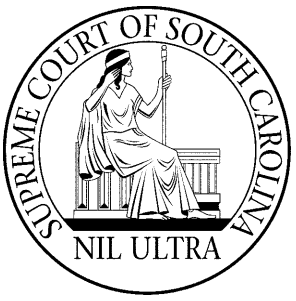

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 39
September 4, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Harvey Breece Breland, Respondent

Appellate Case No. 2013-001398

Opinion No. 27309
Submitted July 15, 2013 – Filed September 4, 2013

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Harvey MacLure Watson, III, of Ballard Watson Weissenstein, of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand or definite suspension not to exceed one (1) year. In addition, he agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of a sanction. We accept the Agreement and suspend respondent from the practice of law in this state for one (1) year. In addition, we order respondent to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this opinion.

Facts

Matter I

In 2005, respondent served as closing attorney for a husband and wife in the purchase of a mobile home. A two-step plan was devised to accomplish the transactions. The first transaction would involve a sale of the clients' real estate to CMH Homes. The second transaction would involve the sale of the real estate from the first transaction with an affixed mobile home from CMH Homes to the husband alone.

Respondent acknowledges that the deed prepared for the first transaction was not completed or filed with the Register of Deeds for Anderson County. Funds were disbursed to respondent for filing fees and recording fees although the deed was not recorded. Respondent relied on his assistant to facilitate the filing of the closing documents but failed to ensure that the filings were properly and timely completed. The clients retained new counsel for further assistance with their real estate issues.

Matter II

Respondent received five notices of insufficient funds in this trust account between August 31, 2009, and September 10, 2009. Respondent retained the services of a CPA to assist in reconciling his trust account. According to respondent, the reconciliation process revealed a pattern of payoff disbursement checks that were either sent in a delayed fashion or never actually sent to lenders. Respondent relied on his assistant to facilitate disbursements but failed to ensure that the disbursements were properly and timely made. Based on the findings of the reconciliation, respondent deposited approximately $150,000 of his personal funds to cover the shortages.

Respondent admits that he failed to timely reconcile his trust accounts pursuant to Rule 417, SCACR. He also failed to make reasonable efforts to ensure that his legal assistant's conduct was compatible with respondent's professional obligations.

Respondent filed a report with law enforcement regarding the assistant's misconduct. Respondent represents that the assistant has been charged with Breach of Trust with Fraudulent Intent, value $10,000 or more.

Matter III

On June 29, 2007, the Complainants purchased real estate. Respondent served as the closing attorney. At the closing, respondent received funds to purchase a one year home warranty for the Complainants. Respondent failed to purchase the home warranty. In January 2009, respondent refunded the money received for the home warranty. The Complainants did not have the benefit of the home warranty due to respondent's failure to purchase the home warranty which was contrary to the agreement of the parties.

In connection with the closing, the parties executed a power of attorney authorizing respondent's law firm to supervise the transfer of the mobile home title. Respondent failed to ensure that the title to the mobile home was properly transferred to the Complainants. The Complainants have since hired new counsel to facilitate the transfer.

Matter IV

The Complainants sold property to the Complainants referenced in Matter III. Respondent served as closing attorney in the transaction. Respondent failed to return the Complainants' telephone calls regarding issues experienced by Complainants as a result of the closing.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.2 (lawyer shall abide by a client's decisions concerning the objectives of representation); Rule 1.4 (lawyer shall keep client reasonably informed about the status of matter and promptly comply with reasonable requests for information); Rule 1.15 (lawyer shall promptly deliver funds to client or third person that client or third person entitled to receive; lawyer may deposit own funds in trust account for sole purpose of paying service charges on account); Rule 8.4(a) (it is professional misconduct for

lawyer to violate Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice). In addition, respondent admits he has violated the provisions of Rule 417, SCACR. Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for one (1) year.[1] In addition, we order respondent to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this opinion. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

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[1] Respondent's prior disciplinary history includes a 2009 admonition issued by the Commission and a 2002 and 2005 letter of caution issued by the Commission warning him to be careful to adhere to some of the specific Rules of Professional Conduct cited in the current proceeding. See Rule 2(r), RLDE (fact that letter of caution has been issued shall not be considered in a subsequent disciplinary proceeding against lawyer unless the caution or warning contained in letter of caution is relevant to the misconduct alleged in proceedings); Rule 7(b)(4), RLDE (admonition may be used in subsequent proceedings as evidence of prior misconduct solely upon issue of sanction to be imposed).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Robert A. Gamble, Respondent.

Appellate Case No. 2013-001569

Opinion No. 27310
Submitted July 30, 2013 – Filed September 4, 2013

DEFINITE SUSPENSION

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

Michael D. Glenn, of Glenn, Haigler & Stathakis, LLP, of Anderson, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to a sanction ranging from the issuance of a public reprimand to the imposition of a definite suspension not to exceed eighteen months. We accept the Agreement and suspend respondent from the practice of law in this state for eighteen months, retroactive to August 24, 2011, the date of his interim suspension.[1] The facts, as set forth in the Agreement, are as follows.

[1] *In re Gamble*, 396 S.C. 215, 721 S.E.2d 767 (2011).

Facts

Respondent was arrested on September 6, 2012, and charged with misconduct in office by a public official. The arrest warrant alleged respondent "did habitually neglect his duties as Circuit Defender for the Anderson County Public Defender's Office. [Respondent] did so neglect by allowing misuse of County and State funds for personal gain and by improperly supervising and approving fraudulent or exhorbant [sic] expense reimbursements." Respondent was allowed to conclude the charge by entering into the Pre-Trial Intervention Program, which required him to complete fifty hours of community service with Habitat for Humanity and pay a fine of $350. Respondent successfully completed all of the requirements of the Pre-Trial Intervention Program. As a result, on March 6, 2013, the criminal charge was nolle prossed. In addition, on March 8, 2013, the Solicitor consented to the expungement of all records relating to the charge.

According to the Office of Disciplinary Counsel, respondent has cooperated with that office throughout this process.

Respondent previously received a public reprimand after he pled guilty to one count of willfully and knowingly failing to timely file a federal income tax return for the year 1978. *In re Gamble*, 278 S.C. 651, 300 S.E.2d 737 (1983).

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 5.1 (a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure the other lawyer conforms to the Rules of Professional Conduct); Rule 8.4(a)(it is professional misconduct for a lawyer to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another); and Rule 8.4(b)(it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects).

Respondent also admits he has violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1)(it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or

any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5)(it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

Conclusion

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for eighteen months, retroactive to the date of his interim suspension. Respondent shall complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School within twelve months of reinstatement. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former Aiken County Magistrate Donald Louis Hatcher, Respondent.

Appellate Case No. 2013-001509

Opinion No. 27311
Submitted August 7, 2013 – Filed September 4, 2013

PUBLIC REPRIMAND

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

Donald Louis Hatcher, of Aiken, *Pro Se*.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Judicial Disciplinary Enforcement (RLDE) contained in Rule 502 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the issuance of an admonition or a public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

At the conclusion of a session of bond court, respondent kissed the clerk who had been working with him on the forehead. Respondent contends the kiss was a gesture of appreciation for the clerk's hard work and that he in no way intended it

to be an amorous gesture. However, respondent recognizes the clerk was offended by the gesture. Respondent maintains he never would have intentionally offended the clerk, but acknowledges it was inappropriate for him to kiss a subordinate on the forehead. The clerk complained about the matter to the Chief Magistrate. Respondent subsequently tendered his resignation.

Law

Respondent admits that his conduct constitutes a violation of Canon 1 (a judge shall uphold the integrity and independence of the judiciary); Canon 1A (a judge should participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards so the integrity and independence of the judiciary will be preserved); Canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities); and Canon 3B(4) (a judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity), of the Code of Judicial Conduct, Rule 501, SCACR.

Respondent also admits his conduct constitutes grounds for discipline under Rule 7(a)(1) (it shall be a ground for discipline for a judge to violate or attempt to violate the Code of Judicial Conduct) and Rule 7(a)(9) (it shall be a ground for discipline for a judge to violate the Judge's Oath of Office contained in Rule 502.1, SCACR), of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Robert W. Mance, Respondent.

Appellate Case No. 2013-000916

Opinion No. 27312
Submitted August 13, 2013 – Filed September 4, 2013

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

Robert W. Mance, of the District of Columbia, *pro se*.

PER CURIAM: By way of the attached opinion of the District of Columbia Court of Appeals, respondent was suspended from the practice of law for six months following misconduct in three client matters. *In re Mance*, 35 A.3d 1125 (D.C. 2012). The Maryland Court of Appeals subsequently imposed an indefinite suspension as reciprocal discipline against respondent.[1] *Attorney Grievance Comm'n of Md. v. Mance*, 61 A.3d 59 (Md. 2013). By letter dated February 6, 2013, respondent notified the Clerk of this Court of his suspensions in both jurisdictions.

The Clerk of this Court sent a letter via certified mail to respondent notifying him that, pursuant to Rule 29(b), RLDE, Rule 413, SCACR, he had thirty (30) days in

[1] As noted by the Maryland Court of Appeals in its opinion suspending respondent from the practice of law, Maryland does not have an express equivalent sanction in its attorney discipline regulatory scheme. However, an indefinite suspension in Maryland is the functionally equivalent sanction because respondent must satisfy a fitness requirement in order to be reinstated in the District of Columbia.

which to inform the Court of any claim he might have that identical discipline in this state is not warranted and reasons for such claim. Though respondent signed the certified mail receipt, he did not respond to the Clerk's notice. The Office of Disciplinary Counsel filed a response stating it had no information that would indicate the imposition of identical discipline in this state is not warranted.

We find a six-month suspension is the appropriate sanction to impose as reciprocal discipline in this matter. *See In re Cooper*, 397 S.C. 339, 725 S.E.2d 491 (2012); *In re Strait*, 343 S.C. 312, 540 S.E.2d 460 (2000); *In re Acker*, 308 S.C. 338, 417 S.E.2d 862 (1992). We also find a sufficient attempt has been made to serve notice on respondent, and find none of the factors in Rule 29(d), RLDE, Rule 413, SCACR, present in this matter. We therefore suspend respondent from the practice of law for six months for the misconduct set forth in the opinion of the District of Columbia Court of Appeals.

Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11-BG-1357

IN RE ROBERT W. MANCE, RESPONDENT.

A Member of the Bar
of the District of Columbia Court of Appeals

(Bar Registration No. 285379)

On Report and Recommendation of an *Ad Hoc* Hearing Committee
Approving Petition for Negotiated Discipline

(BDNs 247-09, 369-09,25-10 & 219-11)

(Decided: January 26, 2012)

Before GLICKMAN and EASTERLY, *Associate Judges*, and FARRELL, *Senior Judge*.

PER CURIAM: In this disciplinary matter, the *Ad Hoc* Hearing Committee ("Committee") recommends approval of a petition for negotiated attorney discipline. *See* D .C. Bar Rule X I, § 12.1. Respondent, Robert Mance, admits to violating the following District of Columbia Rules of Professional Conduct: Rule 1.1 (a) (failure to provide competent representation), Rule 1.1 (b) (failure to serve a client with skill and care), Rule 1.3 (a) (failure to provide zealous and diligent representation), Rule 1.5 (b) (failure to provide client with a writing

stating the rate or basis of fee), Rule 1.7 (b) (representing client at a time when his professional judgment may have been affected by his own interest), Rule 1.8 (business transaction with client) and Rule 1.16 (d) (failure to timely surrender client's papers upon termination of the representation). These violations stem from his representation of three separate complainants. Respondent and Bar Counsel have negotiated a six-month suspension with reinstatement conditioned upon demonstrating fitness to practice law.

Respondent's admissions were made voluntarily, with the advice of counsel, and in connection with a petition for negotiated discipline filed by Bar Counsel on August 30, 2011. [2] The matter was referred to an *Ad Hoc* Hearing Committee, where respondent admitted the stipulated facts contained in the petition and his own supporting affidavit, admitted that his actions constituted violations of the aforementioned Rules of Professional Conduct, and consented to the sanction agreed upon with Bar Counsel. Respondent confirmed that he was entering into the disposition freely and voluntarily, and not as the result of any coercion or duress.[3]

The first complaint of misconduct stemmed from respondent's representation in a civil matter. Following an appeal to Superior Court from an administrative action, the Superior Court directed respondent to file a brief. Respondent failed to comply or seek an extension resulting in dismissal of the case for want of prosecution. As a result, the complainant lodged a complaint with Bar Counsel. Respondent subsequently met with the complainant, and assured

[2] *See* D.C. Bar R. XI, § 12.1 (c); Bd. Prof. Resp. R. 17.5.

[3] *Id.*

him that he would reopen the case and appeal the dismissal, thereby persuading the complainant to withdraw the complaint with Bar Counsel. Shortly thereafter, respondent entered into a written agreement with this complainant to pay him $19,500 as settlement of "any issues or differences between them." Respondent failed to inform the complainant of his right to seek outside counsel to review this proposed settlement. After executing the agreement, respondent paid $900, but made no further payment and stopped communicating with the complainant, who then renewed his complaint with Bar Counsel (BDN 247-09).

The second complaint of misconduct stemmed from respondent's failure to respond to a request for production of documents (BDN 369-09). Although the trial court directed compliance by a certain date and the complainant personally provided respondent with the subject documents, respondent failed to submit them to opposing counsel. As a result, opposing counsel requested sanctions, which the trial court granted. The subject sanctions included prohibiting the complainant from testifying at trial or presenting any evidence of damages or any exhibits at trial. The defendant in that suit then moved for summary judgment, and again respondent failed to respond. The trial court granted the motion and respondent filed an appeal asserting that he had produced the documents by hand delivery, although he never obtained a receipt. This court vacated the order imposing sanctions and the entry of summary judgment and remanded the case. *See Riley v. Metro New U., et al.*, No. 08-CV -1491 (D .C., February 3, 2010).

The third complaint of misconduct stemmed from respondent's representation in a criminal matter (BDN 25-10). The defendant, who was incarcerated and at the time represented

by court-appointed counsel, requested his file from respondent, but respondent failed to produce it. The complainant notified Bar Counsel, who opened an investigation that ultimately led to transmission of the file materials.[4]

In its Report and Recommendation, the *Ad Hoc* Committee has reviewed the circumstances surrounding the three disciplinary events, properly weighed the aggravating and mitigating factors,[5] and found that the facts giving rise to the negotiated discipline did not involve misappropriation, dishonesty or intentional misconduct. [6] As the recommended sanction falls within the range of discipline imposed for similar misconduct, we approve the negotiated discipline. [7] Accordingly, it is

ORDERED that Robert W. Mance, III, is hereby suspended from the practice of law in the District of Columbia for the period of six months. Reinstatement in the District of Columbia shall be conditioned on respondent's proof of his fitness to practice law. Moreover, respondent's

[4] Bar Counsel elected not to pursue additional charges in BDN 219-11, that respondent failed to represent a fourth client with requisite care. Although this claim was not adjudicated, Bar Counsel has reserved the right to present the facts and circumstances of misconduct in connection with any petition for reinstatement.

[5] Board of Professional Responsibility Rule 17.5 (a)(iii).

[6] *See, e.g.*, *In re Steele*, 868 A.2d 146, 153 (D.C. 2005).

[7] *See In re Evans*, 902 A.2d 56 (D.C. 2006) (six-month suspension with final ninety days stayed in favor of one year probation for violating Rules 1.1 (a), 1.1 (b), 1.7 (b)(4) and 8.4 (d)); *In re Banks*, 709 A.2d 1181 (D.C. 1998) (ninety-day suspension with final thirty days stayed during one year of probation for violating Rules 1.3 (a), 1.3 (c), 1.4 (a) and 1.5 (b)).

restitution to his clients or the client security trust fund shall be a prerequisite to any future reinstatement proceeding on the question of fitness. We direct respondent's attention to the requirements of D.C. Bar R. XI, § 14 (g) and its effect on his eligibility for reinstatement. *See* D.C. Bar R. XI, § 16 (c).

So ordered.

The Supreme Court of South Carolina

In the Matter of Marshall U. Rogol, Respondent.

Appellate Case No. 2013-001822

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver, Gretchen B. Gleason, pursuant to Rule 31, RLDE.

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

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

IT IS FURTHER ORDERED that Ms. Gleason is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Ms. Gleason shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Ms. Gleason may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow, operating, and/or any other law account(s) of respondent, shall serve as notice to the bank or other financial institution that

Gretchen B. Gleason has been duly appointed by this Court and that respondent is enjoined from making withdrawals or transfers from or writing any check or other instrument on any of the account(s).

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Gretchen B. Gleason, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Ms. Gleason's office.

Ms. Gleason's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

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

Columbia, South Carolina

August 28, 2013

The Supreme Court of South Carolina

In the Matter of William E. Whitney, Jr., Respondent.

Appellate Case No. 2013-001807

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver, Gretchen B. Gleason, pursuant to Rule 31, RLDE.

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

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

IT IS FURTHER ORDERED that Ms. Gleason is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Ms. Gleason shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Ms. Gleason may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow, operating, and/or any other law account(s) of respondent, shall serve as notice to the bank or other financial institution that

Gretchen B. Gleason has been duly appointed by this Court and that respondent is enjoined from making withdrawals or transfers from or writing any check or other instrument on any of the account(s).

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Gretchen B. Gleason, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Ms. Gleason's office.

Ms. Gleason's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

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

Columbia, South Carolina

August 28, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Melissa Anne York and Olga Joanne Cristy, Appellants,

v.

Dodgeland of Columbia, Inc. and Jim Hudson Automotive Group, and Jim Hudson Superstore, a/k/a Jim Hudson Hyundai, Respondents.

Appellate Case No. 2011-199006

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5169
Heard June 12, 2013 – Filed September 4, 2013

AFFIRMED AS MODIFIED

Patrick E. Knie, of Patrick E. Knie, PA, of Spartanburg, and William Angus McKinnon and Susan Foxworth Campbell, both of McGowan Hood & Felder, LLC, of Rock Hill, for Appellants.

Rebecca Laffitte and John Michael Montgomery, both of Sowell Gray Stepp & Laffitte, LLC, Claude E. Hardin, Jr., of Hardin Law Firm, LLC, and Steven W. Hamm and Jo Anne Wessinger Hill, both of Richardson Plowden & Robinson, PA, all of Columbia, for Respondents.

GEATHERS, J.: Appellants argue the trial court erred in granting Respondents' motions to dismiss and to compel arbitration. Because every dispute was within the scope of at least one valid arbitration agreement, the trial court did not err in dismissing Appellants' suit and compelling arbitration.

FACTS/PROCEDURAL BACKGROUND

This case involved two plaintiffs, Appellant Melissa York (York) and Appellant Olga Cristy (Cristy), with each alleging an automobile dealership charged illegal documentation fees. Notably, each plaintiff's respective claim arose from separate transactions occurring at separate dealerships; although York and Cristy filed suit together, York's two claims were against Dodgeland of Columbia, while Cristy's sole claim was against Jim Hudson Hyundai. Because the underlying case involved three vehicle purchases, one consumer loan, and two distinct sets of parties, as memorialized within four separate contracts, extensive factual review and analysis is necessitated.

York / Dodgeland Transactions

On September 4, 2006, York and her husband, Jessie York (Husband), entered into two purchase agreements with Dodgeland of Columbia for two pre-owned vehicles, a Dodge Ram pickup and a Chevy Trailblazer. The purchase agreement (Buyers Order) for the Ram reflected York and Husband as "co-purchasers," the agreed selling price, a trade allowance, a trade pay-off balance, $289 in "processing fees," and tax, tag, and title fees. The record does not indicate whether the Yorks financed the $29,643 balance owed under this contract. At the top of this Buyers Order, in emboldened, capitalized letters, appeared the following language: "**THIS BUYERS ORDER IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE SECTION 15-48-10**." Additionally, at the bottom of this Buyers Order, was the following language:

> **IN CONSIDERATION FOR SELLER AGREEING TO SELL TO PURCHASER THE ABOVE DESCRIBED VEHICLE, PURCHASER AGREES THAT ANY AND ALL DISPUTES IN ANY WAY RELATED TO ANY NEGOTIATION OR**

POTENTIAL PURCHASE, FINANCING, OR ACTUAL PURCHASE OF ANY VEHICLE OR SERVICE FROM DEALER SHALL BE SUBJECT TO THE FEDERAL ARBITRATION ACT. BUYER UNDERSTANDS AND AGREES THAT THIS TRANSACTION INVOLVES INTERSTATE COMMERCE AND THAT NO ACTION IN A REPRESENTATIVE CAPACITY MAY BE FILED WITH THE ARBITRATOR AND THAT ARBITRATOR HAS NO AUTHORITY TO AWARD ANY RELIEF TO ANYONE OTHER THAN THE ABOVE NAMED PURCHASER OR SELLER AND THAT ARBITRATOR SHALL DECIDE ALL ISSUES OF ARBITRABILITY.

While this document indicated that additional terms existed on the "reverse side hereof," that portion of the document is not part of the Record on Appeal.

The Buyers Order for the Chevy Trailblazer transaction reflected York and Husband as "co-purchasers," the agreed selling price, $289 in "processing fees," and tax, tag, and title fees. The record does not indicate whether the Yorks financed the $18,143 balance owed under this contract. This contract incorporated the same language found within the Buyers Order for the Ram pickup, although the arbitration notice header was underlined and in a bigger font. The reverse side of this document is not part of the Record on Appeal.

Cristy / Jim Hudson Hyundai Transaction

We again note that no relationship existed between York and Cristy, and that Respondent Jim Hudson Hyundai was unaffiliated with Respondent Dodgeland. Thus, the parties and conduct associated with the York/Dodgeland transactions were distinct from those involved in the Cristy/Jim Hudson Hyundai transaction.

On March 28, 2008, Cristy purchased a new 2008 Hyundai Tucson from Jim Hudson Hyundai. Cristy signed two contracts: (1) a Buyers Order memorializing the terms of the sale of the vehicle by Jim Hudson Hyundai to Cristy; and (2) a Retail Installment Contract (Installment Contract) memorializing, *inter alia*,

Cristy's debt and repayment obligations to BB&T, and BB&T's related obligation to pay the funded loan's proceeds to Jim Hudson Hyundai.

As to the Buyers Order, it reflected Cristy as the customer, the agreed selling price and trade allowance, as well as the pay-off balance of the trade-in, a manufacturer rebate, a $289 "processing fee," and tax, tag, and title fees. Under this agreement, Cristy owed the dealership $18,013. At the very top of this Buyers Order, in emboldened, capitalized, and underlined letters, appeared the following language:

> **THIS CONTRACT IS SUBJECT TO ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT, AND IF THE FEDERAL ARBITRATION ACT IS NOT APPLICABLE, THEN THIS CONTRACT IS SUBJECT TO ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT.**

Additionally, at the very bottom of this Buyers Order, but directly above Cristy's signature, was the following language:

> ☜ **SEE ADDITIONAL TERMS AND CONDITIONS ON OPPOSITE PAGE** ☞
> CUSTOMER HAS READ **BOTH SIDES** OF THIS CONTRACT . . . .

The reverse side of this Buyers Order incorporated provisions further defining the scope and terms of arbitration, including remedy and claim type limitations.

While Cristy's Buyers Order evidenced the actual sale and purchase of the vehicle, her Installment Contract memorialized the terms of the financing arrangement (*i.e.*, the BB&T loan) procured to satisfy the balance owed under the aforementioned Buyers Order. In particular, the Installment Contract outlined, among other things, Cristy's and BB&T's, eventually mutual, financial obligations, such as: amount financed; to whom the funded loan proceeds should be remitted; repayment period and monthly payment amounts; applicable interest rates, fees, and finance charges; and other loan related "terms" (*i.e.*, rights and restrictions). Pursuant to this agreement, Cristy was the buyer and debtor, the 2008 Hyundai was the collateral, BB&T was the creditor, lienholder, and Assignee, and Jim Hudson Hyundai was

the seller, recipient of the funded loan proceeds, and assignor. Notably, the Installment Contract read, in pertinent part, as follows:

> [A]ny claim or dispute . . . between you and us or our agents . . . that arises out of or relates to your credit application, this Contract or any resulting transaction . . . is to be decided by neutral, binding arbitration. . . . The Federal Arbitration Act . . . governs [and] not any state [arbitration] law.

This contract also included provisions further defining the scope and terms of arbitration, including remedy and claim type limitations.

Allegations of Illegal Dealer Practices

York and Cristy filed a single suit, on June 25, 2010, against Dodgeland of Columbia, Jim Hudson Automotive Group, and Jim Hudson Superstore, a/k/a Jim Hudson Hyundai.[1] York and Cristy alleged misleading business practices culminated in the charging of illegal administration fees, which artificially raised the agreed purchase prices and, thereby, impermissibly increased the dealers' profits. The complaint also stated that it was filed "for the benefit of all others."[2]

Dodgeland and Jim Hudson Hyundai filed motions to dismiss and to compel Arbitration, which the trial court granted. The trial court denied Appellants' Rule 59(e) motion and this appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in finding valid any of the arbitration agreements or any provisions or subparts, thereof?

---

[1] While York was a named Plaintiff, Husband was not. Also, Jim Hudson Automotive Group was uninvolved in Cristy's purchase from Jim Hudson Cars, L.L.C. d/b/a, Jim Hudson Hyundai. Furthermore, Jim Hudson Superstore is not an official name for Jim Hudson Hyundai.

[2] S.C. Code Ann. § 56-16-110(2) (2006) (authorizing "one or more may sue for the benefit of the whole").

2. Did the trial court err in finding Appellants' claims were within a valid arbitration agreement's scope?

3. Did the trial court err in denying arbitration-related discovery?

STANDARD OF REVIEW

Whether a claim is subject to arbitration is an issue for judicial determination. *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). While this determination by a trial court is reviewed de novo, an appellate court will not reverse this finding if it is reasonably supported by the evidence. *Id.*

LAW/ANALYSIS

I. Valid Arbitration Agreements Existed.

Whether a valid arbitration agreement exists is a matter for judicial determination. *Partain*, 386 S.C. at 491, 689 S.E.2d at 603; *see Simspon v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23-24, 644 S.E.2d 663, 668 (2007) (finding a "gateway matter" to arbitrability is the existence of an agreement to arbitrate). In making this determination, trial courts consider "general contract defenses" to ensure a meeting of the minds to arbitrate existed, and that such an agreement was not the result of "fraud, duress, [or] unconscionability." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001).

The trial court did not err in finding York, as well as Cristy, was bound by a valid arbitration agreement because each Appellant entered into an arbitration agreement that (A) complied with the Federal Arbitration Act (FAA); (B) evidenced intent to arbitrate; (C) was not unconscionable; and (D) was not void as against public policy.

A. All Contested Arbitration Agreements Involved Interstate Commerce and Complied With the FAA.

Pursuant to Section 2 of the FAA, a "written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable,

and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2013). Because "involving commerce" means the "functional equivalent of 'affecting commerce,'" the FAA's reach includes the "full breadth of the Commerce Clause." *Zabinski*, 346 S.C. at 590-91, 553 S.E.2d at 115 (quoting *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 274 (1995)); *accord Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003); *see Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (stating, unless the parties agreed to the contrary, the FAA applies to any transaction involving interstate commerce, regardless of whether the parties contemplated an interstate transaction). Thus, an arbitration agreement that complies with the FAA and that exists within a contract to purchase or finance a vehicle preempts any *state arbitration-specific law* that would otherwise invalidate the arbitration agreement. *See Stout v. J.D. Byrider*, 228 F.3d 709, 715 (6th Cir. 2000) (holding contracts for the purchase and financing of a vehicle involve interstate commerce); *Simpson*, 373 S.C. at 22 n.1, 644 S.E.2d at 667 n.1 (finding a vehicle trade-in contract involves interstate commerce); *Zabinski*, 346 S.C. at 590, 553 S.E.2d at 116 (stating the FAA supersedes state arbitration-specific law that would invalidate an arbitration agreement).

In the instant matter, each contract involved interstate commerce and evidenced an intent to settle disputes by arbitration. Accordingly, the trial court properly determined the FAA applied and the FAA's requirements were met.

B. All of the Contested Arbitration Agreements Evidenced An Agreement To Arbitrate.

Notwithstanding the fact that the contested arbitration agreements complied with the FAA and, thus, potential invalidation under state arbitration-specific law was preempted, York and Cristy must still have agreed, as a matter of general state contract law, to arbitrate. *Zabinski*, 346 S.C. at 593, 553 S.E.2d at 116 (holding while "state law[] [that is] applicable *only* to arbitration provisions" and that would invalidate an FAA compliant arbitration provision is preempted, "general contract defenses," which exist under state law and apply to *all* contracts, are not preempted); *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364 ("General contract principles of state law apply to arbitration clauses governed by the FAA." (citing *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 685 (1996)); *see Simpson*, 373 S.C. at 23-24, 644 S.E.2d at 668 (finding a "gateway matter" to arbitrability is whether a valid agreement to arbitrate existed). Thus, a party challenging an FAA

compliant arbitration provision may still argue no meeting of the minds to arbitrate existed.

Appellants argue no meeting of the minds to arbitrate existed because: (1) York's agreements did not unambiguously demonstrate intent to arbitrate; (2) York's agreements omitted material and essential terms; and (3) Cristy's agreements incorporated inconsistent and conflicting terms.

1. *York's Arbitration Agreements Were Not Ambiguous.*

York cites *Traynham v. Yeargin Enterprises, Inc.*, for the proposition that it is improper to compel arbitration when the underlying agreement is ambiguous about whether the parties agreed to arbitrate. 304 S.C. 188, 190-91, 403 S.E.2d 329, 330 (Ct. App. 1991). In *Traynham*, Article 1 of the executed contract sought to incorporate terms existing within Article 7; Article 7, however, was not attached to the signed document. *Id.* Thus, the court in *Traynham* found the contract, when "viewed in its totality[,] created an ambiguity which was litigable as to whether the parties agreed to arbitration." *Id.*

York's contracts are quite distinguishable from the contract in *Traynham*. York's contracts incorporated an arbitration notice on the top of the first page, as well as a provision clarifying that all disputes within the scope of the arbitration agreement must be arbitrated. This stands in stark contrast to the ambiguous contract in *Traynham* that lacked any actual arbitration language.

York further argues ambiguity existed because her contracts were only "subject to" the FAA and, according to her proffered definition, being "governed or affected by" the FAA does not mean she unambiguously intended to waive her right to a jury trial. Her contracts provided, in pertinent part, as follows:

> PURCHASER AGREES THAT ANY AND ALL DISPUTES IN ANY WAY RELATED TO ANY NEGOTIATION OR POTENTIAL PURCHASE, FINANCING, OR ACTUAL PURCHASE OF ANY VEHICLE OR SERVICE FROM DEALER *SHALL BE SUBJECT TO THE FEDERAL ARBITRATION ACT . . . .*

(emphasis added).

"Where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Park Regency, LLC v. R & D Dev. of the Carolinas, LLC*, 402 S.C. 401, 412-13, 741 S.E.2d 528, 534 (Ct. App. 2012); *accord Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001) (stating the court must interpret contractual language in its natural and ordinary sense). Furthermore, a party who signed a contract is deemed to have read and understood "the effect" of the contract. *Wachovia Bank v. Blackburn*, 394 S.C. 579, 585, 716 S.E.2d 454, 458 (Ct. App. 2011). Here, the contractual language "be[ing] subject to the Federal Arbitration Act" means, in light of FAA Section 2 and the ordinary meaning of "subject to," that all disputes within the scope of the provision must be arbitrated. *See* 9 U.S.C. § 2 ("A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable . . . ."); *Random House Dictionary, Webster's Third New International Dictionary*, 2275 (3d ed. 2002) (defining "subject" as "falling under or submitting to the power or dominion of," as in "*be subject to the laws*" (emphasis added)); *The American Heritage College Dictionary*, 1352 (3d ed. 1997) (defining "subject" as "under the power or authority of"); *Funk and Wagnalls Standard Desk Dictionary*, 671 (1984) (defining "subject" as "under the power of," "yielding" to, or "affected by: with to: *subject to*"). Hence, this contractual language indicated the parties' unambiguous, mutual intent to arbitrate.

2. *York's Arbitration Agreements Did Not Omit Material and Essential Terms.*

Referencing *Grant v. Magnolia Manor-Greenwood, Inc.*, York argues her arbitration agreements are invalid because they omitted the following material terms: how an arbitrator is chosen; what discovery rules apply; how arbitration fees are allocated; and how arbitration is initiated. 383 S.C. 125, 130, 678, S.E.2d 435, 438 (2009) (stating South Carolina law requires an arbitration agreement to reflect a "meeting of the minds . . . with regard to all essential and material terms").

In *Grant*, an arbitration agreement specifically required a particular entity to serve as arbitrator; it did not, however, specify an alternate arbitrator or a mechanism to select an alternate. *Id.* at 128, 678 S.E.2d at 437. After the designated entity was

no longer able to serve as arbitrator, a dispute arose. *Id.* Finding the specification of the named arbitrator was a material term of the agreement and that this material term was rendered ineffective, our supreme court held arbitration was no longer required. *See id.* at 128-132, 678 S.E.2d at 437-39 ("Where designation of a specific arbitral forum has implications that may substantially affect the substantive outcome of the resolution, we believe that it is neither 'logistical' nor 'ancillary.'"). The court also held the default selection mechanism within FAA Section 5 was inapplicable when the parties make a specific arbiter an integral term. *Id.* at 131, 678 S.E.2d at 438.

Although *Grant* does require all material terms to exist within an arbitration agreement for a meeting of the minds to result, each term that York alleges to be absent from her contract is distinguishable from the material terms required under *Grant*. First, the lack of a specified arbiter is not an omission of a material term. While the *Grant* court held that a named arbitrator is a material term *when one is specified within an agreement*, and that FAA Section 5 does not apply when *such a specification exists*, these holdings are inapplicable when the contract does not specify a particular arbitrator, *i.e.*, make the chosen arbitrator a material term. In fact, this is the exact situation to which Section 5 of the FAA applies. *See* 9 U.S.C.A. § 5 (2013) (providing a mechanism to select an arbiter when the agreement does not do so). Second, York cites no authority for the proposition that discovery rules, cost allocations, or arbitration initiation procedures are material terms that an arbitration agreement must explicitly designate. Rather, these terms are "ancillary logistical" ones not required within an arbitration agreement. *Cf. Grant*, 383 S.C. at 131-32, 678 S.E.2d at 439 (distinguishing between "integral terms," which "may substantially affect the substantive outcome," with "ancillary logistical concerns," which do not).

3. *Cristy's Arbitration Agreements Did Not Incorporate Inconsistent or Irreconcilable Terms.*

Cristy argues no meeting of the minds existed to arbitrate because the arbitration provisions within her Buyers Order and Installment Contract were inconsistent and conflicting. Cristy, citing *Harris v. Ideal Solutions, Inc.*, 385 S.C. 74, 79, 682 S.E.2d 523, 526 (Ct. App. 2009), posits that because the "two contracts [were] executed at the same time on the same subject, they are treated as unitary" and, thus, the conflict between the two arbitration clauses prevented any meeting of the

minds to arbitrate. While we agree *Harris* is applicable, we disagree with Cristy's interpretation of the case's holding.

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Id.* (citation and quotation marks omitted). "[I]n the *absence of anything indicating a contrary intention*, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the Court will consider and construe them together." *Id.* (emphasis added).

In the instant matter, Cristy's Buyers Order and Installment Contract should not be construed together because the parties stated their intent to consider them separately:

> This contract for sale is entered into between Jim Hudson Hyundai, hereinafter called Dealer, and Customer, as identified below. *Any retail installment contract* or other document executed by Customer in connection herewith *is simply a means of satisfying* Customer's obligations under *this Contract of Sale* . . . .

(emphases added).

This language demonstrates Cristy and Jim Hudson Hyundai explicitly intended a demarcation between the two contracts. *See McGill v. Moore*, 381 S.C. 179, 185-86, 672 S.E.2d 571, 575 (2009) (examining contractual language to ascertain the parties' intentions and giving it legal effect). Further, this memorialized intent precludes construing the two contracts together. *See Harris*, 385 S.C. at 79, 682 S.E.2d at 526 (stating the general rule that "anything indicating a contrary intention" precludes a court from construing contracts together, even though they were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction). Therefore, Cristy's arbitration agreements did not incorporate inconsistent or irreconcilable terms. *Id.*

Furthermore, even if we accept the litigants' concession that these two contracts should be construed together, Term 14 of the Buyers Order negates the existence of any inconsistent or irreconcilable terms. Term 14 expressly permitted modification of the Buyers Order's terms when new terms were "evidenced in

writing and signed by Customer and an authorized representative of Dealer." *Cf. U.S. Bank Trustee Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009) (stating a contract can be modified by another contract that includes a meeting of the minds on essential terms). Thus, if the subsequently executed Installment Contract effectuated a valid modification to the arbitration terms of the Buyers Order, no inconsistencies existed. Here, Cristy and Jim Hudson Hyundai executed the Installment Contract, which contained revised arbitration terms, after they had already agreed to the purchase/sale within the executed Buyers Order.[3] Thus, even if the two contracts were construed together, no inconsistencies would exist.

C. Unconscionability, as to Cristy.[4]

Just as state law determines whether an agreement to arbitrate existed under the FAA, courts may invalidate arbitration agreements on general state law "contract defenses, such as fraud, duress, and unconscionability." *Zabinski*, 346 S.C. at 593, 553 S.E.2d at 116; *accord Munoz*, 343 S.C. at 539, 542 S.E.2d at 364 ("General contract principles of state law apply to arbitration clauses governed by the FAA." (citing *Doctor's Assoc., Inc.*, 517 U.S. at 685)); *see* 9 U.S.C. § 2 (providing grounds "at law or in equity for the revocation of any contract" remain applicable).

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[3] The Buyers Order reflects an unpaid, "Balance Due" of $18,013. The Installment Contract, however, reflects that Cristy financed $18,463. This $450 difference is due to Cristy's election to purchase GAP Insurance. Because Cristy opted to purchase and finance GAP Insurance *after she agreed to purchase the vehicle, i.e.*, signed the Buyers Order, the Installment Contract was necessarily executed after the Buyers Order.

[4] While the first pages of York's Buyers Orders indicate that additional "terms and conditions" exist on "the reverse side," these portions of the documents were not part of the Record on Appeal. Appellant also indicated these portions were not presented to the trial court. Because of the limited nature of the Record on Appeal in this regard, and the fact that the arbitration provisions existing within the included first pages do not demonstrate oppressiveness, we do not further review York's Buyers Orders for unconscionability. *See Beverly S. v. Kayla R.*, 395 S.C. 399, 401-02, 718 S.E.2d 224, 225-26 (Ct. App. 2011) (noting an appellant bears the burden of providing a record on appeal sufficient for intelligent review); Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal.").

In South Carolina, unconscionability is "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668. Thus, unconscionability is "due to *both* an absence of meaningful choice and oppressive, one-sided terms." *Id.* at 25, 644 S.E.2d at 669 (emphasis added).

In light of the two prongs of the unconscionability analysis, we must determine whether: (1) the arbitration agreements within Cristy's Buyers Order and her Installment Contract were tainted by the absence of meaningful choice; and (2) oppressive and one-sided arbitration terms existed only within Cristy's Buyers Order.

1. *Absence of Meaningful Choice.*

Absence of meaningful choice on the part of one party speaks to the fundamental fairness of the bargaining process. *Id.* "In determining whether a contract was tainted by an absence of meaningful choice, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Id.* (internal citations and quotation marks omitted). As our supreme court noted in *Simpson*, the "loss of the right to a jury trial" and foregoing statutorily provided remedies are also relevant to this determination. *Id.* at 27, 644 S.E.2d at 670. Furthermore, an adhesion contract for the purchase of an automobile receives "considerable skepticism," although it is not, per se, unconscionable. *Id.* at 27, 644 S.E.2d at 669-70. We now analyze *each* of Cristy's arbitration agreements for the absence of meaningful choice.

a. The Arbitration Agreement Within Cristy's Buyers Order.

Initially, we note that Cristy's Buyers Order is an adhesion contract. *See id.* at 26-27, 644 S.E.2d at 669 ("[A]n adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable."). Aside from the selection of the desired vehicle VIN and figures dependent upon the agreed price, the remaining terms of sale, many of which are quite significant, were pre-printed and, presumptively, non-negotiable. Such pre-printed terms included, *inter alia*,

disclaimer of warranty, arbitration provisions, prejudgment interest, attorney's fees, choice of law, and severability. Also, a footer on the Buyers Order stating "Richland County, SC Only" and reflecting a drafting date of "05/10/04" and a revision date of "06/09/06," further support the notion it was a form document. Accordingly, this Buyers Order was an adhesion contract and considerable skepticism is warranted.

Here, as in *Simpson*, Cristy lost her right to a jury trial and mandatory statutory remedies. *See id.* at 27-28, 644 S.E.2d at 670 (considering the loss of the right to a jury trial and foregoing statutorily-required remedies "[i]n determining whether a contract was tainted by an absence of meaningful choice" (internal quotation marks and citation omitted)). Further, Cristy's single purchase was not a substantial business concern to Jim Hudson Hyundai and a significant disparity existed between the parties' relative bargaining power and sophistication. *See id.* at 25, 644 S.E.2d at 669 ("In determining whether a contract was tainted by an absence of meaningful choice, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication . . . ." (internal quotation marks and citation omitted)). In light of these findings and the presence of an adhesion contract, Cristy lacked meaningful choice in agreeing to this arbitration agreement.

b. The Arbitration Agreement Within Cristy's Installment Contract.

Cristy's Installment Contract is also an adhesion contract and, hence, considerable skepticism is again warranted. *Id.* at 26-27, 644 S.E.2d at 670. The terms of this agreement also involved the waiver of the right to a jury trial. Further, Cristy was not a substantial business concern to either the assignor dealer or the assignee-lender, BB&T; a significant disparity existed between the parties' relative bargaining power and sophistication; and the arbitration agreement appeared only in small print on the reverse side of the document. Thus, the Installment Contract, like the Buyers Order, was tainted by the absence of meaningful choice. *Id.*

2. *Oppressive, One-Sided Terms.*

Because the Installment Contract and the Buyers Order were tainted by the absence of meaningful choice, we must next determine whether either agreement

incorporated oppressive, one-sided terms. *Id.* at 25, 644 S.E.2d at 669 (stating unconscionability is "due to *both* an absence of meaningful choice and oppressive, one-sided terms" (emphasis added)). To the extent either one did, that particular arbitration agreement was unconscionable; it would be tainted by the absence of meaningful choice and oppressive, one-sided terms. *Id.* Terms are oppressive when "no reasonable person would make them and no fair and honest person would accept them." *See id.* at 25, 644 S.E.2d at 668.

a. The Arbitration Agreement Within Cristy's Buyers Order.

Cristy argues two provisions within her Buyers Order arbitration agreement are oppressive and one-sided and that these provisions are not severable. We agree.

The first provision Cristy challenges as oppressive reads: "In no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party." Our supreme court held a *literally identical provision* oppressive and one-sided in *Simpson*. *Id.* at 28, 644 S.E.2d at 670. In *Simpson*, the underlying civil court complaint alleged, among other things, that the dealer violated the South Carolina Unfair Trade Practices Act (SCUTPA) and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (Dealers Act). *Id.* at 28-29, 644 S.E.2d at 670-71. Notably, the SCUTPA and Dealers Act required a court to award treble and double damages, respectively, for violations.[5] After our supreme court noted that a provision within the arbitration agreement "unconditionally permit[ed] the weaker party to waive these statutory remedies pursuant to an adhesion contract," the court then held that portion of the arbitration agreement "oppressive, one-sided, and not geared toward achieving an unbiased decision by a neutral decision-maker." *Id.* at 28-30, 644 S.E.2d at 670-71. Because the provision in Cristy's Buyers Order is *word-for-word identical* to the oppressive provision in *Simpson*, the provision within Cristy's contract is necessarily oppressive. *Id.* In light of this finding and the fact that Cristy lacked meaningful choice in agreeing to arbitrate, as previously discussed, the provision banning

[5] S.C. Code Ann. § 56-15-110(1) (2006) (providing that an individual "shall recover double the actual damages by him sustained"); S.C. Code Ann. § 39-5-140(a) (1985) (providing that a "court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper").

statutory remedies is unconscionable. *See id.* at 25, 644 S.E.2d at 669 (stating unconscionability is "due to *both* an absence of meaningful choice and oppressive, one-sided terms" (emphasis added)).

The second provision Cristy challenges allowed Jim Hudson Hyundai to retain repossession, foreclosure, and set-off rights, without regard to pending arbitration claims, while Cristy's sole remedy was arbitration. A "lack of mutuality of remedy in an arbitration agreement, on its own, does not make the arbitration agreement unconscionable." *Id.* at 31, 644 S.E.2d at 672; *see Munoz*, 343 S.C. at 542, 542 S.E.2d at 365 (holding that an arbitration agreement was not unconscionable where it allowed the lender to seek foreclosure while requiring the consumer to arbitrate any counterclaim). When an arbitration clause reserves judicial remedies for protecting the collateral by enforcement procedures specified by law (*e.g.*, replevin or foreclosure), the lack of mutuality is permissible if it bears a "reasonable relationship to the business risks inherent in secured transactions." *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672 (internal quotation marks omitted). However, an "express stipulation that the dealer may bring a judicial proceeding that completely disregards any pending consumer claims that require arbitration," does not bear the requisite reasonable relationship and, therefore, is oppressive and one-sided.

The *Simpson* court reasoned that the clause's express stipulation that the dealer may bring a judicial proceeding, while disregarding any pending arbitration claims, "only act[s] to place an additional burden on the consumer to ensure that the vehicle in controversy is not disposed of in a court proceeding initiated by the dealer before the adjudication of the consumer's claims in arbitration." *Id*. at 32, 644 S.E.2d at 672. Thus, the dealer's retention of judicial remedies that entirely "supersede[d] the consumer's arbitral remedies" did not bear a sufficiently reasonable relationship to risks inherent in secured transactions and it did not promote a neutral arbitral forum. *Id*. Hence, the provision was oppressive. *Id.*

The arbitration clause within Cristy's agreement, which was virtually identical to the oppressive and one-sided clause in *Simpson*, read, in pertinent part, as follows:

> [N]othing in this Contract shall require Dealer to submit to arbitration any claims by Dealer against Customer for claim and delivery, repossession, injunctive relief, or monies owed by Customer in connection with the purchase or lease of any vehicle, and any claims by

> Dealer for the remedies shall not be stayed pending the outcome of arbitration.[6]

Because this clause enables Jim Hudson's judicial remedies to supersede Cristy's arbitral remedies, and because the clause parallels the oppressive language in *Simpson*, it is similarly oppressive and one-sided. In light of this finding and Cristy's lack of meaningful choice in agreeing to arbitrate, as previously discussed, this provision is also unconscionable. Thus, two provisions within this arbitration agreement are unconscionable.

Additionally, we find these two unconscionable provisions are not severable and, therefore, the entire arbitration agreement is invalid. Although courts sometimes strike unconscionable provisions of an arbitration agreement, "severability is not always an appropriate remedy." *Simpson*, 373 S.C. at 33-34, 644 S.E.2d at 673; *see* S.C. Code Ann. § 36-2-302(1) (2006) (permitting courts to refuse to enforce any clause "so as to avoid an unconscionable result"). "'If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties.'" *Simpson*, 373 S.C. at 34, 644 S.E.2d at 674 (quoting *Booker v. Robert Half Int'l Inc.*, 413 F.3d 77, 84-85 (D.C. Cir. 2005)). Further, South Carolina's "general principle . . . is that it is not the function of the court to rewrite contracts for the parties." *Id.*

In *Simpson*, the court found three separate provisions individually unconscionable and invalidated the entire arbitration agreement:

> [W]e find the arbitration clause . . . wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions . . . . While this Court does not ignore South Carolina's policy favoring arbitration, we hold that the intent of the parties is best achieved by severing the arbitration clause in its entirety rather than 'rewriting' the contract by severing multiple unenforceable provisions.

[6] *Accord id.* at 31, 644 S.E.2d at 672.

Id. at 34-35, 644 S.E.2d at 674 (footnote omitted). Likewise, two *key* provisions within Cristy's arbitration agreement are unconscionable. Thus, the aforementioned clauses are not severable and the entire arbitration agreement is unenforceable.

b. The Arbitration Agreement Within Cristy's Installment Contract.

Unlike the unenforceable arbitration agreement within Cristy's Buyers Order, the arbitration agreement within Cristy's Installment Contract did not incorporate oppressive and one-sided terms; the arbitration agreement within the Installment Contract did not preclude the arbitrator from awarding mandatory statutory remedies and it did not incorporate a lack of mutuality of remedies. Further, provisions even existed to advance Cristy's filing and arbitrator fees and to preserve certain self-help remedies for *both* parties. Because this arbitration agreement does not incorporate oppressive and one-sided terms, it is not unconscionable despite the fact that it exists within an adhesion contract and was tainted by a lack of meaningful choice. *See id.* at 25, 644 S.E.2d at 669 (stating unconscionability is "due to *both* an absence of meaningful choice and oppressive, one-sided terms" (emphasis added)).

D. Enforceability, in Light of Public Policy.

Both Appellants argue certain provisions within their respective arbitration agreements were void, as a matter of public policy. We disagree.

1. *Bans Against Group or Class Actions (York and Cristy).*

All of the contested arbitration agreements purport to ban group or class arbitration. The Dealers Act provides, in pertinent part, as follows:

> When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.

§ 56–15–110(2). Noting that the "purpose of the Dealers Act is consumer protection," our supreme court held, in *Herron v. Century BMW* (*Herron I*), that a provision within an arbitration agreement that required purchasers to "waive[] their right to . . . bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration," was void and unenforceable on public policy grounds. 387 S.C. 525, 535-36, 693 S.E.2d 394, 399-400 (2010) (alteration in original). Subsequently, however, the Supreme Court of the United States granted a petition for writ of certiorari, vacated our supreme court's *Herron I* judgment, and remanded with instructions for our supreme court to reconsider its decision invalidating the provision banning class arbitration, in light of the decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2001). *Sonic Automotive, Inc. dba Century BMW v. Watts*, 131 S. Ct. 2872 (2011). Notably, in *Concepcion*, the Supreme Court of the United States held that state law is preempted when it "allows any party to a consumer contract to demand [classwide arbitration]," notwithstanding the presence of a class arbitration waiver in an otherwise valid arbitration agreement.[7] 131 S. Ct. at 1750; *see id*. at 1748 ("Requiring the *availability* of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." (emphasis added)).

On remand, our supreme court noted "the issue of preemption was not preserved for review in the South Carolina proceedings." *Herron v. Century BMW (Herron II)*, 395 S.C. 461, 463, 719 S.E.2d 640, 641 (2012); *id.* at 469, 719 S.E.2d at 644 ("[T]he absence of a preemption discussion [in *Herron I*] is not attributable to this Court's failure to recognize or understand the arguments presented. Rather, Appellants failed to present the issue to us . . . ."). Our supreme court then disposed of the matter on preservation grounds and reinstated its original opinion without considering the preemptive effect of the FAA on the Dealers Act provision affording a right to pursue relief in a representative capacity. *Herron II*, 395 S.C. at 470, 719 S.E.2d at 645 ("[C]onsideration in light of *AT&T Mobility LLC v. Concepcion* is unwarranted.").

Although our supreme court technically "reinstated" its *Herron I* opinion, in light of (1) that case's profound preservation deficiencies; (2) the opinion of the Supreme Court of the United States vacating *Herron I*; and (3) the applicable

[7] York and Cristy argue the Dealers Act affords them a state law right to bring class action, including class arbitration, claims.

holdings within *Concepcion*, the *Herron I* reinstatement did not signify a post-*Concepcion* position that the Dealers Act provision is immune to FAA preemption. Consistently, numerous other jurisdictions now apply *Concepcion* to preempt similar state laws that, if not preempted, would invalidate class action waivers on public policy grounds. *See Litman v. Cellco P'ship*, 655 F.3d 225, 231 (3d Cir. 2011) (holding, in light of *Concepcion* and, thus, contrary to prior New Jersey state law, "the arbitration clause at issue here must be enforced according to its terms, which requires individual arbitration and forecloses class arbitration"); *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1236 (11th Cir. 2012) ("[W]e need not reach the question of whether Florida law would invalidate the class action waiver . . . because, to the extent it does, it would be preempted by the FAA."); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1207 (11th Cir. 2011) ("[I]n light of *Concepcion*, the class action waiver in the Plaintiff's arbitration agreements is enforceable under the FAA."); *id.* at 1215 ("To the extent that Florida law would require the availability of classwide arbitration procedures . . . such a state rule is inconsistent with and thus preempted by FAA § 2."); *McKenzie Check Advance of Fla., LLC v. Betts*, 112 So. 3d 1176, 1178 (Fla. 2013) ("Applying the rational[e] of *Concepcion* . . . we conclude that the FAA preempts invalidating the class action waiver in this case on the basis of it being void as against public policy."); *NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp.*, 24 A.3d 777, 781 (N.J. Super. Ct. App. Div. 2011) ("[W]e uphold the court's specific ruling that the class action waiver provisions in the [vehicle purchase] documents should not be invalidated on public policy grounds, a conclusion that is in keeping with . . . [*Concepcion*]."). Accordingly, the provisions banning class arbitration in the present case cannot be invalidated based upon public policy considerations embodied within state law. Rather, the "the arbitration clause[s] at issue here must be enforced according to [their] terms, which requires individual arbitration and forecloses class arbitration." *Litman*, 655 F.3d at 231.

In York's arbitration agreement, she agreed that "no action in a representative capacity may be filed with the arbitrator and that arbitrator has no authority to award any relief to anyone other than the above named purchaser or seller." This provision is valid and must be enforced according to its terms. *Id.* Similarly, the arbitration agreement within Cristy's Installment Contract incorporated a requirement that Cristy "not . . . participate as a class representative or class member on any class claim that [she] may have . . . , including class arbitration." This provision is also valid and must be enforced according to its terms. *Id.*

2. *Limitations on Statutory Remedies (Cristy).*

As discussed within Section I, C, *supra*, the arbitration agreement within Cristy's Buyers Order was unconscionable and, thus, void. Because *general* state law contract defenses, such as unconscionability, remain effective, post-*Concepcion*, as a permissible basis for voiding an arbitration agreement, it is unnecessary to determine whether (1) state public policy law invalidates any particular provision within this arbitration agreement and (2) the potential preemptive effect of the FAA in this particular instance. *See Concepcion*, 131 S. Ct. at 1746-47 (recognizing generally applicable contract defenses, such as unconscionability, remain valid grounds to void an arbitration agreement, so long as the defense applies to all contracts and is not applied in a manner to specifically disfavor arbitration).

E. Conclusions as to the Validity of the Arbitration Clauses.

The arbitration agreements within York's two Buyers Orders were valid because each: (A) complied with the FAA; (B) evidenced intent to arbitrate; (C) was not unconscionable; and (D) was not void as a matter of public policy.

The arbitration agreement within Cristy's Buyers Order (A) complied with the FAA and (B) evidenced intent to arbitrate. Nonetheless, this agreement was (C) unconscionable and, thus, invalid in its entirety.

The arbitration agreement within Cristy's Installment Contract was valid because it: (A) complied with the FAA; (B) evidenced intent to arbitrate; (C) was not unconscionable; and (D) was not void as a matter of public policy.

II. Appellants' Claims Were Within the Scope Of a Valid Arbitration Agreement.

We now address whether Appellants' claims fell within the scope of their respective, valid arbitration agreements, *i.e.*, the arbitration agreement(s) existing within either York's two Buyers Orders or Cristy's Installment Contract.

A court must determine whether the factual allegations underlying a claim are within the scope of an arbitration clause. *Partain*, 386 S.C. at 492-93, 689 S.E.2d at 604. Because "[t]he policy of the United States and of South Carolina is to favor

arbitration of disputes," arbitration should generally be ordered, "[u]nless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute." *Id.* at 491, 689 S.E.2d at 603-04. "A clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly" and is "capable of an expansive reach." *Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d at 213-14 (2013) (citations omitted). Thus, a claim is within the scope of an arbitration clause that purports to cover all related disputes, so long as a significant relationship exists between the claim and the contract containing the arbitration agreement. *Partain*, 386 S.C. at 493, 689 S.E.2d at 604.

A. York Must Arbitrate Her Claims.

The arbitration clause appearing in York's two Buyers Orders applied to "*any and all disputes* in any way *related to any* negotiation or potential purchase, financing or *actual purchase of any vehicle* or service from dealer." (emphases added). Such broad language affords this clause an expansive reach. *Landers*, 402 S.C. at 109, 739 S.E.2d at 214. Thus, claims within the literal terms of the clause, as well as those claims with a significant relationship to the Buyers Order, are subject to the terms of the arbitration agreement. *Partain*, 386 S.C. at 493, 689 S.E.2d at 604.

York alleged that Dodgeland charged her illegal documentation fees. This allegation is "related to . . . the actual purchase" of the vehicle from the dealer, a dispute type explicitly recognized by the terms of the clause. Thus, York's claims were within the scope of a valid arbitration agreement. Accordingly, she must arbitrate her claims.

B. Cristy Must Arbitrate Her Claim.

The arbitration clause within Cristy's Installment Contract covered "*any claim or dispute . . . that arises out of or relates to* your credit application, *this Contract* or *any resulting transaction* or relationship, including those with third parties." (emphases added). This broad language affords the clause an expansive reach. *Landers*, 402 S.C. 109, 739 S.E.2d at 214. Thus, claims within the literal terms of the clause, as well as those claims with a significant relationship to the Buyers Order, are subject to the terms of the arbitration agreement. *Partain*, 386 S.C. at 493, 689 S.E.2d at 604.

Cristy alleged that Jim Hudson Hyundai charged her an illegal documentation fee. Notably, the Installment Contract specifically lists the contested documentation fee within the "ITEMIZATION OF AMOUNT FINANCED." Thus, Cristy's dispute "arises out of or relates to . . . this Contract." Moreover, because the Installment Contract provided Cristy with the "means" to purchase her vehicle, *i.e.*, satisfy her obligations owed under the Buyers Order, her claim also "arises out of or relates to . . . any resulting transaction." Therefore, Cristy's claims were within the scope of this valid arbitration agreement and she must arbitrate these claims.

III. Arbitration Related Discovery.

Finally, Appellants summarily argue the trial court erred in upholding the validity of the arbitration agreements without first allowing discovery. Yet, Appellants' brief fails to cite any law or authority that supports this *particular* proposition and, instead, relies upon an attenuated argument and a summary conclusion. Therefore, Appellants are deemed to have abandoned this issue. *See* Rule 208(b)(1)(D), SCACR ("The brief of appellant shall contain . . . the *particular* issue to be addressed . . . followed by discussion and citations of authority." (emphasis added)); *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 327 n.1, 730 S.E.2d 282, 284 n.1 (2012) (finding an issue abandoned because appellant's brief was both unsupported by legal authority and relied upon a summary conclusion); *D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 548-49, 730 S.E.2d 340, 350-51 (Ct. App. 2012) (finding appellants' failure to cite supporting law or authority results in an issue being abandoned, despite the existence of a conclusory argument).

CONCLUSION

The trial court did not err in dismissing Appellants' suit and compelling arbitration. Every dispute was within the scope of at least one valid arbitration agreement. Hence, the order of the trial court is

AFFIRMED, AS MODIFIED.

FEW, C.J. and LOCKEMY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Brandon Rogers, Appellant.

Appellate Case No. 2011-190166

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

Opinion No. 5170
Heard April 2, 2013 – Filed September 4, 2013

REVERSED AND REMANDED

Appellate Defender Breen Stevens, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General William M. Blitch, Jr., all of Columbia, for Respondent.

GEATHERS. J.: Appellant Brandon Rogers appeals his convictions for second-degree burglary and of petit larceny. Rogers argues that the trial court erred in (1) granting the State's *Batson*[1] motion regarding three jurors and, thereafter,

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

preventing him from striking the challenged jurors in the subsequent jury selection, and (2) sentencing him based on the pre-amended version of South Carolina Code section 16-11-312 (Supp. 2012). We reverse the trial court's finding of a *Batson* violation as to each of the three jurors and remand for a new trial.

FACTS/PROCEDURAL HISTORY

Rogers and his brother, Daniel Rogers, were indicted for burglary in the second-degree and of petit larceny. During the initial jury selection, Rogers and his co-defendant, both of whom are black, collectively exercised peremptory strikes on nine prospective white jurors[2], including Jurors 65, 89, and 166.[3] Rogers struck Juror 65 (a white female) and Juror 166 (a white male). His co-defendant struck Juror 89 (a white female). The jury was ultimately composed of three black males, six black females, one white male, two white females, and one white female alternate. The State subsequently requested a *Batson* hearing, asserting eight of the nine strikes exercised by the defense were on the basis of race.

Ultimately, the trial court granted the State's *Batson* motion regarding five of the eight jurors. The trial court quashed the first jury and precluded the defense from striking any of the five jurors during the second jury selection. Jurors 65, 89, and 166 were selected for the second jury, and the case proceeded to trial.

The jury found Rogers and his co-defendant guilty of burglary in the second degree and petit larceny. The trial court sentenced Rogers to twelve years' imprisonment for the burglary charge, and to a concurrent term of thirty days for petit larceny. This appeal followed.

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[2] Rogers exercised peremptory challenges against four members of the jury venire: two white males and two white females, one of whom was a potential alternate. His co-defendant exercised peremptory challenges against five members of the jury venire: four white males and one white female.

[3] Although the trial court ultimately found Rogers' and his co-defendant's stated reasons for striking five of the eight jurors were pretextual, Rogers only appeals as to Jurors 65, 89, and 166.

STANDARD OF REVIEW

"Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record." *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). "Appellate courts give the trial judge's finding great deference on appeal, and review the trial judge's ruling with a clearly erroneous standard." *Id.* "A finding is clearly erroneous if it is not supported by the record." *Id.* at 620, 545 S.E.2d at 813.

LAW/ANALYSIS

I. *Batson* Motion

Rogers argues the trial court erred in finding his defense counsel's and his co-defendant's counsel's explanations for striking Jurors 65, 89, and 166 were pretextual, and by preventing him from striking the three jurors when they were called in the subsequent jury selection.

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender." *Id.* at 615, 545 S.E.2d at 810. "The purposes of *Batson* and its progeny are to protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venireperson's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process." *State v. Haigler*, 334 S.C. 623, 628-29, 515 S.E.2d 88, 90 (1999) (citations omitted). "When one party strikes a member of a cognizable racial group or gender, the trial court must hold a *Batson* hearing if the opposing party requests one." *Shuler*, 344 S.C. at 615, 545 S.E.2d at 810.

In *Purkett v. Elem*, 514 U.S. 765, 767 (1995), the Supreme Court of the United States explained the proper procedure for a *Batson* hearing as follows:

> Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with

> a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Step two of this process does not demand an explanation that is persuasive or even plausible. *State v. Cochran*, 369 S.C. 308, 314, 631 S.E.2d 294, 298 (Ct. App. 2006) (quoting *Purkett*, 514 U.S. at 767-68). At step two, "the proponent of the strike does not carry 'any burden of presenting reasonably specific, legitimate explanations for the strikes.'" *Id.* (quoting *State v. Adams*, 322 S.C. 114, 123, 470 S.E.2d 366, 371 (1996)). "Therefore, '[u]nless a discriminatory intent is inherent' in the explanation provided by the proponent of the strike, 'the reason offered will be deemed race neutral' and the trial court must proceed to the third step of the *Batson* process." *Id.* (quoting *Purkett*, 514 U.S. at 768).

"At step three, the opponent of the strike must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination." *Cochran*, 369 S.C. at 315, 631 S.E.2d at 298 (citing *Adams*, 322 S.C. at 124, 470 S.E.2d at 372). "The burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike." *Haigler*, 334 S.C. at 629, 515 S.E.2d at 91. "This burden is generally established by showing similarly situated members of another race were seated on the jury." *Cochran*, 369 S.C. at 315, 631 S.E.2d at 298. "Under some circumstances, the race-neutral explanation given by the proponent may be so fundamentally implausible that the judge may determine, at the third step of the analysis, that the explanation was mere pretext even without a showing of disparate treatment." *Payton v. Kearse*, 329 S.C. 51, 55, 495 S.E.2d 205, 208 (1998). "When the opponent of the strike proves the proponent of the strike practiced purposeful racial discrimination, the trial court must quash the entire jury panel and initiate another jury selection de novo." *Cochran*, 369 S.C. at 315, 631 S.E.2d at 298.

"If a trial court improperly grants the State's *Batson* motion, but none of the disputed jurors serve on the jury, any error in improperly quashing the jury is harmless because a defendant is not entitled to the jury of her choice." *State v. Edwards*, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009). "However, if one of the disputed jurors is seated on the jury, then the erroneous *Batson* ruling has tainted the jury and prejudice is presumed in such cases 'because there is no way to determine with any degree of certainty whether a defendant's right to a fair trial by

an impartial jury was abridged.'" *Id.* (quoting *State v. Rayfield*, 369 S.C. 106, 114, 631 S.E.2d 244, 248 (2006)). "The proper remedy in such cases is the granting of a new trial." *Id.*

A. Juror 65

Rogers argues the trial court erred in finding his reason for striking Juror 65, a white female, was pretextual. We agree.

At the *Batson* hearing, Rogers' defense counsel stated that he struck Juror 65 because she was a retired school teacher and, therefore, "had experience as a disciplinarian." He further explained:

> Because she is a school teacher, Your Honor, I believe that is axiomatic with that job. Or at least every teacher that I had in public school is less likely wanting [sic] to hear excuses from anybody. And less likely to find excuses or any kind of the defendants who are also people in their early twenties might want to -- I just know that teachers don't like excuses, and they don't like -- they don't like people trying to talk their way out of trouble. Or they didn't when I was in school.

In response, the State argued that the strike was improper because defense counsel's stated reason for striking Juror 65 was rooted in a stereotype of the teaching profession. The trial court accepted the State's argument, stating the following:

> [B]ut that kind of stereotyping of groups or subgroups are specifically prohibited by Payton versus Kearse, a South Carolina Supreme Court case, and *you can't just class people into stereotype groups or subgroups, and give that as a reason for being racially neutral.*

(emphasis added). Additionally, the trial court found that defense counsel's explanation was pretextual and, therefore, improper, because the defense seated a juror who was similarly situated to Juror 65.[4]

In *Payton v. Kearse*, 329 S.C. 51, 55-56, 495 S.E.2d 205, 208 (1998), our supreme court held that striking a white juror because she was a "redneck" was facially discriminatory, and, therefore, violated *Batson*. In so holding, the court reasoned, "[t]he term 'redneck' is a racially derogatory term applied exclusively to members of the white race." *Id.* Significantly, the court went on to note: "Our holding *only* prevents a party from striking a juror based on a *racially stereotypical reason*." *Id.* at 56-57, 495 S.E.2d at 208 (emphasis added).

In this instance, the trial court misinterpreted *Payton* as precluding a party from striking a juror on the basis of any stereotype. In *Payton*, our supreme court made clear that its holding only prevented a party from striking a juror based on a *racially* stereotypical reason. *See id.* Because defense counsel's explanation for striking Juror 65 was not rooted in a racial stereotype, the trial court erred in ruling that his explanation was facially discriminatory under the standard enunciated in *Payton*. Moreover, a prospective juror's employment is a legitimate race-neutral reason for exercising a peremptory strike. *See Cochran*, 369 S.C. at 318, 631 S.E.2d at 300 ("The employment status of a prospective juror is a race-neutral reason for using a peremptory challenge."); *Adams*, 322 S.C. at 125, 470 S.E.2d at 372 (finding a prospective juror's type of employment is a race-neutral reason for a strike). Therefore, defense counsel's explanation that he struck Juror 65 based on her previous employment as a teacher was race-neutral.

Because Rogers' defense counsel offered a facially race-neutral explanation for the strike, the burden was on the State, as the opponent of the strike, to prove defense counsel's stated reason was mere pretext for racial discrimination. *See Rayfield*, 369 S.C. at 112, 631 S.E.2d at 247 (stating that once the proponent of the strike offers a reason that is race-neutral, the burden is on the party challenging the strike to show the explanation is mere pretext). Here, the State merely argued that an explanation based on a stereotype does not provide a proper basis for the exercise of a peremptory strike. Our supreme court has held that "just because the reason

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[4] Prior to issuing its ruling, the trial court erroneously stated that Juror 65 was a sales representative. Based on this misstatement it appears the trial court may have confused Juror 65, a retired teacher, with Juror 166, a sales representative.

given for striking a juror may fit a stereotype does not necessarily mean the reason is pretextual." *Cochran*, 369 S.C. at 321-22, 631 S.E.2d at 302. Consequently, the fact that defense counsel's strike was based on a stereotype of the teaching profession, in itself, was insufficient to establish that his explanation was pretextual. *See State v. Ford*, 334 S.C. 59, 64, 512 S.E.2d 500, 503 (1999) (stating the opponent of a strike can show pretext, "either by showing similarly situated members of another race were seated on the jury or the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment"). Accordingly, the State, as opponent of the strike, failed to meet its burden of showing that defense counsel's reason for striking Juror 65 was mere pretext for purposeful discrimination.

Additionally, we find the record fails to support the trial court's finding that defense counsel's strike of Juror 65 was pretext for purposeful discrimination. Here, the trial court found that counsel's explanation was pretextual because the defense seated a juror who was similarly situated to Juror 65. "Pretext generally will be established by showing that *similarly situated* members of *another race* were *seated* on the jury." *Haigler*, 334 S.C. at 629, 515 S.E.2d at 91 (emphases added). Here, the only juror the trial court identified as being similarly situated to Juror 65 was Juror 66, a white male and self-employed college graduate who was stricken by Rogers' co-defendant based on his employment. Because the similarly situated juror identified by the trial court was not seated on the jury and was of the same race as the challenged juror, we find the trial court erred in ruling defense counsel's stated reason for striking Juror 65 was pretextual and, consequently, granting the State's *Batson* motion and quashing the first jury.

B. Juror 166

Rogers asserts the trial court erred in ruling his stated reason for striking Juror 166, a white male, was pretextual. We agree.

During the *Batson* hearing, defense counsel offered the following explanation for striking Juror 166:

> [He] was a sales representative. I know from my personal experience they do tend to be more conservative. Also, I believe he had somewhat of a crew cut haircut, looked kind of militant. They also tend to be

> conservative, law and order type folks. I know sales reps like my father drive around all day selling stuff, listening to Rush Limbaugh. I don't think he would have a whole lot of sympathy for my client, is what he looked like.

The State once again argued that defense counsel's reasons for striking Juror 166 were pretextual because they were based on a stereotype. Additionally, the State contended that a juror's political affiliation was an improper basis for a peremptory challenge, citing *Foster v. Spartanburg Hospital System*, 314 S.C. 282, 442 S.E.2d 624 (Ct. App. 1994). Relying on *Payton*, the trial court concluded that defense counsel's explanation was not race-neutral because it was based on a stereotype. Additionally, the trial court found that defense counsel's explanation was pretextual and, therefore, improper, because the defense seated a similarly situated juror.

As previously noted, the *Payton* court explicitly limited its holding to a narrow subset of stereotypes–racial stereotypes. *See Payton*, 329 S.C. at 56-57, 495 S.E.2d at 208. At the *Batson* hearing, defense counsel stated that he believed Juror 166 was conservative based on his appearance and his employment and, consequently, did not think Juror 166 would sympathize with Rogers. Pursuant to *Payton*, the fact that defense counsel's reason for striking Juror 166 was rooted in a conservative stereotype did not make his stated reason facially discriminatory.

As to defense counsel's strike of Juror 166 due to his conservative appearance, a prospective juror's demeanor and disposition are valid reasons for exercising a strike. *See Purkett*, 514 U.S. at 769 (determining a prosecutor's explanation that he struck a juror because "he had long, unkempt hair, a mustache, and a beard" was race-neutral); *Rayfield*, 369 S.C. at 113, 631 S.C. at 247-48 (concluding that defense counsel's explanation that he struck a juror because of his "conservative appearance" was a gender-neutral explanation); *State v. Tucker*, 334 S.C. 1, 8, 512 S.E.2d 99, 102 (1998) (stating a juror's disposition and demeanor are race-neutral reasons for exercising a peremptory strike). In *United States v. Blotcher*, 142 F.3d 728, 730, 732 (4th Cir. 1998), the Court of Appeals for the Fourth Circuit concluded that defense counsel proffered a race-neutral reason for exercising a peremptory strike where he explained that he struck a white juror because he "appear[ed] to be very-just from his appearance, a conservative person. . . . He's got his hair kind of nice and he's got nice glasses on." Similar to *Blotcher*, Rogers' defense counsel explained that he struck Juror 166 because he believed Juror 166 was a "conservative, law and order type []" based on his "crew cut haircut" and

"militant" appearance. Furthermore, the wearing of a crew cut is not a characteristic peculiar to any particular racial group. *Cf. McCrea v. Gheraibeh*, 380 S.C. 183, 187, 669 S.E.2d 333, 335 (2008) (holding that uneasiness over the juror's dreadlocks' was not a race-neutral reason for exercising a peremptory strike because "dreadlocks retain their roots as a religious and social symbol of historically black cultures"). Therefore, we find defense counsel's explanation that he struck Juror 166 due to his conservative appearance was race-neutral.

As to defense counsel's strike of Juror 166 due to his belief that sales representatives are conservative, the State contends that because *Foster* prohibited a party from striking a juror because of his political affiliation, it is also improper to strike a juror because he or she is a conservative. Specifically, the State argues that defense counsel's categorization of sales representatives as conservative was mere speculation and, therefore, not a reasonable, race-neutral explanation. We disagree.

We find *Foster* is procedurally distinct from the case at hand because it preceded *Purkett* and *Adams*, which clarified the three-step method established for executing a *Batson* hearing. In *Foster*, counsel for the hospital explained that he struck a black male juror based on his answer in his juror questionnaire that he was a member of the Democratic Party, as well as his affirmative statement that he was a "'loyal American citizen, [who has] never been in any trouble with the law.'" 314 S.C. at 285, 442 S.E.2d at 626 (alteration in original). Counsel asserted, "a Democrat is more inclined than a Republican or some other party affiliate to favor 'the little person.'" *Id.* The court held that such a "sweeping generalization" about members of an entire political party was not a race-neutral explanation because it was "mere speculation" and did not "rest on a reasonable basis." *Id.* (citing *State v. Grandy*, 306 S.C. 224, 227, 411 S.E.2d 207, 208 (1991)). Subsequent to the *Foster* decision, *Purkett* and *Adams* altered the procedure for the second step of the *Batson* analysis so that the proponent of the strike no longer has the burden of presenting reasonably specific, legitimate explanations for a strike; instead, the proponent need only present a racially neutral explanation. *See Purkett*, 514 U.S. at 768-69 (stating that under the second step, a party's reasons for striking a juror do not have to be persuasive or even plausible, so long as they are race-neutral); *Adams*, 322 S.C. at 124, 470 S.E.2d at 372 (adopting the standard delineated in *Purkett* for determining whether a party exercised strikes in violation of *Batson*). Thus, the *Purkett*/*Adams* standard is a clear deviation from *Foster*, which required that the proponent of a strike offer an explanation that rests on a reasonable basis,

not mere speculation. *Compare Foster*, 314 S.C. at 285, 314 S.E.2d at 626 (citing *Grandy*, 306 S.C. at 227, 411 S.E.2d at 208), *with Purkett*, 514 U.S. at 768-69 (stating that under the second step a party's reasons for striking a juror *do not have to be persuasive or even plausible*, so long as they are race-neutral).

We also find *Foster* is distinguishable from the instant case because defense counsel did not explicitly state that he struck Juror 166 because he was a member of a particular political party. Although defense counsel referenced a well-known, politically conservative talk-radio host in giving his explanation, counsel explicitly stated that he struck Juror 166 based on his belief that individuals employed as sales representatives are "conservative." Moreover, defense counsel's reason for striking Juror 166 was rooted in his own personal experience with sales representatives and was not based on a "sweeping generalization" about any particular political party.

In addition to the distinctions between *Foster* and the instant case, we also note our courts have previously upheld the exercise of peremptory strikes against members of a particular profession due to their perceived attitudes or beliefs. In *State v. Flynn*, the State explained that it struck a black female because she was a Head Start director, which it viewed as "a very liberal job." 368 S.C. 83, 84, 627 S.E.2d 763, 764 (Ct. App. 2006). In response, defense counsel argued that being liberal was not an appropriate reason for striking a juror. *Id.* at 84, 627 S.E.2d at 765. The State further explained, "'Your Honor, I believe that is a social welfare kind of program, and as director she is liberal in nature. It's a liberal type of attitude and job, and that is why I struck her.'" *Id.* The trial court concluded the State's explanation was race-neutral. *Id.* On appeal, Flynn argued the trial court erred in not finding the State violated *Batson* because the State "'advanced a racial stereotype' to justify striking Juror 21." *Id.* at 86, 627 S.E.2d at 765. This court concluded, "the State asserted that due to her employment, it believed Juror 21 was 'liberal.' As Flynn has offered no evidence other than a conclusory assertion of racial motivation, we find the trial court did not err in failing to find a *Batson* violation." *Id.*

In *Cochran*, defense counsel struck a white female juror, in part, because her husband was an insurance agent. 369 S.C. at 320, 631 S.E.2d at 301. In explaining his strike to the trial court, defense counsel shared his own experience with jurors or spouses of jurors employed as insurance agents:

> Your Honor, I never put the relatives [sic] bank tellers and insurance agents[][o]n my juries[.] . . . If you're an insurance agent. Or if you're married to an insurance agent. Or if they're a bank teller or married to a bank teller. *These are the most straight-laced, conservation [sic] people that, that you could find, in my opinion. And they will . . . always convict your client.*

Id. (emphasis added) (alterations in original). On appeal, this court held defense counsel's explanation was race-neutral. *Id.* at 321, 631 S.E.2d at 302.

Similar to *Flynn* and *Cochran*, defense counsel struck Juror 166 due to his belief that Juror 166's type of employment was linked to a conservative viewpoint and, consequently, Juror 166 would not sympathize with Rogers. Therefore, although defense counsel's stated reason may have been questionable, we find it was race-neutral. *See Adams*, 322 S.C. at 123, 470 S.E.2d at 371 (stating a party's reasons for striking a juror do not have to be reasonable, specific, or legitimate; the reason need only be race-neutral); *Cochran*, 369 S.C. at 321, 631 S.E.2d at 301 ("Because a juror's perceived bias (for whatever reason) lies at the core of virtually every peremptory challenge, courts should intervene only when it is demonstrated that the strike runs afoul of the Constitution."); *State v. Short*, 327 S.C. 329, 335, 489 S.E.2d 209, 212 (Ct. App. 1997), *aff'd*, 333 S.C. 473, 511 S.E.2d 358 (1999) ("The principal function of the peremptory strike is to allow for the removal of a juror in whom the challenging party perceives bias or prejudice, even where the juror is not challengeable for cause.").

Once Rogers' defense counsel offered a race-neutral explanation for the strike, it was incumbent upon the State, as the opponent of the strike, to show the explanation was mere pretext for racial discrimination. Here, the State failed to meet its burden by merely asserting defense counsel based his strike on a stereotype of a political party. *See Cochran*, 369 S.C. at 321-22, 631 S.E.2d at 302 (stating that "just because the reason given for striking a juror may fit a stereotype does not necessarily mean the reason is pretextual"); *Ford*, 334 S.C. at 64, 512 S.E.2d at 503 (stating the opponent of a strike can show pretext, "either by showing similarly situated members of another race were seated on the jury or the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment"). Because the State failed to offer

sufficient evidence of pretext, we find it did not meet its burden of showing the strike was mere pretext.

Additionally, we find the record fails to support the trial court's finding that defense counsel's strike of Juror 166 was pretext for purposeful discrimination. The trial court identified Juror 66, a self-employed college graduate, as being similarly situated to Juror 166. However, Juror 66 was a white male and was struck by Rogers' co-defendant based on his employment. *See Haigler*, 334 S.C. at 629, 515 S.E.2d at 91 (stating "[p]retext generally will be established by showing that similarly situated members of *another race* were *seated* on the jury" (emphases added)). Moreover, defense counsel similarly struck a white female juror who indicated that she worked as a hog farmer on the ground that farmers "tend to be a lot more religious and conservative from my experience with them." *See Cochran*, 369 S.C. at 327, 631 S.E.2d at 304-05 ("[A] strike must be examined in light of the circumstances under which it is exercised, including an examination of the explanations offered for other strikes."). Furthermore, although Rogers exercised most of his strikes against white jurors, he did not strike every white juror, and also struck several black jurors. *See Ford*, 334 S.C. at 66, 512 S.E.2d at 504 (finding the fact that the appellant used most of his challenges to strike white jurors was not sufficient, in itself, to establish purposeful discrimination). As a result, the ultimate composition of the jury panel was diverse. *See Shuler*, 344 S.C. at 621, 545 S.E.2d at 813 ("[T]he composition of the jury panel is a factor that may be considered when determining whether a party engaged in purposeful discrimination pursuant to a *Batson* challenge."). In light of the totality of facts and circumstances in the record, we find the trial court erred in ruling defense counsel's stated reason for striking Juror 166 was pretextual and, consequently, granting the State's *Batson* motion and quashing the first jury.

C. Juror 89

Rogers asserts the trial court erred in finding his co-defendant's reason for striking Juror 89, a white female, was pretextual.

At the *Batson* hearing, counsel for Rogers' co-defendant explained that he struck Juror 89 because she worked as a manager at CitiFinancial in Dillon, South Carolina, and her employer used the Sheriff's Department to serve almost all of

their papers exclusively.[5] The trial court found that counsel offered a race-neutral explanation for striking Juror 89. The State countered that Juror 89 managed a CitiFinancial office in Lumberton, North Carolina, not Dillon, South Carolina, as believed by the defense. Additionally, the State claimed that Juror 89 had not indicated that she had a close relationship with law enforcement officers. The trial court found that the strike was pretextual because it was based on counsel's inaccurate belief that Juror 89 worked in the Dillon office location. The trial court reasoned:

> The real problem is, is that it is not true. This lady, according to the returns, worked for this company in Lumberton, North Carolina. That was shown on her return to the Clerk's Office. This return would be available to all the parties, including defense counsel. It is also my recollection that she said that when the roll was called, but I could not swear to that. But, in any event, it is very clearly on her return that she is employed in Lumberton, North Carolina. Therefore, I find that the reason for striking Juror 89 was pretextual.

Although counsel for Rogers' co-defendant mistakenly believed Juror 89 worked in CitiFinancial's Dillon office, we find this mistake was not evidence that his explanation was pretext for racial discrimination. *See Ford*, 334 at 64, 512 S.E.2d at 503 (stating the opponent of a strike can show an pretext, "either by showing similarly situated members of another race were seated on the jury or the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment"). In offering his explanation for striking Juror 89, counsel for Rogers' co-defendant asserted: "that specific finance company, Your Honor. Not just any finance company in general, but CitiFinancial uses the Sheriff's Department to serve their papers on people who are behind on their payments, or for any other reason." Notably, counsel specifically argued that Juror 89's relationship with law enforcement was grounded in her employment with CitiFinancial in general, rather than a specific CitiFinancial office location. Therefore, the fact that Juror 89 actually worked in CitiFinancial's Lumberton

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[5] Counsel for co-defendant admitted he had no personal basis for this rationale; however, he stated that his prior conversation with Fourth Judicial Circuit Defender Michael Stephens supported this belief.

office did not negate counsel's stated reason. Moreover, a prospective juror's type of employment is a valid race-neutral reason for exercising a peremptory strike. *See Cochran*, 369 S.C. at 318, 631 S.E.2d at 300. Because counsel's error was insufficient to demonstrate pretext and the State offered no other evidence of pretext as required by step three of the *Purkett*/*Adams* analysis, we find the trial court erred in finding a *Batson* violation as to Juror 89.

CONCLUSION

In this case, Rogers offered race-neutral explanations for striking Jurors 65, 89, and 166. The State failed to offer sufficient evidence of purposeful discrimination, as required by step three of the *Purkett*/*Adams* analysis for determining whether a *Batson* violation has occurred. Furthermore, the record fails to support the trial court's finding of a *Batson* violation as to Jurors 65, 89, and 166. Because the trial court improperly granted the State's *Batson* motion and Jurors 65, 89, and 166 were seated on the second jury, Rogers was denied his right to exercise his peremptory challenges. Therefore, we remand this case for a new trial.[6] *See Edwards*, 384 S.C. at 509, 682 S.E.2d at 823 (holding if a trial court improperly grants the State's *Batson* motion and one of the disputed jurors is seated on the jury, then the erroneous *Batson* ruling has tainted the jury and prejudice is presumed because there is no way to determine with any degree of certainty whether a defendant's right to a fair trial by an impartial jury was abridged, and the proper remedy in such a case is a new trial). Accordingly, the decision of the trial court is

REVERSED AND REMANDED.

FEW, C.J., and CURETON, AJ., concur.

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[6] Because we reverse and remand this matter to the trial court, we need not consider Rogers' remaining sentencing issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carolyn M. Nicholson, Claimant, Respondent,

v.

South Carolina Department of Social Services,
Employer, and State Accident Fund, Carrier, Appellants.

Appellate Case No. 2012-206507

Appeal From The Workers' Compensation Commission

Opinion No. 5171
Heard February 12, 2013 – Filed September 4, 2013

REVERSED

L. Brenn Watson and Zachary M. Smith, both of Wilson, Jones, Carter & Baxley, P.A., of Greenville, for Appellants.

Kathryn Williams, of Kathryn Williams, P.A., of Greenville, for Respondent.

GEATHERS. J.: South Carolina Department of Social Services (DSS) appeals the Appellate Panel of the South Carolina Workers' Compensation Commission's (the Commission) finding that Carolyn Nicholson sustained compensable injuries to her neck, back, and left shoulder when she fell while walking in a carpeted

hallway of her workplace. DSS argues the Commission erred because Nicholson's injuries did not arise out of her employment, as the Workers' Compensation Single Commissioner (Single Commissioner) previously found. We reverse.

FACTUAL/PROCEDURAL HISTORY

The facts in this case are undisputed. Nicholson worked as a supervisor in the investigations department of DSS. As a part of her job with DSS, she attended weekly audit meetings to review and update case files. On February 26, 2009, Nicholson was scheduled for an audit meeting, which was held on the lower floor of DSS's building. She grabbed a stack of files and began walking down the hallway to the meeting. While walking down the hallway, Nicholson's shoe scuffed the carpet, and she fell onto her left side. As a result of the fall, Nicholson sustained injuries to her neck, back, and left shoulder.

On January 3, 2011, Nicholson filed a Form 50, alleging she sustained compensable injuries by accident arising out of and in the course of her employment as a result of the fall. Nicholson sought payment for past medical treatment, additional medical treatment for her neck, back, and left shoulder, and temporary total disability benefits from February 26, 2009, to April 13, 2009, the days she was out of work. DSS and its insurance carrier, State Accident Fund, admitted Nicholson fell at work but denied she sustained compensable injuries by accident arising out of her employment.

A hearing before the Single Commissioner was held on March 16, 2011. At the hearing, Nicholson testified her leg did not give way, and she had no health problems that would cause her to fall. During direct examination, Nicholson was specifically asked if she could offer any opinion as to the cause of her fall, and she answered as follows:

> Q. So, what is it that you think caused you to fall?
>
> A. Friction from the carpet.
>
> Q. Did your foot get stuck?
>
> A. Yes, from the friction. As I went to walk, the friction from the carpet just grabbed me and I fell.

Nicholson further testified the hallway had a normal, level, carpeted floor that was free from defect, and there was no debris on the floor. Although Nicholson was carrying ten case files weighing approximately fifteen pounds at the time of her fall, she testified that the files did not cause her to fall.

On April 26, 2011, the Single Commissioner issued an order finding Nicholson did not prove by a preponderance of the evidence that her alleged injuries arose out of her employment. Specifically, the Single Commissioner found Nicholson did not prove a causal connection between her fall and her employment because the fall was "wholly unrelated to her employment with [DSS]." The Single Commissioner found the floor was carpeted, level, and free from defect and, therefore, concluded Nicholson's employment was not a contributing cause because "there was nothing peculiar about the floor at [DSS]'s building that caused her to fall." Additionally, the Single Commissioner determined Nicholson's employment did not contribute to the effect of her fall because the fall "would have carried the same consequences had she fallen on a carpeted floor outside" the DSS building. In support, the Single Commissioner referenced Nicholson's own testimony that the files she carried did not cause or contribute to her fall. Based on these findings, the Single Commissioner denied Nicholson's claim for benefits. The Single Commissioner discussed *Bagwell v. Ernest Burwell, Inc.*, 227 S.C. 444, 88 S.E.2d 611 (1955), in support of his conclusion.

Nicholson appealed to the Commission, which reversed the Single Commissioner's determination that Nicholson did not sustain compensable injuries. The Commission discussed *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 689 S.E.2d 615 (2010), in support of its findings. As to the specific findings, the Commission found that Nicholson's injuries did not result from an idiopathic[1] or unexplained fall because Nicholson identified a specific, non-internal reason for the fall—her shoe scuffing the carpet. The Commission, therefore, concluded that because the fall was not idiopathic, the analysis in *Bagwell* was inapplicable. The Commission also determined "the files did not cause or contribute to [Nicholson's] fall." Nevertheless, the Commission found Nicholson's employment was a contributing cause to her fall, and it was irrelevant that the fall could have happened on any other level, carpeted surface because the fall happened as a result of a risk

[1] An idiopathic fall arises from some physical or mental condition personal to the claimant. Mark A. Rothstein et al., *Employment Law* § 7.18 (4th ed. 2009).

associated with the conditions under which she worked. As a result, the Commission determined that the fall arose out of Nicholson's employment because "it bore a special relation to her work and the conditions under which she worked," because "she was required to work in a carpeted area." This appeal followed.

ISSUE ON APPEAL

Did the Commission err in finding Nicholson sustained compensable injuries arising out of her employment with DSS, thus entitling her to medical and compensation benefits?

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard for judicial review of decisions of the Commission. *Pierre*, 386 S.C. at 540, 689 S.E.2d at 618. This court can reverse or modify the Commission's decision if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. *Fishburne v. ATI Systems Intern.*, 384 S.C. 76, 85, 681 S.E.2d 595, 599-600 (Ct. App. 2009) (citing S.C. Code Ann. § 1-23-380). "'Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached.'" *Pierre*, 386 S.C. at 540, 689 S.E.2d at 618 (quoting *Tennant v. Beaufort Cnty. Sch. Dist.*, 381 S.C. 617, 620, 674 S.E.2d 488, 490 (2009)). Despite the significant deference that the substantial evidence standard affords the Commission as to the weight of the evidence on questions of fact, "[w]here there are no disputed facts, the question of whether an accident is compensable is a question of law." *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007); *see also Langdale v. Harris Carpets*, 395 S.C. 194, 200-01, 717 S.E.2d 80, 83 (Ct. App. 2011) (stating a reviewing court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but it may reverse a decision affected by an error of law).

LAW/ANALYSIS

DSS argues the Commission erred in concluding that Nicholson's injuries arose out of her employment. DSS contends there was no causal connection between Nicholson's injuries and her employment because the carpet on which she fell was

level and free from defect, and Nicholson testified that the files she was carrying did not cause her fall.

To be entitled to workers' compensation benefits, a claimant must show he or she sustained an "injury by accident arising out of and in the course of employment." S.C. Code Ann. § 42-1-160(A) (Supp. 2012). "The two parts of the phrase 'arising out of and in the course of employment' are not synonymous." *Broughton v. South of the Border*, 336 S.C. 488, 496, 520 S.E.2d 634, 638 (Ct. App. 1999). Rather, both parts must exist simultaneously before recovery is allowed. *Id.* This court has explained the distinction between the two parts as follows:

> An accidental injury is considered to arise out of one's employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury occurs within the course of employment when it occurs within the period of employment, at a place where the employee reasonably may be in the performance of his duties, and while fulfilling those duties or engaged in something incidental thereto.

Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 161, 584 S.E.2d 390, 394 (Ct. App. 2003) (internal citations omitted). In this matter, there is no dispute that Nicholson sustained her injuries in the course of her employment, as she was at work at the time of the fall. Thus, the sole issue raised on appeal is whether Nicholson's injuries arose out of her employment.

The term "arising out of" refers to the origin or cause of the accident. *Crosby v. Wal-Mart Store, Inc.*, 330 S.C. 489, 493, 499 S.E.2d 253, 255 (Ct. App. 1998). "'An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury.'" *Crisp v. SouthCo., Inc.*, 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013) (quoting *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 518, 466 S.E.2d 357, 358 (1996)). However, an injury is excluded from compensability under the Workers' Compensation Act when it "comes from a hazard to which the workmen would have been equally exposed apart from the employment." *Crosby*, 330 S.C. at 493, 499 S.E.2d at 255. Therefore, a claimant's injury is only compensable if the source

of the injury was a risk "peculiar to the work and not common to the neighborhood." *Douglas v. Spartan Mills, Startex Div.*, 245 S.C. 265, 269, 140 S.E.2d 173, 175 (1965).

The question of whether an injury arises out of employment is largely a question of fact for the Commission. *Ervin v. Richland Mem'l Hosp.*, 386 S.C. 245, 249, 687 S.E.2d 337, 339 (Ct. App. 2009). However, "[w]here there are no disputed facts, the question of whether an accident is compensable is a question of law." *Grant*, 372 S.C. at 201, 641 S.E.2d at 872; *Jordan v. Dixie Chevrolet*, 218 S.C. 73, 77, 61 S.E.2d 654, 656 (1950) ("Upon admitted or established facts the question of whether an accident is compensable is a question of law and this is not an invasion of the fact-finding field of the Commission on the part of the Court."). We acknowledge the substantial evidence standard generally applies in this type of situation. Nonetheless, under *Grant*, when the facts are undisputed, as they are here, we must examine whether the Commission's decision that Nicholson's injuries arose out of her employment was affected by an error of law. Moreover, "[w]hile the appellate courts are required to be deferential to the full commission regarding questions of fact, this deference does not prevent the courts from overturning the full commission's decision when it is legally incorrect." *Grant*, 372 S.C. at 202, 641 S.E.2d at 872.

On appeal, DSS presents several arguments that the Commission did not apply the correct legal standard in considering whether Nicholson's injuries arose out of her employment. First, DSS argues the Commission erred in finding Nicholson's injuries arose out of her employment in light of the supreme court's decision in *Bagwell*. Additionally, DSS contends the Commission misinterpreted the holding in *Pierre* because the Commission did not focus its analysis on whether Nicholson's injuries were caused by a special condition or hazard. Lastly, DSS argues Nicholson's injuries are not compensable because she was not subjected to a greater degree of risk than the general public due to her employment. We address each of these arguments in turn.

I. The Applicability of *Bagwell*.

Initially, DSS contends the Commission erred in finding Nicholson's injuries arose out of her employment in light of the supreme court's decision in *Bagwell*.

In *Bagwell*, our supreme court confronted the issue of an idiopathic fall, wherein an employee suddenly fell backward on a level, concrete floor, lost consciousness, and later died as a result of a subdural hemorrhage. 227 S.C. at 447, 88 S.E.2d at 612. The fall was unexplained because the claimant had died and the only witness could not give a work-related reason for the fall; however, there was a suggestion the fall was caused by a personal health problem of the claimant. *Id.* at 447-50, 452-53, 88 S.E.2d at 612-13, 614-15. Thus, the issue was whether compensation should be awarded when the cause of the fall was unrelated to the employment but the cement floors contributed to the effect of the fall. *Id.* at 452-53, 88 S.E.2d at 614-15. Our supreme court affirmed the circuit court's denial of compensation, stating:

> *We are not prepared to accept the contention that, in the absence of special condition or circumstances, a level floor in a place of employment is a hazard.* Cement floors or other hard floors are as common outside industry as within it. The floor in the instant case did not create a hazard which would not be encountered on a sidewalk or street or in a home where a hard surface of the ground or a hard floor existed.

Id. at 454, 88 S.E.2d at 615 (emphasis added).

A special condition was required in *Bagwell* because the fall could not be tied to the employment without otherwise proving a special condition of the employment contributed to the effect of the fall. In Nicholson's case, however, there was a specific, non-personal reason for her fall—Nicholson's shoe scuffing the carpet. Moreover, there was no evidence Nicholson suffered any internal breakdown. Thus, her fall was neither idiopathic nor unexplained.

Although the facts of this case are distinguishable from *Bagwell*, our supreme court has made clear that its decision in *Bagwell* was consistent with its previous interpretation of the term "arising out of." *See Bagwell*, 227 S.C. at 454, 88 S.E.2d at 615 (stating the "conclusion [to deny compensation] is more in harmony with the definition which this Court has consistently given the phrase 'arising out' of the employment"). Hence, *Bagwell* reinforces our court's interpretation of the term "arising out of" as requiring a causal connection between the conditions under which the work is required to be performed and the resulting injury. *See Pierre*,

386 S.C. at 548-49, 689 S.E.2d at 622 (finding an employee's injuries from slipping on a wet sidewalk at the employer's on-site housing facility arose out of employment because the source of the injury was a risk associated with the conditions under which the employee was required to live). Therefore, notwithstanding the fact that *Bagwell* is predicated on the existence of an idiopathic condition, the holding in *Bagwell* is instructive in determining whether an employee's injuries from an unexplained, non-idiopathic fall arose out of employment. Accordingly, we find that as in *Bagwell*, the carpet in DSS's building was not a hazard that caused or contributed to Nicholson's injuries in the case at bar. *See Bagwell*, 227 S.C. at 454, 88 S.E.2d at 615 ("We are not prepared to accept the contention that, in the absence of special condition or circumstances, a level floor in a place of employment is a hazard.").

II. The Commission's Interpretation of *Pierre*.

Next, DSS argues the Commission misinterpreted the holding in *Pierre* because it did not focus its analysis on whether Nicholson's fall was caused by a special condition or hazard on the carpet.

In *Pierre*, our supreme court addressed whether an employee's injuries from an explained, non-idiopathic fall arose out of employment. Therein, the employee fell on a wet sidewalk outside his employer's on-site housing facility. 386 S.C. at 538, 689 S.E.2d at 617. The Single Commissioner concluded that the employee's injuries did not arise out of employment, stating the following:

> [T]he wet sidewalk where Pierre fell was not different in character or design from other sidewalks, and the risk associated with slipping on the sidewalk was not one uniquely associated with his employment; rather, it was one he would have been equally exposed to apart from his employment.

Id. at 539, 689 S.E.2d at 617. The Commission subsequently upheld the Single Commissioner's order and incorporated it by reference. *Id.* The Commission determined the employee did not sustain a compensable injury arising out of his employment because the sidewalk on which he fell was no different in character than other sidewalks. *Id.* However, the supreme court rejected the Commission's finding as not supported by substantial evidence because the accident occurred "as

a result of a hazard that existed on the employer's premises, i.e., [the employee] slipped and fell on a wet sidewalk just outside the employees' housing facility." *Id.* at 548, 689 S.E.2d at 622. The court specifically noted that the sidewalk was wet because another person was using the outside sink and the water ran down the sidewalk. *Id.* In addition, the court found that the wet condition of the sidewalk resulted from the employer's placement of the sink and the apparent lack of drainage. *Id.* Based on this evidence, the court concluded that the employee's injury arose out of his employment because the source of the injury, i.e., the wet sidewalk, was a risk associated with the conditions under which the employee was required to live. *Id.* at 549, 689 S.E.2d at 622-23.

The court in *Pierre* examined whether there was evidence that "the source of the injury was a risk associated with the conditions under which the employees were required to live." *Id.* at 549, 689 S.E.2d at 622. Under the analysis used by the court, the wet condition of the sidewalk was only relevant to determine whether the source of the injury was a risk associated with the employment. *Id.* at 549, 689 S.E.2d at 623 (holding the "[employee's] injury is causally related to his employment in that it was due to the conditions under which he lived, i.e., a wet sidewalk outside of his building"). Thus, *Pierre* recognized that a special condition or hazard can be used as a basis for establishing causation when it is a risk associated with the employment. In the present case, unlike *Pierre*, no special condition or hazard existed on the carpet that caused or contributed to Nicholson's injuries.

III. The Increased-Risk Doctrine.

Finally, DSS contends Nicholson's fall is not compensable because she was not subjected to a greater degree of risk than the general public due to her employment.

DSS essentially argues that the Commission should have applied the increased-risk doctrine in determining whether Nicholson's injuries arose out of her employment.[2]

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[2] Courts have taken various approaches to interpreting the "arising out of" requirement. *Simmons v. City of Charleston*, 349 S.C. 64, 71, 562 S.E.2d 476, 479 (Ct. App. 2002) (citing 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 3.01 (2001)). The three most common lines of interpretation of the phrase "arising out of" are: (1) the increased-risk doctrine; (2) the positional-risk doctrine; and (3) the actual-risk doctrine. *Id.* Under the increased-risk

The increased-risk doctrine is the prevalent doctrine in the United States. Mark A. Rothstein et al., *West's Employment Law* § 7.18 (4th ed. 2009). However, a majority of courts that have recently addressed the issue of whether compensation should be awarded to employees who have suffered non-idiopathic falls have adopted the positional-risk doctrine, with a minority of jurisdictions employing the actual-risk doctrine. *Id.* Nonetheless, South Carolina has not formally adopted or rejected any of these doctrines, and we do not presume to do so today. *Simmons*, 349 S.C. at 72, 562 S.E.2d at 480. Rather, we must look to our extant jurisprudence to determine the proper standard for evaluating whether Nicholson's injuries from an explained, non-idiopathic fall arose out of her employment.

For an injury to arise out of employment, "a causal connection must exist between the conditions under which the work is required to be performed and the resulting injury." *Ervin*, 386 S.C. at 249, 687 S.E.2d at 339. Our supreme court has explained the requisite causal connection for an injury to arise out of employment as follows:

> [I]f the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. *But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The*

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doctrine, an injury arises out of employment when the employment increases the risk of an injury. *Id.* The positional-risk doctrine provides that "'[a]n injury arises out of the employment if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where he was injured.'" *Id.* at 71, 562 S.E.2d at 479 (quoting 1 Larson § 3.05). The actual-risk doctrine ignores whether the risk is common to the public and focuses on whether it is a risk of the particular employment. *Id.* at 71, 562 S.E.2d at 479-80 (citing 1 Larson § 3.04). Under this doctrine, an injury arises out of employment as long as the employment subjected the claimant to the actual risk that caused the injury. *Id.* at 71, 562 S.E.2d at 480.

> *causative danger must be peculiar to the work and not common to the neighborhood.* It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

Douglas, 245 S.C. at 269, 140 S.E.2d at 175 (emphasis added) (citation omitted); *see also Ervin*, 386 S.C. at 250, 687 S.E.2d at 339-40 (denying compensation because exposure to perfume fragrances while at work was a common causative danger); *Shuler v. Gregory Elec.*, 366 S.C. 435, 448, 622 S.E.2d 569, 576 (Ct. Ap. 2005) (Kittredge, J., dissenting) (proposing to deny compensation where an employee was driving her own vehicle on a public road because she would have been equally exposed to a car accident outside the employment). Therefore, we must consider whether the Commission correctly applied this legal standard in determining whether Nicholson's injuries arose out of her employment.

Here, the Commission found that *Pierre* foreclosed DSS's argument that Nicholson's injuries were not compensable because it could have happened on any normal, level, carpeted floor. However, under the standard enunciated in *Douglas*, a claimant's injury is only compensable if the source of the injury was a risk "peculiar to the work and not common to the neighborhood." 245 S.C. at 269, 140 S.E.2d at 175 (citation omitted). Therefore, it was not only relevant, but essential that the Commission determine whether there was evidence that the purported causative danger—the carpet— was a risk that was common to the neighborhood and not peculiar to the employment. Accordingly, we find the Commission's decision was affected by an error of law because the Commission did not properly apply the law to the facts of this case.

Although Nicholson was injured while at work, the alleged causative danger, the carpet, is very common. Nicholson testified that the carpet at DSS was level and free from defect and that it did not buckle or move when her foot scuffed it. She further testified her fall could have happened on any level, carpeted surface outside of DSS's building. For example, she admitted that her fall could have happened in the hearing room, which had the same type of carpeting as the DSS building. Moreover, the Commission made no finding that the carpet on which Nicholson

fell was distinguishable in character from other carpets. Instead, in finding of fact number ten, the Commission found "[t]he floor on which [Nicholson] fell was carpeted, level, and free from any apparent defect." Based on Nicholson's testimony and the Commission's findings, we cannot conclude that the carpet was peculiar to DSS and not common to the neighborhood.

Furthermore, the Commission did not find that any other condition or obligation of Nicholson's employment contributed to her fall or subsequent injuries. While she was carrying ten files that together weighed fifteen pounds at the time of her fall, Nicholson testified that the files she was carrying did not cause her fall. Additionally, in finding of fact number nine, the Commission specifically found, "[the] files did not cause or contribute to her fall." The fact that Nicholson's injuries occurred in the carpeted area, in itself, is insufficient to establish the requisite causal connection between her injuries and her employment. *See Bagwell*, 227 S.C. at 454, 88 S.E.2d at 615. ("To say that an injury arises out of the employment in every case where an employee was required to be at the place where the injury occurred would effectively eliminate an essential requirement of the statute."); *Pierre*, 386 S.C. at 549, 689 S.E.2d at 623 ("[M]erely being on an employer's premises, without more, does not automatically confer compensability for an injury."); *Bright v. Orr-Lyons Mills*, 285 S.C. 58, 60, 328 S.E.2d 68, 70 (1985) ("An accidental injury is not rendered compensable by the mere fact that it occurred on the employer's premises. To so hold, would be to abandon the requirement that an accident bear some logical causal relation to the employment.").

In this instance, Nicholson had the burden of providing facts that would bring her injuries within the workers' compensation law. *See Jennings v. Chambers Dev. Co.*, 335 S.C. 249, 254, 516 S.E.2d 453, 456 (Ct. App. 1999) (stating, "[t]he claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture, or speculation"). Nicholson testified that the sole reason for her fall was that her shoe "frictioned" the carpet. The Commission also identified the "specific" reason for Nicholson's fall was "that she tripped when her foot scuffed or caught in the carpet due to the friction of the carpet against her shoe." Thus, the only fact connecting Nicholson's fall to her employment is that her injuries occurred while she was working in a carpeted area of DSS's building. The carpet on which Nicholson tripped and fell was not a hazard, a special condition, or peculiar to her employment. Accordingly, based on the findings of fact in the

record, Nicholson failed to show a causal connection between her injuries and her employment. Therefore, we conclude Nicholson did not sustain an injury by accident arising of her employment.

CONCLUSION

Based on the foregoing, we hold Nicholson's injuries did not arise out of her employment and, therefore, are not compensable under our workers' compensation law. Consequently, the decision of the Commission is

REVERSED.

LOCKEMY, J., concurs.

FEW, C.J., dissenting: The events that led to Nicholson's fall are undisputed. However, the factual inferences to be drawn from those events are disputed. The commission's ruling that Nicholson sustained compensable injuries is based on the factual finding that Nicholson's fall arose out of her employment, which in turn is based on factual inferences the commission drew from the events of Nicholson's fall.

I would affirm the commission because there is substantial evidence in the record to support its findings. *See Ervin v. Richland Mem'l Hosp.*, 386 S.C. 245, 248, 687 S.E.2d 337, 338 (Ct. App. 2009) (stating "this court will affirm findings of facts made by the [commission] if those findings are supported by substantial evidence"). The evidence shows that while walking to a meeting and carrying a stack of files, Nicholson's foot caught in the carpet due to the carpet's friction against her shoe, causing her to trip and fall. Because Nicholson's workplace was carpeted, the source of her injury was a risk associated with the conditions under which she was required to work. I believe this constitutes substantial evidence to support the commission's factual finding of a causal connection between Nicholson's injury and her employment.

The majority quotes *Douglas v. Spartan Mills, Startex Division*, 245 S.C. 265, 269, 140 S.E.2d 173, 175 (1965), "But [the workers' compensation act] excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause. . . . The causative danger must be peculiar to the work and not common to the neighborhood." (emphasis omitted). However, whether an injury can be fairly traced to the employment and is peculiar to the work and not common to the

neighborhood is a factual determination for the commission, not the courts. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) ("In workers' compensation cases, the [commission] is the ultimate fact finder."); *Ervin*, 386 S.C. at 249, 687 S.E.2d at 339 (stating "the question of whether an accident arises out of . . . employment is largely a question of fact for the [commission]"). Our task is not to make conclusions based on the evidence before the commission, but to apply our standard of review to the commission's conclusions. Thus, the majority violates our standard of review when it states, "[W]e cannot conclude that the carpet[] was peculiar to DSS and not common to the neighborhood." *See* S.C. Code Ann. § 1-23-380(5) (Supp. 2012) ("The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.").

The majority relies on *Grant v. Grant Textiles*, 372 S.C. 196, 641 S.E.2d 869 (2007), for the proposition that in this case we may decide a factual dispute as a matter of law. I disagree that *Grant* applies to this case because in *Grant*, unlike here, there were no disputed factual inferences to be drawn from the events that led to the claimant's injury. It was undisputed that the vice-president of sales for a textile business was traveling to meet with clients when he stopped to remove debris along the highway near the entrance to the site of the meeting and was struck by a passing vehicle. 372 S.C. at 198-99, 641 S.E.2d at 870. The issue in the case was whether, under those undisputed circumstances, his action of removing debris from along the highway arose out of and was in the course of his employment. The commission found it was not, and the court of appeals agreed with the commission's finding that the cause of the accident had no relation to his employment duties. 372 S.C. at 200, 641 S.E.2d at 871. The supreme court disagreed stating,

> The accident would not have happened but for Claimant's business trip . . . to meet his employer's customers. Because removing road hazards was not part of Claimant's job duties, he could have ignored the hazard in the road; however, he chose to remove the hazard to benefit himself, his co-worker father, and his customers. . . . Claimant's act, while outside his regular duties, was undertaken in good faith to advance his employer's interest and, therefore, was within the course of his employment.

372 S.C. at 201-02, 641 S.E.2d at 872.

Thus, the decision in *Grant* turned on whether the cause of the accident—deciding to remove the hazard from the road—was sufficiently connected to the employment for purposes of satisfying the arising out of and within the scope of prongs. Once the court ascertained the accident would not have happened if the employee had not traveled to the business meeting and stopped to remove the road hazard, all of which was undisputed, the legal conclusion that his actions arose out of and were in the course of employment necessarily followed. Here, despite no dispute about the events of Nicholson's fall, there remains a factual dispute as to whether "frictioning" the carpet of the hallway while walking to a meeting was caused by the employment. The commission made a factual finding that it was because the fall occurred as a result of a risk associated with the conditions under which she worked. That factual finding should be addressed under the substantial evidence standard.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Timmy Rogers, Appellant.

Appellate Case No. 2010-176426

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5172
Heard June 5, 2013 – Filed September 4, 2013

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Alphonso Simon, Jr., all of Columbia; and Solicitor John Gregory Hembree, of North Myrtle Beach, for Respondent.

FEW, C.J.: A jury found Timmy Rogers guilty of murdering his paramour's husband, Fred Engel. Rogers argues the trial court erred when it refused to direct a verdict in his favor. We affirm.

I. Background

In the early morning hours of April 22, 2008, police found Engel's body in the woods near a bank of mailboxes in the subdivision where he lived. A forensic pathologist determined the killer strangled Engel to death. Three months later, a grand jury indicted Rogers for murder.

At trial, the State theorized Rogers killed Engel because Rogers was having an affair with Engel's wife Sherry. Sherry testified for the State, claiming she and Rogers devised a plan to kill Engel that they carried out the evening of April 21. Rogers moved for a directed verdict, which the trial court denied. After the jury convicted Rogers, the court sentenced him to thirty-five years in prison.

II. The Evidence

At trial, the State presented the following evidence to prove Rogers murdered Engel.

A. The Motive to Kill

Sherry testified the affair with Rogers began in May 2007 when she met him while visiting Kentucky. Thereafter, Sherry traveled from her home in Myrtle Beach to Kentucky to visit Rogers every month. She had family and a treating physician in Kentucky, which gave her excuses to visit. Throughout the affair, Sherry claimed Rogers frequently discussed "getting rid" of Engel "because he felt like [Engel] was going to take [her] away from him." In fact, she testified Rogers even tried to hire one of his family members to kill Engel. The family member, whom Sherry claimed "was a sharp shooter," ultimately refused Rogers' request. Although Sherry initially protested the plan to kill Engel, she claimed she "became more compliant with th[e] idea of having [Engel] killed" and discussed it with Rogers every day.

B. The Plan to Murder

According to Sherry's testimony, Rogers told her the morning of April 21, 2008, that "This was going to be the day that [Engel] died." Rogers was in Myrtle Beach that week, staying at a motel located ten miles from the Engels' home. Sherry

drove to the motel, where she and Rogers discussed their intention to kill Engel. Knowing she could not change Rogers' mind, Sherry told him, "Well, if you're going to do it you go ahead and do it."

Rogers' plan was to park his red Chevrolet pickup truck in the parking area of the Engels' subdivision that night and hide in the bushes behind the mailboxes. Sherry was to call Rogers when Engel walked outside to check the mail. Rogers would lay in wait for Engel and shoot him when he approached the mailboxes. He told her he bought a gun from a man staying in the motel, but Sherry never saw the gun.

C. The Murder

Sherry testified Rogers called her that night at 11:00 p.m. to tell her he was positioned at the mailboxes.[1] Sherry claimed she then asked Engel to check the mail, and when he left the house, Sherry called Rogers and told him, "He's leaving." She testified that when she hung up the phone, she knew she had "fulfilled her part of the agreement."

Rogers called her back later that night and said, "It's done." During that conversation, Sherry recalled "he was out of breath and . . . I could barely understand a lot of what he was saying. But I could tell he was in the woods cause of the way he was stomping and everything."

Around midnight, Sherry called Rogers to make sure he was out of the area and safely at his motel before she put the next part of their plan into action. He told her he made it back and, in Sherry's words, was "cleaning himself up from where he killed [Engel]." He had worn coveralls and boots Sherry had purchased for him, and Rogers told her he had to get "the blood off of his hands . . . and get[] his coveralls and . . . boot [off] because he had stepped in the blood."

After she got off the phone with Rogers, Sherry "sound[ed] the alarm." She testified she walked to the house of her next-door neighbors, Tom and Karen Rickerson, and told them she could not find Engel. Tom testified he drove around the neighborhood searching for Engel but could find no trace of him. At that point,

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[1] The State's expert in tracking cell phone calls presented cell phone records that are consistent with this phone call, but show the call being placed by Sherry to Rogers.

Sherry told Tom they needed to go to the mailboxes because, as she explained to Tom, Engel took the mailbox key with him when he left. Sherry, however, claimed that she "knew something had happened at the mailbox"; she knew Rogers "was supposed to do it" there. When they arrived, Sherry saw "blood on the front of the [mail]boxes" and Engel's glasses laying on the ground. At that point, Sherry "had no doubt in [her] mind that [Engel] was dead," and she "knew who did it."

D. Finding the Body

A police officer from the Horry County police department testified they found Engel's body in the woods approximately thirty feet from the mailboxes early the next morning. He also stated a shoestring was found around his neck, and it appeared Engel had been dragged face-down by his left arm into the woods. A pathologist with a local hospital in Myrtle Beach told the jury it would take significant strength to make the marks on Engel's neck that were left by the shoestring. He further testified Engel had a "fresh" head laceration that could have been inflicted by "[a]nything blunt that you either fall against or get hit with," and a defensive wound on his finger from pulling against the shoestring.

The police submitted twenty pieces of evidence for DNA swabs, but none contained Rogers' DNA. The police also made casts of footwear impressions found at the scene, but they yielded no useful information.

E. Placing Rogers at the Scene

The State introduced the testimony of an employee who worked at the motel where Rogers stayed. She testified Rogers reserved a room from April 8 until May 5, 2008, which Sherry paid for in cash. She also confirmed that Rogers was a guest at the motel on the night of April 21, 2008. However, she testified Rogers checked out on April 30 and did not stay the full twenty-eight days he had reserved. The employee also testified Rogers drove a red Chevrolet S-10 pickup truck.

Kimberly Maluda, a resident of the subdivision where the Engels lived, testified that she passed a red Chevrolet S-10 pickup truck in the neighborhood on her way home from work the evening of April 21, 2008. She saw the same truck "back in" to a parking spot across from the mailboxes with the headlights off. However, she did not see the truck's license plate or driver. Maluda stated the truck was gone the next morning.

Michael Graham—an expert in tracking cell phone calls and text messages—testified about calls and text messages made from and received by Rogers' and Sherry's cell phones.[2] According to Graham's testimony, there were at least fourteen phone calls and text messages sent between Sherry and Rogers on April 21, 2008. However, only two phone calls were made between Rogers and Sherry the next day, and the phone calls remained scarce thereafter.

Relying on Rogers' cell phone records, Graham testified to phone calls made between Rogers' and Sherry's cell phones the night Engel died and to Rogers' general location at the time of these calls based on which cell towers his phone accessed to make or receive those calls:

(1) Sherry called Rogers at 9:06 p.m., and Rogers' cell phone accessed a tower within the vicinity of Rogers' motel;
(2) Sherry and Rogers exchanged a series of phone calls and text messages between 9:41 and 9:44 p.m., and Rogers sent and received them by accessing three different towers that covered the subdivision where the Engels lived;
(3) Sherry placed a twenty-six-second phone call to Rogers at 10:35 p.m., and Rogers' cell phone accessed the tower covering the subdivision where the Engels lived;
(4) Sherry placed an eleven-second phone call to Rogers at 11:05 p.m., and Rogers' cell phone accessed the tower covering the subdivision where the Engels lived;
(5) Rogers placed a three-minute phone call to Sherry at 11:42 p.m., accessing the tower covering Rogers' motel; and
(6) Sherry placed a seven-and-a-half-minute phone call to Rogers at 12:03 a.m., and Rogers' cell phone accessed the tower covering his motel.

The State argued this evidence corresponded with Sherry's testimony regarding phone calls made between her and Rogers the night Engel died and put Rogers at the scene of the crime around the time Maluda claimed she saw a red truck in the neighborhood. Also, the State theorized that Rogers' cell phone accessed three

[2] Graham's testimony refers to a cell phone number with a 502 area code, later identified as Rogers' cell phone number, and a cell phone number with an 843 area code, later identified as Sherry's cell phone number.

different towers for the calls made between 9:41 p.m. and 9:44 p.m. because he was driving to the Engels' home at that time. However, Graham and another witness indicated the phone records showed only that the cell phones were used in the general area of the cell towers routing the calls; the information did not conclusively prove who was using the cell phones or pinpoint exactly where the phones were used.

F. The Aftermath

Sherry testified to conversations she had with Rogers after Engel's death. She claimed she and Rogers spoke only twice the week after Engel's murder. One of those times, Rogers called and told her he had Engel's watch and keys and asked what he should do with them. Additionally, Rogers told her he had washed the steering wheel of his truck with bleach to remove Engel's blood from it, and he had painted his red truck gray.

Sherry testified that before the funeral, Sherry viewed Engel's body and noticed Engel's head was "all mashed in . . . where he [had] been hit with something," and he had "a lot of scratching and bruising down his arm and on . . . his right side." Sherry told the jury she found this odd because their plan did not include "beating [Engel] up or hitting him with anything." She also noticed there was no bullet wound on Engel's body. Afterward, Sherry asked Rogers how he killed Engel, and Rogers explained that Engel "was standing by the mailbox, and I came out behind him" and "put the gun to the back of his head and I pulled the trigger." Although Sherry admitted Rogers had never mentioned strangling Engel when they made their plan to kill him, she told the jury Rogers "had said something about a rope."

III. Directed Verdict Analysis

Rogers argues the evidence discussed above is not sufficient to create a jury question as to his guilt because (1) the State presented no direct evidence he murdered Engel, and (2) the State's circumstantial evidence did not meet the standard for submitting a purely circumstantial evidence case to the jury.

In reviewing a denial of a directed verdict, we must view the evidence in the light most favorable to the State. *State v. Lollis*, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001). If there is any direct evidence, or if there is substantial circumstantial evidence, that reasonably tends to prove the defendant's guilt, we must find the trial

court properly submitted the case to the jury. *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

A. The Existence of Direct Evidence

We begin by addressing whether there was any direct evidence proving Rogers murdered Engel. Direct evidence "is based on personal knowledge or observation and . . . , *if true*, proves a fact without inference or presumption." *Black's Law Dictionary* 636 (9th ed. 2009) (emphasis added). The presentation of direct evidence "immediately establishes the main fact to be proved." *State v. Salisbury*, 343 S.C. 520, 524 n.1, 541 S.E.2d 247, 249 n.1 (2001). Circumstantial evidence, on the other hand, is proof of a chain of facts and circumstances from which the existence of a separate fact may be inferred. *State v. Cherry*, 361 S.C. 588, 596, 606 S.E.2d 475, 479 (2004). Circumstantial evidence is "based on inference and not on personal knowledge or observation," *Black's Law Dictionary* 636 (9th ed. 2009), and establishes "collateral facts from which the main fact may be inferred." *Salisbury*, 343 S.C. at 524 n.1, 541 S.E.2d at 249 n.1.

The State made no argument at trial or in its brief to this court as to the existence of any direct evidence of Rogers' guilt. In fact, the State asserted in its closing argument that all the evidence it relied on to convict him was circumstantial. In its brief, the State argued only that the circumstantial evidence proving Rogers guilty was substantial, and thus met the standard for submitting a case to the jury on purely circumstantial evidence. At oral argument, this court questioned Rogers' counsel regarding whether Sherry's testimony that Rogers said, "It's done," constituted direct evidence, to which counsel responded it was not. Later responding to this question, the State told the court that, "on second thought," it believed the statement was direct evidence. The State explained that because Sherry, the person who heard the statement and testified to it, interpreted it to mean Rogers had killed Engel according to their plan, this was direct evidence proving Rogers' guilt.

There are two additional pieces of evidence that arguably constitute direct evidence of Rogers' guilt—Sherry's testimony that Rogers told her in a phone call later that night he was cleaning himself up from where he killed Engel, and her testimony that Rogers told her "I put the gun to the back of [Engel]'s head and pulled the trigger." The definitions of direct and circumstantial evidence cited above tell us that direct evidence is that which requires only the factfinder's determination that

the evidence is credible before it may find the existence of a disputed fact. Circumstantial evidence, on the other hand, requires the factfinder not only to determine that it believes the evidence, but also to make at least one additional inference from the evidence before concluding the fact has been proven. As to each of these three pieces of evidence, and all other evidence in this record, the jury could not find Rogers guilty of murder simply by believing any one piece of the evidence. At least one additional inference is necessary before any of the evidence proves murder.

As to the statement, "It's done," the jury had to infer what Rogers meant by both the words "it" and "done" before it could determine whether he confessed to murder. Thus, the jury could not find Rogers guilty of murder simply by determining whether it believed Sherry. While the circumstances in the case indicate persuasively that the mere statement "It's done" means he just killed Engel, the statement itself does not prove murder without further inference.

The statement "I put the gun to the back of [Engel]'s head and pulled the trigger" is not direct evidence that Rogers murdered Engel because we know from indisputable forensic evidence that it is not a true statement.[3] Engel died from strangulation, not from a gunshot to the head. Therefore, for the jury to conclude from this statement that Rogers is guilty of murder, it must infer that by saying he shot and killed Engel, he actually meant he strangled Engel to death.

Sherry's testimony that Rogers told her he was cleaning himself up from where he killed Engel is the most difficult of the three. If in fact Rogers told Sherry, "I am cleaning myself up from where I killed Engel," that would be direct evidence of murder. Sherry's actual testimony, however, was:

> Yeah, he was telling me that he was getting the blood off his hands and everything and getting his coveralls and everything off. And his boot and everything because he had stepped in the blood, and he was cleaning his self up from where he killed Fred [Engel].

From this testimony, it is unclear whether Rogers actually said "from where I killed Engel" or whether that is what Sherry inferred he meant. The assistant

[3] Sherry also testified Rogers "told me he had shot him."

solicitor did not follow up on this statement to clarify what Rogers actually said, but moved on to another topic. Thus, for the jury to conclude from this statement that Rogers murdered Engel, it not only must have found Sherry's testimony to be credible, but it must also have inferred from her testimony that Rogers *said* he "killed" Engel, not simply that Sherry thought that is what he meant.

We find the State's proof that Rogers is guilty of murder consisted entirely of circumstantial evidence, and therefore, we review the trial court's decision to deny his directed verdict motion under the "substantial circumstantial evidence" standard from *Odems*. 395 S.C. at 586, 720 S.E.2d at 50 (stating "if there is . . . *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury"); *see also State v. Frazier*, 386 S.C. 526, 532, 689 S.E.2d 610, 613 (2010) (affirming denial of directed verdict because State offered "substantial circumstantial evidence of [defendant]'s guilt").

B. The Sufficiency of the Circumstantial Evidence

The State presented the following circumstantial evidence at trial:

(1) Sherry's testimony that Rogers had an ongoing affair with her at the time Engel was killed;
(2) Sherry's testimony that she and Rogers conspired to kill Engel because Rogers "wanted [Engel] out of the way;"
(3) Maluda's testimony that she saw a red Chevrolet S-10 truck in the neighborhood that night, and the State's evidence that Rogers drove a red Chevrolet S-10 pickup truck;
(4) Cell phone records and the cell tower locations that indicated Rogers' cell phone was used in the vicinity of the crime scene around the time Maluda claims she saw a red Chevrolet S-10 truck in the neighborhood;
(5) Sherry's testimony that Rogers told her he would be waiting by the mailboxes, which were thirty feet from where the police found Engel's body and near where Maluda saw the truck park, and Sherry's testimony that when she talked to Rogers that night, he told her he was "in place" behind the bushes next to the mailboxes;
(6) Sherry's testimony that she was to call, and did in fact call, Rogers when Engel left the house, and cell phone records corroborating that she made a call to Rogers at 11:05 p.m.;

(7) Sherry's testimony that when Rogers called her later that night, he stated, "It's done;"
(8) Sherry's testimony that during this phone call, it sounded like Rogers was in the woods and was out of breath, which is consistent with testimony that Engel's body was dragged to the woods and that it took significant strength to strangle Engel;
(9) Sherry's testimony that she called Rogers around midnight to make sure he was away from the scene, which is consistent with cell phone records showing Sherry made a call to Rogers at 12:03 a.m.;
(10) Sherry's testimony that during this phone call, Rogers indicated he was at the motel washing off Engel's blood and taking off his coveralls and boots, which is consistent with cell tower locations that indicated his phone was used in the vicinity of his motel, and with Sherry's testimony that he told her he wore coveralls and boots when he committed the crime;
(11) Sherry's cell phone records showing she communicated with Rogers at least fourteen times the day Engel died, but their communication became very limited thereafter;
(12) Sherry's testimony that Rogers cleaned the interior of his truck with bleach sometime after the incident;
(13) Testimony that Rogers painted the exterior of his truck before Engel's funeral;
(14) Sherry's testimony that after Engel's death, Rogers mentioned "something about a rope" in connection with Engel's death; and
(15) Sherry's testimony that Rogers asked her before the funeral what he should do with Engel's watch, which is consistent with the State's theory that the watch came off when Rogers dragged Engel's body into the woods by his left arm, and with Sherry's testimony that Engel wore a watch on his left wrist.

We find this evidence meets the "substantial circumstantial evidence" requirement and reasonably tends to prove that Rogers killed Engel, and thus was sufficient for the trial court to submit the case to the jury.

C. Rogers' Other Arguments

Rogers makes several arguments, however, that a directed verdict was required based on decisions of our supreme court regarding the sufficiency of purely

circumstantial evidence. These arguments challenge the State's evidence by isolating pieces of evidence and contending those individual pieces are insufficient to prove his guilt. We acknowledge the State's evidence, when separated out and viewed individually, may merely raise a suspicion of Rogers' guilt. *See Odems*, 395 S.C. at 586, 720 S.E.2d at 50 (stating directed verdict appropriate when the evidence merely raises a suspicion of defendant's guilt); *State v. Schrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 452 (1984) (stating a "trial judge should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty"). Circumstantial evidence, however, gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether it is sufficient to submit to the jury. *See Frazier*, 386 S.C. at 532, 533, 689 S.E.2d at 613, 614 (viewing circumstantial evidence "collectively" and "as a whole" to hold directed verdict properly denied); *Cherry*, 361 S.C. at 595, 606 S.E.2d at 478 (finding the circumstantial evidence, when combined, was "sufficient for the jury to infer [guilt]").

Keeping this in mind, we turn to Rogers' first argument—that the State's evidence failed to place him at the scene of the crime. Rogers' argument is based on a line of cases in which our supreme court held, in part, the State's lack of evidence placing the defendant at the crime scene necessitated a directed verdict.[4] He claims the trial court was required to direct a verdict based on the holdings in these cases because the State's evidence does not prove he was at the mailboxes when Engel went to check the mail. Specifically, Rogers challenges (1) the cell phone and cell tower evidence and (2) Maluda's testimony regarding the red truck she saw that evening as insufficient to place him at the scene of the crime. We agree neither the cell tower evidence nor Maluda's testimony, standing alone, conclusively places

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[4] *See State v. Bostick*, 392 S.C. 134, 141-42, 708 S.E.2d 774, 778 (2011) (reversing denial of directed verdict and noting "[n]o direct evidence linked [the defendant] to the crime scene"); *State v. Arnold*, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004) (holding directed verdict proper, in part, because no evidence directly proved defendant was at the scene of the crime); *State v. Martin*, 340 S.C. 597, 602-03, 533 S.E.2d 572, 574-75 (2000) (reversing denial of directed verdict and stating "[m]ost significantly, the State's evidence failed to place either defendant inside the apartment"); *Schrock*, 283 S.C. at 132, 134, 322 S.E.2d at 452, 453 (reversing denial of directed verdict and relying, in part, on lack of evidence placing defendant at the scene of the crime).

Rogers at the scene of the crime. The cell tower evidence proved only that Rogers' cell phone was used in the general vicinity of the cell towers—not that Rogers called or that he was at the mailboxes when Engel checked the mail—and Maluda's testimony established only that she saw the same type of vehicle driven by Rogers parked near the mailboxes that night—not that Rogers, or his truck, was there.

Rogers' argument, however, is flawed for two reasons. First, a directed verdict is not required merely because the State cannot conclusively show the defendant was at the crime scene at the relevant time. As the supreme court stated in *Frazier*, the holdings in *Arnold*, *Martin*, and *Schrock* did not alter or increase "the sufficiency of evidence standard a trial court is to apply in a case based on circumstantial evidence." *Frazier*, 386 S.C. at 532, 689 S.E.2d at 613. The court explained this is because those holdings were based on the State's failure to present *any* evidence placing the defendant at the scene, not the State's inability to provide conclusive proof on that point. *Id.* Second, this evidence, when considered together and in combination with other evidence—particularly Sherry's testimony[5] that Rogers told her he was there that night waiting near the mailboxes—is sufficient to place Rogers at the scene of the crime at the relevant time, and thus to distinguish this case from *Arnold*, *Martin*, and *Schrock*.

Rogers also challenges the evidence of his affair with Sherry, arguing this case is distinguishable from *State v. Frazier* because evidence of Rogers' and Sherry's affair does not prove Rogers was at the scene of the crime or committed the murder. In *Frazier*, the defendant argued the State's evidence was insufficient to place him at the murder scene. 386 S.C. at 531, 689 S.E.2d at 613. The court

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[5] Although Rogers questioned Sherry's credibility, we consider only the existence or non-existence of evidence, not witness credibility, in reviewing the denial of a directed verdict. *See State v. Cherry*, 348 S.C. 281, 286, 559 S.E.2d 297, 299 (Ct. App. 2001) (en banc) (affirming trial court's denial of directed verdict "without passing on the weight of the evidence"), *aff'd in result*, 361 S.C. at 594, 606 S.E.2d at 478 (stating "[w]hen the state relies exclusively on circumstantial evidence and a motion for directed verdict is made, the circuit court is concerned with the existence or nonexistence of evidence, not with its weight"); *State v. Scott*, 330 S.C. 125, 131 n.4, 497 S.E.2d 735, 738 n.4 (Ct. App. 1998) (finding circumstantial evidence was substantial even though witnesses' testimony conflicted because the jury, not the court, assesses witness credibility and weighs testimony).

disagreed and listed seven pieces of circumstantial evidence[6]—one being evidence of an ongoing affair between the defendant and the victim's wife—and found "[t]his evidence, when viewed collectively, presented a jury question as to [the defendant]'s guilt." 386 S.C. at 531-32, 689 S.E.2d at 613. In listing this evidence, particularly the evidence of the affair, the court did not mean to imply that each piece of evidence proved the defendant was at the scene of the crime. Instead, the court evaluated the seven pieces of evidence in combination with one another and determined they "collectively" met the "substantial circumstantial evidence" test. *Id.* Thus, Rogers' reliance on *Frazier* is misplaced because here, as in *Frazier*, evidence of the affair is merely one piece of the evidence that collectively was sufficient to submit the case to the jury.

Nonetheless, Rogers argues *Frazier* is distinguishable because there were no witnesses placing Rogers at the crime scene—especially considering Maluda could not identify the driver or license plate of the red Chevrolet S-10 truck—and there was no evidence indicating Rogers had a prior confrontation with Engel. The absence of this particular evidence means this case is different from *Frazier*, but it does not mean the case is distinguishable. In fact, the evidence in this case is stronger than in *Frazier* because Sherry testified to (1) Rogers' plan to kill Engel, (2) Rogers' approximate whereabouts before and after the murder that are corroborated by cell phone records and other testimony, and (3) inculpatory statements and actions made by Rogers. While there was no evidence of any confrontations between Rogers and Engel and there were no eyewitnesses conclusively placing Rogers at the mailboxes, evidence of the affair and the additional evidence presented at trial, "*when viewed collectively*, presented a jury question" as to Rogers' guilt. 386 S.C. at 532, 689 S.E.2d at 613 (emphasis added).

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[6] The court found the following evidence to constitute substantial circumstantial evidence: (1) the ongoing affair between the defendant and the victim's wife; (2) the victim was shot twice at point-blank range while the victim's wife was unharmed; (3) a witness overheard the defendant and victim's wife discussing a trip to the beach where the victim was shot; (4) the defendant requested three days off from work a week before the murder and the murder occurred on the second of those three days; (5) the defendant borrowed a friend's car for those three days; (6) the defendant attempted to fight the victim days before the murder; and (7) two witnesses observed the defendant "lurking around the murder scene just before the murder was committed," and both independently identified the defendant in a photographic lineup. 386 S.C. at 531-32, 689 S.E.2d at 613.

Rogers next argues the statement, "It's done," failed to show he actually committed the act of strangling Engel, especially considering Sherry testified Rogers shot, not strangled, Engel. He relies on *Martin* and argues that his potentially inculpatory statement is not "per se substantial circumstantial evidence." In *Martin*, the defendant's girlfriend testified that when she asked the defendant and co-defendant why they were late picking her up from work, the defendant responded, "some shit happened," and the codefendant added, "somebody may have died tonight." 340 S.C. at 600, 533 S.E.2d at 573. Later that morning, the victim was found dead in his apartment, drowned in a pot of water. 340 S.C. at 600, 533 S.E.2d at 573. Despite these inculpatory statements, the supreme court reversed the trial court's denial of a directed verdict. 340 S.C. at 602-03, 533 S.E.2d at 574-75. Considering the evidence as a whole in that case, the court determined "the State failed to place [Martin] at the scene of the crime or show his participation in the killing." 340 S.C. at 602, 533 S.E.2d at 574.

This case is distinguishable from *Martin* for two reasons. First, Rogers' statement, "It's done," is stronger evidence than the inculpatory statements in *Martin*. Rogers' statement did not merely reveal Engels' death, but tied itself to Rogers' elaborate scheme of murder because it informed his co-conspirator that he had executed *their* plan to kill Engel. Also, the statement was corroborated by other details of that conversation, particularly Rogers being out of breath and in the woods, and was consistent with the State's theory that Rogers killed Engel and then dragged his body into the woods. Second, this case is distinguishable from *Martin* because Rogers' inculpatory statements are part of a large body of evidence not present in that case. Rogers' attempts to isolate this and other single pieces of evidence[7] and argue each one alone does not constitute substantial circumstantial evidence are misplaced. The supreme court has consistently evaluated the circumstantial evidence in a case as a whole, not in isolation from other evidence. *See, e.g.*, *Frazier*, 386 S.C. at 531-32, 533, 689 S.E.2d at 613, 614; *Cherry*, 361 S.C. at 594-95, 606 S.E.2d at 478; *State v. Buckmon*, 347 S.C. 316, 323-24, 555 S.E.2d 402, 405-06 (2001). As we have discussed, the State presented evidence of Rogers'

[7] Rogers also challenges the following pieces of evidence, individually, in his brief: (1) the connection between Rogers owning a pair of boots and the shoe impressions found at the scene, (2) the alleged conspiracy to kill Engel, and (3) the testimony that Rogers cleaned the interior of his truck and painted the exterior after Engel's death.

guilt that meets the substantial circumstantial evidence test, and the trial court properly submitted the case to the jury.

IV. Conclusion

For the reasons set forth above, the trial court's refusal to grant Rogers' motion for a directed verdict is **AFFIRMED**.

GEATHERS and LOCKEMY, JJ., concur.