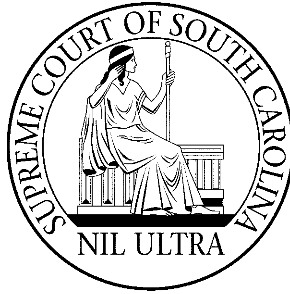

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 35
October 10, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charleston County Department of Social Services,	Respondent,

v.

Christine Marccuci, Sean Taylor and John Doe,	Defendants,
of whom Sean Taylor is the Appellant and Sean Taylor,	Appellant,

v.

Helen Taylor and Donald Shappell,	Respondents.

Appeal from Charleston County
Paul W. Garfinkel, Family Court Judge

Opinion No. 27049
Heard May 5, 2011 – Filed October 3, 2011

REVERSED

Jason Scott Luck, of the Seibels Law Firm, P.A., of Charleston, for Appellant.

Frampton Durban, Jr, Chief Counsel Charleston County Department of Social Services, of N. Charleston, and Ms. Helen Taylor, of Alpha, New Jersey, for Respondents.

Sean Fredrick Keefer, of Charleston, and Virginia Cravens Ravenel, of Columbia, for Guardian ad Litem.

JUSTICE HEARN: Sean Taylor appeals from an order which terminated his parental rights to his six-year-old daughter on three grounds: willful failure to visit, willful failure to support, and the child had been in foster care for fifteen out of the previous twenty-two months. Following a review of the record, we hold that the Charleston County Department of Social Services (DSS) did not meet its burden with respect to the first two grounds and the child's placement in foster care for at least fifteen of the last twenty-two months is not a sufficient ground for termination of Taylor's rights under the facts of this case. Accordingly, we reverse.

FACTUAL/PROCEDURAL BACKGROUND

The minor child who is the subject of this action was born on September 16, 2005, to Taylor and Christine Marccuci. In February 2006, she was removed from her parents' custody by the New Jersey Social Services Agency when Taylor was arrested for excessively disciplining Marccuci's older child[1] and Marccuci could not be located. During this removal period, which lasted approximately five months, his daughter was placed in the home of Taylor's parents, Helen Taylor and Donald Shappell

[1] Taylor struck the child on his back when the child moved during a spanking, leaving a mark that the child's teachers noticed. They accordingly called social services, which then instituted proceedings against Taylor.

(Grandparents).[2] Taylor pled guilty to fourth degree child cruelty,[3] enrolled in a pre-trial intervention program, and was placed on probation. Thereafter, his daughter was returned to his custody. They apparently continued to live together in New Jersey until September 2007, at which point Marccuci left for South Carolina and took the minor child with her. Taylor followed her to South Carolina, ostensibly to find his daughter.

Taylor moved in with Marccuci and his daughter at the Value Inn Hotel in North Charleston in October, planning to stay until he earned enough money to return to New Jersey with his child. On January 23, 2008, police came to the hotel looking for Marccuci after she failed to show up at her job.[4] Following a background check on Taylor, the police inexplicably and erroneously reported he had an outstanding warrant for rape in New Jersey.[5] Consequently, Taylor was arrested and taken away in chains, and his daughter, then two years old, was placed in DSS protective custody.

Taylor's travel to South Carolina was a violation of his probation, which ultimately resulted in his incarceration in New Jersey for five months. However, Taylor was still in jail in South Carolina at the time of the probable cause hearing concerning the child's removal held on January 28, 2008, and appeared *pro se*.[6] The Grandparents traveled to South Carolina to be present as well. An agreement was reached wherein the Grandparents were added as

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[2] Although they have never married, at the time of the termination of parental rights (TPR) hearing Shappell and Ms. Taylor had lived together for twenty-nine years and owned a home together. Furthermore, Shappell has been both a father figure to Taylor and a grandfather figure to the minor child.

[3] This charge is the lowest level of criminal offense in New Jersey. *See* N.J. Stat. Ann. § 2C:43-1; *id.* § 9:6-3.

[4] Marccuci apparently has not been heard from since, and did not file an answer or appear at any hearing in either the removal or TPR action.

[5] The police officer did not testify in this matter and there was no explanation why the police erroneously reported Taylor's violation of probation charge as an outstanding warrant for rape.

[6] Shortly after the hearing, he was extradited to New Jersey, where he served the remainder of his sentence for his probation violation.

party defendants "for the purposes of possible placement for the minor child." Moreover, both Taylor and Marccuci were temporarily restrained from having any contact with their daughter, pending further order of the family court. Because DSS requested a priority placement evaluation of the Grandparents' residence in New Jersey, the family court issued a separate order for an expedited home study pursuant to an interstate compact with New Jersey regarding child custody. That order was issued the same day as the hearing, but DSS did not provide the New Jersey Department of Children and Families (NJDCF) with the necessary information until the Grandparents retained an attorney who urged DSS to do so. The letter approving the Grandparents' home as a licensed foster home finally was issued by NJDCF on August 20, 2008, some eight months after the court's order.

Taylor was released from jail on June 3, 2008. However, he remained subject to the order restraining him from having contact with his daughter and admittedly made no motion to rescind that order, relying instead on his belief that the plan was still for the child to be placed with his parents in New Jersey after the interstate compact study had been completed. Following completion of that home study in August 2008, no transfer of custody occurred so the Grandparents moved for an expedited hearing to have it done. On December 16, 2008, that hearing was held and the family court, by order dated March 9, 2009, mandated a two-week transition period with Ms. Taylor[7] in Charleston where she would "participate in a therapeutic clarification" with her granddaughter. It is noteworthy that by this point in time, the minor child had been in seven foster placements, none of which had apparently involved a transition period for "therapeutic clarification."

The Grandparents attempted to obtain relief from the two-week transition period, but were unsuccessful and ultimately traveled to South Carolina for the transition at their own expense and began visits with the child, which were taped at the office of Dr. Don Elsey, the Clinical Director

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[7] Although Shappell had been made a party defendant to this action at the probable cause hearing, DSS consistently referred to him as Ms. Taylor's "paramour," and the family court ordered the transition period only for Ms. Taylor.

of the Dee Norton Low Country Children's Center. Despite staying approximately eleven days, the Grandparents were only permitted to visit with the child twice before having to return to work in New Jersey. Furthermore, they were advised by DSS that the interstate compact had "run out" and their designation as foster parents was no longer viable; even if the Grandparents completed the two-week transition period, they were informed they would not be able to bring the minor child back to New Jersey until the compact was renewed. Although the Grandparents returned to South Carolina once more after this visit, DSS denied them visitation with the minor child and told them there would be no more visitation.

From the time this little girl was taken into custody until the issuance of the merits order on the removal, this case can best be described as a procedural morass. The action began in a timely manner on January 28, 2008, with the probable cause hearing.[8] The merits hearing was scheduled for February 28, but the court continued it upon the motion of Taylor's guardian *ad litem* once it was clear the case was contested. At some point, the merits hearing was set for June 4. However, a pre-trial hearing scheduled for May 13 was continued until June 18 because no judge was available; the June 4 merits hearing accordingly was rescheduled for October 1. For some reason not apparent in the record, this hearing was continued again. Frustrated at the lack of progress in this case, the Grandparents moved for an expedited placement hearing, but that too was continued on December 8 for unknown reasons. On January 22, 2009, the hearing on the expedited motion was again continued.[9] The merits hearing was then scheduled for April 30,

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[8] While the order that emanated from this hearing was the result of an agreement, the lone affidavit filed in support of DSS retaining temporary custody was from the DSS caseworker and stated, with respect to Taylor: "It was further reported that Mr. Sean Taylor was arrested and will be extradited to New Jersey where he will be charged with rape." It is not clear when DSS recognized the error in this statement, but DSS appears to have relied on it nonetheless in justifying the removal of the child.

[9] It appears from the record that this is the same expedited hearing that was resolved through the order dated March 9, 2009. That order, however, noted the hearing was held on December 16, 2008, by phone. If our reading of the

nearly fifteen months after the minor child was removed by DSS, to no avail: it was continued for lack of notice. The hearing was again continued on May 4 for the same reason. It was not until July 10—far beyond the thirty-day limit provided for by statute—that the merits hearing was held, and the final order was not issued until August 3,[10] over one-and-a-half years after the child was placed in protective custody. The final order authorized DSS to forego efforts at reunification and pursue TPR. By the time the removal action was complete, the child had lived in seven different foster homes and no less than seven different family court judges had been involved.

Before the removal action had been resolved, however, DSS had already initiated this TPR action against Taylor and Marccuci alleging willful failure to visit, willful failure to support, and the fact that the minor child had been in foster care for at least fifteen of the last twenty-two months. On August 10, 2010, the family court issued a final order terminating Taylor and Marccuci's rights on all of the alleged grounds. This appeal followed.

LAW/ANALYSIS

It is well settled that before parental rights can be forever terminated, the alleged grounds for the termination must be established by clear and

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record is correct, we are puzzled as to why the hearing held on December 16 was not brought to the attention of the family court in January when it issued an order extending the continuance it granted December 8 for the same matter. We are also concerned that it took three months for the court to issue an order following an *expedited* hearing regarding the placement of a minor child with her own family, particularly when it had been established by that time that Taylor had no outstanding rape charge in New Jersey and he had already served his time for the probation violation.

[10] This order apparently is the final or merits order in the removal action, although it is captioned "Final Order Judicial Review and Permanence Planning." Both the TPR court and DSS appear to treat it as the final merits order, and it is the only order regarding removal that seems to make all the findings required by Section 63-7-1660(B) of the South Carolina Code (2008).

convincing evidence. *Richberg v. Dawson*, 278 S.C. 356, 357, 296 S.E.2d 338, 339 (1982); *Charleston Cnty. Dep't of Soc. Servs. v. Jackson*, 368 S.C. 87, 95, 627 S.E.2d 765, 770 (Ct. App. 2006). Moreover, on appeal, we may make our own determination from our review of the record as to whether the grounds for termination are supported by clear and convincing evidence. *S.C. Dep't of Soc. Servs. v. Cummings*, 345 S.C. 288, 293, 547 S.E.2d 506, 509 (Ct. App. 2001).

Section 63-7-2570 of the South Carolina Code (Supp. 2010) provides the various ways in which a parent's rights can be terminated. That section provides as grounds for TPR, in part:

> (3) The child has lived outside the home of either parent for a period of six months, and during that time the parent has willfully failed to visit the child. The court may attach little or no weight to incidental visitations, but it must be shown that the parent was not prevented from visiting by the party having custody or by court order. The distance of the child's placement from the parent's home must be taken into consideration when determining the ability to visit.
>
> (4) The child has lived outside the home of either parent for a period of six months, and during that time the parent has willfully failed to support the child.

Id. § 63-7-2570(3)-(4). Willful conduct is that which "evinces a settled purpose to forego parental duties . . . because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent." *S.C. Dep't of Soc. Servs. v. Broome*, 307 S.C. 48, 53, 413 S.E.2d 835, 839 (1992). Under our standard of review, we find DSS has failed to show either willful failure to visit or support the minor child.

While Taylor cannot be excused for violating his probation by coming to South Carolina in search of Marccuci and the minor child, it appears that DSS's case against him was initially fueled by the erroneous information

supplied by the police that he had an outstanding warrant for rape in New Jersey. He was then enjoined from visiting with his daughter at the probable cause hearing, which presumably would not have been warranted but for the erroneous information about the pending New Jersey charge. Thereafter, Taylor was extradited to New Jersey where he served a five month prison sentence for violating his probation, during which it was impossible for him to visit his daughter. Afterwards, he was subject to the court order preventing any contact between him and his daughter. The mere fact that Taylor did not seek to have this order rescinded or altered does not demonstrate any willful failure to visit on his part; his lawful obedience of a valid court order, which was based largely on his belief that his daughter was soon going to be returned to his parents' custody in New Jersey, should not be used to mount a case against him for willful failure to visit. It is also of no moment that Taylor initially agreed to the order enjoining his contact with the child. Taylor, who appeared *pro se* at the probable cause hearing, was facing extradition to and jail time in New Jersey for his probation violation. Furthermore, Taylor spent the next eighteen months fighting for custody of the minor child, or, alternatively, in support of her placement with the Grandparents. Therefore, DSS has failed to prove by clear and convincing evidence that Taylor willfully failed to visit the child while she was in protective custody.

Additionally, we disagree that there was clear and convincing evidence that Taylor willfully failed to support the minor child. Taylor testified that he had no income while incarcerated, had no job for some time when released, and that he tried to support the child once he did have gainful employment but was unaware of the location of the child or even how to pay any support to DSS. Once a court order was in place for Taylor to pay support for the child, he immediately paid on time and was never in arrears. This conduct certainly does not evince a settled purpose to forego his obligation to support his child, and we therefore hold the family court erred in terminating Taylor's rights on this ground.

The family court also terminated Taylor's parental rights on the ground that the minor child had been in foster care for at least fifteen out of the last

twenty-two months, per section 63-7-2570(8). While the family court's determination is technically correct, the facts of this case militate against strict adherence to section 63-7-2570(8). Indeed, this case represents an "instance[] where this statutory ground would not support termination of parental rights." *Jackson*, 368 S.C. at 102 n.8, 627 S.E.2d at 773 n.8 (citing *S.C. Dep't of Soc. Servs. v. Cochran*, 356 S.C. 413, 420, 589 S.E.2d 753, 756 (2003) (Pleicones, J., concurring)). Where there is "substantial evidence that much of the delay . . . is attributable to the acts of others," a parent's rights should not be terminated based solely on the fact that the child has spent greater than fifteen months in foster care. *Cochran*, 356 S.C. at 420, 589 S.E.2d at 756.

Here, there is substantial evidence that this little girl languished unduly in foster care not because of any actions, or inactions, by Taylor, but because the delays generated and road blocks erected in the removal action made it impossible for the parties to regain legal custody of her prior to the expiration of the fifteen month period. Several continuances of the removal action were ordered, only one of which was requested by Taylor through his guardian. Taylor continued to contest his daughter being in the custody of DSS throughout the entire process, despite not being able to appear himself in many instances because he was incarcerated and subject to his probation. In fact, DSS initiated the TPR proceedings while the removal action—the very action that would determine whether the child was properly placed into foster care in the first place—was still pending and contested. Taking our own view of the evidence, we find that Taylor did not sit idly by while his child was in foster care, but rather he was stymied by the system charged with the responsibility of protecting this child and reuniting her with her father if possible. The various continuances requested by other parties were largely the reason the child had remained in foster care for fifteen months at the time the TPR action was filed, and under these circumstances, we hold that this ground should not serve as the basis for terminating this father's parental rights.

As a final matter, we turn briefly to the purpose behind the TPR statute itself:

> [T]o establish procedures for the reasonable and compassionate termination of parental rights where children are abused, neglected, or abandoned in order to protect the health and welfare of these children and make them eligible for adoption by persons who will provide a suitable home environment and the love and care necessary for a happy, healthful, and productive life.

S.C. Code Ann. § 20-7-1560 (1984). Thus, the very purpose behind the statute is to provide for children who are "abused, neglected, or abandoned" and place them with people who will nourish and protect them.

However, this child was neither abused, neglected, nor abandoned[11] by Taylor. Indeed, it is undisputed that at the time she was taken into protective custody, she was healthy, clean, and neatly dressed. Moreover, there is no indication in the record that she had any behavioral problems at the time she was removed from her father. In fact, Dr. Elsey testified that when he saw her on March 7, 2008, "[s]he was a verbal, very pleasant little two year old." Although he stated she had symptoms of Reactive Attachment Disorder, he also testified that this disorder arises in children who have been separated from their parents.

We also express our concern about the numerous unexplained delays in the removal action, as well as DSS's apparent reluctance to return this little girl to the Grandparents despite the fact that they previously had served as foster parents. Moreover, DSS's insistence on a two-week "therapeutic clarification" period for the Grandparents even after the interstate compact had been complied with seems especially inexplicable, particularly given the child's placement with seven sets of strangers where no transition period was

[11] Taylor certainly did not abandon his daughter in the traditional sense. He was arrested and she was placed in DSS protective custody ostensibly because of an outstanding warrant for rape in New Jersey which turned out to be nonexistent. While Taylor initially agreed to stay away from his daughter until the criminal charges were sorted out, he did so primarily based on his belief that his daughter would be expeditiously placed with his parents.

required. While removing this little girl from her father's care and custody in the face of his probation violation may have been warranted, the sole basis for probable cause contained in the caseworker's affidavit was the outstanding rape warrant, not the probation violation. Moreover, the continued procedural road blocks which prevented the expeditious return of this child had tragic consequences for this family, especially for this little girl who has been deprived of the opportunity to develop a relationship with her father over the past three and half years.

CONCLUSION

Accordingly, we hold that Taylor's parental rights should not be terminated based on willful failure to support, willful failure to visit, or that the minor child has been in foster care for more than fifteen months. The order of the family court is therefore reversed,[12] and we direct DSS to immediately implement a plan for the reunification of Taylor and his daughter or, in the alternative, for placement of the minor child with the Grandparents in New Jersey until that reunification can be achieved, effective immediately upon the filing of this opinion.

TOAL, C.J., BEATTY, and KITTREDGE, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

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[12] Because our holding is dispositive of this appeal, we do not reach the other issues raised by Taylor. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address additional issues when one issue is dispositive).

JUSTICE PLEICONES: I respectfully dissent and would affirm the order terminating appellant's parental rights as I find clear and convincing evidence supports the family court's decision. Richland County Dep't of Soc. Serv. v. Earles, 330 S.C. 24, 496 S.E.2d 864 (1998). Appellant's remaining issues are not properly before the Court. Robinson v. Estate of Harris, 391 S.C. 114, 705 S.E.2d 41 (2011) (unchallenged ruling, whether correct or not, is law of the case); S.C. Dep't of Transp. v. Horry County, 391 S.C. 76, 705 S.E.2d 21 (2011) (issue must be raised and ruled upon to be preserved for appellate review).

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Brian Charles Reeve, Respondent.

Opinion No. 27050
Submitted September 13, 2011 – Filed October 10, 2011

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Brian C. Reeve, of Columbia, pro se.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension not to exceed two (2) years. Respondent further agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission). In addition, he agrees to complete the Ethics School and Trust Account School portions of the Legal Ethics and Practice Program prior to seeking reinstatement. We accept the Agreement and impose a definite suspension of two (2) years. In addition, respondent

shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this order. Respondent shall not seek reinstatement until he has completed the Ethics School and Trust Account School portions of the Legal Ethics and Practice Program. The facts, as set forth in the Agreement, are as follows.

FACTS

Matter I

Respondent was admitted to the South Carolina Bar in 1983. In late 2009, he closed his law office and ceased practicing law. Although respondent initially notified the South Carolina Bar of his change of address, he since moved and failed to update his address with the Bar as required by Rule 410(e), SCACR. Respondent admits violating Rule 410(e), SCACR, and acknowledges that his failure to keep the Bar informed of his current address resulted in him not receiving some of ODC's inquiries in the matters discussed below.

Matter II

In January of 2002, Complainant A bought a mobile home and land in Laurens County. In May of 2009, Laurens County served Complainant A with a back tax notice for the mobile home. Complainant A contacted Laurens County and was advised that the mobile home was not in Complainant A's name and that Complainant A needed a copy of the title. Complainant A's mortgage company forwarded all closing document to Complainant A, but there was no title for the mobile home.

Complainant A contacted respondent's office and was informed that Complainant A's file would need to be pulled from storage. Complainant A communicated with respondent's office directly and, later, through counsel, for several months. Respondent ultimately filed a corrective deed to resolve the issue, but failed to inform Complainant A that he had done so. Respondent admits he did

not adequately communicate with Complainant A regarding this issue and closed his office without notice to Complainant A.

Respondent responded to ODC's initial inquiry regarding the letter of complaint. On April 15, 2010, ODC forwarded a Notice of Full Investigation to respondent regarding this matter via certified mail. The certificate of receipt was signed for and returned to ODC, but respondent failed to respond to the Notice of Full Investigation. On May 25, 2010, ODC forwarded a Notice to Appear and Subpoena to respondent regarding this matter via certified mail and regular first class mail. Respondent was to appear before ODC on June 17, 2010.[1] Respondent did not appear pursuant to the Notice to Appear and did not send the documentation pursuant to the subpoena. He did, however, appear for an interview on October 6, 2010. Although he answered questions during his interview, he never submitted a written response to the Notice of Full Investigation.

Matter III

During his practice, respondent was an agent for a title insurance company. The title insurance company filed a complaint against respondent and ODC forwarded the complaint and a Notice of Investigation to respondent. Respondent did not respond to the Notice of Investigation or to a reminder letter sent pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982). Respondent also failed to appear for an interview scheduled on June 17, 2010, but did appear for an interview scheduled on October 6, 2010. Although respondent answered questions during his interview, he never provided ODC with a written response to the Notice of Investigation.

Thereafter, on two occasions, ODC sent respondent additional information received from the title insurance company and, on both occasions, respondent provided a written response. The title

[1] On June 28, 2010, the Court placed respondent on interim suspension. In the Matter of Reeve, 388 S.C. 175, 695 S.E.2d 172 (2010).

insurance company asserts respondent failed to remit $415.90, representing the company's portion of title insurance premiums on four closings. Respondent submits he believes he remitted all premiums due, but cannot establish payment because he failed to keep his financial records after closing his practice. Respondent submits that he closed his trust account after waiting to ensure all outstanding items had cleared.

Matter IV

Respondent was the closing attorney on Complainant B's home purchase in 2005. After respondent closed his office, Complainant B determined she needed her file. Complainant B made numerous unsuccessful attempts to locate respondent and her file before filing a complaint with ODC.

Respondent did not respond to ODC's Notice of Investigation or to the reminder letter sent pursuant to In the Matter of Treacy, id. Respondent never submitted a written response to the complaint.

Respondent appeared for an on-the-record interview on October 6, 2010. During the interview, respondent admitted that, although he was aware Complainant B was trying to retrieve her file, he made no effort to ensure she received her file or its contents.

LAW

Respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly comply with reasonable requests for information); Rule 1.15 (d) (lawyer shall promptly deliver to client or third person any funds or other property that the client or third person is entitled to receive); Rule 1.16(d) (upon termination of representation, lawyer shall take steps to the extent reasonably practicable to protect client’s interests, including surrendering papers and property to which the client

is entitled); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of client); Rule 8.1 (lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority); and Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct). In addition, respondent admits he has violated the recordkeeping provisions of Rule 417, SCACR. Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and impose a definite suspension of two (2) years. Within thirty (30) days of the date of this order, respondent shall pay the costs incurred by ODC and the Commission in the investigation and prosecution of this matter. Respondent shall not seek reinstatement until he has completed the Ethics School and Trust Account School portions of the Legal Ethics and Practice Program. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John W. Harte, Jr., Respondent.

Opinion No. 27051
Submitted September 13, 2011 – Filed October 10, 2011

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

John P. Freeman, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of any sanction set forth in Rule 7(b), RLDE, Rule 413, SCACR. Respondent requests that, if a suspension is imposed, that it be made retroactive to the date of his interim suspension, September 22, 2009. In the Matter of Harte, 385 S.C. 229, 683 S.E.2d 799 (2009). ODC joins in this request. We accept the agreement and disbar respondent from the practice of law in this state, retroactive to the date of his interim suspension. The facts, as set forth in the agreement, are as follows.

FACTS

In or about February 2007, William J. Trier, Jr., hired respondent to represent him in a criminal matter. At some point thereafter, respondent became aware that Mr. Trier was seeking assistance in protecting the proceeds of his criminal activities. Respondent assisted Mr. Trier in obtaining advice and representation concerning the disposition of the proceeds of Mr. Trier's criminal activities. In consultation with others, respondent knowingly conspired with Mr. Trier to take actions that were intended to hide, conceal, and protect the proceeds and assets that resulted from Mr. Trier's criminal activities.

Respondent was charged with Conspiracy to Commit Mail Fraud and Money Laundering in violation of 18 U.S.C. § 371. On September 16, 2009, respondent pled guilty to Conspiracy to Commit Mail Fraud and Money Laundering. On October 13, 2010, respondent was committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of twelve (12) months and one (1) day. In addition, he was deemed to be jointly and severally liable for restitution in the amount of $483,350.00.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2 (lawyer shall not assist a client in conduct that lawyer knows is criminal or fraudulent), Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects), Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation), and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Further, respondent admits his misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct), Rule 7(a)(4) (it shall be ground for discipline for lawyer to be convicted of a crime of moral turpitude or a serious crime), and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent, retroactive to September 22, 2009, the date of his interim suspension. Id. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Richard M. Lovelace, Jr.,

Respondent.

Opinion No. 27052
Submitted September 12, 2011 – Filed October 10, 2011

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

George M. Hearn, Jr., of Hearn & Hearn, PA, of Conway, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of an admonition, public reprimand, or a definite suspension not to exceed ninety (90) days, with conditions as follows: 1) continued psychiatric and/or psychological treatment, including, but not limited to anger management, for a period of one year from the imposition of discipline and 2) the submission of quarterly reports of his diagnosis, treatment

compliance, and prognosis to the Commission on Lawyer Conduct (the Commission). We accept the Agreement and definitely suspend respondent from the practice of law in this state for a ninety (90) day period with the conditions set forth above. The facts, as provided in the Agreement, are as follows.

FACTS

Respondent represented the plaintiff in a civil suit. On April 2, 2008, the deposition of the plaintiff had just concluded and respondent was preparing to take a second deposition. The deponent in the second case was a defendant in the lawsuit. Respondent asked if anyone wanted to take a break. The defendant, who was seated across the table from respondent, said something to the effect of "No, let's get this crap over with." Respondent then stood up and pointed at the defendant's face and warned him not to speak to him in that manner. The defendant stood up and told respondent not to point his finger at him. Respondent then slapped the defendant in the face.

The defendant initiated criminal charges of simple assault and battery against respondent. Respondent pled "no contest" and was sentenced to payment of a fine.

Respondent self-reported this incident to ODC on the day it occurred.

LAW

Respondent admits that he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to administration of justice). In addition, respondent admits his misconduct constitutes grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for

discipline for lawyer to violate Rules of Professional Conduct), Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law), and Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate the oath of office taken to practice law in this state and contained in Rule 402(k), SCACR).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a ninety (90) day period, with conditions as follows: 1) respondent shall continue psychiatric and/or psychological treatment, including but not limited to anger management, for a period of one year from the imposition of discipline and 2) he shall submit quarterly reports of his diagnosis, treatment compliance, and prognosis to the Commission. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY and KITTREDGE, JJ., concur. HEARN, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Efia Nwangaza, Respondent.

Opinion No. 27053
Submitted September 13, 2011 – Filed October 10, 2011

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Stephen John Henry, of Greenville, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand or a definite suspension from the practice of law not to exceed nine (9) months. In addition, respondent agrees to the imposition of certain conditions dependent upon the sanction issued. Finally, respondent agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) in the investigation and prosecution of this matter.

We accept the Agreement and impose a nine (9)month suspension with the following conditions: 1) within twenty (20) days of the filing of this opinion, respondent shall certify to the Commission that she has read the South Carolina Notary Public Manual published by the South Carolina Secretary of State and 2) if she is reinstated to the practice of law, respondent shall notify the Commission before returning to practice and, no later than three (3) months after returning to the practice of law, she shall begin quarterly reporting of her trust account activity to the Commission for a period of one (1) year. The trust account reports shall include copies of respondent's bank statements, including copies of her cancelled checks, copies of her deposit records, a copy of her receipt and disbursement journal, copies of her ledgers for any clients with a trust account balance or trust account activity, copies of her monthly reconciliations, and any other financial records requested by the Commission as needed to interpret the monthly reconciliations. Further, within thirty (30) days of the filing of this opinion, respondent shall pay the costs incurred by ODC and the Commission in the investigation and prosecution of this matter. The facts, as set forth in the Agreement, are as follows.

FACTS

Matter I

Complainant A was the personal representative of his mother's estate. Complainant A hired respondent to assist him in probating the estate. Respondent accepted a $750 retainer to be expended at the rate of $150 per hour. Initially, Complainant A wanted assistance in evicting one of his siblings from their mother's former home. Later, after a pro se attempt to sell the home to one of the heirs, Complainant A sought respondent's assistance in obtaining court approval for the sale. The heirs litigated various issues, including the sale of the home to one of the heirs.

Respondent made procedural errors in some of her pleadings, failed to correctly serve at least one defendant, and failed to file an answer to a complaint filed by two of the heirs. Approximately ten months after her

representation began, respondent failed to appear at a probate court hearing. Respondent attributed her failure to appear to a calendaring mistake.

As a result of her failure to appear, the probate court sanctioned respondent and Complainant A terminated her services. Thereafter, respondent submitted an invoice to Complainant A and the probate court, seeking protection of her outstanding fees. The invoice indicated respondent was owed a balance of $7,650. Among other billing entries, respondent charged two hours for preparing the invoice.

In a letter to respondent, Complainant A disputed the fee and took the position that the estate did not owe respondent any additional fees. Complainant A forwarded this letter to the Commission; the letter was forwarded to ODC where it was treated as a letter of complaint.

The probate court accepted testimony on the question of respondent's fee. During her testimony, respondent admitted she had not maintained contemporaneous time records and created her invoice after her termination based on her review of the file and her recollection of how much time she would typically devote to the various tasks performed.

In an order awarding fees to respondent, the probate court expressed concern about the accuracy of respondent's time estimates and whether all of the hours she claimed to have expended were necessary. The probate court expressed further concern that most of respondent's billing entries were for full hours and the smallest entry was for one-fourth of an hour. The probate court determined respondent was entitled to a total of $1,500 for her services to the estate; this amount included the $750 retainer she initially received. Respondent appealed the court's order, but later abandoned the appeal.

Although respondent admits she should have maintained contemporaneous time records and should not have billed Complainant A for the time to prepare the invoice, she contends her invoice accurately reflected the time she spent on Complainant A's case.

Matter II

Complainant B hired respondent to represent him in a divorce action brought by his wife. Although Complainant B wanted a divorce, he disputed the grounds for divorce cited by his wife.

Respondent charges an hourly rate in contested cases and a flat rate for uncontested cases. Although she did communicate her hourly rate to Complainant B, the fee agreement he signed covered both uncontested and contested divorce cases and did not clearly explain how respondent's fee would be calculated in a contested case. This difficulty was exacerbated because respondent inadvertently and incorrectly wrote "uncontested divorce" on a receipt she issued to Complainant B and Complainant B refused to accept that his divorce was contested.

The relationship between Complainant B and respondent deteriorated, in part because of Complainant B's erroneous belief that his case was uncontested and he should be entitled to pay respondent accordingly. Complainant B complained to the Greenville County Bar Association and a member of the bar's client relations committee attempted to mediate the dispute between respondent and Complainant B. Those efforts were unsuccessful and respondent filed a motion to be relieved with the family court. In preparation for a hearing in the matter, respondent prepared an invoice to give Complainant B. Although the invoice was based on an hourly rate, respondent created the invoice from a review of her file because she had not maintained any contemporaneous time records. The invoice included a charge of one hour for time spent requesting a hearing date on her motion to be relieved. Respondent also included entries totaling five hours for the time she spent communicating with the Greenville County Bar Association member who was trying to resolve her differences with Complainant B.

Respondent admits she should not have billed Complainant B for the time she spent communicating with the Greenville County Bar Association or the time she spent moving to be relieved because these items

were not contemplated by the fee agreement. She otherwise contends her invoice accurately reflected the time she spent on the case but realizes she should have kept contemporaneous time records because she was charging Complainant B by the hour.

Matter III

Respondent issued four checks on her trust account which were returned for insufficient funds. Respondent admits her account was overdrawn because she failed to maintain proper records for her trust account as required by Rule 417, SCACR. In addition to failing to conduct complete monthly reconciliations, respondent failed to maintain an accurate receipt and disbursement journal and accurate client ledgers to assist her in the reconciliation process.

Respondent's practice is such that the only funds she typically holds in trust are for filing fees and service of process. At times, respondent deposited personal funds into the account to avoid overdrafts. Because of her lack of adequate recordkeeping, respondent was unable to provide ODC with an accurate accounting of the funds currently held in trust which, at the time, totaled less than $100.

Respondent maintains she did not misappropriate any client funds and did not deposit unearned fees into her operating account; ODC does not dispute these contentions. During the investigation, respondent completed a Continuing Legal Education Course on trust accounting. She represents she has also sought and implemented the advice of a Certified Public Accountant to bring her trust accounting practices into compliance with Rule 417, SCACR.

Respondent acknowledges it is her responsibility to reconcile her trust account and return any funds due to her clients or other payees. If, after due diligence, respondent is unable to locate the payees for identified funds, she understands she must deliver those funds in accordance with the Uniform Unclaimed Property Act. S.C. Code Ann. § 27-18-10 to -400 (2007). If,

after due diligence, respondent is unable to identify the proper payees of remaining funds, she understands she must deliver those funds to the Lawyers' Fund for Client Protection.

Matter IV

Complainant C hired respondent to pursue a contempt action against her ex-husband who was not meeting his spousal support obligation. Respondent filed a Summons and Complaint, along with Complainant C's Verification.

Respondent later discovered an error in her pleadings and drafted an Amended Summons and Complaint. Respondent represents she contacted Complainant C to inform her of the Amended Complaint and told Complainant C she would take care of the situation. Rather than have Complainant C sign a Verification of the amended pleading, respondent signed Complainant C's name to the Verification and notarized the signature. Respondent did not have Complainant C's permission to sign her name nor did she notify Complainant C that she did so.

Although respondent realizes her actions were wrong and violated her responsibilities as a notary, she submits that, at the time, she was simply attempting to avoid an inconvenience to Complainant C.

LAW

Respondent admits that by her misconduct she has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation), Rule 1.5(a) (lawyer shall not make an agreement for, charge, or collect an unreasonable fee), Rule 1.5(b) (scope of the representation and the basis or rate of the fee for which the client will be responsible shall be communicated to the client, preferably in writing), Rule 1.15 (lawyer shall hold property of clients or third persons that is in lawyer's possession in connection with a representation separate from lawyer's own property), Rule 3.3 (lawyer shall not knowingly make false

statement of fact or law to tribunal), Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct), Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation), and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice). Respondent further admits she violated the recordkeeping provisions of Rule 417, SCACR. In addition, respondent admits that hers actions constitute grounds for discipline under the following provisions of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct) and Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute).

CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for nine (9) months with the following conditions: 1) within twenty (20) days of the filing of this opinion, respondent shall certify to the Commission that she has read the South Carolina Notary Public Manual published by the South Carolina Secretary of State and 2) if she is reinstated to the practice of law, respondent shall notify the Commission before returning to practice and shall, no later than three (3) months after returning to the practice of law, begin quarterly reporting of her trust account activity to the Commission for a period of one (1) year. The trust account reports shall include copies of respondent's bank statements, including copies of her cancelled checks, copies of her deposit records, a copy of her receipt and disbursement journal, copies of her ledgers for any clients with a trust account balance or trust account activity, copies of her monthly reconciliations, and any other financial records requested by the Commission as needed to interpret the monthly reconciliations.[1] Within

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[1] In imposing this sanction, the Court is mindful of respondent's disciplinary history which includes a private reprimand in 1993 and 1996, a public reprimand in 2005, In the Matter of Nwangaza, 362 S.C. 208, 608

thirty (30) days of the filing of this opinion, respondent shall pay the costs incurred by ODC and the Commission in the investigation and prosecution of this matter. Within fifteen (15) days of the filing of this opinion, respondent shall file an affidavit demonstrating she has complied with the requirements of Rule 30 of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

S.E.2d 132 (2005), and a letter of caution with a finding of minor misconduct in 2007.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gerald Bass, Petitioner,

v.

Gopal, Inc. and Super 8 Motels, Inc., Defendants,

of whom Gopal, Inc. is, Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal from Orangeburg County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 27054
Heard May 4, 2011 – Filed October 10, 2011

AFFIRMED

R. Bentz Kirby and Glenn Walters Sr., of Orangeburg, for Petitioner.

Andrew F. Lindemann, of Davidson & Lindemann, of Columbia, for Respondent.

Deborah J. La Fetra, of Sacramento, and Reynolds Williams, of Willcox, Buyck & Williams, of Florence, for Amicus Curiae Pacific Legal Foundation.

CHIEF JUSTICE TOAL: In this premises liability action, we are reviewing the court of appeals' decision upholding the circuit court's grant of summary judgment in favor of a motel and its franchisee when a guest was shot in the leg during an attempted robbery outside of his motel door. We affirm.

FACTS/ PROCEDURAL BACKGROUND

The facts of this case are undisputed. From approximately June 1999 until the end of September 1999, Petitioner Gerald Bass was a guest at the Super 8 Motel (Super 8) in Orangeburg, South Carolina, while he and several co-workers performed refrigeration work at a local grocery store. Gopal, Incorporated (Respondent), a franchisee of Super 8, owned and operated the motel.

The Super 8 is an exterior corridor-style motel. At approximately 10:00 p.m. on the evening of September 28, 1999, Petitioner and his roommate, Wayne Kinlaw, were turning in for the evening when they received a knock at their door. The door was equipped with a peep hole, and there was a large plate glass window beside the door. Looking out the window, Kinlaw did not see anyone at the door and did not open the door. After several minutes, they heard a second knock. This time, Kinlaw and Petitioner noticed a man standing at the door—the same man Petitioner had seen earlier that evening at a convenience store across the street from the motel. Kinlaw asked the man what he wanted through the closed door. They only heard mumbling in response and did not open the door. Approximately fifteen minutes later, they received a third knock at the door. Both men got out of bed, and without looking first to see who was at the door, Kinlaw opened the door. They saw the same man standing a couple of feet from the

door and both Kinlaw and Petitioner stepped outside. The man then asked Petitioner for his money, in unsavory terms. When Petitioner refused, the man shot Petitioner in the leg with a small caliber handgun and fled on foot.

In September 2002, Petitioner filed a complaint alleging negligence against both Respondent and Super 8.[1] Respondent and Super 8 each filed motions for summary judgment, which were granted. The court of appeals affirmed. *Bass v. Gopal, Inc. and Super 8 Motels, Inc.*, 384 S.C. 238, 680 S.E.2d 917 (Ct. App. 2009). This case is now before the Court upon grant of Petitioner's petition for writ of certiorari, pursuant to Rule 242(a), SCACR.

ISSUE

I. Whether the court of appeals erred in upholding the circuit court's finding that Respondent did not have a duty to protect Petitioner from the criminal act of a third party.

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard required of the circuit court under Rule 56(c), SCRCP. *Edwards v. Lexington County Sheriff's Dep't*, 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2010). Rule 56(c), SCRCP, provides that summary judgment may be granted if a review of all documents submitted to the court shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. In determining whether a genuine issue of material fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009). In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving

[1] The appeal against Super 8 has been dismissed. In describing the procedural history preceding this appeal, we refer to Super 8 and Gopal collectively as Defendants.

party must only submit a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

ANALYSIS

Petitioner argues the court of appeals placed too much emphasis on the lack of evidence of other crimes committed at the motel prior to the assault on Petitioner when it upheld the circuit court's grant of summary judgment. Petitioner contends the court of appeals should have instead considered the evidence submitted as a whole, arguing the evidence, viewed in its entirety, raised a genuine issue of material fact as to whether Respondent had a duty of care with respect to Petitioner. In our opinion, Petitioner's submissions to the circuit court provided at least a scintilla of evidence that the criminal assault on Petitioner was foreseeable. However, Petitioner offered no evidence that Respondent's preventative measures were unreasonable under the circumstances. Therefore, we uphold the circuit court's grant of summary judgment.

In any negligence action, the threshold issue is whether the defendant owed a duty to the plaintiff. *See Daniel v. Days Inn of America, Inc.*, 292 S.C. 291, 295, 356 S.E.2d 129, 131 (Ct. App. 1987) (stating the familiar components of a negligence action—duty, breach, causation, and damages). In South Carolina, while an innkeeper is not the insurer of safety of its guests, it is settled that an innkeeper "is under a duty to its guests to take reasonable action to protect them against unreasonable risk of physical harm." *Allen v. Greenville Hotel Partners, Inc.*, 405 F. Supp.2d 653, 659 (D.S.C. 2005) (*quoting Courtney v. Remler*, 566 F. Supp. 1225, 1231 (D.S.C. 1983)). As a guest at the motel, Respondent undoubtedly had a duty to protect Petitioner on some level. The extent of that duty may be determined with an analysis of whether the innkeeper knew or had reason to know of a probability of harm to its guests. *Daniel*, 292 S.C. at 296, 356 S.E.2d at 132 (*citing Courtney*, 566 F. Supp. at 1232). Perhaps a clearer description of a business owner's duty, then, is that a business owner has a duty to take reasonable action to protect its invitees against the *foreseeable* risk of physical harm.

Four basic approaches to the foreseeability issue have emerged amongst jurisdictions nationally. *Miletic v. Wal-Mart Stores, Inc.*, 339 S.C. 327, 331, 529 S.E.2d 68, 69 (Ct. App. 2000) (*citing Posecai v. Wal-Mart Stores, Inc.*, 752 So.2d 762, 766 (La. 1999)). The first approach, considered to be somewhat outdated, is known as the imminent harm rule. *Miletic*, 339 S.C. at 331, 529 S.E.2d at 69. Under this rule, the landowner owes no duty to protect patrons from violent acts of third parties unless he is aware of specific and imminent harm about to befall him. *Id.* at 331, 529 S.E.2d at 70. This Court adopted this rule in *Shipes v. Piggly Wiggly St. Andrews, Inc.*:

> There is no duty upon the owners or operators of a shopping center, individually or collectively, or upon merchants and shopkeepers generally, whose mode of operation of their premises do not attract or provide a climate for crime, to guard against the criminal acts of a third party, unless they know or have reason to know that acts *are occurring or about to occur* on the premises that *pose imminent probability of harm* to an invitee; whereupon a duty of reasonable care to protect against such act arises.

269 S.C. 479, 484, 238 S.E.2d 167, 169 (1977) (*quoting and expounding the rule in Cornpropst v. Sloan*, 528 S.W.2d 188, 198 (Tenn. 1975)) (emphasis supplied). This standard has been criticized as imposing too minimal a duty on business owners to protect patrons. *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 972 (Ind. 1999); *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 902 (Tenn. 1996). Since adopting this standard, Tennessee has replaced its imminent harm rule with the balancing test, discussed below. *McClung*, 937 S.W.2d at 902.

A second approach is the prior or similar incidents test. *Miletic*, 339 S.C. at 331, 529 S.E.2d at 70 (*citing Posecai*, 752 So.2d at 765). This is the test urged by Respondent, and in our view, is the test applied by the circuit court and court of appeals in this case. Under this test, foreseeability may only be established by evidence of previous crimes on or near the premises. *Id.* Courts following this test will consider the nature and extent of previous crimes, their frequency, recency, and similarity to the crime at issue. *Id.*

With this approach, some courts require that prior crimes be of the same general type and nature as the offense at issue, *see, e.g.*, *Taylor v. Hocker*, 428 N.E.2d 662, 664–65 (Ill. App. Ct. 1981) (holding that previous crimes against property were insufficient to put the landowner on notice of personal assaults against its patrons), while others will impose a duty to protect patrons based on past crimes of any type, *see, e.g.*, *Polomie v. Golub Corp.*, 640 N.Y.S.2d 700, 701 (N.Y. App. Div. 1996) ("[T]here is no requirement that the past experience relied on to establish foreseeability be of the same type of criminal conduct to which plaintiff was subjected . . . ."). The prior incidents test offers the same advantages as the imminent harm test—it prevents businesses from effectively becoming the insurer of the public's safety. However, for the following reasons, we do not believe evidence of prior criminal incidents should be the *sine qua non* of determining the foreseeability required to establish a duty:

> First, the rule leads to results which are contrary to public policy . . . . [U]nder the rule, the first victim always loses, while subsequent victims are permitted recovery. Such a result is not only unfair, but is inimical to the important policy of compensating injured parties. Surely, a landowner should not get one free assault before he can be held liable for criminal acts which occur on his property.
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> Second, a rule which limits evidence of foreseeability to prior similar criminal acts leads to arbitrary results and distinctions. Under this rule, there is uncertainty as to how "similar" the prior incidents must be to satisfy the rule. The rule raises a number of other troubling questions. For example, how close in time do the prior incidents have to be? How near in location must they be? The rule invites different courts to enunciate different standards of foreseeability based on their resolution of these questions.
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> Third, the rule erroneously equates foreseeability of a particular act with previous occurrences of similar acts . . . . The mere fact that a particular kind of an accident has not happened before does not . . . show that such accident is one which might

> not reasonably have been anticipated. Thus, the fortuitous absence of prior injury does not justify relieving defendant from responsibility for the foreseeable consequences of its acts.

Isaacs v. Huntington Mem'l Hosp., 695 P.2d 653, 658–59 (Cal. 1985) (internal citations and quotations omitted); *see also* Michael J. Yelnosky, Comment, *Business Inviters' Duty to Protect Invitees from Criminal Acts*, 134 U. Pa. L. Rev. 883, 905 (1986) (observing that the prior similar acts test produces "extraordinarily arbitrary results" and "denies . . . compensation to the first victim").

A majority of jurisdictions have adopted the totality of the circumstances approach in an effort to prevent the "rigid application of a mechanical" prior incidents rule. *Isaacs*, 695 P.2d at 659; *see also District of Columbia v. Doe*, 524 A.2d 30, 33 (D.C. 1987); *Seibert v. Vic Regnier Builders, Inc.*, 856 P.2d 1332, 1339 (Ariz. 1993); *Doud v. Las Vegas Hilton Corp.*, 864 P.2d 796, 802 (Nev. 1993); *Clohesy v. Food Circus Supermarkets, Inc.*, 694 A.2d 1017, 1023–24 (N.J. 1997); *Reitz v. May Co. Dept. Stores*, 583 N.E.2d 1071, 1074 (Ohio Ct. App. 1990). Under this test, courts will consider all relevant factual circumstances, "including the nature, condition, and location of the land, as well as prior similar incidents, to determine whether a criminal act was foreseeable." *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 972 (Ind. 1999). Therefore, "[t]he lack of prior similar incidents will not preclude a claim where the landowner knew or should have known that the criminal act was foreseeable." *Id.* at 973. This test is the broadest of the four approaches.

Because of its broad applicability, the totality of the circumstances approach has been subject to criticism. *See Ann M. v. Pacific Plaza Shopping Ctr.*, 863 P.2d 207, 215 (Cal. 1993) (noting that, at the time, it was the only jurisdiction employing the standard); *McClung*, 937 S.W.2d at 900 ("[T]he totality approach arguably requires businesses to implement expensive security measures (with costs passed on to consumers) and makes them the insurers of customer safety, two results which courts seek to avoid."); Uri Kaufman, *When Crime Pays: Business Landlord's Duty to Protect Customers from Criminal Acts Committed on the Premises*, 31 S. Tex. L. Rev. 89, 112 (1990) (stating the totality approach's effect is to impose an unqualified duty

on businesses in high crime areas to provide elaborate security). The Supreme Court of Tennessee expressed concern over the natural consequence of this test in *McClung v. Delta Square Limited Partnership*: "[b]usinesses may react by moving from poorer areas where crime rates are often the highest. Not surprisingly then, the totality of the circumstances test has been described as 'imprecise,' 'unfair,' and 'troublesome' because it makes liability for merchants even less predictable than under the prior incidents rule." 937 S.W.2d at 900 (citations omitted). We note that, in *McClung*, the Supreme Court of Tennessee abandoned the imminent harm test put forth in *Cornpropst v. Sloan*, the case on which this Court relied in *Shipes*. We, too, believe that a totality of the circumstances test shifts too great a burden on business owners, and effectively requires businesses to anticipate crime by virtue of the unfortunate fact that crime is endemic in today's society.

The fourth and final approach adopted by courts is the balancing test; an approach originally formulated by the California Supreme Court, *Ann M. v. Pacific Plaza Shopping Ctr.*, 863 P.2d 207, 214–15 (1993), and that has since been adopted by the supreme courts of Tennessee, *McClung*, 937 S.W.2d at 902, and Louisiana, *Posecai*, 752 So.2d at 768. *See also Krier v. Safeway Stores 46, Inc.*, 943 P.2d 405, 415 (Wy. 1997) (approving of *McClung*'s balancing test but not expressly adopting). "The balancing approach acknowledges that duty is a flexible concept, and seeks to balance the degree of foreseeability of harm against the burden of the duty imposed." *McClung*, 937 S.W.2d at 901 (*citing Ann M.*, 863 P.2d at 215). As such, the more foreseeable a crime, the more onerous is a business owner's burden of providing security. *McClung*, 937 S.W.2d at 901. Under this test, the presence or absence of prior criminal incidents is a significant factor in determining the amount of security required of a business owner, but their absence does not foreclose the duty to provide some level of security if other factors support a heightened risk. Simply put by Judge Posner of the United States Court of Appeals for the Seventh Circuit, "the hotel should increase its expenditures on security until the last dollar buys a dollar in reduced expected crime costs . . . to the hotel's guests." *Shadday v. Omni Hotels Mgmt. Corp.*, 477 F.3d 511, 514 (7th Cir. 2007).

At least one court has criticized the balancing test as bleeding the line between duty and breach. *See Delta Tau Delta v. Johnson*, 712 N.E.2d 968,

973 (Ind. 1999) (adopting the totality of the circumstances instead of the balancing test because the reasonableness of a business owner's precautions "is basically a breach of duty evaluation and is best left for the jury to decide."). We note this concern, but believe the heavy burden imposed on businesses by the totality of the circumstances approach requires narrowing, and duty can be a flexible concept. As the foreseeability of potential harm increases, so, too, does the duty to prevent against it. Indeed, our courts have consistently imposed a duty on business owners to employ reasonable measures to protect invitees from foreseeable harm. *See Allen v. Greenville Hotel Partners, Inc.*, 405 F. Supp.2d 653, 659 (D.S.C. 2005) (business owner has a "duty to its guests to take reasonable action to protect them against unreasonable risk of physical harm"). In adopting a balancing approach, we do not alter this duty, but merely elucidate how to determine (1) if a crime is foreseeable, and (2) given the foreseeability, determine the economically feasible security measures required to prevent such harm. The optimal point at which a dollar spent equals a dollar's worth of prevention will not always be apparent, but may be roughly ascertained with the aid of an expert, or some other testimony. *Shadday*, 477 F.3d at 514. As opposed to the imminent harm, prior incidents, or totality of circumstances tests, we believe the balancing approach appropriately weighs both the economic concerns of businesses, and the safety concerns of their patrons. In replacing our imminent harm test with a balancing test, we hope to "encourage[] a reasonable response to the crime phenomenon without making unreasonable demands." *McClung*, 937 S.W.2d at 902.

We turn now to the facts of the instant case. The circuit judge found Defendants owed no duty of care to protect Petitioner from the criminal act of a third party because Petitioner did not demonstrate Defendants knew or had any reason to know an assault against Petitioner would occur. The circuit court determined this based on Petitioner's failure to provide the court with specific instances of criminal activity on the premises prior to the September 28, 1999 incident.

Petitioner was unable to supply a report of criminal incidents at the Super 8 prior to the attack on Petitioner.[2] However, Petitioner produced a

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[2] The Orangeburg County Department of Public Safety only has records

CRIMECAST report[3] that showed, in 1999, the risk of crimes against persons at the Super 8 was 3.5 times the national average risk, nearly twice the state average risk, but slightly less than the county risk. The risk of rape and robbery at the Super 8 was above the county average, according to the report. Petitioner also submitted a report indicating the robbery rate in Orangeburg County in 1999 exceeded the state benchmark by approximately 190 percent. Specifically, from January 1, 1999, through September 30, 1999, 160 aggravated assaults and 60 robberies occurred county-wide.

We do not believe evidence of an elevated crime rate covering the expanse of an entire county, on its own, is sufficient to prove foreseeability by a preponderance of the evidence. Such a finding would diminish a business's economic incentive to expand into higher crime counties, which arguably are in the greatest need of commercial stimulus. However, we are not prepared to say crime forecasting tools, such as the CRIMECAST report, bear no probative value. The weight given to CRIMECAST reports in determining foreseeability varies nationally. *Compare Shadday v. Omni Hotel Mgmt. Corp.*, 2006 WL 693680 (S.D. Ind. 2006) (finding a CRIMECAST report showing the risk of rape as 3.5 times higher than the national average did not prove foreseeability sufficient to survive summary judgment), *and Ali v. Dao*, 2009 WL 2567995 (N.J. Super. A.D. 2009) (finding high CAP index was not sufficient evidence to prove foreseeability), *with Whitt v. Wal-Mart Stores East, L.P.*, 2010 WL 1416756 (E.D. Ky. 2010) (a low CAP index for violent crimes indicated a low risk of a violent crime in Wal-Mart parking), *and Currie v. Chevron USA, Inc.*, 2006 WL 5249707 (N.D. Ga. 2006) (CRIMECAST report was sufficient to establish lack of

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dating back to 2000 because of a software change in 2000 that deleted records prior to that time. Instead, Petitioner's expert supplied the circuit court with a crime incident report at the Super 8 showing three robberies, two aggravated assaults, and four simple assaults occurred on the property from 2000 to 2004.

[3] "The CRIMECAST model produces probability measures that place any location in the United States in context with national, state and county levels of criminality." The crimes against persons (CAP) index represents the overall risk of homicide, rape, robbery, and aggravated assault.

foreseeability). In citing these cases, we note federal courts require more from a non-moving party to survive summary judgment than do our state courts. In this case, the especial high probability of crime at the Super 8 compared to the national and state averages raised at least a scintilla of evidence that the crime against Petitioner was foreseeable. We recognize that, according to the report, the risk of an aggravated assault occurring at the Super 8 was slightly lower than the county-wide risk. However, the risk of robbery and rape at the Super 8 was above the county average, and the security measures required to curb robbery, rape, and aggravated assault are arguably similar. Based on the foregoing, we believe Petitioner produced at least some evidence the aggravated assault was foreseeable.

In so finding, this Court must determine whether Petitioner provided any evidence Respondent's preventative actions were unreasonable given this risk. Petitioner asserts Respondent should have either hired a security guard to patrol the premises or installed a roving camera security system. In our view, the hiring of security personnel is no small burden. Considering a business's economic interest, it is difficult to imagine an instance where a business would be required to employ costly security guards in the absence of evidence of prior crimes on the premises. However, a business, such as this one, in a high crime area without evidence of prior criminal incidents may be required to institute less costly measures to offset an elevated risk of harm, such as installing extra lighting, fences, locks, or security cameras, or simply training existing personnel on best security practices.

As part of the balancing approach we adopt, a determination of whether a business proprietor's security measures were reasonable in light of a risk will, at many times, be identified by an expert. Petitioner's expert visited the Super 8 on three occasions, both during the day and night time, to observe the neighborhood and physical layout of the motel. He determined Respondent provided adequate lighting at its facility and the physical hardware on the door was within industry standards. However, the expert concluded the addition of a closed circuit camera or some type of additional security personnel would have been reasonable in light of his perceived risk. The expert based his risk perception at the site primarily upon criminal incident data he gathered from 2000 to 2004, after the assault on Petitioner took place. Determinative of this case, in our opinion, is the expert's testimony that "if . .

. this is [the] first time [a criminal incident occurred], there wasn't enough data for [Respondent] to say he really needed to spend a bunch of money on surveillance cameras, a bunch of money on a full-time security guard or part-time, or train his employees to do a guard tour . . . ." This expert's testimony was the only evidence supplied by Petitioner that spoke to the reasonableness of Respondent's precautions.[4] Even casting all evidence in a light most favorable to the Petitioner, he failed to provide any evidence that Respondent should have expended more resources to curtail the risk of criminal activity that might have been probable. Therefore, we find the court of appeals' decision upholding the circuit court's grant of summary judgment was proper.

CONCLUSION

Today, we adopt the balancing approach to determining foreseeability in the context of whether a business owner has a duty to protect its invitees from criminal acts of third parties. We believe this test appropriately strikes a balance between the economic concerns of businesses and the safety concerns of the public. Even with all reasonable inferences from the evidence cast in favor of Petitioner, we find Petitioner did not provide the circuit court any evidence that Respondent's security measures were unreasonable given the risk of criminal activity on the property. Therefore, the circuit court's grant of summary judgment is

AFFIRMED.

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

[4] The affidavit of another expert supplied by Petitioner merely agreed with the first expert's assessment as it related to the precautionary measures required of Respondent.

JUSTICE PLEICONES: I concur in the majority's decision to affirm the Court of Appeals' decision upholding the circuit court's grant of summary judgment, but would do so on the ground that petitioner's negligence in leaving the safety of his motel room exceeded respondent's negligence, if any, as a matter of law. See Bass v. GOPAL, Inc., 384 S.C. 238, 247, 680 S.E.2d 917, 921-922 (Ct. App. 2009).

The Court of Appeals held that, under existing South Carolina law, an innkeeper owes a duty to her guests "to provide. . . reasonable protection against injuries from criminal acts, and the actual amount of protection depends on the amount and types of criminal activity that have previously occurred on the premises." Bass, at 245, 680 S.E.2d at 245, fn. 4. The court distinguished this specialized innkeeper duty from that of a merchant, whose duty to protect customers from third party criminal acts is limited to those which the merchant has actual or constructive knowledge are, or are about to, occur. Id. [citing Miletic v. Wal-Mart Stores, Inc., 339 S.C. 327, 529 S.E.2d 68 (Ct. App. 2000)].

While I appreciate the majority's scholarly approach to the issues of duty and foreseeability, I perceive little difference between our existing law, and the test adopted by the majority, other than a requirement for expert testimony, and reliance upon city/county statistics. Like the Court of Appeals, I would hold that since there is no duty imposed upon business owners to conduct a crime analysis, there is no reason to impute knowledge of the CRIMECAST report to respondent, and further that these types of city/county statistical reports are irrelevant to determining an innkeeper's duty. I would not alter our existing law, but were I to do so, I would remand to permit the parties an opportunity to meet the newly announced test.

Because I would hold that the Court of Appeals correctly affirmed the grant of summary judgment on the comparative negligence ground, I concur in the result reached by the majority.

The Supreme Court of South Carolina

In the Matter of Sidney J. Jones, Respondent.

ORDER

On September 28, 2011, respondent was arrested and charged with influencing/threatening a witness, possession of marijuana with intent to distribute, and going inside a guard line with weapon/liquor/drugs, all in violation of the laws of the State of Georgia. The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR, and requesting the Court appoint an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

IT IS FURTHER ORDERED that Paul Andrew Anderson, Esquire, is hereby appointed as attorney to protect respondent's South

Carolina clients' interests. Mr. Anderson shall take action as required by Rule 31, RLDE, Rule 413, SCACR, and as provided by this order, to protect the interests of respondent's South Carolina clients.

Upon demand, respondent shall deliver all active client files which have any nexus in South Carolina to Paul Andrew Anderson, Esquire. "Nexus" shall include, but shall not be limited to, any files involving cases pending in any South Carolina local, state, or federal court or which, if filed, would be filed in any of those courts; property, real or personal, situated in South Carolina; any agreements which shall take effect predominately in South Carolina; and any other file in which substantial part of the matter is carried out in South Carolina.

Respondent is ordered to segregate his law office trust and/or escrow account(s) and forward all funds which have a South Carolina nexus to Paul Andrew Anderson, Esquire. Mr. Anderson shall deposit these funds in a separate account and he may make disbursements from the account which are necessary to effectuate this appointment. In addition, respondent shall forward all property belonging to clients and/or related to client matters, bank statements,

cancelled checks, disbursement schedules, trust account records, and the like which have a nexus in this state to Mr. Anderson.

Respondent shall promptly forward all mail related to the above matters to Paul Andrew Anderson, Esquire.

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

IT IS SO ORDERED.

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

Columbia, South Carolina

September 30, 2011

The Supreme Court of South Carolina

In the Matter of Terry Lance Carter, Respondent.

ORDER

Respondent is a member of the South Carolina Bar and Tennessee Bar. Pursuant to Rule 29(a), RLDE, Rule 413, SCACR, the Office of Disciplinary Counsel (ODC) provided the Clerk of Court with a certified copy of the Supreme Court of Tennessee's April 25, 2011, order transferring respondent to disability inactive status in that State. In accordance with Rule 29(b), the Clerk provided the order to ODC and respondent and gave the parties thirty (30) days in which to inform the Court of any reason why respondent should not be transferred to incapacity inactive status in South Carolina. Neither ODC nor respondent filed a response.

Pursuant to Rule 29, RLDE, Rule 413, SCACR, respondent is hereby transferred to incapacity inactive status.

IT IS SO ORDERED.

s/ Jean H. Toal	C.J.
s/ Costa M. Pleicones	J.
s/ Donald W. Beatty	J.
s/ John W. Kittredge	J.
s/ Kaye G. Hearn	J.

Columbia, South Carolina

October 5, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Andre Jackson, Appellant.

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

Opinion No. 4894
Heard June 15, 2011 - Filed October 5, 2011

REVERSED

Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, of Columbia, for Respondent.

KONDUROS, J.: Andre Jackson appeals his conviction of possession with intent to distribute (PWID) marijuana arising out of a traffic stop. He argues the trial court erred in failing to exclude the stop and denying his motion for a directed verdict due to his mere presence. We reverse.

FACTS/PROCEDURAL HISTORY

On September 16, 2008, Jackson was riding in a car being driven by Nicholas Carl Davy on I-85 in Spartanburg County. Davy was driving between 54 and 55 miles per hour when Officer Jonathan Montjoy signaled for him to pull his vehicle over. The posted maximum speed limit was 60 miles per hour and the minimum was 45 miles per hour. A search of the car produced four bags of marijuana.

Jackson and Davy were both indicted for PWID marijuana, and their cases were tried together, but Davy was not present at trial. At the outset of trial, Jackson argued the stop resulting in his arrest was invalid because the officer was without probable cause to stop and search the car. Officer Montjoy testified the vehicle was in the middle of three lanes of traffic and traveling much slower than the other drivers on the road. He also provided that the car was impeding the flow of traffic; cars were passing the vehicle on both sides, and there was a line of cars waiting to pass him. Officer Montjoy determined by radar gun that the car was traveling 54 miles per hour. He testified the normal speed for that time (rush hour) on that road is 70 to 75 miles per hour.

Officer Montjoy testified that once he pulled the car over, he approached it and smelled marijuana in the car. He then asked Davy, the driver, to step to the rear of the vehicle. After talking to Davy and Jackson separately while processing the warning, he noticed their answers were not "real accurate." Although they both told him they were coming from North Carolina and going to Greenville, they could not give an actual location. Officer Montjoy also attempted to find a rental car agreement and Jackson's ID. Officer Montjoy then deployed his K-9 around the vehicle, and the dog alerted on the vehicle. Officers searched the vehicle and found four clear

plastic bags with marijuana "[u]nder the center console, where the gear shifter is, the plastic housing there," which was in between the two front bucket seats. Both Davy and Jackson were then arrested for PWID marijuana.

The trial court found section 56-5-1560 of the South Carolina Code (2006) does not reference speed limits and states that no person should drive a vehicle at such a slow speed to impede the normal and reasonable flow of traffic. The trial court noted the testimony was that the vehicle was traveling in the center lane with a long line of traffic behind it and being passed on both sides. The trial court found the officer had probable cause to stop the car based on the statute.

At the close of the State's case, Jackson moved for a directed verdict, arguing the State had not met its burden in proving he had constructive possession of the marijuana or knew it was in the car. The trial court found the State had presented sufficient facts to establish a case for constructive possession and denied the motion.

Jackson testified that he met Davy once. Jackson's twenty-two-year-old son and Davy were school friends, and Jackson and Davy met at Jackson's grandchild's birthday party. Davy asked to stay with Jackson overnight at his home in Charlotte, North Carolina, on a trip from Maryland to Florida or Georgia. Davy was giving Jackson a ride to Greenville, South Carolina because Jackson had a music "gig" he needed to promote, and Jackson's driver's license was suspended at the time. At the close of the defense's case, Jackson renewed his motion for a directed verdict, which the trial court again denied.

The jury convicted Jackson of PWID.[1] The trial court sentenced him to three years suspended to the three days he had already served and probation for three years. This appeal followed.

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[1] The jury also convicted Davy of PWID.

STANDARD OF REVIEW

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

LAW/ANALYSIS

I. Directed Verdict

Jackson maintains the trial court erred in denying his motion for a directed verdict because he was merely present at the scene. We agree.

In reviewing a denial of a motion for a directed verdict, an appellate court must review the evidence in the light most favorable to the State. State v. Venters, 300 S.C. 260, 264, 387 S.E.2d 270, 272 (1990). If any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006).

When considering a motion for a directed verdict, a trial court is concerned only with the existence of evidence, not its weight. State v. Stuckey, 347 S.C. 484, 498, 556 S.E.2d 403, 410 (Ct. App. 2001). Grant of a defense motion for directed verdict of acquittal is proper only "if there is a failure of competent evidence tending to prove the charge." Rule 19(a), SCRCrimP; State v. Jenkins, 278 S.C. 219, 222, 294 S.E.2d 44, 46 (1982). A trial court must submit the case to the jury if any direct or substantial circumstantial evidence has been presented that reasonably tends to prove the defendant's guilt or from which his guilt may be fairly and logically deduced. State v. Fennell, 340 S.C. 266, 270, 531 S.E.2d 512, 514 (2000). However, the trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt. State v. Cherry, 361 S.C. 588,

594, 606 S.E.2d 475, 478 (2004). Suspicion implies a belief or opinion as to guilt based upon facts or circumstances not amounting to proof, but the trial court is not required to find the evidence infers guilt to the exclusion of any other reasonable hypothesis. Id.

> Conviction of possession of [illegal drugs] requires proof of possession-either actual or constructive, coupled with knowledge of its presence. Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession. To prove constructive possession, the State must show a defendant had dominion and control, or the right to exercise dominion and control, over the [drugs]. Constructive possession can be established by circumstantial as well as direct evidence, and possession may be shared.

State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773, 774-75 (1981). "Possession requires more than mere presence." State v. Stanley, 365 S.C. 24, 43, 615 S.E.2d 455, 465 (Ct. App. 2005). "In drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially." State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009). "Knowledge can be proven by the evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that the accused knew of the existence of the prohibited substances." Id.

In Hernandez, the trial court denied the defendants' motion for a directed verdict on drug trafficking charges when they occupied a rented moving truck that arrived at a place designated for a controlled drug exchange closely behind a car driven by others implicated in the transaction. Id. at 622-23, 677 S.E.2d at 604. The supreme court found the State's contention that the defendants knew the occupants of car and thus had knowledge of the drugs in the tractor trailer being driven by undercover agents was pure speculation and insufficient to support the defendants' conviction. Id. at 625, 677 S.E.2d at 605. The court found that while the

defendants' conduct may have been suspicious, mere suspicion was insufficient to support a guilty verdict. Id.

In State v. Brown, 267 S.C. 311, 315, 227 S.E.2d 674, 676 (1976):

> The sum total of the State's evidence against Brown is that he was a passenger in a car on a deserted rural road about 1:00 A.M., that [the driver] had an undetermined sum of cash in a large roll, that Brown was nervous and had no identification, that there was a smell of marijuana in the car, and that there was a large opaque bag containing eight pounds of marijuana on the rear floorboard. [The driver] knew Brown's name as Chuck Brown and Brown told [the driver] to be quiet when [the driver] started to admit the crime.

The court found the State presented no evidence "as to ownership of the car or any special relation [Brown] had with [the driver] or the owner from which Brown's control of the car or its contents might be inferred. The bag containing the marijuana was opaque and so situated that a front seat passenger might never have seen the bag, much less its contents." Id. "There was no evidence that Brown was a seller or user of drugs, or that he even recognized the odor of marijuana[,] or that he was a close friend of the driver, or that he spent a substantial part of the night with him." Id. at 315-16, 227 S.E.2d at 676-77 (citations omitted). "Although [the officer] testified he smelled the odor of burned marijuana[,] he found no residue of such in or about the car of the defendant." Id. at 316, 227 S.E.2d at 677. The court found "[The driver]'s statements in no way incriminated [Brown]." Id. at 317, 227 S.E.2d at 677. The court determined, "The evidence when reviewed in the light most favorable to the State fails to make a jury issue of [Brown]'s dominion and control of the marijuana, an essential element of both crimes. Therefore, the trial court was in error in denying [Brown]'s motion for a directed verdict." Id.

In United States v. Blue, 957 F.2d 106, 107 (4th Cir. 1992), a police officer conducting nighttime surveillance of a house for possible illegal drug activity saw two men leave the house and enter a parked car on the street. The officer pulled the car over in a well-lit area to investigate a seatbelt violation. Id. While approaching the car, the officer saw the shoulder of the passenger "dip as if the passenger were reaching under the seat with his right hand." Id. After the driver and passenger exited the car, the officer searched the passenger for any weapons and "discovered a needle, a syringe, and a small amount of heroin, and therefore placed [the passenger] under arrest." Id. A consensual search of the car revealed a loaded gun under the passenger seat. Id. Both the driver and the passenger denied knowledge or ownership of the gun. Id. The car did not belong to the passenger, and no evidence was presented that the passenger had been in the car before. Id. at 108.

The passenger was convicted of possession of a firearm by a convicted felon. Id. at 106. On appeal, he challenged the sufficiency of the evidence to support his conviction. Id. at 107. To support its case, the government had relied on (1) the officer's testimony the passenger's shoulder dipped as he approached the vehicle and (2) the discovery of the gun under the passenger seat. Id. at 107-08. The Fourth Circuit determined this evidence was insufficient to support the passenger's conviction:

> Beyond [the officer's] claim that he saw [the passenger]'s shoulder dip and the discovery of the pistol underneath the passenger seat, the government did not substantiate its case against [the passenger]. It did not produce fingerprints or any other physical evidence which would link [him] with the gun. The government introduced no evidence demonstrating that [the passenger] owned the gun or testimony that [he] had been seen with the gun. The car in which the gun was found did not belong to [the passenger]; in fact, no evidence indicated that [he] had ever been in that car before. Without more evidence than that

> proffered by the government, we cannot sustain [the passenger]'s conviction.

Id. at 108.

The Blue court further noted although the shoulder dip alone did not transform the passenger from a mere passenger in the car to a possessor of whatever was discovered underneath the seat in which he was sitting, "the facts of this case fall outside, but just barely, the realm of the quantum of evidence necessary to support a finding of constructive possession." Id.

Although the State contends the center console was centrally located and thus within Jackson's dominion and control, Officer Montjoy testified the marijuana was "[u]nder the center console where the gear shifter is, the plastic housing there." Jackson did not own or rent the car; Davy provided it and was driving it. Additionally, Jackson and Davy had only met once previously, at Jackson's grandchild's birthday party. Although Officer Montjoy testified he smelled marijuana as soon as he approached the vehicle, an officer testified likewise in Brown. However, in Brown when officers found a large opaque bag containing eight pounds of marijuana on the rear floorboard, an officer's testimony he smelled marijuana and testimony the passenger was nervous were not enough evidence for the State's case to survive the passenger's directed verdict motion. Further, in Blue the officer testified the passenger made a shoulder dip and the gun was found under his seat in the car. However, this was not sufficient to sustain the passenger's conviction. Here, the evidence against Jackson is even less than in either Brown or Blue. The drugs were more out of sight, and the State presented no evidence that Jackson was nervous or made any suspicious movements. Accordingly, the State failed to present sufficient circumstantial evidence of knowledge to submit the case to the jury. Thus, the trial court erred in denying Jackson's motion for a directed verdict.

II. Traffic Stop

Jackson contends the trial court erred in failing to exclude or suppress the stop by finding the officer had probable cause to believe the driver had committed a traffic violation. Because we find the trial court erred in failing to direct a verdict in favor of Jackson, we need not consider this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

Because the State failed to present sufficient evidence to establish Jackson had dominion and control over the marijuana, the trial court's denial of Jackson's directed verdict motion is

REVERSED.

SHORT and GEATHERS, JJ., concur.