# The Supreme Court of South Carolina

In the Matter of
R. Charles Richards, Petitioner.

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ORDER

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Petitioner has filed a petition asking that he be transferred to incapacity inactive status pursuant to Rule 28, RLDE, Rule 413, SCACR, and requesting appointment of an attorney to protect the interests of his clients pursuant to Rule 31, RLDE, Rule 413, SCACR. The Office of Disciplinary Counsel does not object to the petition.

IT IS ORDERED that petitioner is placed on incapacity inactive status until further order of the Court.

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

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

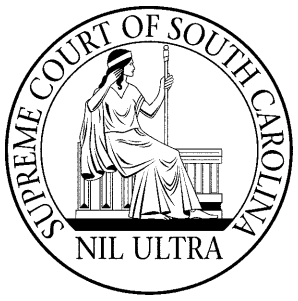
This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of petitioner, shall serve as an injunction to prevent petitioner from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution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

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

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

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

Columbia, South Carolina
August 30, 2004




# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 35**

**September 7, 2004**

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

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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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The State, Respondent,

v.

Timothy Mills, Appellant.

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Appeal from Spartanburg County
Gary E. Clary, Circuit Court Judge

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Opinion No. 25864
Heard April 21, 2004 – Filed September 7, 2004

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**AFFIRMED**

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Chief Attorney Daniel T. Stacey and Assistant Appellate Defender Eleanor Duffy Cleary, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Deputy Director Teresa A. Knox, Tommy Evans, Jr., and J. Benjamin Aplin, all of South Carolina Department of Probation, Parole & Pardon Services, of Columbia, for respondent.

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**JUSTICE MOORE:** This is a statutory construction case. The sole issue before us is the application of S.C. Code Ann. § 24-21-560(D) (Supp. 2003) which determines the sentence for successive revocations of a

prisoner's community supervision. We affirm the trial judge's reading of the statute and the sentence imposed.

## FACTS

Appellant pled guilty to distribution of crack cocaine, second offense, and was sentenced to six months imprisonment. He was given credit for two days served. After serving five months and two days, he entered a Community Supervision Program (CSP) which was to continue for two years.

This case was commenced when appellant's supervising agent swore out a warrant alleging numerous violations of CSP including failure to report, use of controlled substances, failure to maintain employment, and failure to pay supervision fees. The trial judge revoked appellant's CSP and sentenced him to five months and seven days. Because this was the second time appellant's CSP was revoked, his sentence was determined under § 24-21-560(D).

Appellant claims § 24-21-560(D) limits his sentence for revocation to the remaining time left on his original sentence for the substantive crime. His original sentence was six months, of which he served five months and two days, and he served three weeks on the prior revocation. Appellant contends his revocation sentence therefore should not exceed five days. He complains the trial judge erroneously interpreted § 24-21-560(D) to allow a revocation sentence that was "almost double" his original sentence.

## DISCUSSION

Under § 24-21-560(A), participation in CSP is a mandatory condition of release for most no-parole offenses.[1] Section 24-21-560 further provides in pertinent part:

> (C) If the department determines that a prisoner has violated a term of the community supervision program

[1]Distribution of crack cocaine, second offense, is a "no parole offense." S.C. Code Ann. § 24-13-100 (Supp. 2003).

> and the community supervision should be revoked, a probation agent must initiate a proceeding in General Sessions Court.
>
> . . . .
>
> If the court determines that a prisoner has wilfully violated a term or condition of the community supervision program, the court may impose any other terms or conditions considered appropriate and may continue the prisoner on community supervision, or the court may revoke the prisoner's community supervision and impose a sentence of up to one year for violation of the community supervision program. . . .
>
> (D) If a prisoner's community supervision is revoked by the court and the court imposes a period of incarceration for the revocation, the prisoner also must complete a community supervision program of up to two years as determined by the department pursuant to subsection (B) when he is released from incarceration.
>
> A prisoner who is sentenced for successive revocations of the community supervision program may be required to serve terms of incarceration for successive revocations, as provided in Section 24-21-560(C), and may be required to serve additional periods of community supervision for successive revocations, as provided in Section 24-21-560(D). The maximum aggregate amount of time the prisoner may be required to serve when sentenced for successive revocations may not exceed an amount of time equal to the length of incarceration imposed for the original "no parole offense". The original term of incarceration does not include any portion of a suspended sentence.

(emphasis added). Appellant contends the underscored language means his sentence for revocation can equal only the amount of unserved time

remaining on his original sentence. This construction of § 24-21-560(D) is not supported by a plain reading of the statute.

Although a penal statute must be strictly construed against the State, when the terms of the statute are clear and unambiguous, we are constrained to give them their literal meaning. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). The words of the statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Brown v. State, 343 S.C. 342, 540 S.E.2d 849 (2001).

Subsection (C) of § 24-21-560 provides that "the court may revoke the prisoner's community supervision and impose a sentence of up to one year for a violation of the community supervision program." Subsection (D) then provides that for a successive revocation, the prisoner may be sentenced "as provided in [subsection] (C)" *i.e.,* for up to one year, with the limitation that the total time imposed "for successive revocations" *i.e.,* all revocations, cannot exceed the length of time of the prisoner's original sentence. Subsection (D) does not provide, as appellant contends, that the sentence for any successive revocation is limited to the amount of time remaining on the prisoner's original sentence, nor does this statute inevitably result in the "doubling" of a prisoner's sentence. Further, we emphasize that the only issue before us is the construction of this particular statute and not the wisdom of the CSP statutory scheme as a whole.[2]

Since appellant served three weeks on his prior revocation, and his time for all revocations cannot exceed six months, the trial judge properly sentenced appellant to five months and seven days.

**AFFIRMED.**

**TOAL, C.J., WALLER and BURNETT, JJ., concur.**

**PLEICONES, J., dissenting in a separate opinion.**

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[2]*See* State v. Dawkins, 352 S.C. 162, 167, 573 S.E.2d 783, 785 (2002) (construing CSP statutes and noting that "all parties agree the statutory scheme is convoluted.")

**JUSTICE PLEICONES**: I respectfully dissent. The majority holds that S.C. Code Ann. § 24-21-560 (Supp. 2003) permits an inmate found to have violated the terms of his community supervision program (CSP) to serve an **additional sentence**,[3] up to an amount equal to the period of incarceration imposed as part his original sentence. I would read the statute differently

CSP "serves essentially the same function for persons convicted of 'no parole offenses' as parole does for other inmates." Jackson v. State, 349 S.C. 62, 562 S.E.2d 475 (2002). As with parole, the Department of Probation, Parole, and Pardon Services (DPPPS) sets the initial length,[4] terms, and conditions of CSP, and determines whether violations have occurred, and initiates a judicial revocation process. If the circuit court judge determines the inmate has willfully violated the terms of his CSP, then the judge has three options: 1) continue the CSP; 2) continue the CSP but alter the terms and conditions; or 3) revoke CSP and order the inmate reincarcerated. The statute limits the total amount of prison time an inmate can serve following CSP revocation(s) to the period of incarceration ordered by the sentencing judge. Read literally, then, I agree with the majority that the statute permits appellant to be reincarcerated for another six months, the "length of incarceration imposed for the original 'no parole offense.'"

In my opinion, however, to read the statute literally is to render it unconstitutional. Compare In re Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002) (no double jeopardy or due process violation in involuntary commitment for sexually violent predators because commitment is not penal). An inmate's original 'no parole' sentence ordinarily contains a period of incarceration plus a suspended portion. Section 24-21-560 (D) limits the maximum period of reincarceration for CSP revocations to "an amount equal

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[3] This is the term used in § 24-21-560; if the revocation judge is truly imposing a new sentence of up to one year, then the protections afforded all criminal defendants, including but not limited to the right to an indictment, counsel, and a jury, must be afforded her. None of these constitutional niceties were afforded appellant, or any of the other CSP violators who have come before the Court. Our obligation to construe statutes as constitutional where possible, e.g. Ward v. State, 343 S.C. 14, 538 S.E.2d 245 (2000), is a driving force behind my construction of § 24-21-560.

[4] The maximum period of CSP is two years.

to the length of incarceration imposed for the original 'no parole offense'". The original term of incarceration does not include any portion of a suspended sentence." In order to avoid any constitutional infirmity, I would read this language as putting an outside limit on incarceration of twice the period imposed by the trial judge. The outside limit on the total amount of time an inmate could be incarcerated and/or required to participate in the CSP program is the length of the original sentence, that is, the term of incarceration plus any period of suspension**.** For example, an individual sentenced to 20 years, suspended on service of seven years, would be subject to serving an additional seven years for CSP violations,[5] but in no case could be held in prison or required to participate in a CSP program after the expiration of the 20 years. Here, appellant received a six-month sentence, no part of which was suspended. In my view, the maximum time he could constitutionally be subjected to incarceration and/or required to participate in the CSP program pursuant to this sentence was six months. That period having expired, I would hold the trial court erred in reincarcerating appellant.

[5] Of course, an inmate is subject to a maximum one year period of incarceration each time he is found to have willfully violated CSP, but each reincarceration is followed by another CSP until the program is successfully completed or until the term of the original sentence is met.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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James G. Blakely, a.k.a. Jimmy Gatewood Blakely, Respondent,

v.

State of South Carolina, Petitioner.

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Appeal from Greenville County
Joseph J. Watson, Circuit Court Judge

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ON WRIT OF CERTIORARI

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Opinion No. 25865
Submitted June 23, 2004 - Filed September 7, 2004

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**REVERSED**

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Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Chief, Capital & Collateral Litigation Donald J. Zelenka, Assistant Deputy Attorney General Salle W. Elliott, and Assistant Attorney General Christopher L. Newton, all of Columbia, for petitioner.

Senior Assistant Appellate Defender Wanda H. Haile, of Columbia, for respondent.

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**JUSTICE MOORE:** We granted the State's petition to review the grant of relief in this post-conviction relief (PCR) action. The PCR judge found counsel was ineffective for failing to object to evidence of respondent's previous threats. We reverse.

## FACTS

Respondent was charged with murder and assault and battery with intent to kill (ABIK) for wounding his girlfriend Sarah Ann Moss (a.k.a. "Ann") and killing her friend John Henderson (a.k.a. "Steve") after a domestic dispute earlier in the day. Respondent shot both victims in front of Ann's house as they were getting out of a car. Steve managed to drive off after being shot but was found dead near his car about a half-mile away.

Respondent claimed self-defense on the murder charge. He testified he saw Steve and Ann kissing in the car. When he confronted them, Steve came at respondent with a knife. To the contrary, eye-witnesses testified they saw Steve put his hands up immediately before being shot. No one saw a knife and no knife was ever found at the scene or in Steve's car. In his statement to police, respondent did not mention that Steve had a knife when respondent shot him. Respondent claimed he told detectives about the knife but they omitted it from his statement.

As a defense to ABIK, respondent testified he accidentally shot Ann when she came up behind him after he shot Steve.

The jury found respondent guilty of the lesser offenses of voluntary manslaughter and assault and battery of a high and aggravated nature. He was given consecutive sentences of thirty years and ten years. Respondent's direct appeal was dismissed after an Anders review. He then filed this action for PCR.

## ISSUE

Was counsel ineffective for not objecting to evidence of previous threats?

## DISCUSSION

On direct examination, Ann testified as follows:

Q: What was your relationship with [respondent]?
A: I was his girlfriend.
Q: How long did y'all date?
A: About six months.
Q: Were you dating that day on January 1st, 1998? Were y'all still dating then?
A: No. We had quit. I had been calling the relationship all along off, and he like kept threatening me. And, you know, threatened to do something to my family like killing us and blowing up the house. And so I kind of like hung in there because I was afraid of him.

The PCR judge found counsel should have objected to this evidence of previous threats because it impermissibly placed respondent's character in issue.

It is well-settled that evidence of previous threats by the defendant is admissible to show malice. State v. Lee, 255 S.C. 309, 178 S.E.2d 652 (1971); *see also* State v. Alford, 264 S.C. 26, 212 S.E.2d 252 (1975) (previous threats against companion of victim at time of assault also admissible). Respondent was charged with murder and ABIK, both of which include the element of malice. S.C. Code Ann. § 16-3-10 (1985) (murder is killing of any person with malice aforethought); State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000) (ABIK is an unlawful act of violent injury to person of another with malice aforethought). Further, under Rule 404(b), SCRE, this evidence is admissible as evidence of intent.

We conclude counsel was not ineffective for failing to object to the evidence of previous threats. Accordingly, the grant of relief is

**REVERSED.**

**TOAL, C.J., WALLER, BURNETT, and PLEICONES, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Medical University of South Carolina, Respondent,

v.

Dr. Philippe Arnaud, Appellant.

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Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

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Opinion No. 25866
Heard June 23, 2004 - Filed September 7, 2004

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**AFFIRMED**

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Francis T. Draine, of Columbia, for appellant.

Stephen L. Brown, Nancy Bloodgood, and Carol B. Ervin, of Young, Clement, Rivers & Tisdale, L.L.P., of Charleston, for respondent.

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**JUSTICE MOORE:** Respondent (MUSC) filed a breach of contract and declaratory judgment action against appellant (Dr. Arnaud) following Dr. Arnaud's refusal to leave his employment. The trial court granted MUSC's motion for summary judgment. After certifying this case from the Court of Appeals pursuant to Rule 204(b), SCACR, we affirm.

## FACTS

Dr. Arnaud entered into an Agreement of Resignation (agreement) with MUSC in July 1998. In this agreement, Dr. Arnaud agreed to irrevocably resign his employment with MUSC's Department of Immunology and Microbiology as of June 30, 2002, in exchange for a ten percent increase in his base salary for the fiscal years of 1998/1999, 1999/2000, 2000/2001, and 2001/2002. No attempt was made to modify the agreement after signing.

In August 2001, Dr. Arnaud attended a seminar concerning the Teacher and Employee Retention Incentive (TERI) program. Dr. Arnaud's impression after the seminar was that if he entered TERI, his participation in the program would give him the right to keep his position at MUSC.[1]

As of October 1, 2001, Dr. Arnaud entered the TERI program, which did not affect his job in any manner. The Dean of MUSC wrote Dr. Arnaud a letter on October 22 informing him that, although he had entered the TERI program, he would still have to retire at the end of June 2002 pursuant to his agreement with MUSC.[2] Joe Good, General Counsel to MUSC, wrote a

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[1]Pertinent portions of the TERI guidelines for state government state: (1) "Participants in the TERI program retain the same status and employment rights they held upon entering the program;" (2) "While program participants retain the same rights to their positions they held prior to entering the program, participation in the TERI program does not guarantee employment for the specified program period;" and (3) "Employees who enter the TERI program gain no new employment rights and are subject to the employment policies and procedures associated with whatever position(s) they occupy during the program period, to include those policies and procedures related to salary, benefits, and grievance rights." *See also* S.C. Code Ann. § 9-1-2210 (Supp. 2003).

[2]This letter was in response to Dr. Arnaud's letter requesting the Dean's approval of his entrance into the TERI program and indicating his

letter to Dr. Arnaud on December 10, 2001. In this letter, Good indicated that Dr. Arnaud's TERI participation would not alter the prior agreement and that Dr. Arnaud's employment would terminate in June 2002. However, in April 2002, counsel for Dr. Arnaud sent a letter to Good stating that Dr. Arnaud was entitled to work at MUSC for another five years from the date he entered the TERI program.[3]

During his deposition, Dr. Arnaud gave inconsistent testimony. He testified Good told him TERI superseded the agreement and that he could continue to work under TERI. However, he also testified he was not told by anyone that TERI would supersede his agreement. Specifically, Dr. Arnaud acknowledged that no one in his department had informed him that after he entered TERI, his previous agreement was no longer in effect and that he would be guaranteed a job for five years if he signed up for TERI. Dr. Arnaud stated that Good, the counsel for MUSC, told him resignation agreements could be changed and new agreements could be entered into, but, he acknowledged, counsel was not specifically talking about his agreement. Dr. Arnaud testified Good told him that, even though the agreement did not mention TERI, he could join TERI. Dr. Arnaud acknowledged that Good did not tell him he did not have to resign in June 2002.

Holly Maben, the benefits coordinator of MUSC, gave an affidavit in which she stated she told Dr. Arnaud the agreement controlled over his TERI application and he would have to terminate his employment on June 30, 2002, despite his TERI participation. She stated he was given five years on

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plan to remain at MUSC until 2005. His letter did not reference the earlier resignation agreement.

[3] MUSC sent appellant two more letters. The first letter indicated Dr. Arnaud's resignation was effective June 30, 2002. The second letter, dated July 1, 2002, instructed Dr. Arnaud to return his identification badge and any keys to the departmental space he held and to remove all personal items from his office.

the TERI application only so he could continue TERI participation if he decided to work for another state employer when he left MUSC.[4]

The trial court found MUSC was entitled to summary judgment on its breach of contract claim and was entitled to specific performance in the form of Dr. Arnaud's immediate resignation. The court further found, pursuant to the declaratory judgment action, that § 9-1-2210(A) does not alter a state employee's underlying employment rights or grant any additional employment rights to the employee while that employee participates in the TERI program.

## ISSUE

Did the trial court err by granting summary judgment to MUSC?

## DISCUSSION

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003). In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Id.*

Dr. Arnaud's contention that the court improperly granted summary judgment by ignoring disputed issues of material fact is without merit because any alleged disputed issues of fact exist solely due to Dr. Arnaud's

[4]The affidavit of Peggy Boykin, the director of the South Carolina State Retirement System, was also submitted. In this affidavit, Boykin, who was involved in the drafting of the TERI legislation, gave opinions regarding what the TERI legislation was and was not intended for. Boykin also gave specific opinions regarding how the TERI legislation applied to Dr. Arnaud's situation.

own inconsistent statements in his deposition. Dr. Arnaud testified MUSC's counsel, Good, did *not* tell him he did not have to resign June 30, 2002, *i.e.* that the previous resignation agreement was nullified by participation in the TERI program. He also stated that *no one* told him participation in TERI would override the agreement. However, he also testified at various times that Good told him that entering in the TERI program superseded his previous agreement and that he could continue to work under TERI.

Given Dr. Arnaud's vacillation, his mere allegation that he was informed TERI superseded the agreement is not enough to survive a summary judgment motion. *See* City of Columbia v. Town of Irmo, 316 S.C. 193, 447 S.E.2d 855 (1994) (opposing party may not rest upon mere allegations, but must respond with specific facts showing genuine issue). All that was presented to the trial court was Dr. Arnaud's bare assertion that he had been informed TERI nullified his previous agreement. In fact, the evidence is clear Dr. Arnaud was informed several times that he was expected to honor the agreement even though he had entered the TERI program.[5]

Accordingly, the trial court did not err by granting summary judgment in favor of MUSC.[6] *See* Cunningham ex rel. Grice v. Helping Hands, Inc.,

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[5]We note that while the affidavit of Peggy Boykin, the director of the South Carolina State Retirement System, was also submitted, this affidavit is not admissible as evidence of legislative intent. *See* Kennedy v. South Carolina Retirement Sys., 345 S.C. 339, 549 S.E.2d 243 (2001) (it is a settled principle in the interpretation of statutes that even where there is some ambiguity or some uncertainty in the language used, resort cannot be had to the opinions of legislators or of others concerned in the enactment of the law, for the purpose of ascertaining the intent of the legislature). Therefore, the trial court should not have considered this affidavit when deciding to grant summary judgment to MUSC.

[6]Dr. Arnaud further argues the court erred by deciding the novel issue of the statutory construction of a state employee's retirement rights in a summary judgment proceeding. However, the mere fact a case involves a

*supra* (summary judgment appropriate only if no genuine issue of material fact and moving party entitled to judgment as matter of law). The remaining two issues raised by Dr. Arnaud are deemed abandoned given the arguments on those issues were conclusory. *See* First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994) (failure to provide arguments or supporting authority for an issue renders it abandoned).

**AFFIRMED.**

**TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.**

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novel issue does not render summary judgment inappropriate. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 320 S.C. 143, 463 S.E.2d 618 (Ct. App. 1995), *rev'd in part on other grounds*, 327 S.C. 238, 489 S.E.2d 470 (1997).

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Charles Christopher Grant,
Claimant, Respondent,

v.

Grant Textiles, Employer, and
U.S. Fire Insurance Company,
Carrier, Appellants.

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Appeal From Spartanburg County
Donald W. Beatty, Circuit Court Judge

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Opinion No. 3861
Heard June 8, 2004 – Filed September 7, 2004

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**REVERSED**

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Steven L. Brown and Robert P. Gruber, both of Charleston, for Appellants.

Richard H. Rhodes and Ray E. Thompson, Jr., both of Spartanburg, for Respondent.

**STILWELL, J.:** Grant Textiles and its insurer, U.S. Fire Insurance Company, appeal the circuit court's order reversing the decision of the full commission and finding Charles Grant's injuries compensable under the South Carolina Workers' Compensation Act. We reverse and reinstate the full commission's decision.

## FACTS

Grant is the Vice-President of Grant Textiles, where he is responsible for selling textile machinery parts. On the day of the accident, Grant drove to the Clinton House and Meeting Plantation, a private hunting preserve and meeting center owned individually by him, to deliver bobbin samples to customers of Grant Textiles who were staying there. Grant Textiles has a corporate membership at the Clinton House and, although its customers are occasionally guests of the Clinton House, the company has no ownership interest in the facility.

As he approached the entrance gate to the Clinton House, Grant and another motorist abruptly swerved to miss an object in the roadway. Grant testified he was concerned the object created a safety hazard to guests traveling to and from the Clinton House. On his arrival, Grant alerted the manager of the Clinton House to the obstacle, and both men walked back down the highway to attempt to remove it. As Grant walked along the shoulder of the road, a pickup truck swerved off the road while attempting to pass a car, and struck Grant from behind. As a result, he suffered bruising to the right side of his body and severe injury to his right arm.

The single commissioner found Grant's injuries arose out of his employment with Grant Textiles and awarded compensation for his claim. The full commission reversed, finding Grant's accident had no causal connection with his employment. The full commission also found Grant's ordinary job duties did not require him to remove debris from the roads and his job duties and responsibilities were in no way related to road maintenance. The circuit court reversed the full commission, concluding the injuries were compensable.

## STANDARD OF REVIEW

A reviewing court will not overturn a decision by the Workers' Compensation Commission unless the determination is unsupported by substantial evidence or is affected by an error of law. Dukes v. Rural Metro Corp., 356 S.C. 107, 109, 587 S.E.2d 687, 688 (2003). "Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action." Howell v. Pacific Columbia Mills, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987). The question of whether an accident arises out of and in the course and scope of employment is largely a question of fact for the full commission. Grice v. National Cash Register Co., 250 S.C. 1, 3, 156 S.E.2d 321, 322 (1967). However, where the facts are undisputed, the question of whether an accident is compensable is a question of law. Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 517, 526 S.E.2d 725, 729 (Ct. App. 2000).

## DISCUSSION

Grant may recover workers' compensation benefits only if he sustained an "injury by accident arising out of and in the course of the employment." S.C. Code Ann. § 42-1-160 (Supp. 2003). An injury arises out of one's employment "when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury." Broughton v. S. of the Border, 336 S.C. 488, 497, 520 S.E.2d 634, 638 (Ct. App. 1999). Although the injury need not be expected or even foreseeable, it must appear to have originated in an employment-related risk and be a rational consequence of that risk. Carter v. Penney Tire & Recapping Co., 261 S.C. 341, 345, 200 S.E.2d 64, 65 (1973) (citations omitted).

Grant was a senior executive at his family-owned textile supply company where he was principally involved with sales. In fact, according to his own testimony he would have engaged in sales activity with his customers at Clinton House on the day of the accident had he

not returned to the highway to remove the obstacle in the road. He admitted his job duties and responsibilities with Grant Textiles did not include removing debris from the public highway.

As the sole finder of fact, the full commission found that Grant's injuries did not arise out of his employment with Grant Textiles because the cause of the accident had no relation to his employment duties. "The question of whether an accident arises out of and is in the course and scope of employment is largely a question of fact for the Full Commission." Broughton, 336 S.C. at 496, 520 S.E.2d at 638; see also Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 518, 526 S.E.2d 725, 729 (Ct. App. 2000).

Based on that finding of fact, the full commission reached the legal conclusion that Grant's accident and resulting injuries had no causal connection to his employment with Grant Textiles. The factual findings made by the full commission are supported by substantial evidence. Thus, Grant's claim is not compensable as a matter of law. See Douglas v. Spartan Mills, 245 S.C. 265, 140 S.E.2d 173 (1965) (holding "an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which [one] would have been equally exposed apart from the employment" cannot be said to arise out of the claimant's employment).

We therefore conclude the trial court erred in reversing the commission's decision. Accordingly, the trial court's ruling is reversed, and the full commission's ruling is reinstated.

**REVERSED.**

**CURETON, A.J., concurs.**

**HEARN, C.J., dissents in a separate opinion.**

**HEARN, C.J., dissenting**: I respectfully dissent from the majority's determination that Grant's injury is not compensable under

South Carolina Workers' Compensation Law. I would hold that Grant's injury is compensable because it arose out of and in the course of his employment.

The majority bases its decision largely upon what it perceives to be our limited standard of review. While I agree that the question of whether an accident arises out of and in the course of employment is largely one of fact, here there are no material facts in dispute.[1] Thus, the question of whether the accident is compensable is a question of law. See Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 517, 526 S.E.2d 725, 729 (Ct. App. 2000).

Despite the fact that Grant owns the Clinton House, the only reason Grant drove to the Clinton House on the day of the accident was to deliver sample bobbins to customers of Grant Textiles. Grant's father, who is the president of Grant Textiles, was already at the Clinton House meeting with those customers.

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[1] When asked during oral argument which facts were in dispute, the attorney for Grant Textiles pointed to conflicting testimony concerning the distance between the entrance of the Clinton House and the accident. Grant testified that he believed the obstacle was fifty feet down the road, but "it may have been further." The trooper from the highway patrol who investigated the accident testified that "seeing as how both parties had left the scene, [he] was not one hundred percent certain exactly where [the accident] took place." The trooper further testified that, 325 feet from the entrance of the Clinton House, he found a pair of glasses on the side of the road. While the testimony from Grant and the trooper did not coincide exactly, both of their descriptions indicate that the accident took place in close proximity to the entrance of the Clinton House. Thus, any difference in their testimony is immaterial. Furthermore, when this case was presented to the circuit court, Grant's attorney stated twice that the facts were not in dispute, and the attorney for Grant Textiles never objected to that or pointed out any facts that were disputed.

As described in the majority's opinion, as Grant approached the Clinton House, he had to swerve out of his lane in order to avoid debris in the road. After successfully maneuvering around the hazard, Grant left his truck idling in the entranceway of the Clinton House and walked back down the highway to remove the debris from the road. Although removing debris from the highway was certainly not one of his regular duties as vice-president of Grant Textiles, Grant explained that, on this occasion, he felt that he did have an obligation to remove the hazard. Specifically, Grant testified:

> [T]o me that right there was a safety issue because I had to come out of the road [in order to avoid the obstacle] and ended up right there at the driveway [of the Clinton House]. And I had some customers going and coming. I had some customers coming in that evening. And me and my father was [sic] leaving. If you travel as much as I do and see some accidents, you know, I thought I was doing the right thing.

By attempting to remove the debris from the road, Grant was trying to ensure that the customers, his father (a co-worker), and he could safely travel to and from the Clinton House.

For an injury to be compensable under the South Carolina Workers' Compensation Law, it must both arise out of and be in the course of the employment. Osteen v. Greenville County Sch. Dist., 333 S.C. 43, 49, 508 S.E.2d 21, 24 (1998). The phrase "arising out of" refers to the causal origin of the injury, whereas the phrase "in the course of" refers to the injury's time, place, and circumstance. Id. at 50, 508 S.E.2d at 24. In Hiers v. Brunson Construction Co., our supreme court explained:

> '[I]f in the course of [a worker's] employment an emergency arises and, without deserting his employment, [the worker] does what he thinks necessary for the purpose of advancing the

> work in which he is engaged in the interest of his employer, and in so doing he suffers injury, the accident may properly be regarded as arising out of the employment.'

221 S.C. 212, 234-235, 70 S.E.2d 211, 222 (1952) (quoting 58 Am.Jur. 764). Furthermore, in Osteen v. Greenville County School District, 333 S.C. 43, 48, 508 S.E.2d 21, 24 (1998), the supreme court recognized that our state has "adopted Professor Larson's view that there are circumstances when injuries arising out of acts outside the scope of an employee's regular duties may be compensable." The court explained that "[t]hese circumstances have been applied to: (1) acts benefiting co-employees; (2) acts benefiting customers or strangers; (3) acts benefiting claimant; and (4) acts benefiting [the] employer privately." Id. at 48-49, 508 S.E.2d at 24 (citing Larson, §§ 27.00-27.48) (internal footnote omitted).

In the case before us, the undisputed facts indicate that the time, place, and scope of Grant's duties as an employee of Grant Textiles brought him immediately in contact with a dangerous situation. The undisputed facts also show that Grant attempted to remove the debris from the road in order to ensure that he, his co-employee, and the customers of Grant Textiles could safely travel to and from the Clinton House. Thus, Grant's injury arose out of and in the course of his employment. Osteen, 333 S.C. at 48-49, 508 S.E.2d at 24.

The supreme court's decision in Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975), lends further support to awarding Grant benefits. In Howell, an employee of a grocery store was injured when he chased down two boys who had snatched a purse from a woman in the parking lot. The supreme court acknowledged that chasing thieves was not part of the employee's regular duties, but ultimately concluded the employee's injuries arose out of and in the course of his employment. In reaching this conclusion the court explained that "awards have been upheld for injuries occurring in the course of miscellaneous Good Samaritan activities by employees, on the theory that the employer ultimately profited as a result of the good

will thus created." Id. at 301-302, 214 S.E.2d at 822. Like the grocery store employee in Howell, the time, place, and scope of Grant's actual duties brought him immediately in contact with a situation that was dangerous to his employer's customers. While clearing debris from the highway was not a part of Grant's regular duties, his attempt to rectify a dangerous situation was a Good Samaritan act similar to the grocery store clerk's actions in Howell. Therefore, I would affirm the circuit court's decision to award Grant benefits.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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Verlette R. Kizer, Respondent,

v.

Kenneth L. Kinard, Appellant.

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Appeal From Bamberg County
Rodney A. Peeples, Circuit Court Judge

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Opinion No. 3862
Heard April 7, 2004 – Filed September 7, 2004

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**AFFIRMED**

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Lewis C. Lanier, of Orangeburg, for Appellant.

Randolph Murdaugh, IV, of Hampton, for Respondent.

**BEATTY, J.:** Verlette R. Kizer brought this action seeking a declaratory judgment under an underinsured motorist (UIM) policy issued to her by Horace Mann Insurance Company. The circuit court

found Mrs. Kizer could receive compensation for an amount up to the limits of the UIM policy subject to a setoff of $25,000. Horace Mann appeals, asserting it is entitled to a setoff of $50,000. We affirm the circuit court's ruling.

## FACTS

Verlette Kizer's claim for underinsured motorist benefits arises from a collision in Bamberg County between an automobile driven by her and one driven by Kenneth L. Kinard. As a result of the collision, Mrs. Kizer suffered severe personal injury. Her husband, Charles F. Kizer, also suffered damages for loss of consortium as a result of the accident; however, Mr. Kizer never filed a loss of consortium action. Kinard's negligence or fault in causing the accident and resulting injury and loss of consortium is not disputed in this appeal.

At the time of the accident, Horace Mann Insurance Company insured Mrs. Kizer against bodily injury or death caused by an underinsured motorist.[1] Kinard had automobile liability insurance coverage with Government Employees Insurance Company (GEICO) with split liability limits of $50,000 per person and $100,000 per occurrence.

GEICO disbursed the $50,000 proceeds of Kinard's liability coverage equally between Mrs. Kizer and her husband, receiving a covenant not to execute from the Kizers. Thus, GEICO allocated $25,000 to Mrs. Kizer on her personal injury claim and $25,000 to Mr. Kizer on his loss of consortium claim. Claiming damages for her personal injuries in excess of $25,000, Mrs. Kizer sought compensation under the Horace Mann UIM policy.[2]

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[1] Mrs. Kizer was also insured by an underinsurance policy with Nationwide Insurance Company in the amount of $25,000.

[2] Mrs. Kizer's damages apparently amounted to at least $75,000. Even though Mrs. Kizer received $25,000 from GEICO and an additional $25,000 from Nationwide, Horace Mann agreed to pay an additional $25,000 if Mrs. Kizer prevails in this action.

Horace Mann denied Mrs. Kizer's request, asserting it was entitled to a $50,000 setoff of GEICO's policy limits against all liability stemming from her personal injury claim. Mrs. Kizer, however, asserted Horace Mann was only entitled to a setoff of $25,000 from the GEICO payments because she received that amount. Mrs. Kizer argues that the payments she and her husband received exhausted the $50,000 per person liability limits of the GEICO policy. The circuit court agreed with Mrs. Kizer, finding, as to Mrs. Kizer's claim, that Horace Mann was entitled to a setoff of $25,000 of GEICO's payment. Also, the court determined that Horace Mann would be entitled to a $25,000 setoff on any UIM claim by Mr. Kizer. Horace Mann appeals.

## STANDARD OF REVIEW

A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. Antley v. Nobel Ins. Co., 350 S.C. 621, 625, 567 S.E.2d 872, 874 (Ct. App. 2002) (citing Felts v. Richland County, 303 S.C. 354, 400 S.E.2d 781 (1991)). As the issue below involved a determination of underinsured motorist coverage, the action is at law. State Farm Mut. Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 237, 530 S.E.2d 896, 899 (Ct. App. 2000). "In an action at law, the trial judge's factual findings will not be disturbed on appeal unless a review of the record reveals there is no evidence which reasonably supports the judge's findings." Id.

## LAW/ANALYSIS

Horace Mann contends it is entitled to a setoff of GEICO's $50,000 policy limits in Mrs. Kizer's UIM claim because Mrs. Kizer failed to exhaust GEICO's available coverage. We agree that Horace Mann is entitled to a setoff; the question presented on this appeal is the amount of Horace Mann's setoff of GEICO's payment.

Underinsured motorist coverage is optional coverage provided when the insured sustains damages in excess of the at-fault driver's liability coverage, recovery being in addition to any recovery from the

at-fault motorist, the total recovery not to exceed the damages sustained. Broome v. Watts, 319 S.C. 337, 341, 461 S.E.2d 46, 48 (1995). The UIM statute does not require payment of the applicable policy limits as a precondition to collecting UIM benefits; however, the UIM carrier is entitled to a credit for any amount of liability coverage not exhausted in settlement. Cobb v. Benjamin, 325 S.C. 573, 589, 482 S.E.2d 589, 597 (Ct. App. 1997).

"The very definition of UIM insurance mandates set-off." Broome, 319 S.C. at 341, 461 S.E.2d at 48. Horace Mann asserts that GEICO's apportionment of payment of its policy limits between Mr. and Mrs. Kizer does not alter Horace Mann's right to a setoff of the entire $50,000 against any claim by Mrs. Kizer. Horace Mann argues that, notwithstanding payment of the liability limits of GEICO's policy, the limits were not exhausted as to Mrs. Kizer's bodily injury claim because the entire amount was not paid to her. We disagree.

Horace Mann erroneously assumes that the consequential damages characterization of a loss of consortium claim requires that it be inseparable from the spouse's bodily injury claim. The two claims are distinct and independent. "It is well settled in South Carolina that one spouse's cause of action for medical expenses and loss of consortium resulting from negligent injuries to the other spouse is a different and distinct cause of action from one maintained by the injured spouse; judgment in favor of the defendant in one action is not a bar to the other action." Graham v. Whitaker, 282 S.C. 393, 397, 321 S.E.2d 40, 43 (1984).

"[A]ny person may maintain an action for damages arising from an intentional or tortious violation of the right to the companionship, aid, society and services of his or her spouse." Stewart v. State Farm Mut. Auto. Ins. Co., 341 S.C. 143, 156, 533 S.E.2d 597, 603-604 (Ct. App. 2000) (quoting S.C. Code Ann. § 15-75-20 (1977)). "[L]oss of consortium is an independent action, not derivative." Stewart, 341 S.C. at 156, 533 S.E.2d at 604.

Our courts have decided that "per person" liability limits include loss of consortium claims. Id.; see also Sheffield v. Am. Indem. Co., 245 S.C. 389, 140 S.E.2d 787 (1965). However, the courts' rulings in these cases did not nullify the independent status of a loss of consortium claim. Nor did they rule that a loss of consortium claim is inseparable from the claim of an injured spouse. The courts simply pointed out that the bodily injury claim and the loss of consortium claim share the limits of a per person liability limits policy.

We find that the $50,000 per person injury limit in Kinard's GEICO liability policy was exhausted by the combined payment of $25,000 to Mrs. Kizer for her physical injuries and $25,000 to Mr. Kizer for his loss of consortium due to Mrs. Kizer's injuries. Accordingly, we conclude that Horace Mann is only entitled to setoff the $25,000 GEICO paid to Mrs. Kizer. The ruling of the circuit court is therefore

**AFFIRMED.**

**HEARN, C.J., and ANDERSON, J., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Robert J. Burgess, Respondent,

v.

Nationwide Mutual Insurance Company, Appellant.

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

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Opinion No. 3863
Heard April 6, 2004 – Filed September 7, 2004

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**AFFIRMED AS MODIFIED**

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Robert C. Brown, of Columbia, for Appellant.

Kristi F. Curtis, of Sumter, and Nelson R. Parker, of Manning, for Respondent.

**BEATTY, J.:** Robert J. Burgess brought a declaratory judgment action against Nationwide Mutual Insurance Company seeking a declaration that he was entitled to underinsured motorist coverage. The trial judge granted declaratory relief and found Burgess was entitled to UIM coverage in the amount of $15,000. Nationwide appeals. We affirm as modified.

## FACTS[1]

Burgess was operating his 1986 Honda motorcycle when a car driven by Angelo T. Heyward struck him. Heyward carried automobile liability insurance on his car with New Hampshire Indemnity Company. Burgess collected $15,000 of liability coverage from New Hampshire Indemnity and agreed to a covenant not to execute with Heyward.

Burgess had a liability policy on his motorcycle with Alpha Property and Casualty Insurance, but the policy did not provide any underinsured motorist ("UIM") coverage. In addition to the motorcycle, Burgess also owned three vehicles that were covered by Nationwide Mutual Insurance Company ("Nationwide"). That policy provided UIM coverage of $25,000 per person. The Uninsured and Underinsured Motorist Endorsement provided that:

> If a vehicle owned by you or a relative is involved in an accident where you or a relative sustains bodily injury or property damage, this policy shall: a) be primary if the involved vehicle is your auto described on this policy; or b) be excess if the involved vehicle is not your auto described on this policy. The amount of coverage applicable under this policy shall be the lesser of the coverage limits under this policy or the coverage limits on the vehicle involved in the accident.

[1] The parties stipulate these facts.

Because the motorcycle was not listed under Nationwide's policy, Nationwide refused to pay Burgess, arguing that the motorcycle did not have any UIM coverage.

Burgess moved for declaratory judgment. He argued that he was entitled to $15,000 of UIM coverage from the Nationwide policy that covered his "at-home" vehicles. Nationwide countered it should not be required to pay any UIM benefits because Burgess had more than the basic amount of UIM coverage and the vehicle involved in the accident had none. Nationwide also argued that its UM/UIM endorsement excludes coverage under these circumstances. The trial judge granted declaratory relief to Burgess in the amount of $15,000.

## ISSUES

I. Did the trial court err in finding Burgess was entitled to UIM coverage in an amount equal to the liability coverage on the Honda motorcycle involved in the accident under the Nationwide policy?

II. Did the trial court err in finding that Burgess was entitled to UIM coverage under S.C. Code Ann. § 38-77-160?

III. Did the trial court err in finding that Burgess was entitled to coverage under Nationwide's policy?

## STANDARD OF REVIEW

Whether a suit for declaratory judgment is legal or equitable is determined by the nature of the underlying issue. Auto-Owners Ins. Co. v. Horne, 356 S.C. 52, 56, 586 S.E.2d 865, 867 (Ct. App. 2003) (citing Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)). "An action to determine coverage under an insurance policy is an action at law." S.C. Farm Bureau Mut. Ins. Co. v. Wilson, 344 S.C. 525, 528, 544 S.E.2d

848, 849 (Ct. App. 2001). In an action at law, tried without a jury, the appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, when an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts. In re Estate of Boynton, 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct. App. 2003). In such a situation, the appellate court does not have to defer to the trial court's findings. Id.

## LAW/ANALYSIS

There is a great division of authority as to coverage for damages arising out of accidents involving owned but not insured vehicles. In some jurisdictions, UIM coverage follows the person; in others it follows the vehicle. We believe that South Carolina falls in the category where UIM coverage follows the person, as is the case with uninsured motorist ("UM") coverage.

UIM insurance is a variant of UM insurance. 9 Couch on Ins. 3d § 122:3 (2004). In some jurisdictions, UIM is referred to as supplemental uninsured coverage. Id. South Carolina courts have often analogized UM and UIM, especially when discussing the application and interpretation of section 38-77-160 of the South Carolina Code (2002), which deals with UM and UIM coverage.[2] Therefore, our appellate courts' treatment of UM is instructive in this case.

The purpose of the UM statute is "to provide benefits and protection against the peril of injury or death by an uninsured motorist to an insured motorist, his family, and the permissive users of his vehicle." Ferguson v. State Farm Mut. Auto Ins. Co., 261 S.C. 96, 100, 198 S.E. 2d 522, 524 (1973). The statute "is remedial in nature, enacted for the benefit of injured

[2] See McAllister v. State Farm Mut. Auto Ins. Co., 301 S.C. 113, 390 S.E.2d 383 (1990); Nationwide Mut. Ins. Co. v. Howard, 288 S.C. 5, 339 S.E.2d 501 (1985).

persons, and is to be liberally construed so that the purpose intended may be accomplished." Gunnels v. American Liberty Ins. Co., 251 S.C. 242, 247, 161 S.E.2d 822, 824 (1968).

Our supreme court has previously explained, "uninsured motorist coverage is not to provide coverage for the uninsured vehicle but to afford additional protection to the insured." Nationwide Mut. Ins. Co. v. Howard, 288 S.C. 5, 12, 339 S.E.2d 501, 504 (citing Hogan v. Home Ins. Co., 260 S.C. 157, 162, 194 S.E.2d 890, 892 (1973)). The court further clarified in Hogan that "unlike the provisions relative to liability coverage, the statute plainly affords uninsured motorist coverage to the named insured and resident relatives of his or her household at all times and without regard to the activity in which they were engaged at the time. Such coverage is nowhere limited in the statute to the use of the insured vehicle." Hogan, 260 S.C. at 162, 194 S.E.2d at 892.

Similarly, the statutory purpose of UIM coverage is to provide coverage in the event damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured. S.C.Code Ann. § 38-77-160. Thus, our UIM statute is also remedial in nature and enacted for the benefit of injured persons. It should be construed liberally to effect the purpose intended by the legislature. See Sloan v. Greenville County, 356 S.C. 531, 564, 590 S.E.2d 338, 356 (Ct. App. 2003) (reasoning that the provisions of a code should be construed liberally if the code is remedial in nature).

Understanding that UIM coverage is a variation of UM coverage, we believe that Hogan indicates the legislative intent behind our UIM statute and is applicable here. In other words, *under*insurance, like *un*insurance, is personal and portable. "In jurisdictions where the coverage follows the person any person who enjoys the status of an insured under a motor vehicle policy of insurance which includes uninsured/underinsured coverage enjoys coverage protection simply by reason of having been injured by an uninsured/underinsured motorist." 9 Couch on Ins. 3d § 123:3.[3]

[3] South Carolina appears to share the majority view. See DeHerrera v. Sentry Ins. Co. 30 P.3d 167 (Colo. 2001); Honeycutt v. Walker, 119 N.C. App. 220,

## S.C. Code Ann. § 38-77-160

The proper interpretation of section 38-77-160 is central to the resolution of the issues in this case. That section deals with UM and UIM and states:

> Automobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed by section 38-77-160. Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute. ***If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident.*** If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of

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458 S.E. 2d 23 (1995) *review denied*, 342 N.C. 192, 463 S.E.2d 236 (1995); Dines v. Pacific Ins. Co., 78 Haw. 325, 893 P.2d 176 (1995), *recons. denied*, 78 Haw. 474, 896 P.2d 930 (1995); Smith v. Nationwide Mut. Ins. Co., 328 N.C. 139, 400 S.E.2d 44 (1991), *reh'g denied*, 328 N.C. 577, 403 S.E. 2d 514 (1991); Howell v. Balboa Ins. Co., 564 So.2d 298 (La. 1990); see also State Farm Mut. Auto Ins. Co. v. Jackson, 462 So.2d 346 (Ala. 1984), *later proceeding*, 757 F.2d 1220 (11th Cir. Ala. 1985).

> the vehicles with the excess or underinsured coverage. [4]

(Emphasis added).

Nationwide argues that the emphasized language excludes basic UIM coverage in situations where the vehicle involved in a collision is owned by the insured but is not specifically covered in a UIM policy. We disagree.

The emphasized language has been interpreted or discussed on numerous occasions by our appellate courts.[5] Several of those cases involved facts very analogous to the case *sub-judice*.[6] However, none of them has directly addressed the question we face today, that is whether or not section 38-77-160 and public policy allow the exclusion of basic UIM coverage. Each of the cases addressed the issue of "stacking" UIM or UM coverage. Invariably, each of these cases found the emphasized language to apply to situations involving stacking. See S.C. Farm Bureau Mut. Ins. Co. v. Mooneyham, 304 S.C. 442, 445, 405 S.E.2d 396, 398 (1991) ("[W]e interpret the pertinent language of the statutes as setting a cap on the amount which can be stacked . . . ."). In each case the insurer made an initial payment of at

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[4] There is no requirement that an insurer offer UIM coverage in an amount less than the statutorily required bodily injury or property damage limits. S.C. Code Ann. § 38-73-470 (Supp. 2002); Moody v. Dairyland, 354 S.C. 28, 28, 579 S.E.2d 527, 529 (Ct. App. 2003). The statutorily required minimum bodily injury amount is $15,000. See S.C. Code Ann. § 38-77-140 (Supp.2002).

[5] See Concrete Services v. U.S. Fidelity, 331 S.C. 506, 498 S.E.2d 865 (1998); South Carolina Farm Bureau Mut. Ins. Co. v. Mooneyham, 304 S.C. 442, 405 S.E.2d 396 (1991); Howard; Garris v. Cincinatti Ins. Co., 280 S.C. 149, 311 S.E.2d (1984); Gambrell v. Travelers Ins. Co., 280 S.C. 69, 310 S.E.2d 814 (1983); State Farm Mut. Ins. Co. v. Gunning, 304 S.C. 526, 532 S.E.2d 16 (Ct. App. 2000); Ohio Cas. Ins. Co. v. Hill, 323 S.C. 208, 473 S.E.2d 843 (Ct. App. 1996).

[6] See McAlister; Gunning; Continental Ins. Co. v. Shives, 328 S.C. 470, 492 S.E.2d 808 (Ct. App. 1997); Hill.

least the basic UIM/UM coverage and only litigated additional UIM/UM payments.

To address the issue of basic coverage, we must consider section 38-77-160 in its entirety, not just the isolated emphasized portion argued by Nationwide. See Beattie v. Aiken County Dep't of Soc. Servs., 319 S.C. 449, 452, 462 S.E.2d 276, 278 (1995) ("An entire code section should be read as a whole so that phraseology of isolated section is not controlling."). Additionally, "[o]ne of the primary rules in a construction of a statute is that the words used therein should be taken in the ordinary and popular significance, unless there is something in the statute requiring a different interpretation." Gambrell, 280 S.C. at 73, 310 S.E.2d at 817. A subtle or forced construction of words in a statute for the purpose of expanding the operation of the statute is prohibited. See Moon v. City of Greer, 348 S.C. 184, 188, 558 S.E.2d 527, 530 (Ct. App. 2002).

Section 38-77-160 states in pertinent part:

> Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute . . . . If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage.

Nowhere in the statute is there language that limits **basic** UIM coverage to an insured vehicle. To the contrary, the statute plainly allows coverage when none of the insured's vehicles is involved in the accident. To say that the legislative intent was to exclude basic UIM coverage if an insured's vehicle is involved in an accident but include coverage when none of the insured's vehicles is involved in an accident is absurd, absent specific

language to that effect. In construing a statute, the court looks to its language as a whole in light of its manifest purpose. Simmons v. City of Columbia, 280 S.C. 163, 165, 311 S.E.2d 732, 733 (1984). The manifest purpose of section 38-77-160 is to provide coverage in the event that the insured sustains damages in excess of the liability limits carried by the at fault motorist.

Nationwide's argument that the emphasized language of section 38-77-160 excludes coverage because Burgess had no UIM coverage on the motorcycle is without merit based upon our finding that UIM coverage is personal and portable. Moreover, our supreme court said in Howard, when construing the emphasized provision of 56-9-831 as it pertains to UM coverage, that such coverage was nowhere limited to the use of the insured vehicle.[7] That holding is instructive here.

Nationwide also argues that since Burgess's UIM coverage exceeded the basic UIM coverage of $15,000, his coverage is excess and therefore his claim is precluded by the emphasized language in section 38-77-160.[8] However, section 38-77-160 does not limit *basic* UIM in any way; all limitations specifically reference *excess* UIM. Had the legislature intended to limit basic UIM coverage, it could have easily done so by simply omitting the word "excess." To argue that Burgess should be denied UIM coverage because he purchased too much is absurd.

## UIM Policy Endorsement

Nationwide next argues that its UIM endorsement precludes Burgess's recovery of UIM benefits because the motorcycle had no UIM coverage. Nationwide's endorsement states, in pertinent part, "[t]he amount of coverage

[7] Section 56-9-831 was the predecessor to section 38-77-160. Although the section has been amended and recodified as section 38-77-160, the pertinent emphasized language is unchanged.

[8] Nationwide offers no authority in support of its position. Nationwide concedes that South Carolina's reported cases with similar facts are not directly on point but argues the inferences from those cases supports its position. Again, each of the cases raised by Nationwide concerns stacking.

applicable under this policy shall be the lesser of the coverage limits under this policy or the coverage limits on the vehicle involved in the accident."

Nationwide's endorsement language is far more restrictive than the language in section 38-77-160. Nationwide excludes the recovery of basic UIM whereas section 38-77-160 merely allows an insurer to limit the amount of recovery of excess UIM. The statute does not allow an insurer to limit or exclude basic UIM in any way. An insurance policy issued pursuant to a statute may give more coverage than the statute requires but not less. Belk v. Nationwide Mut. Ins. Co., 271 S.C. 24, 244 S.E.2d 744 (1978). Once UIM is offered and accepted, the coverage cannot be retracted. See Gambrell v. Travelers Ins. Co., 280 S.C. 69, 72, 310 S.E.2d 814, 816 (1983).

Section 38-77-160 governs the application of UIM coverage. It applies to every policy as if embodied therein, and inconsistent insurance policy provisions are void. State Farm Mut. Ins. Co. v. Gunning, 340 S.C. 526, 532 S.E.2d 16 (2000). Nationwide's endorsement exceeds the limitations allowed by section 38-77-160 and is therefore inconsistent with our public policy.

Moreover, in State Farm Mut. Ins. Co. v. Horry, 304 S.C. 165, 403 S.E.2d 318 (1991), our supreme court expressly approved this court's opinion in Purvis v. State Farm Mut. Ins. Co., 302 S.C. 283, 403 S.E.2d 662 (Ct. App. 1991) which declared South Carolina to be an "excess" UIM coverage state. The court went on to say that "excess" UIM coverage "provides benefits to an insured under his own policy *at any time* the at fault drivers liability coverage is less than the amount of the claimants actual damages." Horry, 304 S.C. at 169, 403 S.E.2d at 320 (emphasis added).[9] The court did not require that the vehicle involved in the accident carry UIM coverage.

[9] The phrase "excess UIM coverage" as used in Horry is not synonymous with the word "excess" as used in § 38-77-160. In § 38-77-160 the word excess refers to an amount of coverage greater than the basic amount of $15,000. In Horry the phrase refers to a type of underinsurance coverage theory, *i.e.*, " excess UIM" or " reduction UIM."

## CONCLUSION

The trial court erred when it concluded that Burgess was entitled to $15,000 UIM coverage from the at home vehicles because he had $15,000 liability coverage on the motorcycle involved in the accident. Burgess was entitled to $15,000 UIM coverage because that is the statutory minimum coverage and Burgess had at least that amount on the at home vehicles. However, because we find that UIM coverage is personal and portable, and because we find that section 38-77-160 does not allow the exclusion or restriction of basic UIM coverage, we affirm the trial court's decision as modified.

**AFFIRMED AS MODIFIED.**

**HEARN, C.J., and ANDERSON, J., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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The State, Respondent,

v.

Levell Weaver, Appellant.

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

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Opinion No. 3864
Heard June 9, 2004 – Filed September 7, 2004

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**AFFIRMED**

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Derrick K. McFarland, all of Columbia; and Solicitor Cecil Kelley Jackson, of Sumter, for Respondent.

**CURETON, A.J.:** Levell Weaver appeals his convictions for murder and possession of a weapon during the commission of a crime of violence. Weaver contends the trial court erred in: (1) admitting evidence obtained pursuant to a procedurally defective warrant; (2) admitting hearsay testimony; and (3) declining to grant a mistrial based on inappropriate prosecutorial comment on Weaver's decision not to testify during the trial. We affirm.

## FACTS

At approximately 10:00 p.m. on June 23, 1999, Marion Dwayne McKnight was shot thirteen times while outside a club called Rob's Place in Hemingway, South Carolina. At the time of the shooting, McKnight was getting into his car with Antonio Brown and Tracy Scott. After the shooting, Scott contacted his mother, Loretta, who drove to the club. When she arrived she saw Weaver covered in blood, standing over McKnight's body that had been stripped to its underwear.

Investigator Sandy Thompson, with the Williamsburg County Sheriff's Department, was called around 11:00 p.m. to investigate the incident. Leroy Powell, who witnessed the shooting, identified Weaver as the shooter. Investigator Thompson interviewed other witnesses and spoke with investigators at the scene who informed him that Weaver was a suspect and that he left the scene driving a green Jeep. Upon further investigation, the officers discovered that Weaver was at his cousin's house. Investigator Thompson then left for the residence accompanied by Investigator Collins and several other officers. At the home, the officers spoke with Weaver's cousin, Arnold Weaver. He confirmed Weaver arrived driving a green Jeep and told them Weaver had asked for bleach, a trash bag, and a change of clothes.

After the discussion with Weaver's cousin, officers found the Jeep in the backyard. When Investigator Thompson opened the driver's side door, he noticed the Jeep's back area was wet and smelled of bleach. On a pump house near the Jeep, Investigator Thompson also discovered a bag containing

a towel and some socks which smelled of bleach. To preserve the evidence for investigation, the officers seized the bag and towed the Jeep to an impoundment area. During the early morning hours of June 24, 1999, Weaver turned himself in at the Williamsburg County Jail.

After the Jeep was impounded, Lieutenant Ricky Weston requested and obtained a search warrant. Though the police searched the impounded vehicle after the warrant was issued, no return of the warrant was made.

SLED Agent Steve Lambert processed the vehicle and collected samples of blood evidence from the Jeep and the decedent's vehicle. During the search, Agent Lambert found a cloth with blood evidence on the back seat of the Jeep. As part of the investigation, Lambert analyzed a pair of underwear that contained blood evidence. Agent Lambert received this evidence from Investigator Dennis Parrott who identified the underwear as belonging to Weaver. Investigator Parrott also turned over the bag of clothing that was seized from the pump house near the Jeep. DNA testing of the evidence revealed that all of the samples matched the decedent's blood type.

A Williamsburg County grand jury indicted Weaver for murder, armed robbery, and possession of a weapon during a violent crime. Before trial, Weaver's counsel filed a motion to suppress evidence taken from the Jeep on two primary grounds: (1) the Jeep was seized without a warrant; and (2) no return was made to the search warrant as required by South Carolina Code section 17-13-140. The trial court made a preliminary ruling denying the motion to suppress.

During trial, Weaver's counsel renewed his motion. After hearing testimony and arguments, the court gave a final ruling denying the motion to suppress. As a threshold matter, the court found Weaver had standing to challenge the legitimacy of the search even though he was not the owner of the vehicle. The court then concluded a search warrant was not necessary because the State had probable cause to seize the vehicle and to conduct the subsequent search. The court reasoned the warrantless search was permissible based on the automobile exception to the Fourth Amendment.

As a result, the court found an analysis of the statutory provisions of section 17-13-140 was unnecessary.

The jury found Weaver guilty of murder and possession of a weapon during the commission of a crime of violence. The trial court sentenced Weaver to thirty years imprisonment for murder and a concurrent five-year sentence for the weapon charge. This appeal follows.

## DISCUSSION

### I.

Weaver contends the trial court erred in denying his motion to suppress the evidence seized from the Jeep. Specifically, he asserts the court erred in finding that a search warrant was not necessary. Moreover, because a warrant was required, Weaver claims the failure to file a return as mandated by section 17-13-140 invalidated the search, and thus, required the suppression of the evidence.

"On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings." State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004). "In an appeal from a motion to suppress evidence based on Fourth Amendment grounds, an appellate court may conduct its own review of the record to determine whether the evidence supports the circuit court's decision." Id. at 349-50, 592 S.E.2d at 347.

Section 17-13-140 requires search warrants to be executed and return made within ten days after the date of the warrant:

> Any warrant issued hereunder shall be executed and return made only within ten days after it is dated. The officer executing the warrant shall make and deliver a signed inventory of any articles seized by virtue of the warrant, which shall be delivered to the judicial officer to whom the return is to be made, and if a

> copy of the inventory is demanded by the person from whose person or premises the property is taken, a copy of the inventory shall be delivered to him.

S.C. Code Ann. § 17-13-140 (2003).

Failure to observe the ten-day requirement for execution and return under section 17-13-140 does not necessarily void the warrant. State v. Wise, 272 S.C. 384, 386, 252 S.E.2d 294, 295 (1979) (holding the ten-day requirement was ministerial and the defendant failed to show he was prejudiced by the delay). Because the statute's return requirement is ministerial in nature, any purported noncompliance only provides grounds for exclusion upon a showing of prejudice. State v. Mollison, 319 S.C. 41, 47, 459 S.E.2d 88, 92 (Ct. App. 1995). In at least one case, this court has excluded evidence based on the provisions of section 17-13-140. State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995). In Freeman, we found that drug evidence should have been excluded under a defective warrant where the State failed to produce the original warrant and a signed, sworn return. We concluded the defendant was prejudiced by this failure given he was unable to review the return and match the items listed with the items that were analyzed and admitted into evidence. Id. at 116-19, 459 S.E.2d at 871-72.

Here, the police searched and seized the Jeep prior to obtaining the warrant that Weaver contends was rendered faulty by virtue of noncompliance with the statute's return requirement. We agree with Weaver that the State's failure to produce a return constituted more than a ministerial error. However, as will be discussed, any error in failing to file a return did not require the suppression of the evidence. Under the specific facts of this case, a warrant was not necessary to search and seize the Jeep.

The Fourth Amendment guarantees "[t]he right of the people to be secure . . . [from] unreasonable searches and seizures." U.S. Const. amend. IV. "In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840

(2001); S.C. Const. art. I, § 10. Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. Forrester, 343 S.C. at 643, 541 S.E.2d at 840.

"Generally, a warrantless search is per se unreasonable and thus violative of the Fourth Amendment's prohibition against unreasonable searches and seizures." State v. Bultron, 318 S.C. 323, 331, 457 S.E.2d 616, 621 (Ct. App. 1995). "However, a warrantless search will withstand constitutional scrutiny where the search falls within one of a few specifically established and well delineated exceptions to the Fourth Amendment exclusionary rule." Id. at 331-32, 457 S.E.2d at 621. These exceptions include: (1) search incident to a lawful arrest; (2) "hot pursuit;" (3) stop and frisk; (4) automobile exception; (5) "plain view" doctrine; (6) consent; and (7) abandonment. State v. Dupree, 319 S.C. 454, 456-57, 462 S.E.2d 279, 281 (1995), cert. denied, 516 U.S. 1131 (1996). "The burden of establishing probable cause as well as the existence of circumstances constituting an exception to the general prohibition against warrantless searches and seizures is upon the prosecution." Bultron, 318 S.C. at 332, 457 S.E.2d at 621.

Our supreme court analyzed the automobile exception in State v. Cox, 290 S.C. 489, 351 S.E.2d 570 (1986). In Cox, the court stated:

> The automobile exception was first articulated in Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925). Since Carroll, the doctrine has been applied on a case-by-case basis to various sets of facts.
>
> The two bases for the exception are: (1) the ready mobility of automobiles and the potential that evidence may be lost before a warrant is obtained; and (2) the lessened expectation of privacy in motor vehicles which are subject to governmental regulation.

Id. at 491, 351 S.E.2d at 571 (citations omitted). In view of these reasons, the court found that "under the automobile exception, probable cause alone is sufficient to justify a warrantless search." Id. at 492, 351 S.E.2d at 571-72 (citing California v. Carney, 471 U.S. 386 (1985)). Thus, "the inherent

mobility of automobiles provides the requisite exigency." Id. at 492, 351 S.E.2d at 572.

In this case, the State met its burden to prove probable cause and the existence of circumstances to support the warrantless search under the automobile exception. During their investigation at the crime scene, the officers established that: (1) Weaver was a suspect; (2) he had been seen driving a green Jeep; and (3) there most likely would be blood evidence in the Jeep if in fact Weaver had been involved in the shooting. Additionally, once the officers arrived at Weaver's cousin's home, they discovered that Weaver had asked for a change of clothing, a trash bag, and bleach. Upon further investigation, the officers found a bag of "wash clothes" near the Jeep that smelled of bleach and the inside of the Jeep was wet with bleach. Thus, based on probable cause that the automobile contained evidence of a crime, and the necessity to preserve the potential blood evidence, the warrantless search and subsequent seizure did not violate the Fourth Amendment. See Cox, 290 S.C. at 492, 351 S.E.2d at 572 (holding automobile exception applied to shotgun seized from trunk of vehicle parked at defendant's home); State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 477 (1978) (finding probable cause existed to conduct warrantless search of vehicle based on Carroll doctrine where police stopped vehicle after receiving information from confidential informant that defendant was driving vehicle containing marijuana); State v. Hayden, 268 S.C. 214, 218, 232 S.E.2d 889, 891 (1977) (holding probable cause and exigent circumstances justified warrantless search of automobile where officers received information from an informant that defendants would be traveling in a vehicle containing illegal drugs and due to the lateness of the hour it would have been impractical to get a search warrant); State v. Frank, 262 S.C. 526, 531-33, 205 S.E.2d 827, 830 (1974) (concluding warrantless search of automobile was proper where officer had strong reasons to believe that the automobile was being used in criminal activity and that it very probably contained stolen goods); see also Robinson v. State, 308 A.2d 734, 739-40 (Md. Ct. Spec. App. 1973) (outlining cases holding exigency existed for the search of a vehicle and then removal to police garage).

The question then becomes whether the warrantless search of the Jeep after it was impounded was permissible under the Fourth Amendment. Because the Jeep was at that point immobilized, Weaver asserts that a warrant was required because the exigent circumstances of the mobility of the Jeep were no longer present.

Although there are no South Carolina cases directly on point, the case law from the United States Supreme Court and other jurisdictions supports the admissibility of this evidence despite the lack of a warrant. These cases stand for the proposition that if there is probable cause to search a vehicle at the time it is seized this rationale does not disappear merely because the vehicle is taken into police custody. Because a subsequent search would be part of an ongoing criminal investigation, a warrant would not be required. See, e.g., United States v. Johns, 469 U.S. 478, 487 (1985) (holding warrantless search of packages seized three days earlier from trucks which were suspected of being involved in drug smuggling operation was not unreasonable); Florida v. Meyers, 466 U.S. 380, 382 (1984) (finding warrantless search of automobile impounded and in police custody conducted approximately eight hours after valid initial search at the time of defendant's arrest was proper); Michigan v. Thomas, 458 U.S. 259, 261 (1982) ("It is thus clear that the justification to conduct such a warrantless search does not vanish once the car has been immobilized."); Chambers v. Maroney, 399 U.S. 42, 52 (1970) (concluding officers had probable cause to conduct second search of automobile at station house); Rabadi v. State, 541 N.E.2d 271, 275 (Ind. 1989) ("Where there is probable cause to believe that a vehicle was used in the commission of a crime and contains evidence, a search of the impounded vehicle may be conducted after the arrest at the police station.").

Turning to the facts of the instant case, the State offered evidence that the Jeep was linked to the crime scene and contained evidence when it was impounded. Thus, there was sufficient evidence to support a finding that the officers had probable cause to conduct a warrantless search of the vehicle less than a day after it was impounded. See Ex parte Boyd, 542 So. 2d 1276, 1284-86 (Ala. 1989), cert. denied, 493 U.S. 883 (1989) (holding warrantless search of defendant's automobile four days after impoundment was permissible under requirements of Fourth Amendment and state constitution

where officers had probable cause to search vehicle when it was impounded and that probable cause continued between the time of the impoundment and the search); Robinson v. State, 308 A.2d 734, 740-41 (Md. Ct. Spec. App. 1973) (finding officers' decision to scrape carbon residue from tailpipe of defendant's vehicle at impoundment lot without a warrant was permissible where officers had probable cause to believe defendant was involved in double murder case and similar carbon residue was found at the crime scene). Moreover, the case law in our state appears to support the admissibility of the evidence. Cf. State v. Lemacks, 275 S.C. 181, 183-84, 268 S.E.2d 285, 286 (1980) (holding police officers were justified in impounding and conducting inventory search which extended to the trunk of the vehicle where vehicle was abandoned and believed to contain stolen goods).

As a consequence, even if a procedural defect marred the later-acquired warrant, a subsequent failing cannot retroactively undermine the admissibility of previously acquired evidence. Because all the evidence acquired from the Jeep fits within the purview of the automobile exception, Weaver cannot show he was prejudiced by the failure to comply with the ten-day return requirement. Thus, the trial court properly admitted the evidence.

Despite the applicability of the automobile exception, Weaver contends the evidence should have been excluded because Article I, section 10 of the South Carolina Constitution afforded him greater protection. Although we agree with Weaver that our state constitution may provide greater protection against unreasonable searches and seizures and unreasonable invasions of privacy, our decision in no way violates or diminishes this protection. See State v. Forrester, 343 S.C. 637, 644, 541 S.E.2d 837, 840 (2001). ("[T]his Court can interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution."). In analyzing the automobile exception in this case, we have not blindly applied the exception as a blanket provision for the admissibility of evidence. Instead, we have adhered to the probable cause requirement established by our case law that inherently provides protection against unreasonable searches and seizures as well as unreasonable invasions of privacy. See California v. Carney, 471 U.S. 386, 394 (1985) (The two requirements for the application of the automobile exception "ensure that law

enforcement officials are not unnecessarily hamstrung in their efforts to detect and prosecute criminal activity, and that the legitimate privacy interests of the public are protected."); State v. Lejeune, 576 S.E.2d 888, 892 (Ga. 2003) ("[T]he 'automobile exception' cases do not hold that a search warrant is never needed to search a car. There is an automobile exception to the search warrant requirement, not an exemption. Otherwise, the Supreme Court of the United States would have held that the police would not, under any circumstances, need to obtain a search warrant for an automobile, provided they have probable cause for the search.").

## II.

Weaver asserts the trial court erred in admitting the testimony of Lieutenant Ricky Weston that "all of the evidence led to" or pointed to Weaver. Because this testimony was based on what witnesses told Lieutenant Weston, Weaver contends it constituted inadmissible hearsay.

During the State's redirect examination of Lieutenant Weston, the following exchange took place:

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| Solicitor: | Did—Let me ask you this, Lieutenant Weston. Why didn't you do gunshot residue tests on these other people? |
| Weston: | Well, all evidence that the people they interviewed there at Rob's Place – |
| Defense counsel: | I'll object to what these people said, Your Honor. |
| Court: | All right. I'm going to sustain it as such because you did ask him the question, so he can give a reason without saying what the people told you. You can say what his investigation revealed. Thank you. |

| | |
|---|---|
| Weston: | All the evidence led to Levell Weaver. I didn't see no blood stain on none of the witnesses that I was talking to at that table. All of the witnesses that I talked to led me to believe that -- |
| Defense Counsel: | I'll object to that, Your Honor. |
| Court: | Overruled. |
| Weston: | Led me to believe that the subject that we were looking for was the only suspect that really was involved with doing the killing at this crime scene, and I didn't see no reason to take swabs from those subjects at that table. |

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." Simpkins v. State, 303 S.C. 364, 367, 401 S.E.2d 142, 143 (1991); Rule 803, SCRE.

For several reasons we find no error in the admission of the above testimony. First, Lieutenant Weston never repeated statements made to him by individuals at the crime scene. Rather, he testified only to the conclusions he made based on what his investigation had thus far revealed. Second, this testimony was in response to the questions asked on cross-examination as to why Lieutenant Weston did not perform a gunshot residue test on everyone at the crime scene. Lieutenant Weston's testimony was offered to explain this part of his investigation. See State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 893-94 (1994) (finding officers' statements explaining why they began their surveillance of defendant's apartment were not hearsay); State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003) ("'[A]n out of court statement is not hearsay if it is offered for the limited purpose of

explaining why a government investigation was undertaken.'" (quoting Brown, 317 S.C. at 63, 451 S.E.2d at 894)). Furthermore, Lieutenant Weston did not testify to any specific statements that identified Weaver.[1] Cf. German v. State, 325 S.C. 25, 27-28, 478 S.E.2d 687, 688-89 (1996) (holding testimony of undercover drug agent regarding tips that defendant was selling drugs and description of defendant were inadmissible hearsay given the statements specifically referred to defendant). Because this testimony did not constitute hearsay, the trial court did not abuse its discretion in admitting it. See State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995), cert. denied, 516 U.S. 1080 (1996) (stating the admission or exclusion of evidence

[1] At oral argument, Weaver's appellate counsel asserted this issue was controlled by a recent United States Supreme Court case. Crawford v. Washington, 124 S. Ct. 1354 (2004). In Crawford, the defendant was convicted of first-degree assault with a deadly weapon despite his claim of self-defense. At trial, a tape-recorded statement of defendant's wife to police officers, in which she implicated her husband in the stabbing, was admitted at trial even though wife did not testify based on the spousal privilege. In offering this statement into evidence, the State relied on the hearsay exception for statements against penal interest. Id. at 1358. The Supreme Court reversed the defendant's conviction, finding the admission of wife's testimonial statement violated the Confrontation Clause of the Sixth Amendment. Even though there was an indication of reliability to the statement and it fell within a hearsay exception, the Court believed such statement could only be admitted if the witness was declared unavailable and the defendant had an opportunity to cross-examine the witness prior to trial. Id. at 1374.

Even if a Confrontation Clause argument was implicit in Weaver's counsel's objection, the facts of this case are decidedly different than those in Crawford. As previously stated, Lieutenant Weston did not repeat specific statements of witnesses that implicated Weaver as a suspect. Moreover, two of the witnesses, Loretta Scott and Leroy Powell, who identified Weaver as a suspect, testified at trial and were cross-examined by Weaver's counsel. Therefore, we do not believe Crawford is dispositive.

is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion).

We also note the testimony is cumulative to that given by Investigator Thompson to which Lee made no objection: "Upon talking to all of those people, gathered information that we gathered, myself along with Investigator Collins started looking for Mr. Levell Weaver." Furthermore, Leroy Powell, an eyewitness to the shooting, testified Weaver was the shooter. Thus, even if the testimony constituted hearsay, any error in its admission would be harmless. See State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003) (stating the admission of improper evidence is harmless where the evidence is merely cumulative to other unobjected-to evidence); State v. Kirby, 325 S.C. 390, 396-97, 481 S.E.2d 150, 153 (Ct. App. 1996) (finding even if officer's testimony regarding information radioed by the police dispatcher constituted hearsay, its admission was harmless given it was cumulative to similar testimony that was admitted without objection).

**III.**

Weaver argues the trial court erred in not granting a mistrial based on the solicitor's closing argument. He contends the solicitor impermissibly commented on his right to not testify.

Weaver did not testify during the trial. During closing argument, Weaver's counsel asked the jury why Weaver would have remained at the scene if he had, in fact, shot the victim: "If hearing [Leroy Powell's] testimony and then [sic] believe his testimony, Levell shot a fellow some 13 times and stayed there until later, does that have the ring of truthfulness to it? Ask yourselves those questions."

During his closing argument, the solicitor suggested only Weaver could properly provide an answer to the question posited by his trial counsel:

> He was laying there and Levell Weaver was standing down near him or over him she said. He had the gun in his hand and he had

> blood on him. Now, I can't explain to you why Levell Weaver was there.
>
> That's one of the things [Weaver's counsel] said, why would Levell Weaver stay around there all that time. Nobody can tell you that except Levell Weaver.
>
> I can't say why somebody would do something, but we know he was there because Ronald Williams said that he went out there a couple of minutes after the thing, after the shooting occurred, he went out the door.

Weaver's counsel objected to the argument, contending the solicitor impermissibly commented on Weaver's decision to not testify during the trial. After a bench conference, the trial court gave a curative instruction, charging the jury the State must prove guilt beyond a reasonable doubt and that a defendant has an absolute right to remain silent, which cannot be considered against him if exercised.

"The trial court has broad discretion when dealing with the propriety of the solicitor's argument, including the question of whether to grant a defendant's mistrial motion." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "The trial court's discretion will not be overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant." Id.

Under the United States and South Carolina Constitutions, a criminal defendant has a right to remain silent and to not testify during his trial. U.S. Const. amend. V; S.C. Const. art. I, § 12. As a corollary of this right, a prosecutorial comment, whether direct or indirect, upon a defendant's failure to testify at trial is constitutionally impermissible. State v. Graddick, 345 S.C. 383, 387, 548 S.E.2d 210, 211-12 (2001); State v. Hawkins, 292 S.C. 418, 423, 357 S.E.2d 10, 13 (1987), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). "Where the solicitor refers to certain evidence as uncontradicted and the defendant is the only person who could contradict that particular evidence, the statement is viewed as a

comment on the defendant's failure to testify." State v. Sweet, 342 S.C. 342, 348, 536 S.E.2d 91, 94 (Ct. App. 2000).

Here, by stating, "Nobody can tell you that except Levell Weaver," the solicitor plainly implied a question for which only Weaver could supply an answer, and therefore indirectly commented on Weaver's silence. At the same time, although it is improper for a solicitor to indirectly comment on a defendant's failure to testify, such comments do not necessarily mandate reversal of a conviction. Johnson v. State, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997). Indeed, a criminal defendant is entitled to a fair trial, not a perfect one. State v. Mizell, 332 S.C. 273, 285, 504 S.E.2d 338, 345 (Ct. App. 1998). Thus, as a prerequisite to reversal, Weaver must demonstrate the effect of the solicitor's closing argument was to deny him a fair trial. In making this determination, we must examine the alleged impropriety in light of the entire record. State v. Brown, 333 S.C. 185, 191, 508 S.E.2d 38, 41 (Ct. App. 1998); see State v. King, 349 S.C. 142, 159, 561 S.E.2d 640, 649 (Ct. App. 2002) ("The test of granting a new trial for alleged improper closing argument is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.").

In full view of the statement's context, we are forced to conclude that although the comment was improper, reversal is not mandated in this case. First, it was Weaver's counsel rather than the solicitor that first asked the jury to contemplate why Weaver would have stood over the victim. Though it was still improper for the solicitor to point out only Weaver could answer the question posed by his counsel, the egregiousness of the comment is mitigated by the previous comment of Weaver's counsel. Second, the trial court gave a corrective instruction immediately after the allegedly improper argument. "Generally, a trial judge's curative instruction is deemed to cure any error." State v. Simmons, 352 S.C. 342, 354, 573 S.E.2d 856, 863 (Ct. App. 2002). Accordingly, we find no error in the trial court's denial of Weaver's motion for mistrial.

## CONCLUSION

Based on the foregoing, we find the trial court properly admitted the evidence seized from the Jeep based on the automobile exception to the Fourth Amendment. Additionally, we hold the testimony of Lieutenant Weston regarding his investigation did not constitute inadmissible hearsay. Even if it did, any error in its admission would be harmless. Finally, we hold any impropriety in the solicitor's closing argument did not warrant reversal of Weaver's convictions.

**AFFIRMED.**

**HEARN, C.J. and STILWELL, J., concur.**