The Supreme Court of South Carolina

RE: Expediting Appeals from Termination of Parental Rights Proceedings, Adoption Proceedings, and/or Department of Social Services Actions Involving Custody of a Minor Child

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O R D E R

In recognition of the need for stability in children's lives, the Supreme Court of South Carolina and the South Carolina Court of Appeals will expedite consideration of any appeal or petition for a writ of certiorari to the Court of Appeals from termination of parental rights proceedings, adoption proceedings, and/or Department of Social Services actions involving the custody of a minor child. To facilitate expediency, there will be a presumption against granting motions for extensions of time to file petitions, returns, briefs, records, and other documents. A motion for an extension of time will only be granted in the most extraordinary of circumstances and for the most compelling reasons in the interest of justice.

As to appeals to the Court of Appeals, the Court of Appeals shall, consistent with its current practice, expedite appeals as follows. Once the case is assigned to a panel, oral argument will be held, if at all, at the next practicable term of court. Notice of oral argument will be sent at least fifteen

days prior to the scheduled argument. A written opinion from the court shall be entered within thirty days of being assigned to a panel or hearing oral argument, whichever is later. However, if the case warrants additional consideration, the time for filing an opinion may be extended.

As to matters before this Court, a petition for a writ of certiorari to the Court of Appeals in such cases shall be given priority and will be considered by the Court as expeditiously as possible. Where certiorari is granted or where the matter is pending before the Supreme Court on direct appeal, oral argument shall be held, if at all, at the next practicable term of Court after the briefs are filed. Notice of oral argument will be sent at least fifteen days prior to the scheduled argument. The Court shall issue a written opinion within thirty days after the case being submitted for consideration or within thirty days after hearing oral argument. However, if the case warrants additional consideration, the time for filing an opinion may be extended.

IT IS SO ORDERED.

s/ Jean H. Toal

Chief Justice Jean Hoefer Toal

Columbia, South Carolina
October 20, 2011

The Supreme Court of South Carolina

In the Matter of
Joseph W. Reeves, Deceased.

ORDER

The Commission on Lawyer Conduct has filed a petition advising the Court that Mr. Reeves passed away on September 14, 2011, and requesting the appointment of an attorney to protect Mr. Reeves' clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. The petition is granted.

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

Mr. Reeves maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Reeves, shall serve as notice to the bank or other financial institution that Charles Winfield Johnson, III, Esquire, has been duly appointed by this Court.

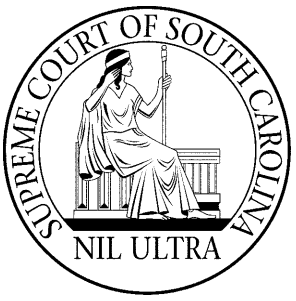
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Charles Winfield Johnson, III, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Reeves' mail and the authority to direct that Mr. Reeves' mail be delivered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

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

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

Columbia, South Carolina

October 25, 2011



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 38
October 31, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2011-UP-473-James Emmett Sessions and Louise Green Sessions v. Stephen Michael Platt
(Dorchester, Master-in-Equity Patrick R. Watts)

2011-UP-474-State v. Norwood Lee Jordan
(Richland, Judge J. Michelle Childs)

2011-UP-475-State v. James P. Austin
(Sumter, Judge W. Jeffrey Young)

2011-UP-476-State v. Mokeia Hammond
(Horry, Judge Benjamin H. Culbertson)

2011-UP-477-State v. Tyquan Cohen
(Aiken, Judge R. Ferrell Cothran,Jr.)

2011-UP-478-Cynthia A. Tomkins v. SCESC
(Greenwood, Judge D. Garrison Hill)

2011-UP-479-Harry M. Snipes v. Tammy R. Snipes
(Aiken, Judge Peter R. Nuessle)

PETITIONS FOR REHEARING

4858-Pittman v. Pittman	Denied 10/18/11
4862-5 Star v. Ford Motor Company	Pending
4864-Singleton v. Kayla R.	Pending
4872-State v. K. Morris	Pending
4874-Wachovia Bank v. Blackburn	Pending
4875-Powell v. Bank of America	Pending
4876-Crosby v. Prysmian Comm.	Pending
4880-Gordon v. Busbee	Pending
4887-West v. Morehead	Pending
4888-Pope v. Heritage Communities	Pending

4891-SCDSS v. Carpenter	Pending
4892-Sullivan v. Hawker Beech Craft	Pending
4894-State v. A. Jackson	Pending
2011-UP-385-State v. A. Wilder	Pending
2011-UP-397-Whitaker v. UPS Freight	Pending
2011-UP-418-F. DeLeon v. State	Pending
2011-UP-419-CCDSS v. Pridgen	Denied 10/21/11
2011-UP-425-State v. V. Ravenel	Pending
2011-UP-427-Port City v. City of Charleston	Pending
2011-UP-428-Murphy v. Bi-Lo, Inc.	Pending
2011-UP-432-Pittman v. Lowcountry	Pending
2011-UP-433-SCDSS v. Anderson-Cook	Pending
2011-UP-436-In the matter of A. Chisolm	Pending
2011-UP-438-Carroll v. Johnson	Pending
2011-UP-441-Babb v. Graham	Pending
2011-UP-455-State v. J. Walker	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4526-State v. B. Cope	Pending
4529-State v. J. Tapp	Pending
4548-Jones v. Enterprise	Pending
4592-Weston v. Kim's Dollar Store	Pending

4605-Auto-Owners v. Rhodes	Pending
4609-State v. Holland	Pending
4616-Too Tacky v. SCDHEC	Pending
4617-Poch v. Bayshore	Pending
4633-State v. G. Cooper	Pending
4635-State v. C. Liverman	Pending
4637-Shirley's Iron Works v. City of Union	Pending
4659-Nationwide Mut. V. Rhoden	Pending
4670-SCDC v. B. Cartrette	Pending
4675-Middleton v. Eubank	Pending
4680-State v. L. Garner	Pending
4685-Wachovia Bank v. Coffey, A	Pending
4687-State v. Taylor, S.	Pending
4688-State v. Carmack	Pending
4691-State v. C. Brown	Pending
4697-State v. D. Cortez	Pending
4698-State v. M. Baker	Pending
4699-Manios v. Nelson Mullins	Pending
4700-Wallace v. Day	Pending
4705-Hudson v. Lancaster Convalescent	Pending
4706-Pitts v. Fink	Pending
4708-State v. Webb	Pending

4711-Jennings v. Jennings	Pending
4716-Johnson v. Horry County	Pending
4725-Ashenfelder v. City of Georgetown	Pending
4732-Fletcher v. MUSC	Pending
4737-Hutson v. SC Ports Authority	Pending
4742-State v. Theodore Wills	Pending
4746-Crisp v. SouthCo	Pending
4747-State v. A. Gibson	Pending
4750-Cullen v. McNeal	Pending
4752-Farmer v. Florence Cty.	Pending
4753-Ware v. Ware	Pending
4756-Neeltec Enterprises v. Long	Pending
4760-State v. Geer	Pending
4761-Coake v. Burt	Pending
4763-Jenkins v. Few	Pending
4764-Walterboro Hospital v. Meacher	Pending
4765-State v. D. Burgess	Pending
4766-State v. T. Bryant	Pending
4769-In the interest of Tracy B.	Pending
4770-Pridgen v. Ward	Pending
4779-AJG Holdings v. Dunn	Pending

4781-Banks v. St. Matthews Baptist Church	Pending
4785-State v. W. Smith	Pending
4787-State v. K. Provet	Pending
4789-Harris v. USC	Pending
4790-Holly Woods Assoc. v. Hiller	Pending
4792-Curtis v. Blake	Pending
4794-Beaufort School v. United National Ins.	Pending
4798-State v. Orozco	Pending
4799-Trask v. Beaufort County	Pending
4805-Limehouse v. Hulsey	Pending
4800-State v. Wallace	Pending
4808-Biggins v. Burdette	Pending
4810-Menezes v. WL Ross & Co.	Pending
4815-Sun Trust v. Bryant	Pending
4820-Hutchinson v. Liberty Life	Pending
4823-State v. L. Burgess	Pending
4824-Lawson v. Hanson Brick	Pending
4826-C-Sculptures, LLC v. G. Brown	Pending
4828-Burke v. Anmed Health	Pending
4830-State v. J. Miller	Pending
4831-Matsell v. Crowfield Plantation	Pending
4832-Crystal Pines v. Phillips	Pending

4842-Grady v. Rider (Estate of Rider)	Pending
4847-Smith v. Regional Medical Center	Pending
4851-Davis v. KB Home of S.C.	Pending
4859-State v. Garris	Pending
4877-McComb v. Conard	Pending
4879-Wise v. Wise	Pending
2009-UP-322-State v. Kromah	Pending
2010-UP-090-F. Freeman v. SCDC (4)	Pending
2010-UP-141-State v. M. Hudson	Pending
2010-UP-182-SCDHEC v. Przyborowski	Granted 10/20/11
2010-UP-196-Black v. Black	Pending
2010-UP-232-Alltel Communications v. SCDOR	Pending
2010-UP-253-State v. M. Green	Granted 10/20/11
2010-UP-256-State v. G. Senior	Denied 10/20/11
2010-UP-287-Kelly, Kathleen v. Rachels, James	Pending
2010-UP-303-State v. N. Patrick	Denied 10/20/11
2010-UP-308-State v. W. Jenkins	Pending
2010-UP-331-State v. Rocquemore	Pending
2010-UP-339-Goins v. State	Pending
2010-UP-352-State v. D. McKown	Pending
2010-UP-355-Nash v. Tara Plantation	Pending

2010-UP-356-State v. Robinson	Pending
2010-UP-369-Island Preservation v. The State & DNR	Pending
2010-UP-370-State v. J. Black	Pending
2010-UP-378-State v. Parker	Pending
2010-UP-382-Sheep Island Plantation v. Bar-Pen	Pending
2010-UP-406-State v. Larry Brent	Pending
2010-UP-425-Cartee v. Countryman	Pending
2010-UP-427-State v. S. Barnes	Pending
2010-UP-437-State v. T. Johnson	Pending
2010-UP-440-Bon Secours v. Barton Marlow	Pending
2010-UP-437-State v. T. Johnson	Pending
2010-UP-448-State v. Pearlie Mae Sherald	Pending
2010-UP-449-Sherald v. City of Myrtle Beach	Pending
2010-UP-450-Riley v. Osmose Holding	Pending
2010-UP-461-In the interest of Kaleem S.	Pending
2010-UP-464-State v. J. Evans	Pending
2010-UP-494-State v. Nathaniel Noel Bradley	Pending
2010-UP-504-Paul v. SCDOT	Pending
2010-UP-507-Cue-McNeil v. Watt	Pending
2010-UP-523-Amisub of SC v. SCDHEC	Pending
2010-UP-525-Sparks v. Palmetto Hardwood	Pending

2010-UP-547-In the interest of Joelle T.	Pending
2010-UP-552-State v. E. Williams	Pending
2011-UP-005-George v. Wendell	Pending
2011-UP-006-State v. Gallman	Pending
2011-UP-017-Dority v. Westvaco	Pending
2011-UP-024-Michael Coffey v. Lisa Webb	Pending
2011-UP-038-Dunson v. Alex Lee Inc.	Pending
2011-UP-039-Chevrolet v. Azalea Motors	Pending
2011-UP-041-State v. L. Brown	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-059-State v. R. Campbell	Pending
2011-UP-071-Walter Mtg. Co. v. Green	Pending
2011-UP-076-Johnson v. Town of Iva	Pending
2011-UP-084-Greenwood Beach v. Charleston	Pending
2011-UP-091-State v. R. Watkins	Pending
2011-UP-095-State v. E. Gamble	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-110-S. Jackson v. F. Jackson	Pending
2011-UP-112-Myles v. Main-Waters Enter.	Pending
2011-UP-115-State v. B. Johnson	Pending

2011-UP-121-In the matter of Simmons	Pending
2011-UP-125-Groce v. Horry County	Pending
2011-UP-127-State v. B. Butler	Pending
2011-UP-130-SCDMV v. Brown	Pending
2011-UP-131-Burton v. Hardaway	Pending
2011-UP-132-Cantrell v. Carolinas Recycling	Pending
2011-UP-136-SC Farm Bureau v. Jenkins	Pending
2011-UP-137-State v. I. Romero	Pending
2011-UP-138-State v. R. Rivera	Pending
2011-UP-140-State v. P. Avery	Pending
2011-UP-145-State v. S. Grier	Pending
2011-UP-147-State v. B. Evans	Pending
2011-UP-148-Mullen v. Beaufort County School	Pending
2011-UP-152-Ritter v. Hurst	Pending
2011-UP-161-State v. Hercheck	Pending
2011-UP-162-Bolds v. UTI Integrated	Pending
2011-UP-173-Fisher v. Huckabee	Pending
2011-UP-174-Doering v. Woodman	Pending
2011-UP-175-Carter v. Standard Fire Ins.	Pending
2011-UP-185-State v. D. Brown	Pending
2011-UP-199-Davidson v. City of Beaufort	Pending

2011-UP-205-State v. D. Sams	Pending
2011-UP-208-State v. L. Bennett	Pending
2011-UP-218-Squires v. SLED	Pending
2011-UP-225-SunTrust v. Smith	Pending
2011-UP-229-Zepeda-Cepeda v. Priority	Pending
2011-UP-242-Bell v. Progressive Direct	Pending
2011-UP-264-Hauge v. Curran	Pending
2011-UP-268-In the matter of Vincent Way	Pending
2011-UP-291-Woodson v. DLI Prop.	Pending
2011-UP-305-Southcoast Community Bank v. Low-Country	Pending
2011-UP-333-State v. W. Henry	Pending
2011-UP-334-LaSalle Bank v. Toney	Pending
2011-UP-346-Batson v. Northside Traders	Pending
2011-UP-359-Price v. Investors Title Ins.	Pending
2011-UP-372-Underground Boring v. P. Mining	Pending
2011-UP-383-Belk v. Weinberg	Pending
2011-UP-389-SCDSS v. David Sullivan	Pending
2011-UP-398-Peek v. SCE&G	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cheryl Ann Burch, Appellant,

v.

Thomas Andrew Burch, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
G. Larry Inabinet, Family Court Judge
Dorothy M. Jones, Family Court Judge
Dana A. Morris, Family Court Judge

Opinion No. 27060
Heard September 20, 2011 – Filed October 31, 2011

AFFIRMED IN PART AND REVERSED IN PART

A. Camden Lewis and Ariail E. King, of Lewis & Babcock, and John D. Elliott, all of Columbia, for Appellant.

James T. McLaren and C. Dixon Lee, both of McLaren & Lee, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: In this action for divorce and equitable division, Appellant Cheryl Burch (Wife) appealed (1) the family court's valuation of certain real properties at the filing date for divorce rather than the date the properties were actually sold; (2) the denial of a request for contribution from Respondent Thomas Burch (Husband) to their child's private school education; (3) the denial of reimbursement for delinquent interest payment advanced by Wife; (4) the amount of Husband's child support obligation; and (5) the assessment of attorney's fees against Wife for her delay and non-cooperation. We affirm in part and reverse in part.

FACTS/ PROCEDURAL HISTORY

Wife and Husband married on October 18, 1992, and filed for divorce on January 28, 2005. One child (Son) was born of the marriage.

At the time of filing, Wife earned $10,418.16 per month while Husband estimated that he made $6,792 per month.[1] The couple sent Son to Heathwood Hall Episcopal School (Heathwood Hall), a private school in Columbia, from 5-K kindergarten through the 6th grade at a cost of $12,000 annually, split between the parties. After Wife filed for divorce, Husband refused to contribute to Son's education claiming financial hardship, heavy debts, and a desire for Son to have a "fresh start" at a public school.[2]

During the marriage, Husband worked primarily as a real estate developer. Around the time of the marriage, Husband met Robert S. Small, Jr. who owns Avtex Commercial Property, Inc. (Avtex), a real estate development company. Husband and Small agreed to share ownership with each other in deals that Husband brought to Avtex and also decided that each

[1] Wife's expert alleged that Husband actually earned $8,333 per month from 2000 to 2004.

[2] But shortly after Wife filed for divorce, Husband purchased a new home worth approximately 1 million dollars, a brand new Porsche costing $90,000, and a new office in the Vista area of Columbia.

development project would be structured under a separate limited liability company (LLC) designated Avtex Partners I, Avtex Partners II, and so forth.

This appeal concerns two of those entities, Avtex Partners VI, LLC ("Avtex VI") and Avtex Partners VII, LLC ("Avtex VII"). Husband owned a 25% interest in Avtex VI and Avtex VII, while Small retained a 65% interest, and a third investor, Tom Fox, shared a 10% interest in the companies.

Avtex VII's sole asset consisted of a development located in Charleston County known as the Market at Oakland (Oakland). Husband's largest contribution to the project was setting up the initial meeting between Small and the owner of the property, which led to an agreement in February 2003 to develop Oakland. Small financed 100% of the deal by taking out a personal loan, and he testified that Husband's role in the Avtex VII project was limited:

> I have got to tell you I didn't want [Husband] working on it . . . . Mount Pleasant is a very difficult place to develop. And you can't have more than one voice out there . . . . The politics down there are incredible. So I asked him, you work on the others, I will work on this.

At the time of the divorce filing, Avtex VII had yet to be developed, no lease had been signed, and Husband claimed the property had zero equity value. After the divorce filing, Husband's participation in Avtex VII amounted to attending two trade shows in Charlotte, North Carolina and Las Vegas, Nevada in March and May 2005, respectively. At both shows, Husband failed to attract any lessees for the project.

In contrast, Small secured the participation of Wal-Mart to anchor Oakland for Avtex VII, and in September 2005, a lease agreement was entered into by the parties. When asked what role Husband played in the development of Avtex VII between January 2005 and September 2005, Small stated, "I think his was more of a passive role." Around the same time, Husband and Small parted ways and Small bought Husband's interest in Avtex VII for $1,591,500.

The Avtex VI development project was a shopping center located on Forest Drive in Richland County. At the time of the divorce filing, a lease for Bonefish Grill, a restaurant chain, was already in place. After filing, Casual Living, a retail store, signed a lease with Avtex VI.[3] Subsequently, while the divorce was pending, Small also bought Husband's interest in Avtex VI.

With respect to Avtex VI, the family court allocated $254,920.35 as non-marital assets and $194,730.82 as marital assets. The family court also awarded the marital home to Wife and directed Husband to make payments on the mortgage in the amount of $3,982.80. Husband did not tender the money in violation of the court's order. Instead, Wife advanced the payment and then sought reimbursement, which the family court denied on equitable grounds, finding Wife received a $54,279.66 windfall from refinancing the marital home.

ISSUES

I. Whether the family court erred in valuing Husband's interests in Avtex VI and VII at the filing date rather than at a date occurring after the separation but before the divorce was final.

II. Whether the family court erred in declining to require Husband to contribute to the expenses of Son's private school education.

III. Whether the family court erred in denying Wife reimbursement for an interest payment advanced by her.

IV. Whether the family court abused its discretion in awarding $1,000 per month in child support.

V. Whether the family court properly assessed attorney's fees against Wife.

[3] The Record lacks details concerning the post-filing activities of Husband in acquiring the Casual Living lease.

STANDARD OF REVIEW

On appeal from the family court, this Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Dickert v. Dickert*, 387 S.C. 1, 6, 691 S.E.2d 448, 450 (2010) (citation omitted). This broad scope of review does not require the Court to disregard the findings of the family court. *Id*. (citation omitted).

ANALYSIS

I. Valuation of Avtex VII

Petitioner contends the family court erred in valuing Avtex VII at the time of filing rather than at a date occurring after a separation but before final divorce. We agree.

In South Carolina, marital property subject to equitable distribution is generally valued at the divorce filing date. *Fuller v. Fuller*, 370 S.C. 538, 545–48, 636 S.E.2d 636, 640 (Ct. App. 2006); *see also* S.C. Code Ann. § 20-3-630 (Supp. 2010) ("'[M]arital Property' as used in this article means all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation"). However, the parties may be entitled to share in any appreciation or depreciation in marital assets occurring after a separation but before divorce. *McDavid v. McDavid*, 333 S.C. 490, 497 n.7, 511 S.E.2d 365, 369 n.7 (1999); *Fields v. Fields*, 342 S.C. 182, 186, 536 S.E.2d 684, 686 (Ct. App. 2000). "[G]iven the volume of cases handled by our family courts, there often is a substantial delay between the commencement of an action and its ultimate resolution. Thus, it is not unusual for the value of marital assets to change, sometimes substantially, between the time the action was commenced and its final resolution." *Dixon v. Dixon*, 334 S.C. 222, 228, 512 S.E.2d 539, 542 (Ct. App. 1999).

When determining the proper date of valuation, other states examine whether there has been "active" or "passive" appreciation or depreciation of

the marital assets. *See Mayhew v. Mayhew*, 205 W. Va. 490, 519 S.E.2d 188 (W. Va. 1999); *Greenwald v. Greenwald*, 164 A.D.2d 706, 565 N.Y.S. 494 (N.Y. 1991); *In re Marriage of Wagner*, 208 Mont. 369, 679 P.2d 753 (Mont. 1984); *Brackney v. Brackney*, 199 N.C. App. 375, 682 S.E.2d 401 (Ct. App. 2009); *Scavone v. Scavone*, 243 N.J. Super. 134, 578 A.2d 1230 (N.J. Super. Ct. App. Div. 1990); *Diamond v. Diamond*, 360 Pa.Super. 101, 519 A.2d 1012 (Pa. Super. Ct. 1987). As one court explained:

> "**Passive appreciation**" refers to enhancement of the value of the property due solely to inflation, changing economic conditions, or market forces, or other such circumstances beyond the control of either spouse. *O'Brien v. O'Brien*, 131 N.C. App. 411, 420, 508 S.E.2d 365 (1999). *See Lee's Family Law* § 12.52(b)(i) ("[P]assive forces include interest, inflation, market forces, government action, [and] *labor of third parties* . . . ."). "**Active appreciation**," on the other hand, refers to "financial or managerial contributions" of one of the spouses. *O'Brien*, 131 N.C. App. at 420, 508 S.E.2d at 306.

Brackney, 199 N.C. App. at 385–86, 682 S.E.2d at 408 (emphasis added).

Courts tend to value active appreciation or depreciation at the filing date to encourage the parties to engage in productive economic activity and discourage waste by allowing them to reap the reward of their labor and suffer the burden of their dissipation. *See, e.g., McDavid*, 333 S.C. at 496, 511 S.E.2d at 368; *Bowman v. Bowman*, 357 S.C. 146, 591 S.E.2d 654, 660 (Ct. App. 2004). On the other hand, passive appreciation of marital property should be valued at a post-filing date when equity requires that both spouses share in the fruits of the marriage. *See, e.g., Fuller*, 370 S.C. at 546, 636 S.E.2d at 640. In making the public policy argument for the active and passive distinction it has been said:

> It is fairer to value a passive asset at or near the time of the final hearing, because both parties are equally deserving to share in any increase or decrease . . . . [On the other hand,] active assets should be valued at the time of commencement [or filing] of the marital litigation, to enable the person who causes the change in

> value to receive the benefits of his or her labor and skills or, conversely, to prevent the person who controls the assets from manipulating the value downward during litigation.

Roy T. Stuckey, *Marital Litigation in South Carolina* 310 (3rd ed., 2001).

While this Court has never formally adopted the active and passive distinction, precedent in our state supports its adoption. In *Bowman*, the court of appeals noted that "passive post-filing changes in the appreciation or depreciation of marital assets may be considered by the family court in determining an equitable apportionment of the marital estate." 357 S.C. at 146, 591 S.E.2d at 660. Moreover, without using the precise language, our courts in practice have applied the active and passive distinction in furtherance of equity and public policy. *See, e.g.*, *Fuller*, 370 S.C. at 546, 636 S.E.2d at 640 (finding an IRA account that passively increased in value should be valued at the date of the final hearing rather than the divorce filing date); *Bowman*, 357 S.C. at 159, 594 S.E.2d at 660 (holding where the husband actively and intentionally depleted his retirement account, the account should be valued at the filing date); *Dixon*, 334 S.C. at 234, 512 S.E.2d at 545 (finding where the husband actively set out to destroy his business during the marital litigation, the proper valuation date for equitable division is the filing date); *Mallet v. Mallet*, 323 S.C. 141, 151, 473 S.E.2d 804, 810 (Ct. App. 1996) (holding where the husband's insurance business decreased passively because of market forces, the proper valuation date was the date of the hearing rather than the filing date). In *McDavid v. McDavid*, this Court determined that the increase in the equity of a marital home from the time of filing to the time of trial stemmed from the reduction in the mortgage balance due solely to payments made by the wife and not her husband.[4] 333 S.C. at 496, 511 S.E.2d at 368. In other words, the wife's *active* contribution caused the appreciation in the equity of the marital home, and we determined the valuation date should be the date of filing. *Id.*

[4] Similar to the *Bowman* court, we recognized in *McDavid* that the statutory filing date is not appropriate for every situation and that "both parties *may* be entitled to share in any appreciation in marital assets which occurs after the parties separate but before the parties divorce." 333 S.C. at 497 n.7, 511 S.E.2d at 369 n.7 (emphasis added).

Applying the active and passive distinction in the present case, we find that appreciation in value of Avtex VII that occurred post-filing does not cross the threshold from passive to active. Husband's only real contribution to the Avtex VII project was to arrange the initial meeting between Small and the landowners. However, Husband made this contribution during the marriage so any value derived from it was marital property. S.C. Code Ann. § 20-3-630 (Supp. 2010) ("The term 'marital property' as used in this article means all real and personal property which has been acquired by the parties during the marriage"). Husband claimed Avtex VII had no value at the time of filing because the equity value of the property was zero.[5] Assuming this proposition is true, only Husband's post-filing activities matters.

In this regard, the Record indicates that Husband's post-filing contribution was minimal, if any. Small financed 100% of the deal by taking out a personal loan, and Small testified that he purposely restricted Husband's role in the Avtex VII project. In addition, neither party contests that the Wal-Mart lease was the primary cause of the increase in the value of Avtex VII. The acquisition of the lease and the subsequent appreciation of the property was attributable to Small alone, and as Small testified, Husband played a "passive role" from January 2005 (the filing date) to September 2005 (the lease date). Husband's participation in the Avtex VII project amounted to attending two trade shows where he failed to attract any lessees or add value to the project. Consequently, the appreciation resulted from the labor of a third party. *See Brackney*, 199 N.C.App. at 385-86, 682 S.E.2d at 408 (citing with approval a definition of passive appreciation that includes "labor of a third party").

[5] We question whether Husband's stake in the property really was valueless at the time of filing because of the business and investment opportunities that such a stake presents. However, we do not reach this question because here the parties dispute only the appreciation in the value of the land post-filing.

Under these facts, Husband's involvement does not cross the threshold from passive to active.[6] Thus, we formally adopt the active and passive distinction and deem the appreciation of Avtex VII passive, and value the property at the buyout date of the property rather than the filing date. Furthermore, we order that the passive gain be split fifty/fifty between the parties.

II. Valuation of Avtex VI

With respect to Avtex VI, the family court allocated $254,920.35 as a non-marital asset and $194,730.82 as a marital asset subject to equitable division in recognition of Husband's contribution in acquiring the Casual Living lease. By statute, marital property subject to equitable distribution is by default valued at the date of the divorce filing. S.C. Code Ann. § 20-3-630 (Supp. 2010). While our jurisprudence has carved out exceptions to this rule, the burden of proof is properly on the party seeking a deviation from the statutory filing date. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56, 126 S. Ct. 528, 534 (2005) ("The burdens of pleading and proof with regard to most facts have and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure or proof or persuasion") (*quoting* 2 J. Strong, *McCormick on Evidence* § 337, p. 412 (5th ed. 1999)).

Here, the burden of proof is on Wife to show Husband's activity is passive because she seeks a deviation. However, the Record is insufficiently developed to classify Husband's contribution to the acquisition of the Casual Living lease as passive. Thus, Wife fails to meet her burden of proof, and we affirm the family court's decision as to Avtex VI.

[6] We emphasize that the determination of whether a person's involvement crosses the threshold from passive to active requires an intensive examination of the underlying facts, and in this particular case involving a close corporation, Husband's level of activity does not pass muster.

III. Son's Private School Education

Wife claims the family court erred in declining to require Husband to contribute to the expenses of Son's private school education. We agree.

Section 63-5-20(A) of the South Carolina Code entitled "Obligation to Support" requires a divorced person to "provide a living standard for the [child] substantially equal to that of the person owing the duty to support." S.C. Code Ann. § 63-5-20(A) (Supp. 2010). In *Miller v. Miller*, this Court reiterated that family courts should "award support in an amount sufficient to provide for the needs of the children and to maintain the children at the standard of living they would have been provided but for the divorce." 299 S.C. 307, 312, 384 S.E.2d 715, 717 (1989). This may include contributing to private school expenses where appropriate. *See Rabon v. Rabon*, 288 S.C. 338, 340, 342 S.E.2d 605, 606 (1986) (ordering an increase in child support to cover private school tuition because "the children would benefit from enrollment at a [private school,] . . . . [f]ather [was] in good health, earn[ed] a high income and [was] capable of meeting the increased expenses"); *LaFrance v. LaFrance*, 370 S.C. 622, 657, 636 S.E.2d 3, 22 (Ct. App. 2006), *overruled on other grounds by Arnal v. Arnal*, 371 S.C. 10, 636 S.E.2d 864 (2006) (requiring the husband to contribute fifty-seven percent to child's private school tuition because the parties historically placed the child in private school, it was in the best interest of the child, and it was within the financial ability of the husband).

In the present case, Son has attended Heathwood Hall since kindergarten, and the Record does not suggest it would be detrimental or against the child's best interest to continue to attend Heathwood Hall. *Rabon*, 288 S.C. at 340, 342 S.E.2d at 606; *LaFrance*, 370 S.C. at 657, 636 S.E.2d at 22. We see no reason here to upset the status quo. Given Husband's income and high standard of living, Husband can afford to contribute approximately $6,000 towards Son's private education "to maintain [Son] at the standard of living [he] would have been provided but for the divorce." *Miller*, 299 S.C. at 312, 384 S.E.2d at 717; *see also* S.C. Code Ann. § 63–5–20(A).

Thus, we reverse the family court and order Husband to contribute fifty percent of the cost of Son's tuition at Heathwood Hall.

IV. Reimbursement for Delinquent Payment

Wife argues the family court erred in denying reimbursement for a delinquent payment advanced by Wife. We agree.

Under a temporary court order, the family court directed Husband to pay $3,982.80 on the mortgage on the marital home. Husband did not tender the money, so Wife made the payment. When Wife sought reimbursement, the family court denied her request, noting that the stipulated payoff for the first mortgage at trial was $299,197, and Wife refinanced the mortgage with a payoff of $244,918.34. In the family court's view, Wife received a $54,279.66 windfall because the court relied on the stipulated amount to fashion an equitable apportionment of the marital property. Accordingly, the family court concluded that the amount of delinquent interest owed by the Husband should be absolved as a matter of equity.

In considering whether the family court erred, it is settled law in South Carolina that "[c]ourts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Buckley v. Shealy*, 370 S.C. 317, 323–24, 635 S.E.2d 76, 79 (2006) (*citing Ex Parte Dibble*, 279 S.C. 592, 595–96, 310 S.E.2d 440, 442 (Ct. App. 1983)). Equally instructive is the equitable maxim that "[one] who seeks equity must do equity." *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (1994); *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000).

In the present case, we need not decide whether Wife received a windfall in refinancing the marital home. In *Buckley v. Shealy*, this Court found the family court erred in awarding the husband a set-off for overpaying child support because the husband failed to make timely child support payments as ordered. 370 S.C. at 325, 635 S.E.2d at 80. Similarly, here, Husband violated an explicit court order to make the mortgage payment on the marital home. Therefore, Husband is not entitled to have his obligation absolved in equity since Husband did not act equitably in fulfilling his

obligation to the court and to Wife. *Id*; *Provident Life & Accident Ins. Co.*, 317 S.C. at 479, 451 S.E.2d at 929.

Accordingly, we reverse the family court and order Husband to pay Wife the delinquent interest payment.

V. Child Support Payment

Wife claims the family court abused its discretion in awarding $1,000 per month in child support. We disagree.

In determining whether or not to award child support, courts should consider both parents': (1) incomes; (2) ability to pay; (3) education; (4) expenses; (5) assets; and (6) the facts and circumstances surrounding each case. *Holcombe v. Hardee*, 304 S.C. 522, 524-25, 405 S.E.2d 821, 822 (1991) (*citing Miller v. Miller*, 299 S.C. 307, 384 S.E.2d 715 (1989)). Family court judges are generally required to follow the South Carolina Child Support Guidelines (Guidelines) when awarding child support. *Matter of Bennett*, 321 S.C. 485, 469 S.E.2d 608 (1996); *see also* S.C. Code Ann. § 63-17-470(A) (2010).

The family court determined that Wife had an income of $10,418.16 per month and Husband had an income of $6,792 per month. Wife paid $119 per month to provide health insurance for Son and $200 per month for babysitters. Because Son spent 132 overnights annually with Husband, the family court classified the case as a "shared custody" calculation under the Guidelines. Under a "shared custody" calculation under Worksheet C, Husband would be required to pay only $181 per month in child support. *See* S.C. Code Ann. Regs. 114-4720, *et. seq.* (Supp. 2009). Therefore, by requiring Husband to pay $1,000 per month, the family court deviated upward and exercised its discretion to "provide a living standard for the [the child] substantially equal to that of the person owing the duty to support." S.C. Code Ann. § 63–5–20(A).

In our view, the family court did not abuse its discretion, and we affirm.

VI. Attorney's Fees Assessed Against Wife

Wife asserts the family court improperly assessed attorney's fees. We disagree.

The family court expressed frustration at Wife's non-cooperation and delay.[7] After concluding that the "positions taken by [Wife] were not reasonable or appropriate," the court awarded Husband $3,250 in attorney's fees.

Wife asserts that the family court improperly relied on evidence of mediation in violation of ADR Rule 8(a)(4) on confidentiality to award attorney's fees.[8] Specifically, the family court found that "the majority of the issues brought before the Court by [Wife] were of such a nature that they should have been resolved by the parties through agreement and/or mediation."

It is not clear that the family court considered confidential communications in reaching its decision to award attorney's fees because it

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[7] In its order, the family court noted, "[T]he Court has considered the lengthy period of time this property has been on the market for sale unsuccessfully and Wife's failure to remove Husband from the Paradise Island financing, despite the Order of the Court."

[8] ADR rule 8(a)(4) provides:

> [T]he parties and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding, any oral or written communication having occurred in a mediation proceeding, including but not limited to . . . [t]he fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

merely looked at the "nature" of the "issues brought before the [c]ourt." *Id.* Even if the family court considered evidence of mediation, the Record suggests that both parties may have waived confidentiality by agreeing to voluntarily submit the various offers of settlement for the court's consideration. *See Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009) (a waiver is a voluntary and intentional abandonment or relinquishment of a known right) (citations omitted); *Laser Supply and Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 347 676 S.E.2d 139, 145 (Ct. App. 2009) (the determination of whether one's actions constitute waiver is a question of fact). Nevertheless, the Record provides sufficient independent grounds for the family court to award attorney's fees based on Wife's non-cooperation and delay.

Thus, we affirm the family court's award of $3,250 in attorney's fees.

CONCLUSION

For the foregoing reasons, we affirm in part and reverse in part.

AFFIRMED IN PART AND REVERSED IN PART.

BEATTY, KITTREDGE, JJ., and Acting Justices James E. Moore and DeAndrea Gist Benjamin, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sloan Construction Company, Inc., Respondent,

v.

Southco Grassing, Inc., Wanda Surrett and South Carolina Department of Public Transportation, Defendants,

Of Whom South Carolina Department of Public Transportation is the Appellant.

Appeal From Greenville County
Charles B. Simmons, Jr., Circuit Court Judge

Opinion No. 27061
Heard May 4, 2011 – Filed October 31, 2011

AFFIRMED

Beacham O. Brooker, Jr, SCDOT, of Columbia, for Appellant.

T.S. Stern, Jr. and V. Elizabeth Wright, of Covington Patrick Hagins Stern & Lewis, of Greenville, for Respondent.

JUSTICE HEARN: This is the second appeal involving a highway construction project and the payment bond for it required by the Subcontractors and Suppliers Payment Protection Act (SPPA). After examining *Sloan Construction Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 659 S.E.2d 158 (2008) (*Sloan I*), we find a governmental entity does not have a continuing obligation to maintain a payment bond. However, we hold that *Sloan I* is the law of the case and affirm the circuit court's order that SCDOT was liable to Sloan Construction. We further affirm the circuit court's finding SCDOT did not meet its burden in proving Sloan Construction failed to mitigate its damages.

FACTUAL/PROCEDURAL BACKGROUND

Southco Grassing, Inc. (Southco) and SCDOT were parties to a contract in January 2000 for the performance of highway maintenance in Greenville, South Carolina. In connection with the contract and the SPPA, Southco supplied to SCDOT a performance bond and a payment bond with Southco as principal and Amwest Insurance Company (Amwest) as surety in the penal sum of 100% of the face value of the contract. On November 27, 2000, Sloan Construction Company entered into a subcontract with Southco, and it is undisputed that Sloan Construction properly performed all of its work. During the course of performance on the project, Amwest was adjudged insolvent in Nebraska and ordered to be liquidated; all outstanding bonds, including the bond with Southco, were cancelled. A Nebraska court

approved a distribution amount of forty percent of each claim to be relinquished to claimants who previously held bonds.[1]

On July 28, 2001, SCDOT wrote Southco, advising it of the need to obtain a replacement surety company for the payment bond. Southco did not respond or replace the bond. Sloan Construction submitted to Southco its final billing on October 31, 2001; however, Southco never paid any amount of money to Sloan Construction. A few months later, on January 15, 2002, Sloan Construction notified SCDOT of its demand for payment from SCDOT by reason of Southco's failure to pay. Shortly thereafter, on February 6, 2002, Sloan Construction's lawyer advised SCDOT that SCDOT was liable for its failure to require Southco to obtain a bond in substitution for the cancelled Amwest payment bond. The following day, SCDOT responded that "[a]ll payments under the contract with Southco have not been made. It is likely some funds may remain and may therefore be available to at least partially satisfy your client's claims." Wanda Surrett, Southco's principal, represented in writing to SCDOT on March 6, 2003, that all payments had been made in full for work performed in connection with the project. Later that same month, SCDOT completed its checklist confirming Southco had completed all contract work and dispersed to Southco its final retainage. However, Southco never paid Sloan Construction for its work.

Thereafter, Sloan Construction commenced this action against Southco, Surrett, SCDOT, and Greer State Bank, but it made no claim against Amwest. Sloan Construction alleged negligence against SCDOT pursuant to the South Carolina Tort Claims Act and breach of contract as a third party beneficiary of Southco and SCDOT's contract, both relating to SCDOT's obligation under the SPPA to ensure a contractor is properly bonded. SCDOT moved to dismiss Sloan Construction's complaint against it under Rule 12(b)(6), SCRCP, and the circuit court granted the motion on the ground that there was no private right of action to sue for violations of the

[1] While Amwest was adjudged insolvent in 2001, the distributed amount was not approved until 2009. The trustee in Nebraska apparently represented that distributions of no less than a total of fifty percent of each bond claim would be made before Amwest's estate was exhausted.

SPPA. The court of appeals affirmed this dismissal, but we reversed that decision in *Sloan I* and remanded the matter for a determination of SCDOT's liability to Sloan Construction consistent with the opinion. 377 S.C. at 121, 659 S.E.2d at 166. On remand, the circuit court found SCDOT liable in the amount of $26,393.37. The court also held SCDOT did not meet its burden of proof in showing Sloan Construction failed to mitigate its damages when it did not file a claim against Amwest. This appeal followed.

ISSUES PRESENTED

SCDOT raises two issues on appeal:

I. Did the circuit court err in ruling SCDOT had a duty to maintain a payment bond under the SPPA?

II. Did the circuit court err in ruling SCDOT failed to meet its burden of proof regarding mitigation?

LAW/ANALYSIS

I. DUTY TO MAINTAIN BOND

In *Sloan I*, we granted certiorari on the following issue: "Did the court of appeals err in holding that statutory bond requirements applicable to public projects do not create an enforceable duty giving rise to a private right of action by a subcontractor against a government entity?" 377 S.C. at 112, 659 S.E.2d at 161. In answering that question, we held that "the duty created under the SPPA gives rise to a private right of action against a government entity for failure to ensure that a contractor is properly bonded." *Id.* at 118, 659 S.E.2d at 164. We instructed that the SPPA is separate from the "little Miller Acts" enacted in various states which address the problem of subcontractors not being able to use liens on public property to secure payment. *Id.* at 114, 659 S.E.2d at 161-62. As we noted, the SPPA was intended to give stronger payment protection to subcontractors on government projects than the "little Miller Acts." *Id.* at 115, 659 S.E.2d at

162. As to the third-party beneficiary claim, we first determined that public policies contained in the SPPA plus its applicability to public procurement incorporated the bond requirements into construction contracts. *Id.* at 120, 659 S.E.2d at 165. We then found that because subcontractors are the only ones with a financial stake in enforcing bond requirements, they are direct third-party beneficiaries to these contracts and could bring suit against governmental entities for their failure to ensure a payment bond is properly in place. *Id.*

We stated in *Sloan I* that "a government agency's failure to secure *and maintain* statutory bonding as required by the SPPA" gives rise to an action against the agency. *Id.* at 120, 659 S.E.2d at 165 (emphasis added). Sloan Construction thus argues SCDOT's claim that it had no duty to continuously monitor the bond was already determined in *Sloan I* and therefore is the law of the case. We agree.

Under the law of the case doctrine, "a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*, 381 S.C. 455, 458-59, 674 S.E.2d 151, 153 (2009) (citing *Bakala v. Bakala*, 352 S.C. 612, 632, 576 S.E.2d 156, 166 (2003)). "The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case." *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957). While *Sloan I* did not specifically raise the issue of maintenance of the payment bond, this Court's holding resolved that issue in this matter. However, although *Sloan I* requires us to affirm the circuit court's ruling that SCDOT had a duty to maintain the bond in this case, we take this opportunity to address whether a governmental entity otherwise has a duty to continuously monitor and maintain a bond on a construction project.

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used . . . ."). If a statute's

language is plain, unambiguous, and conveys a clear meaning, "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 582 (2000). "In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect." *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998).

As recognized in *Sloan I*, the SPPA creates a duty on the part of SCDOT to secure an appropriate bond for its projects, the breach of which gives rise to a cause of action on behalf of the contractor or subcontractor. In pertinent part, the SPPA reads as follows:

> (1) When a governmental body is a party to a contract to improve real property, and the contract is for a sum in excess of fifty thousand dollars, the owner of the property shall require the contractor to provide a labor and material payment bond in the full amount of the contract . . . .
> . . . .
> (3) For the purposes of any contract covered by the provisions of this section, it is the **duty of the entity contracting for the improvement to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form.**

S.C. Code Ann. § 29-6-250 (emphasis added).

Some jurisdictions have determined whether a bonding statute places an affirmative duty on government entities to require contractors to provide a payment bond for public works projects. *Compare Med. Clinic Bd. of the City of Birmingham-Crestwood v. E.E. Smelley*, 408 So.2d 1203, 1204 (Ala. 1981) (finding liability against a municipality for failing to require a bond based on statute), *with O & G Indus., Inc. v. Town of New Milford*, 640 A.2d 110, 111 (Conn. 1994) (finding no liability for failing to require a bond). In addition, courts have also considered whether such statutes place a duty on government entities to ensure that a contractor's bond is valid. *See, e.g.*, *DeKalb County v.*

J & A Pipeline Co., 437 S.E.2d 327, 330 (Ga. 1993) (holding there is a duty on the government entity to take the bond and the surety's affidavit in "specified manner and form"). However, the jurisdictions that have considered the precise issue here—whether a bonding statute places on a government entity a *continuing* duty to ensure a valid bond is maintained by a contractor throughout the course of the construction process—have answered that question in the negative.

In one of the first cases to address this issue, the Michigan Court of Appeals determined that Michigan's bonding statute imposed no such duty on a governmental body. *Barnes & Sweeney Enters., Inc. v. City of Hazel Park*, 425 N.W.2d 572, 573 (Mich. 1988). In *Barnes & Sweeney*, the City of Hazel Park contracted with Conco Midwest to repair the city's streets. *Id*. Barnes & Sweeney was subcontracted to supply materials for the project. *Id.* After Conco defaulted on payments, Barnes & Sweeney discovered the payment bond obtained for the project had expired prior to the beginning of its work. *Id.* In its suit against the city and other parties, the subcontractor claimed the city had breached its statutory duty to ensure that Conco's payment bond was still valid throughout the time the subcontractor supplied materials for the project. *Id.* The trial court granted summary judgment to Hazel Park and the other defendants, and the court of appeals affirmed the finding that the city owed no duty to inform the subcontractor of the bond's expiration or to ensure that the bond was renewed. *Id.*

The Arizona Supreme Court addressed a similar issue in *Flori Corp. v. Yellow Rose Development & Construction, Inc.*, 911 P.2d 546 (Ariz. 1995). In *Flori*, Yellow Rose and the City of Tucson contracted for certain improvements, and Yellow Rose posted payment and performance bonds obtained from Pacific States Casualty. *See* 911 P.2d at 547. One of Yellow Rose's subcontractors notified Tucson that it had not been paid, and shortly thereafter, Tucson learned Pacific States was in a court-ordered conservatorship in California. *Id.* Tucson eventually terminated its contract with Yellow Rose, and various subcontractors of Yellow Rose who did not receive payment brought suit against Tucson. *Id.* at 547-48. The subcontractors argued that Tucson owed a duty to subcontractors to ensure

that a payment bond was always in effect from a financially secure surety. *Id.* The court in *Flori* rejected that claim, noting that it "joined most other courts" in so holding. *Id.*

We believe the reasoning behind these courts' rejection of a continuous duty on a government entity to ensure a viable bond is in place is sound and persuasive.

> [I]t would be a herculean task for those governmental units which are engaged in a number of public works projects at any given time to continually check to ensure that a payment bond is still in force for each project and to determine the identity of the various subcontractors and suppliers and to advise them of the status of the payment bond.

Barnes & Sweeney, 425 N.W.2d at 575. While an unhappy situation for all parties involved in these situations, "the legislature [ ] did not provide that a public entity would guarantee the debts of the general contractor nor the financial stability of bonding companies." *Flori Corp.*, 911 P.2d at 548.

Like the statutes examined in *Barnes & Sweeney* and *Flori*, section 29-6-250, by its terms, imposes an obligation upon the entity only to ensure the appropriate bond is issued and in proper form. Holding that a government entity has a continuing duty to maintain a payment bond under the SPPA would effectively render government entities guarantors of the general contractor's payment bonds. If the government entity has a continuing duty to maintain a payment bond under the SPPA, the reason for requiring the bond in the first place is substantially eroded. The plain language of the statute does not require the government entity to ensure the maintenance of the bond throughout the course of the project, and we discern no reason why the General Assembly would place such an onerous requirement on government entities. As a result, we hold that governmental entities do not have a duty to continuously maintain a bond in these situations.

II. MITIGATION

SCDOT additionally argues the circuit court erred in rejecting its argument that Sloan Construction failed to mitigate its damages, thereby entitling SCDOT to offset the amounts Sloan Construction could have recovered from the Amwest liquidator had it filed a claim. The defendant has the burden of establishing the plaintiff's lack of due diligence in mitigating damages. *Adams v. Orr*, 260 S.C. 92, 98, 194 S.E.2d 232, 235 (1973). After a thorough review of the record, we find there is evidence to support the circuit court's finding that SCDOT failed to meet its burden to establish a lack of due diligence in this case. Therefore, we affirm.

CONCLUSION

Therefore, we affirm the circuit court's ruling that SCDOT is liable to Sloan Construction for its failure to maintain a valid bond and that SCDOT did not meet its burden in proving Sloan Construction failed to mitigate its damages. However, pursuant to the clear language of the statute, governmental entities otherwise have no duty to continuously maintain a bond throughout the life of a construction project.

AFFIRMED.

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

CHIEF JUSTICE TOAL: I concur in the result reached by the majority that SCDOT is liable to Sloan Construction under our holding in *Sloan I*, and that SCDOT did not meet its burden in proving Sloan Construction failed to mitigate its damages. However, I strongly disagree with the majority's suggestion that *Sloan I* is no longer binding precedent.

The Court already squarely addressed the issue of the SCDOT's continuing duty to secure and maintain a bond under the SPPA in *Sloan I*, despite the majority's contention to the contrary. The majority relies on the statement in *Sloan I* that a governmental agency's liability under the SPPA can be premised on that agency's "failure to *secure and maintain* statutory bonding as required by the SPPA" as the determining factor of SCDOT's liability in the present action. *Sloan I*, 377 S.C. at 120, 659 S.E.2d at 165 (emphasis added). However, after stating that *Sloan I* is binding precedent under the law of the case doctrine, the majority opinion then effectively overrules *Sloan I* by holding it has no future application. In my view, we held in *Sloan I* that SCDOT had a continuing duty to secure and maintain a bond, and for this reason, we should now affirm accordingly.

Furthermore, it is my opinion that we correctly interpreted the SPPA to require a continuing duty to maintain a bond in *Sloan I*. *See* S.C. Code Ann. § 29-6-20(3) (stating that "it is the duty of the entity contracting for the improvement to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form."). It is my firm belief that the legislature did not intend to protect a governmental entity at the expense of an innocent (and extremely vulnerable) subcontractor in enacting the bond requirement of the SPPA.[2]

Therefore, I would affirm the order of the circuit court because SCDOT had a continuing duty to maintain the construction bond under our holding in *Sloan I*. For this reason, I concur in result only.

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[2] I note that the actions of SCDOT in this case were particularly egregious, in that the agency possessed knowledge of Amwest's financial dissolution and was aware of Southwest's failure to secure a replacement bond, yet when charged with this knowledge, SCDOT paid Southwest anyway.

JUSTICE PLEICONES: I respectfully dissent because, as I stated the first time this case came before the Court, it is my opinion that the SPPA does not apply here. Moreover, the majority acknowledges that the issue of maintaining the payment bond was not before the Court in the first appeal, but concludes that the inclusion of that term in a holding renders it the law of the case. I disagree. E.g., Berberich v. Jack, 392 S.C. 278, 709 S.E.2d 607 (2011) (appellate court comments on unpreserved issue must be viewed as *dicta*). I simply point out that the law of the case doctrine does not apply to mere *dicta*. E.g., White's Mill Colony Inc. v. Williams, 363 S.C. 117, 609 S.E.2d 811 (Ct. App. 2005).

I would reverse.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Christopher Sam Commander, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 27062
Heard June 21, 2011 – Filed October 31, 2011

AFFIRMED AS MODIFIED

Chief Appellate Defender Robert M. Dudek and Appellate Defender LaNelle C. DuRant, both of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney

General Melody J. Brown, and Solicitor Daniel E. Johnson, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Petitioner appeals *State v. Commander*, 384 S.C. 66, 681 S.E.2d 31 (Ct. App. 2009), claiming the court of appeals erred by affirming the trial court's admission of expert testimony concerning the victim's manner of death and refusal to instruct the jury on the defense of accident. We affirm the court of appeals' decision as modified.

FACTS/ PROCEDURAL BACKGROUND

On January 7, 2005, family members discovered Gervonya Goodwin's (Victim) mummified[1] and partially decomposed body covered by a blanket and lying on a sofa inside her home.[2] Victim's family members and friends had not seen or spoken to her since November 29, 2004. A police investigation revealed (and numerous trial witnesses attested) that Petitioner stole Victim's purse, mobile telephone, and vehicle from her home, sent text messages from Victim's phone to her family members in which Petitioner pretended to be Victim alive and on vacation, withdrew money from her bank account, used her credit cards, made calls on Victim's behalf from her mobile telephone, and used that telephone number as a contact number for a telephone chat line.

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[1] As noted by the court of appeals, "mummification" occurs after the body dries out due to conditions of low level humidity such that the skin surfaces remain intact and internal organs are preserved anatomically. Dr. Clay Nichols, the State's expert in forensic pathology, testified that the Victim's body most likely became mummified after it lay undiscovered in her heated home for several weeks.

[2] Victim was pregnant at the time of her death, and the non-viable fetus was discovered expelled between her legs.

At the time of his arrest in New Orleans, Louisiana, Petitioner possessed Victim's vehicle. After police officers gained entry into his hotel room, Petitioner admitted killing Victim.[3] The arresting officers recovered items from Petitioner's hotel room that connected Petitioner to Victim, including her checkbook, driver's license, birth certificate, ultrasound image, OB-GYN appointment card, a medical slip bearing her name, car keys, and keys to another vehicle that police located in Victim's driveway. Trial testimony established that Victim and Petitioner worked together, lived together, and shared an intimate relationship, that Petitioner fathered Victim's unborn child, and that Victim tried to end the relationship shortly before she disappeared.

Petitioner's issues on appeal concern the testimony of two of the State's witnesses. Dr. Clay Nichols testified as the State's expert witness in forensic pathology.[4] Dr. Nichols responded to the crime scene in his capacity as chief medical examiner for Richland County on the day Victim's body was discovered in her home, and subsequently performed an autopsy on the body. Dr. Nichols testified the autopsy did not uncover any evidence of violence or trauma to Victim's body or any other evidence of injury. A later toxicology report was similarly indefinite. However, using the anecdotal history relayed by officers at the scene, together with the lack of normal indicators of physical violence, Dr. Nichols opined that the cause of death was asphyxiation, which would not leave physical marks, and that the manner of death was homicide due to the suspicious nature of Victim's death. The following colloquy occurred when the Solicitor questioned Dr. Nichols about his preliminary findings:

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[3] While holding a gun to his head, Petitioner stated to the arresting officers, "Get out of the room, I'm going to kill myself like I killed Vonnie," and, in the police car, "I just did what I had to do."

[4] Defense counsel stipulated to Dr. Nichols's qualification as an expert in forensic pathology and did not question his reliability.

Q. Did you come—after your examination and prior to getting the toxicology reports back, did you come to a preliminary conclusion as [to] the cause of death[5] in this case?

A. Yes, I did.

Q. And what was that, sir?

A. Given the fact that this woman died under suspicious circumstances, that the history I was given was that her—she was already in her house, no one had talked to her for a period of time, her car was missing, her purse was missing, there was some indication that somebody was sending text messages to family members indicating that the dead woman . . . was still alive, this indicated an extremely suspicious circumstance, and I felt that we were dealing with a homicide.

Defense counsel objected to Dr. Nichols's description of the death as a "homicide," asserting it constituted an opinion concerning a legal issue because "homicide" implies criminal culpability. Therefore, defense counsel argued, Dr. Nichols's testimony concerning the cause and manner of death was inadmissible under Rule 702, SCRE, because it invaded the province of the jury. This prompted the trial judge to question Dr. Nichols outside the presence of the jury about the meaning of "homicide" in his line of work. Dr. Nichols replied:

A. Yes, sir. Homicide is someone who died as a result of the actions of another individual.

Q. As opposed to?

[5] The parties used the terms "cause of death" and "manner of death" interchangeably.

A. An accidental cause where somebody unintentionally caused death to another individual.

Defense counsel again objected to Dr. Nichols's reference to intent in his definition of "homicide" and asked the court to provide a curative instruction to the jury. Instead of providing a curative instruction, however, the trial judge allowed the State to proceed with the line of questioning, instructing counsel to question Dr. Nichols further, so that he could explain his definition of "homicide" to the jurors.[6] This directive occasioned the following exchange in front of the jury:

Q. Doctor, what is your definition of homicide?

A. A person that has died as a result of another person's actions.

Q. And in your opinion in this case, was this or could this have been a natural death?

A. No, I don't believe so.

Q. Or an accidental death?

A. No, I don't believe so.

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[6] In overruling defense counsel's objection, the trial judge observed:

> . . . [H]e has not said in his opinion it was a murder, which gets to intent and malice and whether or not there was malice, but whether it was a homicide, in other words, a death caused by someone else as opposed to an accidental or a natural death. That's where I see the line being drawn. And at this point in time, I don't believe this witness has crossed that line. But that definition [of homicide]–that question needs to be asked [by counsel], or either the Court needs to explain it to the jury.

Q. Or a suicide?

A. No, I don't believe so.

Q. And that is your expert opinion?

A. Yes, it is.

Q. During the course of your examination, were there any signs of any kind of disease or anything else that could have caused her death?

A. No.

Q. And as to the cause of death, what was your opinion?

A. Once again, not stabbed, not shot, not beaten, not strangled with hands. And as a result of looking at the body of [Victim] and reviewing the circumstances of her death, I was looking for a cause of death that would leave no marks, no evidence of injury. And as such, I feel that [Victim] died as a result of asphyxiation.

Under cross-examination by defense counsel about the "suspicious circumstances" of the death, Dr. Nichols recounted autopsy procedures and the methodology he used in arriving at his opinion, and stated:

> I believe [Victim] died of unnatural causes. And as a result of elimination [of other manners of death], and like you mentioned, the interpolation of the facts of the case, that being her purse is gone, her car is gone, the house is locked up and somebody went through an awful lot of effort to cover up this death,[7] that I feel that [Victim] died as a result of homicide due to asphyxiation.

[7] Defense counsel did not object to this statement.

Finally, Dr. Nichols noted, "I'm not claiming intent. I'm claiming that [Victim] died as a result of somebody else's actions."

Petitioner's "jailhouse lawyer," John F. Presley, also testified at trial. He stated that Petitioner sought legal advice from him while both men were detained at the county jail. Presley testified Petitioner told him he admitted to arresting officers that he killed Victim and wondered whether his statements would impair his case. Presley testified that he and Petitioner had the following discussion a few days later:

> [Petitioner] said, "What do you think if I told my attorney to tell them that she . . . hit me in the head with a stick, we had an argument and she hit me in the head with a stick and I fell unconscious and fell on top of her, and when I regained consciousness she had died from being suffocated?"
>
> And [Presley] said, "Well, no one is going to believe that."
> . . .
> Well, either later that day or the next day, [Presley] spoke to [Petitioner] again. And [Presley] asked him the question, was [Victim] cheating on him, and he denied that she was cheating on him. And [Presley] asked him was he cheating on her, and he said he had friends like on the side, but it wasn't nothing serious.
>
> And [Presley] asked [Petitioner] then, [Presley] said, well, what really happened then, you know, what really went on.
>
> And [Petitioner] said that he and [Victim] had an argument, [Victim] hit him with a stick, and in other words he—she pissed him off and he fell on her and suffocated her.
>
> And [Presley] asked [Petitioner] were you unconscious, and [Petitioner] said, no, he wasn't unconscious, he suffocated her.
> . . .

> [Petitioner] said that he wrapped her body in sheets and placed her body on the sofa somewhere in the house. [Petitioner] placed her body on the sofa and left her there. And [Petitioner] said he took her credit cards and her car. And [Petitioner] went to various states.[8]

Presley subsequently informed police that Petitioner admitted killing Victim.

Petitioner asked the trial court to instruct the jury on the defenses of self-defense and accident based on Presley's testimony. The trial court declined Petitioner's request, finding the evidence did not substantiate the charge. Instead, the trial court instructed the jury on the law of murder, voluntary manslaughter, and involuntary manslaughter.

A jury found Petitioner guilty of murder pursuant to S.C. Code Ann. § 16-3-10 (2003).

ISSUES

I. Whether the court of appeals erred in affirming the circuit court's admission of expert testimony concerning Victim's manner of death?

[8] Under cross-examination by defense counsel, Presley testified:

> And he asked me a question, what did I think, he wanted my opinion. If he had this lawyer . . . what did I think if he told his lawyer to tell the State that his girlfriend . . . hit him in the head with a stick and he fell unconscious and fell on her and when he was—when he regained consciousness that she had died from suffocation because he was on her, he fell on top of her. And I told him, no one is going to believe this.

II. Whether the court of appeals erred in affirming the circuit court's refusal to charge the defense of accident?

STANDARD OF REVIEW

"The general rule in this State is that the conduct of a criminal trial is left largely to the sound discretion of the presiding judge and this Court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way." *State v. Bridges*, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982) (citations omitted). Therefore, in criminal cases, this Court will only review errors of law. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citations omitted).

DISCUSSION

I. Admissibility of Expert Testimony

The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a "manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted).

The court of appeals affirmed the decision of the trial court allowing Dr. Nichols to testify that Victim died as a result of a "homicide" because any error on the part of the trial judge was harmless in view of the overwhelming evidence of Petitioner's guilt. On appeal, Petitioner argues that the court of appeals erred because Dr. Nichols's testimony was inadmissible under Rule 702, SCRE. We disagree.

At the outset, we note that the court of appeals correctly analyzed Petitioner's position under a harmless error analysis. We agree with the court of appeals that the circumstantial evidence implicating Petitioner was overwhelming. *See Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480,

623 S.E.2d 373, 375 (2005) (citations omitted) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence."); *State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) (listing factors of a harmless error analysis, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case.") (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)); *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) ("Error is harmless when it 'could not reasonably have affected the result of the trial.'") (quoting *State v. Key*, 256 S.C. 90, 180 S.E.2d 888 (1971)).

However, we take this opportunity to expound on the admissibility of Dr. Nichols's expert testimony under Rule 702, SCRE.

Rule 702, SCRE, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Generally, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE. However, expert testimony on issues of law is usually inadmissible. *Dawkins v. Fields*, 354 S.C. 58, 66–67, 580 S.E.2d 433, 437 (2003) (citations omitted) (finding the trial court properly declined to consider an expert affidavit that "offered some helpful, factual information" but mainly offered legal arguments concerning the reasons the trial court should deny summary judgment); *Green v. State*, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002) (affirming the exclusion of expert

testimony where "[t]he testimony was not designed to assist the PCR court to understand certain facts, but, rather, was legal argument why the PCR court should rule, as a matter of law, trial counsel's actions fell below an acceptable legal standard of competence."). Likewise, an expert's testimony may not exceed the scope of his expertise. *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001) (finding police officer, who was qualified as an expert in crime scene processing and fingerprint identification, exceeded the scope of his expertise when he was permitted to testify to conclusions drawn from the location and position of the victim's body at the time of the shooting).

State law requires medical examiners to make an initial inquiry, forming the basis of a medical conclusion, as to the cause and manner of death in certain instances. *See* S.C. Code Ann. § 17-5-530(A)(5) (Supp. 2010) ("If a person dies . . . in any suspicious or unusual manner . . . a person having knowledge of the death immediately shall notify the county coroner's or medical examiner's office."); *id.* § 17-5-530(B) (requiring a coroner or medical examiner once notified to "make an immediate inquiry into the cause and manner of death"). The statute defines "cause of death" as "the agent that has directly or indirectly resulted in a death." *Id.* § 17-5-5(2). On the other hand, "manner of death" is "the means or fatal agency that caused a death." *Id.* § 17-5-5(9). The statute further categorizes the "manner of death" as natural, accidental, *homicidal*, suicidal, and undetermined. *Id.* (emphasis added). To aid in his or her determination of cause and manner of death, a medical examiner will routinely conduct an autopsy, which is defined by the statute as "the dissection of a dead body and the removal of bone, tissue, organs or foreign objects for the purpose of determining the cause and manner of death." *Id.* § 17-5-210(5).

In this context, then, the testimony that an individual died from "homicide" means simply that he or she died "by the act, procurement, or omission of another" without regard to the criminality of the killing or culpability of the killer. 23 S.C. Jur. Homicide § 2 (2011) (quoting Black's Law Dictionary 661 (5th ed. 1979)).[9]

[9] Our cases and statutes also stand for the proposition that "homicide" does not necessarily connote criminality, even though our criminal justice system

It is well-established in South Carolina that a medical professional, qualified as an expert, may render an opinion concerning the scientific bases of a victim's injuries or death in a criminal trial. Even before the codification of Rule 702, SCRE, the Court explained:

> That in questions of science, skill or trade, or others of like kind, persons of skill, sometimes called experts, may not only testify to facts, but are permitted to give their opinions in evidence. Thus, the opinions of medical men are constantly admitted as to cause of death or disease or the consequences of wounds, and as to the sane or insane state of a person's mind, as collected from a number of circumstances, and as to other objects of professional skill; and such opinions are admissible in evidence, though the witness founds them, not on his own personal observation, but on the case itself as proved by other witnesses.

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categorizes homicide in varying degrees. For example, murder is merely one form of homicide. *See* S.C. Code Ann. § 16-3-10 (defining "murder" as "the killing of any person *with malice aforethought either express or implied*.") (emphasis added); *see also State v. Elliott*, 346 S.C. 603, 552 S.E.2d 727 (2001) (Pleicones, J., dissenting) ("The recognition of these lesser grades of homicide, and their accompanying lesser punishments, developed as the common law recognized that some killings were more heinous than others: 'The distinction between murder and manslaughter . . . is not merely an arbitrary rule, but is founded on a thorough knowledge of the human heart, and framed in compassion to the passions and frailties which belong to and are inseparable from our natures.'" (quoting *State v. Ferguson*, 20 S.C. Law (2 Hill) 619, 621–22 (1835)), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *State v. Lee*, 79 S.C. 223, 60 S.E. 524, 524 (1908) (affirming the following jury instruction: "'Homicide,' Mr. Foreman and gentlemen, is the killing of any human being. Homicide may be felonious, may be justifiable, may be excusable. Murder is felonious homicide, so is manslaughter. Both of them are felonies.").

State v. Griggs, 184 S.C. 304, 312–13, 192 S.E. 360, 364 (1937) (quoting *State v. Clark*, 15 S.C. 403, 408 (1881) *and* Greenleaf, vol. 1 § 440). Therefore, a qualified expert[10] is permitted to testify concerning the cause and manner of death under Rule 702, SCRE. *See* Rule 702, SCRE; *see also Baraka v. Commonwealth*, 194 S.W.3d 313, 315 (Ky. 2006) (citations omitted) ("[I]t is axiomatic that a determination of the cause and manner which led to a person's death is generally scientific in origin and outside the common knowledge of layperson jurors.").

Because autopsies assist the medical examiner at arriving at the cause and manner of death, it follows that they fall within the purview of the expert's specialized knowledge, and therefore, expert testimony concerning their contents is often deemed helpful to the trier of fact. *See* Rule 702, SCRE. Petitioner argues that an expert should not be permitted to testify concerning autopsy findings which are based on information comprising the circumstantial evidence in a case. In our estimation, however, anecdotal history is routinely relied on by medical professionals in fulfilling their duties under section 17-5-530 of the South Carolina Code. The role played by this information in arriving at a finding as to the cause and manner of death was aptly described by Dr. Nichols under cross-examination when he testified:

> [T]here is some confusion as to what [role] the history actually plays in the part of the autopsy. Many people feel the autopsy is nothing more than the dissection of a person and looking at the tissues underneath the microscope. The history is vital and a mandatory part of all autopsies. It's such a mandatory part that I must document in every autopsy I do where the history came

[10] In *Griggs*, the Court found the coroner unqualified to testify to the cause of death because he was not a physician. *Id.* at 313, 192 S.E. at 364 ("We do not find where any witness, not a physician, there being some doubt which one of two injuries caused a death, has been permitted to give an opinion as to the cause of death. This is as it should be. The juror of average intelligence would be just as competent to reach a conclusion."). Because the parties stipulated to Dr. Nichols's qualification as an expert in this case, he was qualified to render an opinion as to the cause and manner of death.

> from and who gave it to me. And without a history, the autopsy, in and of itself, is invalid. The two are not separable, they are part of one another. The autopsy includes the history as well as all the other anatomic and laboratory findings.

Because the anecdotal history is an essential component of any autopsy, we find testimony concerning findings based on this information falls within the umbrella of the expert's specialized knowledge. *See* Rule 703, SCRE; *Peterson v. National R.R. Passenger Corp.*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005) (citations omitted) ("An expert witness may state an opinion based on facts not within his first-hand knowledge, and may base his opinion on information, whether or not admissible, made available to him before the hearing if the information is of the type reasonably relied upon in the field."); *Hundley ex rel. Hundley v. Rite Aid of South Carolina, Inc.*, 339 S.C. 285, 295, 529 S.E.2d 45, 50–51 (Ct. App. 2000) (citations omitted) (stating "an expert may testify as to matters of hearsay for the purpose of showing what information he relied on in giving his opinion of value"); *see also In Re Manigo*, 389 S.C. 96, 106, 697 S.E.2d 629, 634 (Ct. App. 2010). Dr. Nichols testified extensively concerning his methodology, stating he arrived at the cause and manner of death through a process of elimination, in which the lack of physical injury figured prominently into his opinion that Victim died from asphyxiation as a result of homicide. The information gleaned from the police investigation formed merely one aspect of his examination.[11]

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[11] We note that Dr. Nichols did not base his opinion *exclusively* on the circumstantial information provided by the police officers at the scene. *See State v. Vining*, 645 A.2d 20, 20–21 (Me. 1994) (finding an expert's opinion "amounted to an assessment of the credibility and investigatory acumen of the police," and should have been a question for the jury, where the physical examination was inconclusive and the ultimate issue in the case was whether the victim was pushed down a staircase by the defendant or accidentally fell, and the medical examiner testified in her "expert" opinion that the victim's death was a homicide based on her "conversations with police investigators"); *see also Rollins v. State*, 897 A.2d 821, 848 (Md. 2006) (distinguishing *Vining* because the prosecution's expert in forensic pathology used a process of elimination to exclude various illnesses suffered by the elderly victim in

However, we recognize that, in certain circumstances, expert medical testimony of this type has the potential to invade the province of the jury. Petitioner urges that "[t]he line is crossed where the physician gives an opinion outside of his medical expertise where he is in reality only enhancing the circumstantial evidence available to the jury with the prestige of a forensic pathologist." Pet'r's Br. at 21. While we agree with the spirit of Petitioner's contention, no such line was crossed in this case.

Of the many courts in other jurisdictions that have considered where to draw the line in these cases, we tend to agree with those courts that have found that expert testimony addressing the state of mind or guilt of the accused is inadmissible. *See, e.g.*, *Rollins*, 897 A.2d at 852–53 (stating "[the expert] did not opine on [the defendant's] guilt, she opined, in her expert opinion, that [the victim] died of smothering and that the time of death of the victim coincided with the time of the robbery," and therefore, the jury could weigh that testimony against the other evidence presented in that case); *State v. Bradford*, 618 N.W.2d 782, 793 (Minn. 2000) (finding medical examiner's opinion that the manner of death was a "homicide," rather than a suicide, assisted the jury in determining who shot the victim); *State v. Scott*, 206 W.Va. 158, 164, 522 S.E.2d 626, 632 (W.Va. 1999) (noting that "homicide" is a "neutral" term, trial court did not err in admitting medical examiner's testimony that manner of death was homicidal); *State v. Chambers*, 507 N.W.2d 237, 239 (Minn. 1993) (finding expert in pathology could not testify to a criminal defendant's *mens rea*, and observing, "A pathologist may appropriately testify to things such as the number and extent of the wounds, the amount of bleeding, whether the wounds were caused by a knife or a blunt instrument, whether a gunshot wound is a contact wound, whether the wounds could or could not have been the result of accident, the cause of death, and so forth, but the pathologist should not be allowed to make an 'expert inference' of intent to kill from these matters. That is for the jury to do.") (quoting *State v. Provost*, 490 N.W.2d 93, 101–02 (Minn. 1992)); *State v. Richardson*, 158 Vt. 635, 636, 603 A.2d 378, 379 (Vt. 1992) (finding

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conjunction with police reports to ultimately arrive at the cause and manner of death).

medical examiner's testimony that victim died as a result of "homicide" was properly admitted because the expert did not testify concerning defendant's guilt, and stating "[i]f the jury believed that a crime had been committed, it still had to decide the ultimate question of whether defendant was at all involved in the homicide[]"); *Fridovich v. State*, 489 So.2d 143, 145 (Fla. Dist. Ct. App. 1986) (finding trial court erred in excluding medical examiner's testimony that death was accidental in a fatal shooting because "[s]uch opinions may support a conclusion that a defendant is not guilty, but the opinions themselves are directed to expert inferences to be drawn from a set of facts, not personal opinions of guilt or innocence[]"); *State v. Howard*, 195 Mont. 400, 637 P.2d 15 (Mont. 1981) (finding, despite doctor's qualification to testify about the nature and extent of the victim's injuries, doctor could not testify that, based on the nature of the injuries, the person who inflicted them did so with the intent to murder because the jury was as qualified as the doctor to draw an inference of intent from the circumstantial evidence).

In the present case, the circuit court judge relied on *State v. Young*, 662 A.2d 904 (Me. 1995), to aid him in determining whether to admit Dr. Nichols's opinion testimony that Victim's death was a homicide, and we think such reliance was appropriate. *Young* is in line with those cases that have allowed an expert to opine that the victim's death was a homicide so long as the testimony does not speak to the defendant's "state of mind at the time of the killing," determining that such testimony "would cross the line between proper expert testimony and testimony in the form of a legal conclusion." *Id.* at 907.

Consequently, we adopt a rule whereby an expert in forensic pathology's opinion testimony as to cause and manner of death is admissible under Rule 702, SCRE, so long as the expert does not opine on the criminal defendant's state of mind or guilt or testify on matters of law in such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendant's guilt or innocence.

We further recognize that, practically speaking, there is a real possibility that a lay juryperson could interpolate into our technical definition of "homicide" his or her preconceived notions of criminal culpability. Depending on the circumstances, a jury instruction on the meaning of "homicide" could prove necessary to prevent any resulting prejudice to the criminal defendant. In the present case, not only did counsel for Petitioner inform the trial court that he did not seek an instruction on the meaning of "homicide," but the trial judge went to great lengths to ensure that the jury was aware of the context of Dr. Nichols's testimony. In particular, the trial judge directed counsel to question Dr. Nichols in front of the jury on the meaning of "homicide." In addition, the trial judge gave a standard instruction to the jury concerning the relative weight to accord witness testimony, including expert witness testimony, along with the other evidence in the case.[12] Therefore, we find that any potential prejudice was cured, and the trial judge did not abuse his discretion in admitting the testimony.

II. Jury Instruction

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007)). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.* at 479, 697 S.E.2d at 583 (citing *State v. Burkhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002)).

Petitioner contends the court of appeals erred by affirming the trial court's refusal to instruct the jury on the defense of accident. We disagree.

[12] As part of the instruction, the trial judge directed the jurors not to "place any [expert] opinions above the idea of [their] own opinions on the subject" and to form their own conclusions after considering the expert opinions in conjunction with all the other evidence in the case.

"A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *Mattison*, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted). "The law to be charged must be determined from the evidence presented at trial." *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000) (citations omitted); *Mattison*, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted) (stating that appellate courts should "consider the court's jury charge as a whole in light of the evidence and issues presented at trial"). When reviewing the trial court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant. *Id.* at 101, 525 S.E.2d at 512–13 (citations omitted).

"A homicide will be excusable on the ground of accident when (1) the killing was unintentional, (2) the defendant was acting lawfully, and (3) due care was exercised in the handling of the weapon." *State v. Chatham*, 336 S.C. 149, 153, 519 S.E.2d 100, 102 (1999) (citing *State v. Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1994)). "A homicide is not excusable on the ground of accident unless it appears that the defendant was acting lawfully." *Id.* (citations omitted) (affirming trial court's refusal to instruct the jury on the defense of accident where the evidence established that the defendant engaged in assault and battery and the defendant presented no evidence that he was acting in self-defense).

The court of appeals held Pressley's testimony concerning his "strategy session" with Petitioner did not represent evidence of accident because Petitioner "merely sought advice on what to tell his attorney." *Commander*, 384 S.C. at 76, 681 S.E.2d at 36. Therefore, the court of appeals held the trial court acted within its discretion in refusing to charge the jury on accident.

Petitioner contests this characterization of the evidence and submits he deserves a new trial because *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001), supports his contention that discrepancies in the evidence cannot divest a criminal defendant of the advantage of using such evidence to support a jury instruction on a lesser-included offense.

In our view, there was no evidence to support an accident charge. Considering Pressley's testimony in the light most favorable to Petitioner, Petitioner's conversations with Pressley intimate that he may have fallen on top of Victim by accident, but not that he suffocated her by accident. Petitioner's only statement that he accidentally killed Victim was posited as part of a hypothetical question to Presley in an effort to garner legal advice and therefore, does not affirmatively indicate he was unconscious at the time of Victim's death. In contrast, in their later conversation, Pressley testified Petitioner stated he *was* conscious when he suffocated Victim. Therefore, we agree with the court of appeals that Petitioner's "strategy session" cannot form the basis of an accident charge under the facts. Accordingly, we affirm the court of appeals as to this issue.

CONCLUSION

Based on the foregoing, we affirm the court of appeals' decision as modified.

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

JUSTICE PLEICONES: I agree that we should affirm the Court of Appeals' decision which upheld petitioner's murder conviction, and agree that there was no error in the refusal to charge accident here. I also agree with the Court of Appeals that any error in Dr. Nichols's testimony that "suspicious circumstances" surrounding the victim's death were evidence of a homicide was harmless beyond a reasonable doubt in light of the overwhelming evidence of petitioner's guilt. State v. Commander, 384 S.C. 66, 681 S.E.2d 31 (Ct. App. 2009). I do not join that part of the majority's opinion that suggests that a forensic pathologist's testimony regarding the victim's anecdotal history is always admissible under Rule 702, SCRE, as part of the pathologist's opinion as to manner and cause of death. I also do not agree that the term "homicide" is necessarily a neutral term which does not imply death resulting from the criminal act of another. See Article 1, "Homicide," of Chapter 3, "Offenses Against the Person," found in South Carolina Code Ann. Title 16, "CRIMES AND OFFENSES."

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David Ray Tant, Appellant,

v.

South Carolina Department of Corrections, Respondent.

Appeal From Administrative Law Court
Judge Ralph K. Anderson, III

Opinion No. 4897
Heard June 7, 2011 – Filed October 26, 2011

REVERSED

Desa Ballard and Harvey M. Watson, III, both of West Columbia; and Douglas Jennings, Jr., of Bennettsville, for Appellant.

Christopher D. Florian, of Columbia, for Respondent.

FEW, C.J.: David Ray Tant appeals the decision of the South Carolina Department of Corrections to change its interpretation of his sentence from fifteen years to thirty years. SCDC claims it merely corrected the sentence to reflect the sentencing judge's intent. The Administrative Law Court affirmed SCDC's interpretation. We reverse.

Tant pled guilty to assault and battery of a high and aggravated nature (ABHAN), possession of a dangerous animal, and forty-one counts of owning an animal for the purpose of fighting or baiting. On November 22, 2004, the trial judge sentenced Tant. The sentencing sheets reflect a fifteen-year sentence as follows:

> 5829 ABHAN: 10 years
> 3473 Animal Fighting: 5 years consecutive to 5829
> 3474 Animal Fighting: 5 years consecutive to 5829
> 3475 Animal Fighting: 5 years consecutive to 5829
> 3476 Animal Fighting: 5 years consecutive to 5829

SCDC correctly interpreted the sentencing sheets and entered the sentence of fifteen years in Tant's record.

In January 2006, an SCDC employee contacted a former prosecutor with the Attorney General's office who assisted in Tant's prosecution to inquire about the length of Tant's sentence. A staff notation stated the prosecutor returned the call on January 25, 2006 and said he "has crafted an order for [the sentencing judge] to sign indicating [inmate] to have 40 yr. sentence not 15 yr. – inmate can reduce by 10 yrs if fines are paid." On July 7, 2007, SCDC's general counsel sent an SCDC employee an e-mail stating:

> Did we ever get the Order from [the] Judge [] clarifying this inmate's sentence? I think there is something in your notes indicating that you spoke with [the prosecutor] who was going to get this Order from [the] Judge []. I need to know because I think the inmate's attorney is trying to say he should be parole eligible based upon a fifteen-year rather than a forty-year[1] sentence.

[1] For two of the animal fighting convictions, the judge sentenced Tant to five years consecutive to the ABHAN sentence but included a stipulation that they would be null and void if Tant paid restitution, which he did in June 2009.

On July 8, 2007, the sentencing judge sent a letter to SCDC which stated:

> I have been advised by the Probation Office in Charleston that there is some confusion about the sentences imposed on David Ray Tant on November 2, 2004, by me. It was my intent for Mr. Tant to receive a sentence of 10 years on the ABHAN charge and 5 years consecutive for each of the six charges of Animal Fighting for a total of 40 years. It was further my intent that upon payment of restitution, the sentence would be reduced by 10 years.

All of this was done without notice to Tant. Apparently based on this letter, SCDC reinterpreted Tant's sentence to be thirty years.

On appeal, the ALC ruled it was improper for SCDC to rely on a letter from the sentencing judge made outside of the record and after the criminal term of court expired. On remand from the ALC, SCDC considered the sentencing sheets and the sentencing hearing transcript, which SCDC did not have until this controversy arose.

The sentencing hearing transcript reflects that the judge announced a fifteen-year sentence. He stated Tant was sentenced to ten years for ABHAN and "a term of five years consecutive to" the ABHAN conviction for four of the animal fighting convictions.[2] However, counsel for the State asked the judge to repeat the sentence. The judge responded by saying the four animal fighting convictions with five-year terms "are consecutive to each other and consecutive to [the ABHAN sentence]. Is that clear?"

When SCDC reconsidered Tant's sentence on remand from the ALC, this time based on the sentencing hearing transcript, it again interpreted Tant's sentence as thirty years. Tant appealed to the ALC. The ALC correctly concluded the sentencing sheets reflected a fifteen-year sentence.

[2] The judge suspended the sentences for the remaining thirty-five animal fighting convictions and possession of a dangerous animal.

However, it then found an oral sentencing pronouncement prevails over written sentencing sheets. The ALC affirmed SCDC's decision to reinterpret Tant's sentence.

Under ordinary circumstances, SCDC must determine the sentence imposed by the trial court from the sentencing sheets. If there is some ambiguity in the sentencing sheets, SCDC may examine the transcript of record to determine the intent of the sentencing judge. See Major v. S.C. Dep't of Prob., Parole & Pardon Servs., 384 S.C. 457, 471, 682 S.E.2d 795, 802 (2009) (Pleicones, J., dissenting) ("[O]nly if there is an ambiguity in the sentences, must the Department or the court ascertain the intent of the judge . . . ."). In this case, there is no ambiguity. Therefore, SCDC was limited to interpreting the sentencing sheets.[3] We hold the proper interpretation of Tant's sentence is fifteen years.[4]

REVERSED.

PIEPER and LOCKEMY, JJ., concur.

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[3] There are some situations in which SCDC may look beyond unambiguous sentencing sheets. See, e.g., Boan v. State, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010) (finding in a post-conviction relief case where "the trial judge announced one sentence from the bench in the presence of the defendant, but later increased that sentence in his written order," that "due process require[d] the judge's oral pronouncement control over a conflicting written sentencing order" (emphasis added)).

[4] Tant raises numerous issues on appeal which all relate to why he believes SCDC misinterpreted his sentence. In light of our decision, it is unnecessary to address each of his arguments.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Paul David Purser, Respondent,

v.

Angela Renee Owens, Appellant.

Appeal From Lancaster County
Brian M. Gibbons, Family Court Judge

Opinion No. 4898
Heard April 5, 2011 – Filed October 26, 2011

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Michael J. Anzelmo, and John D. Shipman, both of Greenville, for Appellant.

James B. Tucker, Jr., of Rock Hill, for Respondent.

Charlotte Mooney, of Lancaster, Guardian ad Litem.

KONDUROS, J.: Angela Owens (Mother) appeals the family court's award of custody to Paul Purser (Father). We affirm in part, reverse in part, and remand.

FACTS

Mother and Father are the parents of an autistic child (Child) who is now eleven years old. Mother and Father's relationship has never been stable. They never married and never lived together on a regular basis.[1] They dated on and off for about two years and finally stopped seeing each other when Mother became pregnant with Child. Father raised the possibility of whether to have the Child or terminate the pregnancy. Mother elected to have Child, and he was born on October 1, 1999. Father had not been actively involved in the pregnancy, but attended the birth and, afterwards, moved to Lancaster, South Carolina, where Mother lived, "to try to make it work." A few months later, Father moved permanently to Charlotte, North Carolina. Father claims that Mother gave him a choice of being with her and seeing Child or not seeing Child at all. However, Father's mother was allowed to see Child, and he arranged to see Child through her occasionally. He voluntarily paid child support in the amount of $75 to $150 per week from the time of Child's birth.

In May 2004, Child was diagnosed with autism by Mae Baird, a regional consultant with the Department of Developmental Services autism division. Father was initially reluctant to accept Child's autism diagnosis. At the custody hearing, both Dr. Carmena Cruz, Child's pediatrician, and Baird testified denial is a normal reaction for some parents. Mother left her job as an internet manager at a car dealership in 2004, after the initial diagnosis, to devote her time to caring for Child. Dr. Cruz testified that caring for an autistic child can be overwhelming for parents, especially a single parent. Dr. Cruz explained that because change is difficult for an autistic child, a stable, consistent environment is the most important thing to provide. Similarly, Baird testified that "autistic individuals have a lot of problems with routine changes," and change "can produce a lot of problem behaviors because [they] don't understand perhaps what is happening around them or what is expected of them."

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[1] It appears the parties may have stayed together periodically, but Father always retained a separate residence.

After filing for custody in September 2005, Father remarried and attempted to become regularly involved in Child's life. Until then, Father's visitation with Child had been irregular. However, by the time of the hearing, Father attended Child's school meetings, visited his doctors, and enrolled him in a therapy program. He also generally had visitation with Child every other weekend.

In 2006, when Mother was thirty-five years old, she briefly dated a nineteen-year-old man (Boyfriend) with a prior marijuana conviction. Boyfriend spent the night in Mother's home, arriving after Child was asleep and leaving before he awoke.[2] According to Mother, Boyfriend was around Child "maybe two or three weekends." Mother became pregnant with Boyfriend's child and had an abortion. She testified she chose to abort the pregnancy because this child had a fifty-percent chance of being autistic, she felt a second child would take away her focus from Child, and Boyfriend was not someone she wanted involved in her and Child's lives anymore.

Mother still lives in Lancaster and has been Child's primary caretaker for his entire life. She is unmarried, and Child is her only child. She works from her home as a real estate marketer. While Child lived with Mother, he received speech therapy, occupational therapy, and Applied Behavior Analysis (ABA) therapy in school.[3] He received some additional therapy after school as well.

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[2] Boyfriend came to Mother's house drunk one night and broke her car window because she danced with another man. Boyfriend subsequently broke the car window of a man with whom he had seen Mother having dinner.

[3] According to the Department of Disabilities and Special Needs, ABA therapy is the process of "systematically applying interventions to improve socially significant behaviors . . . . Socially significant behaviors include reading, social skills, communication, and adaptive living skills. Adaptive skills include gross and fine motor skills, eating and food preparation, toileting, personal self-care, and home and community orientation." Pervasive Developmental Disorder Waiver/State Funded Program Manual for

Mother argued Father filed this custody case because she sought a child support order. She testified Father served her with custody papers within days of being contacted by the Department of Social Services about child support payments. Father denied this and said he filed because he did not "believe the medical avenues are being followed up diligently like they should be for Child. . . . [T]here's an element of danger in the environment that's around [him]."

On March 18, 2008, the family court awarded custody to Father. The family court found Mother was Child's primary caretaker and both parties presented as fit parents with appropriate households. However, the family court expressed concerns about Mother's combativeness with school officials, her lack of access to more therapy for Child, and her lack of judgment. The family court stated:

> Other things I'm concerned about is the pregnancy with a 19 year old and abortion. That was an irresponsible decision; two irresponsible decisions. First being involved with a 19 year old when you are 36 or 35. That's irresponsible. And then having an abortion. That's irresponsible. I am concerned about the environment.

The family court concluded Father was the parent best equipped "to bring about the most adjusted and mature . . . child." Visitation was structured so that Mother would have Child every other weekend as well as every other Tuesday after school and every Thursday after school. This appeal followed.

STANDARD OF REVIEW

We review the family court's decision de novo. Lewis v. Lewis, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011).

Case Managers and Early Intensive Behavioral Intervention Providers, available at http://ddsn.sc.gov/providers/medicaidwaiverservices/pdd/

LAW/ANALYSIS

I. Totality of Circumstances Versus Change of Circumstances

Mother contends the family court erred in utilizing a totality of the circumstances standard in this case instead of requiring Father to demonstrate a change in circumstances. She maintains the custody of an illegitimate child in the natural mother, as provided for in section 63-17-20(B) of the South Carolina Code (2010) (formerly section 20-7-953 (B)),[4] coupled with Father's failure to pursue custody of Child sooner, demonstrate an established custody agreement that should have been recognized by the family court. We disagree.

In Altman v. Griffith, 372 S.C. 388, 642 S.E.2d 619 (Ct. App. 2007), this court addressed Mother's first point. In Altman, the mother argued section 20-7-953(B), gave her an advantage over the father in the custody determination, which required him to demonstrate a change in circumstances to gain custody. Id. at 397, 642 S.E.2d at 624. The court stated:

> In giving a father the right to petition the family court for custody, the statute makes no mention of a change of circumstances burden. This plain reading of the statute is in accord with the general legal principle that the imposition of a change of circumstances

[4] The newer version of the statute is identical to the former statute. Both provide that "[u]nless the court orders otherwise, the custody of an illegitimate child is solely in the natural mother unless the mother has relinquished her rights to the child. If paternity has been acknowledged or adjudicated, the father may petition the court for rights of visitation or custody in a proceeding before the court apart from an action to establish paternity." § 63-17-20(B).

> burden applies when a parent seeks to alter a prior custody order.

Id. (emphasis added).

While the statute does place custody of a child of unmarried parents with the mother, the statute simply clarifies the legal standing of the parties in the absence of a court-determined custody order should the matter of custody be called into question. Custody in the natural mother under this statute does not give her a legal advantage in a custody determination as it is well-settled that a mother and father stand in parity with one another as the custody analysis begins and in light of the abolition of the tender years' doctrine. See Kisling v. Allison, 343 S.C. 674, 678, 541 S.E.2d 273, 275 (Ct. App. 2001) ("In South Carolina, in custody matters, the father and mother are in parity as to entitlement to the custody of a child."); see also S.C. Code Ann. § 63-15-10 (2010) ("The 'Tender Years Doctrine' in which there is a preference for awarding a mother custody of a child of tender years is abolished."). The statute establishes custody so the illegitimate child's societal needs can be met, such as enrolling in school, obtaining medical treatment, or being returned to the appropriate party should law enforcement or the child's school or daycare be required to elect between proper custodians.

We recognize the facts in this case are in some respects distinguishable from those in Altman. Father in this case did not seek custody of Child soon after the parties separated but waited until Child was almost six years old, and the parties never lived together. However, we do not believe those differences dictate a different reading or application of the statute than in Altman.

Mother also argues Father's inaction and reluctance to accept Child's autism diagnosis evidenced his acquiescence to Mother's having custody of Child. She contends Father's conduct demonstrates the existence of an agreement between the parties regarding custody so that a change of circumstances burden should be imposed. We disagree.

The dissent is persuaded Mother's and Father's conduct evidences an agreement between them regarding custody of Child and under Davenport v.

Davenport, 265 S.C. 524, 220 S.E.2d 228 (1975), a change in circumstances approach is therefore appropriate. However, in Davenport, Mother and Father had a written agreement regarding custody at the time of their separation. Id. at 526, 220 S.E.2d at 229-30. In this case, at no time did the parties have an explicit agreement, court-approved or otherwise. Without some definite agreement, the family court is left to attempt to ascertain the point in time when the actions of the parties gave rise to a de facto custody agreement. Only then could a court determine if the circumstances in existence at the time of the agreement had changed. This simply requires too much guesswork and speculation.[5]

In sum, Altman indicates the initial determination of custody between unmarried parents is measured by the totality of the circumstances, and a change in circumstance is only required to be demonstrated since the issuance of a court order. This framework ensures the best interests of the child have been considered by a neutral court and provides a date in time from which the family court can measure any alleged change in circumstances. Consequently, we conclude the family court did not err in examining the totality of the circumstances in reaching its decision.

II. Award of Custody to Father

Mother argues the family court erred in considering her abortion when making its custody determination. We agree.

South Carolina law is clear that a parent's personal, moral behavior, while a proper consideration in custody cases is "limited in its force to what relevancy it has, either directly or indirectly, to the welfare of the child." Davenport, 265 S.C. at 527, 220 S.E.2d at 230. In this case, Mother's abortion had no direct or indirect effect on Child and therefore was not relevant to the custody determination. Thus, the family court should not have considered Mother's abortion in the custody analysis. Accordingly, we

[5] Because we do not believe an agreement existed in this case, we decline to address whether a change of circumstances approach is proper when the parties have established a custody agreement but not a court order.

reverse the family court's order awarding custody of Child to Father and remand for consideration of the issue excluding Mother's abortion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

THOMAS, J., concurs.

FEW, C.J., dissents.

FEW, C.J., dissenting: I agree with the majority's holding that the family court improperly considered the mother's decision to have an abortion as part of the basis on which it awarded custody to the father. However, I believe the parents established a mutually agreed upon custody arrangement giving sole custody to the mother, a responsibility she fulfilled essentially unassisted for almost six years. Under these circumstances, this court's reasoning in Altman v. Griffith, 372 S.C. 388, 642 S.E.2d 619 (Ct. App. 2007) required the father to prove a change in circumstances affecting the child's welfare before the family court could change the custody arrangement. Even pursuant to the majority's position, I would remand for a new trial and not permit the family court to simply reconsider without taking into account the abortion. Further, I would impose upon the father the burden of proving a change in circumstances before he may gain custody from the child's mother.

Paul Purser and Angela Owens dated on and off for two years. They stopped dating when Owens became pregnant with Purser's child. Purser attended the birth and afterwards moved from Charlotte, North Carolina, to Lancaster, where Owens lived, "to try to make it work." Purser testified that, after a short time, Owens gave him a choice of living with her or not seeing the child at all. Purser chose the latter, and before the child was three months old moved permanently back to Charlotte. Purser admitted he rarely saw the child for the first six years of his life. He testified that from 1999 until September 2005, he "never had the opportunity to visit, to take [the child] to a doctor's appointment or anything like that."[6] The family court found that Purser had no contact with the child for eight months while Purser lived in

[6] The quoted portion is from a question, to which Purser answered: "Correct."

Florida. Purser did not file for custody or even visitation until the child was almost six years old.

In all child custody cases, the welfare and best interests of the child are the primary considerations for a court in making the determination of which parent gets custody. Patel v. Patel, 359 S.C. 515, 526, 599 S.E.2d 114, 119 (2004). Whether the court makes that determination by considering the totality of the circumstances, or by requiring the noncustodial parent to show a change in circumstances, depends on whether custody is being decided for the first time. In an initial custody determination, no preference is given to either parent in their right to custody, and the judge must determine the best interests of the child under the totality of the circumstances. S.C. Code Ann. § 63-5-30 (2010); Brown v. Brown, 362 S.C. 85, 90-91, 606 S.E.2d 785, 788 (Ct. App. 2004). However, once custody has been established and a parent later seeks to change the custody arrangement, he or she must prove a change in circumstances that occurred after the custody arrangement was established. Spreeuw v. Barker, 385 S.C. 45, 59, 682 S.E.2d 843, 850 (Ct. App. 2009).

I recognize that in all but one instance in which our appellate courts have applied the change of circumstances burden to a party seeking a change in custody, the event establishing custody was the entry of a court order. See Davenport v. Davenport, 265 S.C. 524, 528, 220 S.E.2d 228, 231 (1975) (requiring proof of a change of circumstances to alter custody agreement reached by parties despite the fact the agreement was never incorporated into a court order). In Spreeuw, for example, this court stated, "the moving party must demonstrate changed circumstances occurring subsequent to the entry of the order in question." 385 S.C. at 59, 682 S.E.2d at 850. However, I do not believe a prior custody order is always required before a party seeking to change the custody arrangement will be required to prove a change of circumstances. In some situations, like Davenport, and like this case, the parties' custody agreement is a sufficiently established custody arrangement that may be changed only by showing a change of circumstances, even without a court order.

The majority is careful not to base its ruling on the requirement of a prior court order, but rather on its finding that "at no time did the parties have an explicit agreement, court-ordered or otherwise." I disagree with this

finding. The agreement between Purser and Owens that Owens would have sole custody of this child could not have been any more explicit even if it had been in writing. Purser did not simply acquiesce in Owens' role as sole custodian of the child; rather, he insisted on it by refusing to fulfill his role as secondary caretaker for over five years. Moreover, on the facts of this case there is no uncertainty as to when the custody arrangement was established. Purser's decision to move to Charlotte before the child was three months old, leaving him in Owens' sole custody, established the arrangement. From that point forward, Purser and Owens had a mutually agreed upon, established custody arrangement under which Owens had sole custody and was the sole caretaker of the child. Under these circumstances, Purser should have been required to prove a change of circumstances in order to gain custody of the child.

The reasoning of Altman supports my position that the family court was required to apply the change of circumstances burden in this case. The mother and father in Altman never married. 372 S.C. at 394, 642 S.E.2d at 622. However, they lived together for approximately one year before their son was born, and they continued living together, although with many separations, for over three years afterwards. Id. During those three years, the parents shared custody of their son and neither parent sought any custody order in family court. Id. When they finally separated permanently, the mother took the child to live with her, but the father regularly attempted to see his son. Id. After only three months of permanent separation, the father filed an action in family court seeking custody. Id. The family court considered the totality of the circumstances, and granted custody to the father. 372 S.C. at 395, 642 S.E.2d at 623. The mother appealed on the ground that the father should have been required to prove a change in circumstances, arguing only that section 63-17-20(B)[7] of the South Carolina Code (2010) required it. 372 S.C. at 397, 642 S.E.2d at 624 ("Mother's specific contention is that a statute concerning paternity, section [63-17-20(B)], imposes on Father the burden of showing a substantial change of circumstances to gain custody.").

[7] Section 63-17-20(B) was previously codified at section 20-7-953(B) which contained identical language.

This court stated the issue as follows: "when parents are not married, does the law mandate a change of circumstances burden on every father who seeks custody?" Id. We answered the question "no," and gave three reasons. Id. First, we stated the statute did not mention a change of circumstances burden and our ruling was in accord with "the general legal principle that the imposition of a change of circumstances burden applies when a parent seeks to alter a prior custody order." Id. (emphasis added). Second, our decision was "in line with" the "established rule" in custody matters that "'the father and mother are in parity as to entitlement to the custody of a child.'" Id. (quoting Brown, 362 S.C. at 91, 606 S.E.2d at 788). Third, the court noted the parents lived together when the child was born and for three years thereafter, and therefore "[t]he family court in this case was presented with an initial custody determination." 372 S.C. at 397-98, 642 S.E.2d at 624 (emphasis added).

By framing the issue as whether "every father" must prove a change of circumstances, the Altman court contemplated the possibility that in a different factual situation it might be appropriate to impose the change of circumstances burden. I believe the facts of this case present such a different factual situation. To explain this, I address each of the reasons given for the decision in Altman in reverse order. Addressing the third reason from Altman, the family court in this case did not face "an initial custody determination" as we described in Altman. 372 S.C. at 397-98, 642 S.E.2d at 624. In contrast to the parents in Altman, who lived together for a year before the child was born and for over three years afterwards, Purser and Owens never lived together. In contrast to the three months separation in Altman before the father filed an action for custody, Purser waited almost six years to seek custody. During this time, Owens was not merely the primary caretaker, she was the sole custodian. Purser visited the child only sporadically, maintaining a "voluntary absence" from the child's life for as long as eight months on one occasion, according to the family court's order. By seeking no formal custody order, Purser knowingly allowed this to become the established custody arrangement. The father in Altman, on the other hand, was diligent in his efforts to see and gain custody of the child. This court explained:

> In an effort to see the child, Father called and wrote Mother "on a regular basis," but Mother avoided him. Rather than permit Father to see his son, Mother "directed [Father] to speak to my attorney." Father was denied any contact with his son until he filed this action in January 2003.

372 S.C. at 394, 642 S.E.2d at 622.

While the Altman father's efforts show he did not acquiesce in the mother having custody, Purser's lack of effort amounts to an agreement to the terms of custody and visitation imposed by Owens. As an example of the terms of the arrangement to which he agreed, Purser testified he could see the child only when Owens allowed him.

> Q: So I don't understand what you're saying about she wouldn't let you visit with the child?
>
> A: . . . I'm not saying [she never let me take him]. What I'm saying is it was her total decision and she was the total control over that. I may call after having plans to come get him and she would say, "I changed my mind. You're not going to get him."
>
> . . .
>
> Q: Did you ever go see an attorney about that?
>
> A: No, sir, I didn't.
>
> Q: You just sit back?
>
> A: I did and I blame myself for that.

Years before Purser finally took action, he had his chance to ask the family court for an initial custody determination. He let the time for that lapse,

however, through his intentional absence from the child's everyday life. In contrast to the choice made by the father in Altman to immediately pursue custody, Purser made choices that resulted in an established, agreed-upon arrangement in which Owens had sole custody of the child.

The second reason from Altman is the legal principle that parents are in parity with each other regarding custody. 372 S.C. at 397, 642 S.E.2d at 624. This principle does nothing more than establish that there is no gender preference in custody disputes. Kisling v. Allison, 343 S.C. 674, 678, 541 S.E.2d 273, 275 (Ct. App. 2001) ("When analyzing the right to custody as between a father and mother, [they must be treated equally]."). We also noted in Kisling that this parity exists "as the custody analysis begins." Id. This is illustrated by an examination of Brown, the case we cited in Altman as support for the principle of parity. In Brown, the custody determination occurred simultaneously with the divorce proceeding. 362 S.C. at 89, 606 S.E.2d at 787. Thus, the court considered the parents to be in parity at the first point in time when custody became an issue. We found the same situation to exist in Altman because "Mother and Father were living together when their child was born" and for three years afterwards, and the father sought custody only three months after the parents permanently separated. 372 S.C. at 394, 397, 642 S.E.2d at 622, 624. In this case, the same situation existed in 1999 when the child was born. At that point in time, Purser and Owens stood "in parity" because the issue of which parent would have custody had never before been in dispute. However, that parity became disparity as Purser consistently ignored his parental rights and duties for almost six years. The general rule that parents stand in parity to each other as the custody analysis begins does not apply when the noncustodial parent chooses to let six years elapse before taking action.

Addressing the first reason from Altman, which we described as "the general legal principle that the imposition of a change of circumstances burden applies when a parent seeks to alter a prior custody order," 372 S.C. at 397, 642 S.E.2d at 624 (emphasis added), this general principle does not require the existence of a prior custody order in every instance before a parent seeking custody must show a change of circumstances. Purser's request for custody was, in reality, a request to change an established

custodial arrangement. On the facts of this case, the lack of a prior court order does not require an initial custody determination.

This is consistent with Davenport, which was recently cited by the supreme court in Latimer v. Farmer, 360 S.C. 375, 602 S.E.2d 32 (2004), as authority for the rule that before a court may "grant a change in custody, there must be a showing of changed circumstances occurring subsequent to the entry of the divorce decree." 360 S.C. at 381, 602 S.E.2d at 35. In Davenport, however, there was no decree establishing custody. The Davenports married in 1967, and separated by written agreement dated January 18, 1974. 265 S.E.2d at 526-27, 220 S.E.2d at 229-30. They had two children during the marriage, ages three and five at the time of separation. 265 S.E.2d at 525, 525 n.1, 220 S.E.2d at 229, 229 n.1. Pursuant to the separation agreement, the children were placed in the custody of their mother with liberal visitation given to the father. 265 S.E.2d at 526, 220 S.E.2d at 229-30. There is no indication in the opinion that the agreement was ever incorporated into a court order. After the parents separated, the mother moved from Greer, where the couple had lived together, to Spartanburg, where she set up a home and took a job as a school teacher. 265 S.E.2d at 527, 220 S.E.2d at 230. Within months, the father suspected the mother was hosting a male visitor overnight in the home with the children, which he was soon able to prove through the use of a private investigator. Id. On June 12, 1974, the father filed an action for divorce and a change in custody. 265 S.E.2d at 525-26, 525 n.1, 220 S.E.2d at 229, 229 n.1.

On appeal by the father from the circuit court's decision to leave custody with the mother, the supreme court first noted "the paramount consideration is the welfare of the child." 265 S.E.2d at 527, 220 S.E.2d at 230. The court then stated: "In cases, as here, where the parties have previously agreed as to whom should have custody, the party seeking to set aside the agreement has the burden of proving that the welfare of the children requires the agreement to be abrogated." Id. Despite no court order and the passage of less than five months from separation to the filing of the action seeking custody, the court required the father to bear the burden of proving why a change should be made from the established custody arrangement. While the court did not use the term "change in circumstances," I believe the facts of the case, and particularly the supreme court's citation of Davenport in

Latimer, demonstrate that a change in circumstances is precisely what the father was required to prove.

A comparison of the facts of Altman and Davenport supports my position that Purser should have been required to show a change in circumstances. The two significant similarities between the cases are that each father filed a custody action within months of separating from the mother and no previous court order establishing custody existed in either case. There are also differences between the cases. In Davenport, for example, the parties had been married for seven years and had two children born during the marriage. In Altman, the parties never married and thus their child was illegitimate. However, the difference in outcomes between the two cases did not turn on these differences. Rather, the different outcomes turned on the existence or nonexistence of an established custody arrangement. In Davenport, the supreme court found an agreement between the parents that had been in place for only five months was an established custody arrangement requiring the father to prove a change in circumstances. In Altman, on the other hand, the lack of any custody arrangement required the family court to make an initial custody determination based on the totality of the circumstances. Considering the facts of this case in light of Davenport and Altman, there is an even stronger case here for requiring "the party seeking to set aside the agreement [to bear] the burden of proving that the welfare of the children requires the agreement to be abrogated" than the supreme court had in Davenport. Davenport, 265 S.C. at 527, 220 S.E.2d at 230.

The majority states that without some "explicit" or "definite" agreement,

> the family court is left to attempt to ascertain the point in time when the actions of the parties gave rise to a de facto custody agreement. Only then could a court determine if the circumstances in existence at the time of the agreement had changed. This simply requires too much guesswork and speculation.

Ascertaining the point in time when a custody arrangement becomes established may be difficult in some cases. However, it is not difficult on the facts of this case. The family court must simply answer: When did the parents mutually agree on the custody arrangement such that the arrangement became established? In general, the answer to that question is the point in time when both parents knew, accepted, and implemented the terms of the custody arrangement. Here, the custody arrangement became established at the point in time when Purser moved to Charlotte permanently and left the child in Owens' sole custody. At that point, both parents knew that Owens would have sole custody of the child, and that Purser would have limited visitation at best. From that point forward both parents' actions consistently demonstrated that they accepted and implemented the agreed upon custody arrangement.

I also disagree that we should be concerned about the potential difficulty of deciding when a custody arrangement becomes established. Courts should not shrink from difficult decisions. Further, concern over any such difficulty is minimal when compared to our true concern: the child's best interests. Where it applies, the change of circumstances burden protects those interests by promoting stability in the lives of children in established custody arrangements. Autistic children are particularly in need of this stability. Both the child's pediatrician and the Department of Disabilities and Special Needs consultant who diagnosed him with autism testified this stability is critical. An unwed mother like Owens, facing a fragile situation with an absent father, should not be required to sue him for the custody she already has in order to provide the stability her child needs in a custody arrangement. The majority's position that Purser may wait six years before seeking custody, and yet the court will treat it as an initial custody determination, imposes just that requirement.

I would reverse the change in custody and remand for a new trial, at which Purser would be required to prove a change in circumstances affecting the welfare of the child.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jerome Chisholm, Appellant.

Appeal From Greenwood County
Judge Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 4899
Heard September 14, 2011 – Filed October 26, 2011

AFFIRMED

Appellate Defender Robert Pachak, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Deputy Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

HUFF, J.: Appellant, Jerome Chisholm, appeals his conviction of criminal sexual conduct (CSC) with a minor in the first degree, asserting (1) the State lacked probable cause to obtain oral swabs from him for DNA comparison, (2) the trial court erred in failing to exclude Human Immunodeficiency Virus (HIV) test results when no chain of custody was established, (3) the trial court erred in failing to exclude HIV test results because the probative value was substantially outweighed by the danger of unfair prejudice, and (4) the trial court erred in overruling defense counsel's motion for a mistrial after the child victim's treating doctor testified the child told her Chisholm "did something bad," as this testimony amounted to improper hearsay. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

The mother of the victim (Mother) testified that on Saturday morning, September 17, 2005, Chisholm came to the home she shared with her six year-old daughter (Victim) and Mother and Chisholm's two year-old son. Mother and the two children were up early that morning, and Mother had already made her bed by the time Chisholm arrived. Mother received a phone call and went to her back porch to take the call, which lasted five to ten minutes. When Mother returned inside the home, the children were not in their bedroom where she left them. Mother looked in her bedroom, where she found her son and Chisholm in her bed, underneath the covers. Mother did not see Victim, and when she inquired where Victim was, Chisholm did not answer, but he had a "crazy look." Mother then noticed Victim's hair bow sticking out from under the top of the covers. When Mother pulled the covers back, she observed Victim face down in the bed, with her underwear and shorts pulled down and "Chisholm's penis hanging down between his legs and inside [her] child's butt." Mother lifted Victim and put her clothes back on her. She tried to call police, but was thwarted by Chisholm, who would not let Mother leave the home either. Mother sent Victim down the street to her sister-in-law's home, and Mother eventually made it there as well. After talking with police, Mother transported Victim to the hospital for a sexual assault examination.

Victim, who was ten years old at the time of the trial, also testified concerning the incident. Victim stated that on Saturday, September 17, she and her brother were playing in their room at Mother's house. Her brother's father, Chisholm, put her in the bed, turned her over from her back to her stomach, and got on her. At this time, Chisholm had pulled Victim's shorts and underwear down to her knees. Victim testified Chisholm put his penis inside her, "in [her] butt." Mother walked in, pulled Victim up, and took Victim to her aunt's house to call the police. After she talked to the police, Mother took her to the hospital where she underwent an examination. Thereafter, Victim went to see Dr. Pritchard for another examination.

Victim was seen in the emergency room that same day and was examined following her complaint of sexual assault. Included with the sexual assault kit in the evidence turned over to law enforcement was Victim's underwear. Victim had an external vaginal and rectal exam at the emergency room, but because of her young age she was referred to "The Child's Place" for an internal examination. Nothing out of the ordinary was noted from her emergency room examination.

South Carolina Law Enforcement Division (SLED) Agent Kenneth L. Bogan, who was qualified as an expert in the field of DNA analysis, testified regarding his analysis of the various items submitted in regard to Victim's emergency room visit. Agent Bogan found no semen on the vaginal and rectal smears and swabs, but did find the presence of blood on the vaginal swab. Upon inspecting Victim's underwear, he observed what he believed to be a blood stain. A presumptive analysis for the presence of blood was positive. Agent Bogan proceeded to extract DNA from the underwear stain and found a mixture of DNA from two individuals, one being consistent with that of Victim and the other belonging to an unidentified male. Agent Bogan then requested a DNA standard from any likely suspects in the case. After receiving a known DNA standard in the form of buccal swabs from Chisholm, Agent Bogan made a comparison of Chisholm's DNA to the mixed sample taken from Victim's underwear, and determined the DNA profile from the unidentified male matched the DNA of Chisholm. Further analysis revealed there was semen present in the stain, and the DNA profile from the semen matched Chisholm's DNA profile.

Pediatrician Dr. Lyle Pritchard, who was qualified as an expert in child sexual assault examination, testified Victim was referred to her by law enforcement for a medical exam for possible child sexual abuse. Dr. Pritchard examined Victim on October 12, 2005. At that time, Victim complained of genital discomfort and pain. Child had a normal genital exam, but Dr. Pritchard stated this was common in cases where children had been sexually abused, particularly when there is a time lapse between the alleged trauma and her examination, as mucosal skin heals very quickly. Dr. Pritchard agreed that the records from the hospital indicated Victim had a normal exam on the day the allegations were reported, but explained the hospital did not use a special instrument for examination, called a the culpascope, in Victims' exam. Rather, the hospital personnel just looked at the skin on the outside of the bottom. Dr. Pritchard further testified she tested Victim for certain sexually transmitted diseases, and the HIV test came back positive. She noted that children can become HIV positive in three major ways: (1) from a congenital infection where the mother passes it on to the baby in utero or from the baby passing through the birth canal; (2) from a blood transfusion; or (3) from sexual contact. Dr. Pritchard noted Mother's HIV testing from her pregnancy with Victim and her pregnancy with Victim's younger brother were both negative, and found no history of Victim having a blood transfusion. Therefore, based on Victim's history of sexual contact and her positive HIV test, Dr. Pritchard diagnosed Victim with sexual abuse.

Finally, the State presented the testimony of Jean Banks, Greenwood County Health Department's administrative supervisor and the supervisor of medical records. Banks testified clients would have their blood drawn by a nurse at the Health Department, and it would then be sent by courier to the DHEC lab in Columbia where it is tested. The results are then sent from Columbia to a printer at the Health Department, where the results are printed out and maintained in a file at the Health Department. These records are kept by the Health Department in the normal course of business. The Health Department's records show Victim had her blood collected on October 21, 2005, which showed Victim was HIV positive, and Chisholm had his blood collected on November 14, 2005, and he likewise tested positive for HIV. Banks admitted she did not have the names of the nurse, courier, the person who ran the test, or anyone who handled the blood before testing. She stated,

however, that DHEC had procedures in place in terms of handling, packaging and transporting to keep the blood samples straight.

ISSUES

1. Whether the State lacked probable cause to obtain oral swabs from Chisholm when there was insufficient evidence to establish that the blood found in Victim's underwear was the result of trauma caused by the alleged assault.

2. Whether the trial court erred in failing to exclude the HIV test results when no chain of custody was established.

3. Whether the trial court erred in failing to exclude HIV test results when the probative value of such evidence was substantially outweighed by the danger of unfair prejudice.

4. Whether the trial court erred in overruling defense counsel's motion for a mistrial after Dr. Pritchard testified that Victim told her Chisholm did something bad, because this testimony was improper hearsay.

STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The admission or exclusion of evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. State v. Winkler, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010). An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law. Id. "Similarly, whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." State v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009). A mistrial should be granted only when absolutely necessary, and a defendant must show both error and resulting

prejudice to be entitled to a mistrial. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000).

LAW/ANALYSIS

I. Probable Cause to Obtain Oral DNA Swabs

The record shows that in July 2007, the State sought an order requiring Chisholm to submit to a blood draw for the purpose of DNA comparison pursuant to section 17-13-140 of the South Carolina Code (2003). At a hearing before Judge Goldsmith on July 25, 2007, the State presented the testimony of Officer Vernon Peppers, who testified Mother reported finding Chisholm in a sexual situation with her six-year-old daughter, noting Mother indicated she pulled the bed sheets back and discovered her daughter's panties around her ankles with Chisholm behind the child with his penis in his hand. Officer Peppers testified he spoke with SLED Agent Bogan, who analyzed Victim's underwear and found a blood stain in them. On the blood stain, Agent Bogan identified Victim's blood, "along with an unidentified male's DNA." Agent Bogan therefore requested a DNA swab from the defendant to make a comparison to the stain found in Victim's underwear. Officer Peppers acknowledged the nurse at the hospital indicated there was no evidence of trauma in the visual examination of Victim. However, he further testified Victim was referred to "The Child's Place" because the hospital was unable to perform a vaginal exam on Victim since the hospital did not have the necessary equipment for such an examination on a child her age.

Chisholm opposed the State's motion arguing, in part, that the State failed to establish probable cause that a crime had taken place as there was no evidence of any trauma to Victim; there was evidence that Victim was in bed with a male sibling such that the male blood could have come from another source; and there was "nothing in the record to establish that the underwear was clean and contaminated with blood." Judge Goldsmith found the State demonstrated probable cause existed to believe Chisholm committed the crime of CSC with a minor, that relevant and material evidence was involved which necessitated the comparison of Chisholm's blood sample with that taken from the crime scene, and that the swab method was a safe and reliable

method for obtaining DNA. He further found the crime involved was of a serious nature. Judge Goldsmith therefore ordered Chisholm provide an oral swab to the police in order to enable comparison with the blood evidence.

On appeal, Chisholm contends the State lacked probable cause to obtain oral swabs from him for DNA comparison because "there was no evidence to establish what caused the blood to be on the underwear and how long it was there," and therefore, there was only speculation that it was Chisholm's blood. He cites State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006) for the proposition that there was no substantial basis upon which to conclude that probable cause existed.

A search warrant may issue only upon a finding of probable cause, and it is the duty of the reviewing court to ensure the issuing official had a substantial basis upon which to conclude that probable cause existed. Id. at 50, 625 S.E.2d at 221. "A court order issued pursuant to § 17-13-140, which stands in place of a search warrant, should only be issued upon a finding of probable cause, which is supported by oath or affirmation." Id. at 54-55, 625 S.E.2d at 223. "An order issued pursuant to § 17-13-140 that allows the government to procure evidence from a person's body constitutes a search and seizure under the Fourth Amendment," and must comply with constitutional and statutory guidelines. Id. at 53, 625 S.E.2d at 222. Considerations for determining whether or not there exists probable cause to permit the acquisition of such nontestimonial identification evidence include the following elements: (1) probable cause to believe the suspect has committed the crime; (2) a clear indication that relevant material evidence will be found; and (3) the method used to secure it is safe and reliable. Id. at 53-54, 625 S.E.2d at 222-23. "Additional factors to be weighed are the seriousness of the crime and the importance of the evidence to the investigation." Id. at 54, 625 S.E.2d at 223. "The judge is required to balance the necessity for acquiring involuntary nontestimonial identification evidence against constitutional safeguards prohibiting unreasonable bodily intrusions, searches, and seizures." Id.

The record shows Judge Goldsmith was presented with evidence that Mother found Chisholm in a "sexual situation" with the six-year-old Victim, discovering him in bed with her daughter, whose body was mostly hidden

under the covers, and when Mother pulled the covers away, she found Victim bent over, with her underwear pulled down and Chisholm behind Victim with his penis in his hand. Additionally, the State presented evidence to Judge Goldsmith that Victim's clothing was collected at the hospital following this incident, Officer Peppers submitted the clothing to SLED, and the SLED agent who analyzed Victim's underwear found a blood stain in her underwear that contained Victim's blood, along with the DNA of an unidentified male. Judge Goldsmith properly considered the necessary elements in determining whether probable cause existed, and the record supports these findings. Accordingly, we find there was a substantial basis upon which to conclude that probable cause existed for the issuance of the order.

II. Failure to Exclude HIV Test Results Based on Chain of Custody

Prior to trial, Judge Maddox granted the State's motion requiring Chisholm to submit to an HIV blood test, noting Chisholm had been charged with CSC with a minor and Victim's sexual assault examination indicated the child had the HIV virus.[1] Thereafter, Chisholm sought to exclude HIV test results, maintaining the State was required to supply the chain of custody before the results could be admitted.[2] The trial judge disagreed, ruling the results were admissible as business records under Ex parte Dep't of Health & Envtl. Control, 350 S.C. 243, 565 S.E.2d 293 (2002) (hereinafter Ex parte DHEC).

On appeal, Chisholm contends the trial court erred in failing to exclude the HIV test results because no competent chain of custody existed. He notes that Banks testified she did not have any names of the persons who drew the blood, transported the blood to Columbia, performed the tests, or actually handled the blood. He argues the trial court erroneously relied upon Ex parte DHEC, as that case was distinguishable from the case at hand inasmuch as Ex parte DHEC dealt with HIV tests taken for purposes of medical diagnosis before any charges were pending. Chisholm argues charges were already

[1] It appears as though Chisholm actually consented to this blood test.

[2]Although Chisholm's argument to the trial judge focused more on the admission of Chisholm's HIV test results, he also raised the chain of custody argument as to Victim's HIV test.

pending against him when the State sought and administered the test, the State's purpose in requesting the test was to seek evidence as to his guilt, and the test was not performed for purposes of diagnosis and treatment. He therefore maintains that Ex parte DHEC does not apply, and the State was required to establish a complete chain of custody.

In Ex parte DHEC, the State sought to prove that defendant Doe had knowingly exposed the minor victim to HIV. Id. at 246, 565 S.E.2d at 295. The State filed a motion seeking to compel DHEC to, among other things, release the names and addresses of any possible chain of custody witnesses in the matter. Id. After the circuit court ordered the release of the names and access to all possible chain of custody witnesses, and this court affirmed that portion of the circuit court's order, DHEC petitioned the supreme court for certiorari, which was granted. Id. at 246-47, 565 S.E.2d at 294-95. The State maintained it was required by the South Carolina Rules of Evidence to establish a chain of custody to admit Doe's HIV blood test at trial, while DHEC argued the exception to the rule against hearsay contained in Rule 803(6), SCRE allowed Doe's HIV test results to be admitted into evidence as business records without the requirement of establishing a chain of custody. Id. at 247, 565 S.E.2d at 295. The supreme court disagreed with the State's position, but agreed with DHEC. Id. The supreme court specifically determined "the procedure for admitting business records would afford sufficient indicia of reliability to admit HIV test results without a chain of custody." Id. at 249, 565 S.E.2d at 297.

In addressing the issue, the supreme court noted that our courts consistently require a chain of custody in criminal prosecutions to prove the samples analyzed are, in fact, those of the defendant. Id. at 248, 565 S.E.2d at 296. However, it further differentiated HIV test results from those blood and urine samples taken at the time of an accident or other crime such as in driving under the influence (DUI) cases. Id. Specifically, the court noted that DUI cases "involve time-sensitive tests taken at the time of an arrest or an accident that cannot be replicated outside of that time frame," as a defendant's blood alcohol level could not be re-tested at a later time with an accurate result, and thus such cases require a chain of custody. Id. at 248-49, 565 S.E.2d at 296. "HIV test results, on the other hand, can be confirmed or proved false by re-testing at a later date, as HIV is a permanent condition,

unlike the level of alcohol or drugs in the bloodstream." Id. at 249, 565 S.E.2d at 296. Based upon this distinction, the supreme court found the admission of HIV test results was not controlled by the line of cases dealing with drug and alcohol tests. Id.

It should be noted, however, that the supreme court's decision was also premised upon the fact that "[t]he trustworthiness of medical records is presumed, based on the fact that the test is relied on for diagnosis and treatment." Id. at 250, 565 S.E.2d at 297. The rationale for admitting laboratory test results as business records is that "if it is sufficiently trustworthy to be relied upon for medical treatment, it is sufficiently trustworthy to be admitted as a business record." Id. The court in Ex parte DHEC found this rationale persuasive and held Doe's HIV tests were admissible as business records, observing that the blood test was taken by DHEC personnel for the purpose of diagnosis and was relied upon for subsequent diagnosis, treatment, and counseling; that Doe was not tested by DHEC for purposes of litigation; and he was tested voluntarily before any charges were pending against him. Id.

However, the supreme court did not center its decision in Ex parte DHEC solely on the basis that Doe's HIV blood test was taken for the purpose of diagnosis and treatment and that Doe was not tested by DHEC for the purposes of litigation and charges were not pending at the time of the test. Rather, the court immediately thereafter stated as follows:

> Further, Doe could be retested at any time to refute the evidence presented against him at trial. If Doe tested negative at the time of trial, the DHEC test results could be ruled out as a false positive as HIV is a permanent condition. A person charged with DUI based on a blood alcohol test taken at the time of his arrest has no such protection and, therefore, needs the indicia of reliability provided by a chain of custody.

Id.

Based upon the supreme court's opinion in Ex parte DHEC, it is not clear whether that court intended to provide that no chain of custody is

necessary for the submission of the results of HIV testing performed by DHEC, as HIV tests are distinguishable from drug and alcohol prosecution tests since HIV is a permanent condition and the test could be replicated, or whether the decision would also require the test be taken, not for purposes of litigation, but for medical diagnosis before any charges are pending in order for the HIV test results to be admissible without a chain of custody. However, we find it unnecessary to make that determination in the case at hand, as we hold that any error in the admission of the HIV test results was harmless in light of the overwhelming evidence of Chisholm's guilt.

"Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." State v. Sims, 387 S.C. 557, 567, 694 S.E.2d 9, 14 (2010) (quoting State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). "When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, [the appellate court] will not set aside a conviction for insubstantial errors not affecting the result." Baccus, 367 S.C. at 55, 625 S.E.2d at 223.

Here, the State presented evidence from Victim that at the time in question, Chisholm pulled Victim's shorts and underwear down to her knees, placed her in the bed, turned her over on her stomach, got on her and put his penis inside her "butt." Mother testified as an eyewitness, stating she discovered Chisholm in her bed underneath the covers, that Chisholm failed to respond when she asked where Victim was, she then noticed Victim's hair bow sticking out from under the top of the covers, and when she pulled the covers back, she observed Victim face down in the bed, with her underwear and shorts pulled down and "Chisholm's penis hanging down between his legs and inside [her] child's butt." Finally, forensic evidence revealed a vaginal swab collected on the day of the incident from Victim tested positive for blood, and Victim's underwear, also collected the day of the incident, contained a stain which tests proved to contain a mixture of Victim's blood and Chisholm's semen. Accordingly, admission of the HIV test result, even if erroneous, was harmless. See State v. Herring, 387 S.C. 201, 215-16, 692 S.E.2d 490, 497 (2009) (holding admission of evidence seized in search, even if erroneous, was harmless where there was overwhelming evidence of guilt); State v. Tench, 353 S.C. 531, 537, 579 S.E.2d 314, 317 (2003) (finding any error in admission of the seized evidence harmless beyond a reasonable doubt

given the abundant evidence of appellant's guilt); State v. Woods, 376 S.C. 125, 129, 654 S.E.2d 867, 869 (Ct. App. 2007) (finding error in admission of defendant's hair, blood, and saliva samples obtained through an order that was defective on its face was harmless in light of overwhelming evidence of defendant's guilt).

III. Failure to Exclude HIV Test Results Based on Rule 403, SCRE

At trial, Chisholm requested the trial court rule on whether the unfair prejudice outweighed the probative value of the HIV test results. In considering Rule 403, SCRE, the trial court determined the HIV test results were relevant, and would not unduly prejudice Chisholm. On appeal, Chisholm argues the State did not need the HIV test results to prove CSC with a minor, and he was not charged with knowingly giving Victim HIV. He contends the trial court's ruling in this regard denied him a fair trial and was prejudicial, asserting "[t]here was no way for the jury not to take into consideration the HIV test results in reaching their verdict." The State counters that the HIV test results were probative evidence of the sexual battery committed on Victim.

Generally, all relevant evidence is admissible. Rule 402, SCRE. However, relevant evidence must be excluded if the danger of unfair prejudice substantially outweighs the probative value of the evidence. Rule 403, SCRE; State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." Wiles, 383 S.C. at 158, 679 S.E.2d at 176. An appellate court reviews Rule 403, SCRE balancing determinations pursuant to the abuse of discretion standard, and gives great deference to the trial court's decision. State v. Myers, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004).

Here, as noted by the State, Chisholm sought to establish there was no battery upon Victim, maintaining there was no evidence of injury or trauma to show penetration. The State sought to counter that position by presenting Dr. Pritchard's testimony that transmission of HIV during sexual contact required an exchange of body fluids, and blood or semen could mix as a result of a "very small micro trauma," thereby showing the HIV test results were probative evidence of the sexual battery committed on Victim.

Therefore, the evidence of the HIV test results was probative of whether Chisholm committed a sexual battery upon Victim. Further, giving deference to the trial court's decision, we do not believe there was an undue tendency of the HIV test results evidence to suggest a decision on an improper basis which substantially outweighed the probative value of the evidence. At any rate, as previously discussed, given the overwhelming evidence, including the testimony of Victim, the eyewitness testimony of Mother, and the DNA evidence showing a mixture of Victim's blood and Chisholm's semen found in Victim's underwear following the incident of Chisholm's guilt, any error in the admission of the HIV test results would be harmless. Accordingly, we find no reversible error.

IV. Motion for Mistrial Based on Improper Hearsay

Finally, Chisholm argues the trial court erred in overruling his motion for a mistrial after Dr. Pritchard testified Victim told her appellant "did something bad," as this testimony was improper hearsay. He contends this improper corroboration evidence cannot be harmless, because it is the cumulative effect which enhances the devastating impact of improper corroboration.

During direct examination of Dr. Pritchard, when the solicitor asked about the history given to her, the doctor stated she asked the patient about why she was brought there, and Victim told Dr. Pritchard "she and her brother had gotten cold and they got underneath the covers and then Rome did something bad." The solicitor immediately interjected in an apparent attempt to stop the testimony, and defense counsel requested he be heard on a matter of law. The trial court took up the matter outside the jury's presence, at which time defense counsel maintained it was improper for Dr. Pritchard to testify as to identity, which went beyond the nonhearsay exception of time and place, and asserted "Rome" was an obvious nickname for Jerome. Although acknowledging the testimony was improper, the trial court found other witnesses had consistently identified Chisholm as the perpetrator such that the comment was cumulative and harmless. Noting the problem was caught quickly, the trial court indicated a curative instruction might serve to highlight the improper testimony, but stated he would give such instruction if requested. Defense counsel argued a curative instruction would not cure the

harm, and asked instead for a mistrial. The trial court found the full name of Chisholm was not given, both the solicitor and defense counsel stopped the testimony, and that Victim and Mother both identified Chisholm as the perpetrator such that the comment was harmless. It therefore found no basis for a mistrial.

The decision to grant or deny a motion for a mistrial is a matter within the sound discretion of the trial judge, whose decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Council, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). A mistrial should be granted only when absolutely necessary. Id. at 13, 515 S.E.2d at 514. "In order to receive a mistrial, the defendant must show both error and resulting prejudice." Id. " The grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way." Herring, 387 S.C. at 216, 692 S.E.2d at 498.

Here, it is questionable whether the jury even understood that the name "Rome" referred to Chisholm, as there is nothing in the record before us to indicate that Chisholm ever used the name "Rome" or that the witnesses knew him by that name. Furthermore, the comment was fleeting, with both the solicitor and defense counsel immediately stopping the testimony from going any further. Additionally, even if the jury understood the name "Rome" to refer to Chisholm, the properly admitted testimony of both Victim and Mother identified Chisholm as the perpetrator such that the comment would have been harmless. See State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (noting the admission of improper hearsay evidence is harmless where the evidence is merely cumulative to other evidence). Accordingly, we find no abuse of discretion in the trial court's denial of Chisholm's motion for a mistrial. We further find, as previously stated, there is overwhelming evidence of Chisholm's guilt such that any error in the brief comment regarding "Rome" would be harmless. See id. (holding, where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed).

CONCLUSION

For the foregoing reasons, Chisholm's conviction is

AFFIRMED.

PIEPER and LOCKEMY, JJ., concur.