administrative Tribunals; When and What to File"—does not require that a notice of appeal state any grounds or alleged errors. Because the requirement in section 42-17-60—that a notice of appeal "must state the grounds of the appeal or the alleged errors of law"—conflicts with the Appellate Court Rules the APA requires us to apply, Rule 203 controls. *See Pringle v. Builders Transp.*, 298 S.C. 494, 496, 381 S.E.2d 731, 732 (1989) ("Where provisions of the APA and the Workers' Compensation Act conflict, the APA controls."). Accordingly, a party filing an appeal from the Commission to the Court of Appeals need not state in the notice of appeal the grounds of the appeal or the alleged errors of law. *See Allen v. Florence Pole & Piling, Inc.*, S.C. Sup. Ct. Order dated November 6, 2008 (holding because section 42-17-60 conflicts with the APA, "failure to state grounds for appeal or alleged errors of law in the[] notice of appeal does not require dismissal of the appeal"). This appeal will not be dismissed for noncompliance with section 42-17-60.

s/ John Cannon Few C.J.

s/ Thomas E. Huff J.

s/ Paul E. Short, Jr. J.

Columbia, South Carolina
August 22, 2014