The Supreme Court of South Carolina

In the Matter of Jacquelyn Lee Bartley, Deceased.

Appellate Case No. 2013-001971

ORDER

The Office of Disciplinary Counsel has notified the Court that Jacquelyn Lee Bartley, Esquire, passed away on August 29, 2013, and petitions the Court for the appointment of the Receiver, Gretchen B. Gleason, to protect Ms. Bartley's clients' interests pursuant to Rule 31, RLDE, of Rule 413, SCACR. The petition is granted.

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

This Order, when served on any bank or other financial institution maintaining trust, escrow, operating accounts and/or any other law office accounts of Ms. Bartley, shall serve as notice to the bank or other financial institution that Gretchen B. Gleason has been duly appointed by this Court.

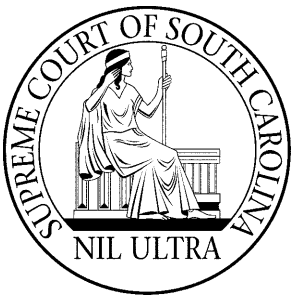
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Gretchen B. Gleason, Esquire, has been duly appointed by this Court and has the authority to receive Ms. Bartley's mail and the authority to direct that Ms. Bartley's mail be delivered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

September 20, 2013



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 41
September 25, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Auto-Owners Insurance Company, Petitioner,

v.

Samuel W. Rhodes; Piedmont Promotions, Inc; Marion L. Eadon d/b/a C&B Fabrications; C&B Fabrications, Inc.; and Low Country Signs, Inc., Respondents.

Appellate Case No. 2009-143546

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 27316
Heard February 20, 2013 – Filed September 25, 2013

AFFIRMED IN PART AND REVERSED IN PART

Alfred Johnston Cox, of Gallivan, White & Boyd, PA, John Lucius McCants of Rogers Lewis Jackson Mann & Quinn, LLC, both of Columbia, for Petitioner.

William O. Sweeny, III, William Roberts Calhoun, Jr., both of Sweeny Wingate & Barrow, PA, of Columbia, Creighton B. Coleman of Coleman Tolen & Swearingen, LLC, of Winnsboro, Bert Glenn Utsey, III, Matthew Vernon Creech, both of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Walterboro, for Respondents.

JUSTICE BEATTY: Samuel W. Rhodes ("Rhodes") and Piedmont Promotions, Inc. ("Piedmont") sued Marion L. Eadon, d/b/a C&B Fabrication,[1] for damages arising out of the faulty construction of three outdoor advertising billboard signs after one of the signs fell across Interstate 77. A Fairfield County jury returned a verdict for actual and punitive damages in favor of Rhodes ("the tort action"). At the time of the tort action, Eadon's two corporations, C&B Fabrications, Inc. and Low Country Signs, Inc., were listed as named insureds under a commercial general liability ("CGL") policy ("the policy") issued by Auto-Owners Insurance Company ("Auto-Owners"). Eadon sought indemnification from Auto-Owners for the verdict. In response, Auto-Owners filed this declaratory judgment action (the "DJ action") to determine whether it has a duty to indemnify Eadon under the policy.

The circuit court judge found Eadon was insured by the policy and that all damages, except for the price of the signs, were covered by the policy. After post-trial motions were filed, the Court of Appeals reversed the tort action on the ground that venue was proper in Clarendon County rather than Fairfield County. *Rhodes v. Eadon*, Op. No. 2006-UP-413 (S.C. Ct. App. filed Dec. 15, 2006). Subsequently, Auto-Owners filed a motion to be relieved from the DJ order as the underlying tort action had been reversed and vacated. The judge denied this motion. On appeal, the Court of Appeals affirmed as modified the DJ order. *Auto-Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 682 S.E.2d 857 (Ct. App. 2009). This Court granted Auto-Owners' petition for a writ of certiorari to review the decision of the Court of Appeals. We affirm in part and reverse in part.

I. Factual/Procedural History

Eadon is the sole owner and shareholder of C&B Fabrication and Low Country Signs, Inc., both of which conducted business under the name C&B Fabrication. Rhodes is the sole owner and shareholder of Piedmont Promotions, Inc., which owns and leases outdoor advertising space in various locations. In 1999, Rhodes contracted with Eadon to design, fabricate, and erect three outdoor advertising signs on property owned by Rhodes that bordered Interstate 77 in Fairfield County. Rhodes obtained the requisite permits from the South Carolina Department of Transportation ("SCDOT") to erect the three signs.

[1] Throughout these proceedings, Eadon's business has been referred to as C&B Fabrication, C&B Fabrications, and C&B Fabricators.

In December 2000, approximately ten months after the installation of the signs, the middle sign was discovered to be leaning toward I-77. Rhodes contacted Eadon to inform him of the problem. Shortly thereafter, Eadon sent a crew to address the issue. On January 20, 2001, three days after the crew visited the site, one of the other signs fell across I-77, blocking both lanes of southbound traffic. Based on its investigation, SCDOT ordered Rhodes to remove the remaining two signs and revoked Piedmont's permits to maintain signs on the property. Rhodes immediately requested that Eadon remove the two remaining signs. Eadon, however, removed only the one sign that was previously leaning and refused to remove the third and final sign.

Following this incident, a General Liability Notice of Occurrence/Claim was forwarded to Auto-Owners from Creech Roddey Watson Insurance, Eadon's insurance company. Upon receipt of this claim, Auto-Owners sent a reservation of rights letter to Eadon regarding the incident, stating it was unsure whether a claim existed under the CGL policy. Over the next few months, Auto-Owners paid several claims for damages caused by the fallen sign, but stated the CGL policy did not cover the majority of the expenses that would be incurred following the loss.

On December 12, 2001, Rhodes and Piedmont filed the tort action against "Marion L. Eadon d/b/a C&B Fabrication," alleging damages to the real estate owned by Rhodes and lost income by Piedmont due to the negligent design, fabrication, and erection of the signs by C&B, which led to the removal of the three signs and the revocation of the SCDOT permits.

On October 14, 2002, while the tort action was pending, Auto-Owners filed the DJ action to determine whether coverage was provided pursuant to the CGL policy.

The tort action was tried in Fairfield County between August 30 and September 2, 2004. A jury returned a verdict for Rhodes and Piedmont in the amount of 3 million dollars in actual damages and 3.5 million in punitive damages for the negligence cause of action. Eadon appealed this verdict to the Court of Appeals.

While Eadon's appeal was pending, the circuit court judge issued an order in the DJ action on November 7, 2006. The judge found that Auto-Owners was obligated to indemnify Eadon for the judgment rendered in the tort action. In so ruling, the judge found the sign falling on the interstate constituted an "occurrence" that resulted in damages "beyond the defective work" to "property other than the

defective work itself." The judge further found "the loss of use of the remaining two signs and the consequential damages flowing therefrom was causally linked to the sign that fell and constituted property damage caused by an occurrence."

Specifically, the judge found coverage for "property damage" based on the physical injury to the real estate, costs to remove the signs, and loss of use of the signs. The judge further found that Rhodes suffered diminution in value of his real property as SCDOT prohibited him from erecting signs in the future. The judge discounted all of the policy exclusions raised by Auto-Owners as Rhodes's claim for damages was based on the consequential damages incurred to his real estate rather than to the signs produced by C&B. However, the judge ruled that the contractual price of the signs was excluded as this fell within the purview of the "your work" exclusion.

On December 15, 2006, the Court of Appeals reversed the verdict in the tort action based on the trial court's failure to grant Eadon's motion to transfer venue to Clarendon County, his county of residence. *Rhodes v. Eadon,* Op. No. 2006-UP-413 (S.C. Ct. App. filed Dec. 15, 2006).

Based on this development, Auto-Owners filed a supplemental Rule 59(e), SCRCP, motion. Alternatively, Auto-Owners filed a motion pursuant to Rule 60, SCRCP, to have the DJ order declared null and void based on the judge's reliance on the evidence and testimony in the vacated tort action. The judge granted Auto-Owners' motion in part, striking only the portion of the order referencing the money damages awarded by the jury. The other portions of the order remained in full force and effect.

Auto-Owners appealed the DJ order to the Court of Appeals. The Court of Appeals affirmed as modified. *Auto-Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 682 S.E.2d 857 (Ct. App. 2009). In so ruling, the court found: (1) the DJ action was ripe for adjudication; (2) Eadon constituted an insured under the policy as he was involved in the procurement of the contract with Rhodes and Piedmont; (3) there was an "occurrence" under the policy because the property damages were the result of the unexpected happening of the sign falling; (4) the policy covered the costs associated with Rhodes's required removal of the final sign as well as the diminution of value to Rhodes's property due to the loss of his permits to erect signs in the future; and (5) none of the policy exclusions relied on by Auto-Owners precluded coverage as the majority of the damages sought by Rhodes were to his business, rather than the actual work product (the signs of C&B), which was properly excluded. *Id.* at 93-108, 682 S.E.2d at 863-71. Additionally, the court

vacated the portions of the judge's order that referenced the jury, verdict, and damages in the tort action as they were "moot in view of the reversal of that verdict." *Id.* at 96, 682 S.E.2d at 864. This Court granted Auto-Owners' petition for a writ of certiorari to review the decision of the Court of Appeals.

II. Discussion

A. Overview of Analysis

In analyzing this case, we must answer the threshold question of whether the reversal of the underlying tort action affected the propriety of the DJ action. If the requisite judicial controversy is present, we must next determine whether Eadon is an "insured" under the provisions of the policy. If so, then the question becomes whether Auto-Owners is legally obligated to pay for damages arising out of the tort action. In assessing Auto-Owners' duty to indemnify Eadon, we must determine whether there was an "occurrence" that caused "property damages," which were not excluded by any policy provision. We answer "yes" to all of these questions.

B. Standard of Review

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 46, 717 S.E.2d 589, 592 (2011) (citation omitted).

"In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." *Id.* at 46-47, 717 S.E.2d at 592 (citation omitted). However, an appellate court may make its own determination on questions of law and need not defer to the trial court's rulings in this regard. *Id.* at 47, 717 S.E.2d at 592.

C. Propriety of the DJ Action

Auto-Owners argues the Court of Appeals erred in upholding the judge's denial of its Rule 60(b)(4)[2] and (5), SCRCP motions. Because the verdict in the

[2] Although Auto-Owners references subsection 4, its argument is confined to subsection 5. However, even if properly argued, this subsection would not support

tort action has been reversed, Auto-Owners claims there is no duty to indemnify Eadon. Auto-Owners maintains that the DJ action cannot be decided at this time as additional coverage issues may arise out of the retrial, such as new damages, whether Eadon is an insured, and evidence triggering policy exclusions.[3]

Rule 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . . .
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Rule 60(b)(5), SCRCP.

Auto-Owners' contention as the underlying tort action was not void for lack of due process, subject matter jurisdiction, or personal jurisdiction. *See* Rule 60(b)(4), SCRCP ("On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding . . . if the judgment is void."); *Linda Mc Co. v. Shore*, 390 S.C. 543, 703 S.E.2d 499 (2010) (recognizing that the definition of "void" under Rule 60(b)(4) only encompasses judgments from courts that failed to provide proper due process, lacked subject matter jurisdiction, or lacked personal jurisdiction).

[3] In support of its argument, Auto-Owners relies on *Jourdan v. Boggs/Vaughn Contracting, Inc.*, 324 S.C. 309, 476 S.E.2d 708 (Ct. App. 1996), wherein Jourdan sued Boggs and SCDOT for injuries Jourdan suffered when he wrecked his motorcycle in a construction zone where Boggs, a paving contractor, was working for SCDOT. *Id.* at 311, 476 S.E.2d at 709. Boggs filed a cross-claim against SCDOT for equitable indemnification. *Id.* The trial court dismissed Boggs's claim. *Id.* The Court of Appeals reversed, finding that allegations in a complaint are not determinative of the right to equitable indemnification; rather, the right to indemnity "does not ripen until decided by the finder of fact." *Id.* at 313, 476 S.E.2d at 711. *Jourdan*, however, is not controlling because it does not preclude a declaratory judgment action once a concrete dispute arises that involves issues of law as in the instant case.

Because our appellate courts have not definitively addressed Rule 60(b)(5), we have looked to the federal courts' interpretation as our rule is similar to the federal rule.[4] Our research reveals that this rule has limited application and has rarely been applied. *See* 11 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2863 (3d ed. Supp. 2012) (identifying cases where relief has been granted and denied based on Rule 60(b)(5) and stating, this ground is "rarely" relied upon as a basis to allow relief from judgment). Furthermore, in reviewing a decision with respect to Rule 60(b), this Court utilizes a deferential standard of review. *See Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 399 S.E.2d 779 (1990) (recognizing that a motion for relief from judgment pursuant to Rule 60(b) is addressed to the sound discretion of the trial judge, and this Court will not disturb the trial judge's decision absent an abuse of discretion).

With this background in mind, we find the judge and, in turn, the Court of Appeals properly concluded the DJ action was appropriate for judicial determination.

Section 15-53-20 of the South Carolina Code identifies the purpose of the Uniform Declaratory Judgments Act ("the Act") and provides that courts "shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. § 15-53-20 (2005); *see* Rule 57, SCRCP ("The procedure for obtaining a declaratory judgment pursuant to Code §§ 15-53-10 through 15-53-140, shall be in accordance with these rules, and . . . [t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."). The Act is to be liberally construed and administered to achieve its intended purpose "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." S.C. Code Ann. § 15-53-130 (2005). However, the Act does not require the courts to give purely advisory opinions as to the issues sought to be raised. *City of Columbia v. Sanders*, 231 S.C. 61, 97 S.E.2d 210 (1957). "[A]n issue that is contingent, hypothetical, or abstract is not ripe for judicial review." *Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006).

Although an insurance contract may be construed either before or after a breach occurs, there must be a real or actual controversy between the litigants at

[4] Note to Rule 60, SCRCP (stating that Rule 60 is drawn from the Federal Rule).

the time of the institution of the DJ action. S.C. Code Ann. § 15-53-40 (2005); *Nelson v. Ozmint,* 390 S.C. 432, 702 S.E.2d 369 (2010).

We find there was a justiciable controversy sufficient to implicate the Act given: (1) Eadon demanded Auto-Owners defend and indemnify the claim; (2) Auto-Owners denied portions of the claim; (3) definite and concrete issues exist regarding the adverse interests of Auto-Owners' and Eadon with respect to liability under the CGL policy; and (4) the tort action is still pending.

Accordingly, we hold the Court of Appeals correctly affirmed the judge's denial of Auto-Owners' Rule 60 motion. *See* H. A. Wood, Annotation, *Application of Declaratory Judgment Acts to Questions in Respect of Insurance Policies*, 142 A.L.R. 8, § 3(c) (1943 & Supp. 2012) (analyzing state and federal cases involving declaratory judgment actions and stating, "where the controversy is definite and concrete and involves the legal relations of parties who have adverse interests, as regards questions of liability under, and the application of, insurance policies, it has been held in numerous cases that an actual or justiciable controversy existed within the purview of the declaratory judgments acts"); *Assoc. Indem. Corp. v. Davis*, 45 F. Supp. 118 (D. Pa. 1942) (finding declaratory judgment action was not rendered moot where the state supreme court reversed a judgment in favor of injured persons and ordered a new trial in a state court action growing out of an accident resulting from the operation of the insured automobile), *overruled on other grounds by*, 136 F.2d 71 (3rd Cir. 1943).

Despite this ultimate conclusion, we find the DJ decision regarding "property damages" is not proper for our consideration as the resolution of this issue is based on questions of fact that will be presented at trial rather than issues of law to be resolved at this juncture. *See* 4 Phillip L. Bruner & Patrick J. O'Connor, Jr., *Bruner & O'Connor on Construction Law*, § 11:84 (2002 & Supp. 2012) ("What damages result from or arise out of the 'property damage' in any given situation is a question of fact."); *Penn Nat'l Sec. Ins. Co. v. Design-Build Corp.*, No. 2:11-cv-02043-PMD, 2012 WL 2712555 (D. S.C. July 9, 2012) (declining to grant summary judgment to insurer on duty to defend with respect to whether coverage existed for alleged damages for loss of use of the property and loss of profits as these issues were premature); *Guar. Nat'l Ins. Co. v. Beeline Stores, Inc.*, 945 F. Supp. 1510, 1514 (M.D. Ala. 1996) ("Although the existence of a duty to defend may be established by the allegations in the injured party's complaint, the insurer's liability to the insured is ultimately established by what is developed at trial. So a determination of the duty to indemnify cannot be made at a preliminary stage in the proceedings, when it is still possible for the plaintiff in the

underlying lawsuit to change the theory of liability and assert a claim that is covered by the policy at issue."). Accordingly, we confine the remainder of our analysis to answering the questions regarding Eadon's status as an "insured" and whether there was an "occurrence" as required by the terms of the policy.

D. Eadon's Status as an "Insured"

Auto-Owners asserts the Court of Appeals erred in finding that Eadon qualified as an insured under the CGL policy. In support of this assertion, Auto-Owners claims Rhodes and Piedmont should have been judicially estopped from arguing that Eadon was acting on behalf of the corporation when they conversely argued during the tort action that Eadon was subject to individual liability. Auto-Owners further contends that because Eadon was not directly involved in designing, manufacturing, installing, or inspecting the signs, the CGL policy did not provide coverage as any other actions taken by Eadon were performed in his individual rather than his covered, corporate capacity. Specifically, Auto-Owners points to Eadon's trial and deposition testimony wherein he testified that his only role in the corporation was to provide financial resources and procure insurance.

1. Judicial Estoppel

In rejecting Auto-Owners' judicial estoppel contention, the Court of Appeals found it failed to meet the fourth element of the applicable test. *Rhodes*, 385 S.C. at 99, 682 S.E.2d at 866. Specifically, the court found there was no evidence that any inconsistent position asserted by Rhodes was part of an intentional effort to mislead the court. *Id.* Additionally, the court found that Rhodes was not in privity with Auto-Owners or Eadon under the CGL policy. *Id.*

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). "The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary." *Id.*

For the doctrine of judicial estoppel to apply, the following elements must be satisfied: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position

and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Id.* at 215-16, 592 S.E.2d at 632.

We agree with the Court of Appeals that the doctrine of judicial estoppel was inapplicable in the instant case because there was no privity of contract between Rhodes and Auto-Owners. *See Young v. Smith*, 168 S.C. 362, 167 S.E. 669 (1933) (recognizing that no privity of contract exists between an insurance company and a third party who may benefit from indemnification unless the insurance contract specifically lists the third party as a beneficiary). Moreover, Auto-Owners cannot rely on Rhodes's "inconsistent" theories as the decision in the tort action has been reversed and, thus, the proceeding vacated. Accordingly, any reference to Rhodes's trial testimony, the jury charge, or the jury's verdict to support the contention that Eadon was subject to individual liability is misplaced.

2. Executive Officer as Insured

The CGL policy, which lists C&B Fabrications, Inc. and Low Country Signs, Inc., as its insureds on the Declarations page, provides:

> 1. If you are designated in the Declarations as:
>
> a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
>
> . . . .
>
> c. An organization other than a partnership or joint venture, you are insured. Your executive officers and directors are insured, but only with respect to their duties as your officers or directors. . . .
>
> 2. Each of the following is also an insured:
>
> a. Your employees, other than your executive officers, but only for acts within the scope of their employment by you.
>
> . . . .

> No person or organization is an insured with respect to the conduct of any current or past partnership or joint venture that is not shown as a Named Insured in the Declarations.

In interpreting this policy provision, the Court adheres to the general rules of contract construction. *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). " 'Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning.' " *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (quoting *Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977)).

Significantly, during the DJ action, the parties entered into a stipulation to resolve any ambiguity regarding the names of the business entities intended by the parties to be covered by the CGL policy. This stipulation provided:

> For purposes of this Declaratory action only, the named insureds on Auto-Owners' policies are reformed to C&B Fabricators, Inc. and Lowcountry Signs & Fabrication, Inc., both d/b/a C&B Fabrication, trade name of these corporations.

In view of this stipulation and the plain terms of the CGL policy, we agree with the conclusion of the Court of Appeals that Eadon was an insured. However, in reaching this conclusion, we find it was unnecessary for the court to consider a distinction between the actions of "executive officers and directors" and "employees" for the purposes of the CGL policy.

Instead, we find the analysis to be more straightforward. Rhodes identified the defendant in the tort suit as "Marion L. Eadon, d/b/a C&B Fabrication." Based on the stipulation that C&B Fabrication was the trade name of Eadon's corporation, Auto-Owners acknowledged that Rhodes sued Eadon in his corporate capacity. Thus, it is unnecessary to delve into the specific actions performed by Eadon to determine whether he was an insured. The fact that Eadon operated his business under another name did not create a separate legal entity for insurance purposes. *See O'Hanlon v. Hartford Accident & Indem. Co.*, 639 F.2d 1019 (3d Cir. 1981) (holding that where insured purchases policy in trade name, policy will be viewed as if issued in his given name); *Bushey v. N. Assurance Co. of Am.*, 766 A.2d 598,

603 (Md. 2001) (stating that "sole proprietorship form of business provides 'complete identity of the business entity with the proprietor himself' " (citation omitted)); *cf. Providence Wash. Ins. Co. v. Valley Forge Ins. Co.*, 42 Cal. App. 4th 1194, 1201 (Cal. Ct. App. 1996) ("In short, it is commonly held that '[a]n individual who does business under several different names, and whose insurance policies are written out to the individual doing business under certain trade names, is not a separate entity in his capacity in operating each of such businesses, but rather there is only one legal entity, the individual, for the purposes of insurance coverage.' " (quoting 46 C.J.S. *Insurance* § 948 (1993))).

E. "Occurrence"

Auto-Owners asserts the Court of Appeals erred in finding the removal of the two signs that did not fall constituted an "occurrence" as defined by the policy. The policy states, in pertinent part:

> **Coverage A. Bodily Injury and Property Damage Liability**
>
> **1. Insuring Agreement.**
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. . . .
>
> . . . .
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory."
>
> . . . .
>
> **Section V-Definitions**
>
> . . . .
>
> 9. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Although not defined by the policy, this Court in a case involving an identical CGL policy defined "accident" as "[a]n unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt." *Green v. United Ins. Co. of Am.*, 254 S.C. 202, 206, 174 S.E.2d 400, 402 (1970).

In finding an "occurrence," both the judge and the Court of Appeals referenced this Court's decision in *L-J, Inc. v. Bituminous Fire and Marine Insurance Company*, 366 S.C. 117, 621 S.E.2d 33 (2005) and cases cited therein, particularly *High Country Associates v. New Hampshire Insurance Company*, 648 A.2d 474 (N.H. 1994).[5] Based on these cases, the courts concluded that the "damage alleged by Rhodes [was] not merely . . . damages sustained to the work product alone, due to faulty workmanship, but also to the 'other property' of Rhodes." *Rhodes*, 385 S.C. at 101, 682 S.E.2d at 867.

As noted by the judge, Auto-Owners conceded that the falling of the first sign constituted an "occurrence." The parties diverge as to whether this occurrence precipitated the removal of the two remaining signs. In other words, was the loss of the remaining two signs and the consequential damages flowing therefrom causally linked to the sign that fell and, thus, constituted property damage caused

[5] In *High Country*, a condominium homeowners' association sued the condominium builder seeking damages due to the negligent construction of the buildings. *High Country*, 648 A.2d at 475. This suit alleged damages due to continuous moisture intrusion from a subcontractor's defective installation of siding resulting from moisture seeping into the buildings, which caused decay of the interior and exterior walls and loss of structural integrity to the condominiums. *Id.* at 476. The builder filed a declaratory judgment action seeking indemnification from its insurer under a CGL policy. *Id.* The New Hampshire Supreme Court found in favor of the insureds on the ground the claim was not simply one for damages resulting from faulty workmanship but, rather, was a claim for negligent construction resulting in property damage to other property. *Id.* at 477. In so ruling, the court broadly construed what would constitute an "occurrence" under the policy, stating that " '[o]ccurrence' has a broader meaning than 'accident' because 'occurrence' includes 'an injurious exposure to continuing conditions as well as a discrete event.' " *Id.* at 477-78 (quoting *Vermont Mut. Ins. Co. v. Malcolm*, 517 A.2d 800, 802 (N.H. 1986)).

by an occurrence under the policy. In analyzing these divergent positions, it is necessary to review the case law progression of *L-J* and its progeny.[6]

In *L-J*, this Court adhered to the majority rule that "faulty workmanship standing alone, resulting in damage only to the work product itself, does not constitute an occurrence under a CGL policy." *L-J, Inc.*, 366 S.C. at 121, 621 S.E.2d at 35. The Court reasoned that "faulty workmanship is not something that is typically caused by an accident or by exposure to the same general harmful conditions." *Id.* at 123, 621 S.E.2d at 36. The Court noted that a "CGL policy may, however, provide coverage in cases where faulty workmanship causes a third party bodily injury or damage to other property, *not in cases where faulty workmanship damages the work product alone*." *Id.* at 123 n.4, 621 S.E.2d at 36 n.4.

Four years later, the Court decided *Auto-Owners Insurance Company, Inc. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), wherein it relied on the analysis in *L-J* and found that a "subcontractor's negligence resulted in an 'occurrence' falling within the CGL policy's initial grant of coverage for the resulting 'property damage' to the [home]." *Id.* at 194, 684 S.E.2d at 545. In so ruling, the Court gave effect to the subcontractor exception to the "your work" exclusion in the standard CGL policy and recognized that this exclusion did not apply "if the damaged work or the work out of which the damage arises was performed on [policyholder's behalf] by a subcontractor." *Id.* at 195, 684 S.E.2d at 545.

Recently, in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Company*, 395 S.C. 40, 717 S.E.2d 589 (2011), this Court adhered to its decision in *Newman* and clarified that "negligent or defective construction resulting in damage to otherwise non-defective components may constitute 'property damage,' but the defective construction would not." *Id*. at 50, 717 S.E.2d at 594. The Court further found that, "the expanded definition of 'occurrence' is ambiguous and must be construed in favor of the insured." *Id.*

Based on this line of cases, we are now confronted with the question of whether *Crossmann*'s expansive view of an "occurrence" is limited to progressive

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[6] We note the General Assembly statutorily defined the term "occurrence" on May 17, 2011. S.C. Code Ann. § 38-61-70 (Supp. 2012). This definition, however, does not affect the disposition of the instant case as this Court recently ruled that it could only be applied prospectively. *Harleysville Mut. Ins. Co. v. State of South Carolina*, 401 S.C. 15, 736 S.E.2d 651 (2012).

property damage cases. Unlike the "normal" defective construction case where damage from faulty workmanship is obvious and directly related, the mandated removal of the two additional signs in the instant case is more tangential.

After careful consideration of the implications of *Crossman*, we find there was an "occurrence" that triggered coverage under the CGL policy. In reaching this conclusion, we view the fallen sign and the removal of the remaining two signs under a continuum of an "occurrence," as this is analogous to the CGL cases involving "continuous or repeated exposure to substantially the same general harmful conditions."

Stated another way, we find the existence of an "occurrence" as the removal of the remaining two signs would not have occurred "but for" the fallen sign as this accident precipitated the mandate issued by the SCDOT. Furthermore, because the signs were simultaneously constructed, we view this as a single occurrence with progressive damage. Thus, the degree of "fortuity" is present and, in turn, the potential for coverage under the CGL policy. *See D.R. Sherry Const., Ltd. v. Am. Family Mut. Ins. Co.*, 316 S.W.3d 899 (Mo. 2010) (noting that the determinative inquiry into whether there was an "occurrence" or "accident," for purpose of coverage under a liability insurance policy, is whether the insured foresaw or expected the injury or damages); *see also Yakima Cement Prods. Co. v. Great Am. Ins. Co.*, 608 P.2d 254 (Wash. 1980) (concluding insured's unexpected "mismanufacture" of concrete panels requiring their removal and repair was an "accident"); *Doe 1 v. Archdiocese of Milwaukee*, 794 N.W.2d 468 (Wis. Ct. App. 2010) (recognizing that the focus of determining whether events are accidental for insurance purposes is not whether a specific result was accidental but, rather, whether the cause of the damage was accidental). Finally, we believe this conclusion effectuates the purpose of the CGL policy as we cannot discern how there would ever be coverage if the "occurrence" was limited to an accident involving only one sign.

Although we find an "occurrence," which implicates coverage under the policy, we emphasize that this decision does not express our opinion regarding "property damages" as the presentation of different evidence on retrial may establish new coverage issues, including policy exclusions.

III. Conclusion

Based on the foregoing, we find the Court of Appeals correctly affirmed the judge's denial of Auto-Owners' motion pursuant to Rule 60(b), SCRCP. We hold

the declaratory judgment action was procedurally proper save for a ruling on issues regarding property damages as there are related questions of fact that must be decided by a jury on retrial. Additionally, we affirm the Court of Appeals' determination that Auto-Owners has a duty to indemnify Eadon as he is an insured under the policy. Finally, we agree with the Court of Appeals that the removal of the remaining two signs constituted an "occurrence" for purposes of the policy as the "occurrence" of the first fallen sign, which was stipulated to by Auto-Owners, precipitated their removal. Accordingly, the decision of the Court of Appeals is

AFFIRMED IN PART AND REVERSED IN PART.

KITTREDGE, J., Acting Justices James E. Moore and William P. Keesley, concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ira Banks, James Bell and Vernon Holmes, Respondents,

v.

St. Matthew Baptist Church, an Unincorporated Association, and Clinton Brantley, of whom Clinton Brantley is the, Petitioner.

Appellate Case No. 2011-188006

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
John M. Milling, Circuit Court Judge

Opinion No. 27317
Heard October 2, 2012 – Filed September 25, 2013

AFFIRMED

P. Gunnar Nistad and Helen F. Hiser, of Mt. Pleasant, and Weston Adams, III, of Columbia, all of McAngus Goudelock & Courie, LLC, for Petitioner.

Thomas O. Sanders, IV, of Sanders Law Firm, LLC, of Charleston, for Respondents.

JUSTICE HEARN: In this case we must decide whether a pastor may use the First Amendment's Free Exercise Clause to shield him from tort liability for allegedly defamatory statements he made about the church's trustees at a congregational meeting. While the pastor acknowledges the non-religious nature of his statements, he contends the setting in which they were made and their relationship to church governance places the trustees' defamation claim outside the jurisdiction of civil courts under the First Amendment. The circuit court dismissed the claim, and the court of appeals reversed. We hold the circuit court had jurisdiction to resolve this defamation claim using neutral principles of law and affirm the court of appeals.

FACTUAL/PROCEDURAL BACKGROUND

Petitioner Clinton Brantley was the pastor of St. Matthew Baptist Church (the Church) in North Charleston. Respondents Ira Banks, James Bell, and Vernon Holmes (the Trustees) served as trustees of the Church. At a congregational meeting, Brantley stated that without his knowledge, the Trustees had placed a mortgage upon the Church's property in order to purchase apartment buildings nearby. He further stated the Trustees failed to insure the apartment buildings and that funds were missing because of their mismanagement. Finally, he stated the Trustees had constantly deceived him. He urged the congregation to remove the Trustees from their position, and the congregation subsequently did so.

The Trustees filed this suit asserting causes of action for defamation, negligence, and intentional infliction of emotional distress against Brantley as well as a negligence cause of action against the Church. Specifically, the complaint alleged the statements Brantley made about the Trustees at the congregational meeting were false and defamatory.

Brantley and the Church both moved to dismiss the case for lack of subject-matter jurisdiction because due to the religious nature of the claims, the First Amendment barred the court from hearing the case. The circuit court granted both motions to dismiss, reasoning:

> The Court finds that according to the pleadings any alleged defamatory statements were made during the course of a congregational meeting where the [Trustees] continuing to serve as Trustees of the church was being discussed. The Court finds that it is

> not appropriate for it to intervene in such a church matter and that the Court does not have jurisdiction to intervene.

The court of appeals affirmed the dismissal of all of the claims, with the exception of the defamation claim which it reversed. *Banks v. St. Matthew Baptist Church*, 391 S.C. 475, 706 S.E.2d 30 (2011). Applying the neutral principles of law approach, the court of appeals concluded the defamation claim could be decided without ruling on religious matters, stating:

> Here, the Trustee's [sic] defamation claim can be resolved using solely legal principles without examining any religious questions. . . . In the present case, the court would not need to look at the Church's beliefs to determine if the statements constitute defamation. Accordingly, the trial court erred in dismissing the defamation cause of action.

Id. at 481–82, 706 S.E.2d at 33. This Court granted certiorari to review the reversal of the circuit court's dismissal of the defamation claim.

LAW/ANALYSIS

Brantley argues the court of appeals erred in holding the defamation claim could be resolved using neutral principles of law because resolution of the claim would permit a civil court to interfere with issues of internal church governance and administration. Brantley characterizes the defamation claim as a matter of church governance because his statements were made during a congregational meeting discussing church business. Contrary to Brantley's assertions, we hold the defamation clause of action falls squarely within the realm of claims susceptible to the neutral principles of law approach because adjudication of the claim would not require any consideration of religious doctrine or governance. Accordingly, we agree with the well-reasoned decision of the court of appeals and affirm.

In accordance with our constitutional freedom of religion and corresponding separation of church and state enshrined in the First Amendment to the United States Constitution,[1] religious organizations must be given "an independence from

[1] The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ." U.S. Const. amend. I. The amendment applies to the states through the Fourteenth

secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). To put that principle into practice, we have held that civil courts "may not engage in resolving disputes as to religious law, principle, doctrine, discipline, custom, or administration." *Pearson v. Church of God*, 325 S.C. 45, 52, 478 S.E.2d 849, 853 (1996). However, we recognized that civil courts may hear cases touching upon religious organizations where the dispute may be resolved entirely by neutral principles of law. *See id.* at 51–53, 478 S.E.2d at 852–53. Under the neutral principles of law approach, courts may apply "property, corporate, and other forms of law to church disputes." *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S.C.*, 385 S.C. 428, 444, 685 S.E.2d 163, 172 (2009). In other words, so long as a court can hear a case without deciding issues of religious law, principle, doctrine, discipline, custom, or administration, the court must entertain jurisdiction. *Id.*

The tort of defamation permits a plaintiff to recover for an injury to his reputation caused by the false statements of another. To prove defamation, a plaintiff must show "(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 464, 629 S.E.2d 653, 664 (2006).

The allegations in this case are relatively straightforward. Brantley allegedly made statements in a church meeting that the Trustees failed to inform him of a mortgage on church property, failed to insure church property, mismanaged—and impliedly stole—the Church's money, as well as lied to him. The Trustees allege those statements were false and harmed them. As a result, the Trustees brought a defamation claim against Brantley.

The statements allegedly made by Brantley are all simple declarative statements about the actions of the Trustees. The truth or falsity of such statements can easily be ascertained by a court without any consideration of religious issues or doctrines. The pastor admitted in his answer that he made statements concerning the Trustees at a congregational meeting. Thus, the pastor admits he made

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Amendment's Due Process Clause. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

statements to a third party—the congregation—and the only issue as to that element is whether the pastor made the particular statements alleged by the Trustees. Determining whether the statements were made would not require consideration of any religious issues. As to the actionability of the statements, whether the statements harmed the Trustees' reputations would not require delving into religious issues. Thus, adjudication of the defamation claim would not require any inquiry into or resolution of religious law, principle, doctrine, discipline, custom, or administration.

The only aspect of the Trustees' defamation claim that could be characterized as religious is that the statements were made in a church meeting—a religious setting—in which church governance was discussed. That seems to be the essence of the circuit court's holding and the core of Brantley's arguments before this Court: because the statements were made in a "congregational meeting where the [Trustees] continuing to serve as Trustees of the Church was being discussed," they are outside the bounds of the neutral principles of law approach.

We cannot allow the setting in which the statements were made to defeat the jurisdiction of the circuit court where the claim is susceptible to resolution through neutral principles of law. Certainly a defamation claim based on a man making similar statements from a soapbox on the street corner would be within the court's jurisdiction. Defamation is a tort, and the situs of that tort should not dictate the jurisdiction to adjudicate it. Had Brantley physically struck the Trustees in the meeting, we would not hold that a resulting battery claim could not be decided by a civil court because the tort occurred in a church meeting. Similarly, if the Trustees had embezzled money from the Church, we would not hold that the Church could not bring an action in civil court against the Trustees because the funds were taken in the context of church governance. In short, a tortfeasor is not shielded from liability simply by committing his torts within the walls of a church or under the guise of church governance.

The contours of the neutral principles of law approach in this context and the susceptibility of the defamation claim to that approach are perhaps best illuminated by considering a defamation claim that would *not* be subject to the approach. Had the pastor stated that the Trustees were sinners, were not true followers of God, or had violated church law, the resulting defamation claim would not be susceptible to resolution through the neutral principles approach because to adjudicate the claim would require a civil court to wade into church doctrine and governance. However, the case before us does not present such a situation. Here, Brantley's

statements, although made in a religious setting, are independent of religious doctrine or governance, and thus, whether they constitute defamation can be decided in a civil court of law.

CONCLUSION

The neutral principles of law approach provides a workable framework to distinguish between the areas in which religious organizations and their members must have autonomy in order to ensure freedom of religion and those areas in which they are subject to the civil law like all other individuals. Based on the pleadings before us, this case falls squarely within the class of cases susceptible to resolution through the neutral principles of law approach. To find otherwise would be to grant tort law immunity to religious practitioners, enabling them to make any statement regardless of its falsity and harmfulness provided the statement is made in a religious setting. The First Amendment does not require such a result. Accordingly, we affirm.

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

CHIEF JUSTICE TOAL: I respectfully dissent. I would reverse the court of appeals' decision holding that the circuit court should have exercised jurisdiction over the Trustees' defamation claim against Brantley.

At the time of the events in question, the Trustees were members of the Board of Trustees (the Board) at the Church, an independent Baptist Church. According to its constitution, governance of the Church "is vested in the body of believers who compose it." As a "sovereign and democratic Baptist church," the "membership retains unto itself the exclusive right of self-government in all phases of the spiritual and temporal life of the church." The congregation's powers include the selection and removal of trustees from its Board. The Church's constitution further provides that trustees are officers of the Church. As officers of the Church, the trustees are responsible for the management of the Church's assets and, as Trustee Holmes testified, for "support[ing] . . . the spiritual ministry of the [C]hurch."

In 2000, the South Carolina Department of Transportation purchased the Church's former location to make way for the construction of the Arthur J. Ravenel Bridge. The Church relocated, and shortly thereafter made a decision to purchase adjacent properties in an attempt to expand its influence in its new neighborhood. The Board sought and obtained approval from the congregation to purchase an adjacent apartment complex. The Board financed the purchase with a $300,000 mortgage on the Church's property.

The Church owned the apartment complex for some time without incident. However, a disgruntled tenant set fire to an apartment causing damage to seven other rental units. After the fire, it was discovered that the Church did not have insurance on the apartment building, and that the Board used the Church's property as collateral for the loan.

Upon this discovery, the working relationship between Brantley and the Trustees deteriorated, and the Pastor subsequently sought the Trustees' removal from the Board in a quarterly congregational meeting on May 22, 2006. It is during this meeting that the Trustees claim Brantley defamed them. More specifically, the Trustees claim the Pastor made false statements that he was unaware the Trustees placed a $300,000 mortgage on the Church's property and

failed to insure the complex, that the Trustees mismanaged the Church's money,[2] that money was missing, and that the Trustees "constantly" deceived Brantley throughout the purchase process. A motion was made to remove the Trustees from their positions on the Board, and a majority of the congregation voted to remove the Trustees.

Internal disputes among members of a church present some of the most difficult questions involving the limits of governmental intrusion into the religious affairs of its citizens. *Knotts v. Williams*, 319 S.C. 473, 476, 462 S.E.2d 288, 290 (1995). Freedom of religion is among the most fundamental of the guarantees of liberty contained in the Bill of Rights. U.S. Const. amend. I; *see also* S.C. Const. art. I, § 2. To preserve and foster this most cherished of freedoms, federal and state governments chose a constitutional prohibition against governmental interference with its citizens' free exercise of religious belief. *See, e.g.*, *Knotts*, 319 S.C. at 477, 462 S.E.2d at 290 (noting the "maintenance of governmental neutrality in the court resolution of church disputes has been the consistent and dominant theme of the South Carolina cases in this area."). This Court has consistently stated that "civil courts will not enter into the consideration of church doctrine or church discipline, nor will they inquire into the regularity of the proceedings of the church judicatories having cognizance of such matters." *Pearson*, 325 S.C. at 51–52, 478 S.E.2d at 852 (quoting *Morris St. Baptist Church v. Dart*, 67 S.C. 338, 341–42, 45 S.E. 753, 754 (1903)).

However, in *Jones v. Wolf*, 443 U.S. 595, 603 (1979), the United States Supreme Court expressly approved the use of the neutral principles of law approach to resolve church disputes. This method "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges." *Id.* The doctrine frees civil courts completely from entanglement in questions of religious doctrine, polity, and practice, and permits the application of property, corporate, and other forms of law to church disputes. *Id.*; *see also All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of S.C.*, 385 S.C. 428, 445, 685 S.E.2d 163, 172 (2009).

This Court provided a clear explanation of the neutral principles of law approach in *Pearson*:

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[2] A June 2006 audit of the Church finances did not uncover any mismanagement of funds or wrongdoing.

> (1) Courts may not engage in resolving disputes as to religious law, principle, doctrine, discipline, custom, or administration; (2) courts cannot avoid adjudicating rights growing out of civil law; (3) in resolving such civil law disputes, courts must accept as final and binding the decision of the highest religious judicatories as to religious law, principle, doctrine, discipline, custom, and administration.

Pearson, 325 S.C. at 53, 478 S.E.2d at 854.

The *Pearson* rule established that the First Amendment requires a civil court to enter a church dispute only when the resolution rests on neutral principles of law. *All Saints Parish*, 385 S.C. at 445, 685 S.E.2d at 172. However, if the issue is merely a question of religious law or doctrine masquerading as a dispute over church property or corporate control, courts must defer to the decisions of the proper church judicatories insofar as the dispute concerns religious or doctrinal issues. *Id.* (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976)). Simply put, the doctrine stands for the proposition that, where a civil court may completely resolve a church dispute on neutral principles of law without entangling itself in internal church governance or doctrinal matters, the First Amendment does not bar the court from entertaining jurisdiction. *Milivojevich*, 426 U.S. at 721.

This Court's decision in *All Saints Parish* illustrates the doctrine. In that case, this Court decided the validity of an 18th Century trust deed, and whether certain members of the congregation were the corporate officers of the parish. *All Saints Parish*, 385 S.C. at 441, 685 S.E.2d at 170. The Court decided such issues as property ownership, the duties of trustees, identification of possible beneficiaries pursuant to the trust deed, and whether corporate control documents had been adopted in accordance with state law. *Id.* at 445–51, 685 S.E.2d at 172–75. In my view, these are the types of issues ripe for an analysis relying on the neutral principles of law doctrine.

I find that the instant case is not comparable. *All Saints Parish* involved issues unaffected by the religious nature of the dispute. Here, Brantley made the statements in question during the course of a congregational meeting while discussing issues *inextricably related to church governance*. A court cannot possibly exercise jurisdiction over this matter without becoming ensnared in the internal workings of the church's system of self-governance. Moreover, under the

Church's constitution, the Trustees are responsible for more than just the financial well-being of the Church, they are also responsible for the spiritual leadership of the congregation. *See Hutchinson v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986) ("The 'neutral principles' doctrine has never been extended to religious controversies in the areas of church government, order and discipline, nor should it be. The claim here relates to appellant's status and employment as a minister of the church. It therefore concerns internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law.") (citation omitted).

All Saints Parish implicitly relied on this Court's holding in *Morris St. Baptist Church v. Dart*, 67 S.C. 338, 45 S.E. 753 (1903). In that case, this Court explained:

> Where, however, a church controversy necessarily involves rights growing out of a contract recognized by the civil law, or the right to the possession of property, civil tribunals cannot avoid adjudicating these rights, under the law of the land; having in view, nevertheless, the implied obligations imputed to those parties to the controversy who have voluntarily submitted themselves to the authority of the church by connecting themselves with it.

Id. at 338, 45 S.E. 753, 754. It is clear that *Dart* envisioned two typical scenarios for court intervention into church disputes: those controversies arising from a civil contract or property possession. While I would not rigidly constrain the Court's authority to these two instances, our precedents do not stand for the proposition that the courts should involve themselves in a defamation claim arising from statements made during a meeting called for the express purpose of discussing church matters, including the continued service of its Trustees in the wake of a financial crisis for the institution.

In my opinion, the United States Court of Appeals for the First Circuit's decision in *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989), is instructive. In that case, a reverend filed suit in federal district court against a non-profit religious corporation, the Christian and Missionary Alliance (the CMA). *Id.* at 1576. The reverend alleged that the CMA "unceremoniously" discharged him in contravention of the organization's governance procedures, and as a result, tarnished his reputation. *Id.* The CMA filed a motion to dismiss pursuant to Rule 12(b)(6), FRCP, and the district court granted that motion. *Id.*

The First Circuit affirmed, basing its decision on the well-settled principle that civil courts cannot adjudicate disputes turning on church policy and administration or religious doctrine and practice. *Id.* at 1576. The fact that the reverend couched his complaint in terms of the CMA failing to follow its own rules, thus denying him due process, was of no moment. According to the court, "Howsoever a suit may be labeled, once a court is called upon to probe into a religious body's selection and retention of clergymen, the First Amendment is implicated." *Id.* at 1577. Adjudication of the reverend's complaint would have required forbidden judicial intrusion into "rules, policies, and decisions which are unmistakably of ecclesiastical cognizance," and thus the court refused to intervene. *Id.* ("It is well-settled that religious controversies are not the proper subject of civil court inquiry. Religious bodies must be free to decide for themselves, free from state interference, matters which pertain to church government, faith, and doctrine."); *see Heard v. Johnson*, 810 A.2d 871, 884–86 (D.C. 2002) (rejecting a pastor's defamation claim following his removal by the church's trustees on the principle that the prohibition against judicial encroachment into church decisions included the employment of ministers because selection and termination of clergy is a core matter of ecclesiastical self-governance not subject to interference by a state).

In the instant case, the Trustees held positions in which they were beholden to the congregation, and responsible for supporting the spiritual ministry of the Church. The First Amendment permits the Church to establish its own rules and regulations for internal discipline and government, and to create a tribunal for adjudicating the Church's disputes. *See Milivojevich*, 426 U.S. at 724. Moreover, when that tribunal decides a dispute, the Constitution requires that civil courts accept that decision as binding. *Id.* As observed in *Hosanna-Tabor v. Equal Employment Opportunity Commission*, 132 S. Ct. 694, 710 (2012), the Church must "be free to choose who will guide its way." The interests of a religious group in choosing who will preach its beliefs and carry out its mission demands that civil courts abstain from interference into disputes grounded in ecclesiastical decisions. *See id.*

The Trustees argue that the trial court may take jurisdiction because the Trustees did not contest their termination, were not employees of the church, and did not engage in litigation against a governing board. However, the Trustees ignore the pertinent facts that the alleged defamation took place during a congregational meeting and that the allegedly defamatory statements directly

concerned their continued leadership, both financial and spiritual. Thus, the dispute here involved integral components of ecclesiastical governance.

I agree with the majority that certain torts fall squarely within the neutral principles of law doctrine. *See, e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 710 ("We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise."). If Brantley made certain defamatory remarks unrelated to the Trustees' roles in the management of the Church's finances and their continued spiritual leadership, the analysis might very well be different. Because the alleged defamatory remarks center on the relationship between Brantley and his Board and the Trustees and their role in Church affairs and spiritual life before a self-governing congregation, I respectfully disagree with an analysis invariably placing civil courts in the position of having to referee this type of ecclesiastical decision-making.

KITTREDGE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Joenathan Shelly Chaplin, Respondent.

Appellate Case No. 2013-001719

Opinion No. 27318
Submitted August 27, 2013 – Filed September 25, 2013

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Julie M. Thames, Assistant Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel

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

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PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) 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 an admonition or public reprimand. In addition, respondent agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct (the Commission) in the investigation and prosecution of this matter within thirty (30) days of the imposition of a sanction and to complete the Legal Ethics and Practice Program within nine (9) months of the imposition of a sanction. We accept the Agreement, issue a public reprimand, and order respondent to pay the costs incurred by ODC and the Commission within thirty (30) days of the date of this order. The facts, as set forth in the Agreement, are as follows.

Facts

In 1996, John Doe was convicted of murder. After a post-conviction relief hearing, John Doe was granted a new trial based on ineffective assistance of counsel. In lieu of a second trial, the victim's family agreed to the imposition of a twenty (20) year sentence and John Doe entered a guilty plea to voluntary manslaughter.[1]

In 2005, John Doe's mother (Complainant) retained respondent to negotiate a reduction in her son's sentence. Respondent's fee was $10,000. After several years without success, Complainant filed this action with the Resolution of Fee Disputes Board (the Board).

On May 23, 2011, a panel hearing of the Board was conducted. The panel found respondent's fee was unreasonable and ordered respondent repay $7,000 to Complainant. The final decision was issued on June 23, 2011. On September 14, 2011, a Certificate of Non-Compliance was issued based on respondent's failure to comply with the final decision of the Board.

In November 2011, Complainant filed a complaint with ODC against respondent. Respondent failed to respond to ODC's Notice of Investigation. He further failed to respond to ODC's *Treacy* letter. *See In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982).

On April 18, 2012, respondent was subpoenaed to appear for an interview pursuant to Rule 19, RLDE. Although respondent appeared and brought John Doe's client file to the interview, he did not provide a written response to the Notice of Investigation.

During the interview, respondent acknowledged he was required to refund $7,000 to Complainant. He indicated he would make payments to Complainant and would update ODC every thirty (30) days with progress reports on the payments.

On April 24, 2012, respondent provided a written response to the Notice of Investigation. In the written response, respondent again acknowledged he was

[1] Respondent did not represent John Doe during any of these proceedings.

required to refund $7,000 to Complainant; he indicated he intended to fulfill his obligation and he planned on making the payments in order to comply with the Board's ruling. Respondent stated he intended to begin making payments within thirty (30) days.

Respondent paid Complainant a total of $7,500 by making the following payments: $3,000 on September 14, 2012; $500 on January 7, 2013; $500 on February 1, 2013; $1,500 on March 21, 2013; and $2,000 on May 20, 2013.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, RPC, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter); Rule 1.5 (lawyer shall not charge unreasonable fee); Rule 1.15 (lawyer shall safekeep client funds); 8.1(b) (lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

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); Rule 7(a)(3) (it shall be ground for discipline for lawyer to knowingly fail to respond to lawful demand from disciplinary authority to include a request for a response under Rule 19); and Rule 7(a)(10) (it shall be ground for discipline for lawyer to willfully fail to comply with a final decision of the Resolution of Fee Disputes Board).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.[2]

[2] Respondent's prior disciplinary history includes a 2010 letter of caution with no finding of misconduct also citing Rule 1.5, RPC. *See* Rule 2(r), RLDE (fact that letter of caution has been issued shall not be considered in subsequent disciplinary

Within thirty (30) days of the date of this order, respondent shall pay the costs incurred by ODC and the Commission in the investigation and prosecution of this matter. We do not require respondent to attend the Legal Ethics and Practice Program.

PUBLIC REPRIMAND.

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

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proceeding against lawyer unless the caution or warning contained in letter of caution is relevant to the misconduct alleged in new proceedings).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Sidney J. Jones, Respondent.

Appellate Case No. 2013-001266

Opinion No. 27319
Submitted August 12, 2013 – Filed September 25, 2013

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Julie M. Thames, Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Desa Ballard, of Ballard Watson Weissenstein, of West Columbia, for Respondent.

PER CURIAM: The Georgia Supreme Court disbarred respondent from the practice of law after respondent pled guilty to eleven misdemeanors, ten of which involved smuggling contraband to a client in jail. In the Matter of Jones, 744 S.E.2d 6 (Ga. 2013).

The Office of Disciplinary Counsel (ODC) subsequently notified this Court of respondent's disbarment. Pursuant to Rule 29(b), RLDE, Rule 413, SCACR, the Clerk of the Supreme Court provided ODC and respondent with thirty days in which to inform the Court of any reason why the imposition of identical discipline was not warranted in this state. ODC filed a response stating it had no information that would indicate the imposition of identical discipline was not warranted. Respondent filed a return urging this Court not to impose reciprocal discipline.

We find disbarment is the appropriate sanction to impose as reciprocal discipline in this matter. *See* Rule 8.4(b), RPC, Rule 407, SCACR; Rule 8.4(e), RPC, Rule 407,

SCACR; Rule 7(a)(2), RLDE, Rule 413, SCACR; Rule 7(a)(5), RLDE, Rule 413, SCACR; *In re Walters*, 400 S.C. 625, 735 S.E.2d 635 (2011); *In re Yarborough*, 343 S.C. 316, 540 S.E.2d 462 (2000); *In re Chance*, 276 S.C. 1, 274 S.E.2d 422 (1981). We also find none of the factors in Rule 29(d), RLDE, Rule 413, SCACR, present in this matter. We therefore disbar respondent from the practice of law for the misconduct set forth in the opinion of the Georgia Supreme Court.

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, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Social Services,
Respondent,

v.

Christopher Pringle and Brandy Darby, Defendants,

of whom Christopher Pringle, is the Appellant.

In the Interest of Minor Children under the Age of 18 Years.

Appellate Case No. 2012-212255

Appeal From Orangeburg County
Anne Gue Jones, Family Court Judge

Opinion No. 27320
Heard June 5, 2013 – Filed September 25, 2013

REVERSED

Lawrence Keitt, of Orangeburg, for Appellant.

Patrick L. Wright, of Orangeburg, for Respondent.

JUSTICE PLEICONES: This is an appeal from a family court order finding appellant (Father) sexually abused his two young daughters, requiring that his name be entered on the Central Registry of Child Abuse and Neglect, and

prohibiting him from visiting his four children until successful completion of a treatment plan. Father, who is divorced from the children's mother, contends the family court erred in its interpretation of S.C. Code Ann. § 19-1-180 (Supp. 2012) and in permitting the playing of videotape forensic interviews of the non-testifying child victims. We find the videotapes were inadmissible under § 19-1-180(G) and reverse.

FACTS

Father was alleged to have sexually abused his two young daughters. When the parties arrived at court for the hearing, the Department of Social Services (DSS) announced that it intended to rely on a videotape interview of the alleged victims in lieu of their testimony. The court instructed DSS that when it intended to rely on a child's statement where the child was not available for cross-examination, a pretrial hearing was required. The family court judge adjourned the court until the next day in order to allow Father to prepare for the hearing on the admissibility of the videotape.

At the hearing the next day, DSS presented two witnesses to support its contention that the children were unavailable and their statements trustworthy within the meaning of § 19-1-180. Following the hearing, the family court found that both these criteria were satisfied. Ultimately, she admitted the videotape itself over Father's objection that the person who interviewed the children on the tape was not a qualified person under § 19-1-180(G).

Following this videotape hearing, the trial itself commenced. The first witness, a DSS employee, testified that following a report of abuse he interviewed the children. After each child related graphic details of Father's alleged misconduct, the DSS employee determined that a forensic interview of each child was required. The DSS employee explained that his role was only to take statements to determine whether further investigation was warranted, but that the referral for a forensic interview is to determine "the validity or the truthfulness of these kids."[1]

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[1] The hearsay statements of the children were admitted during the DSS employee's testimony not for their truthfulness, but rather to explain why further investigation was warranted. *See State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994) (hearsay statements to explain investigation are not admitted for truth). That DSS and the family court understood the limited use of these statements is evident from the fact

Appellant contends that the videotape of the forensic interview was not admissible under § 19-1-180(G). We agree.

ISSUE

Was the videotape erroneously admitted?

ANALYSIS

By statute, certain hearsay statements made by children under the age of twelve[2] may be admitted in family court proceedings "concerning an act of alleged abuse or neglect." § 19-1-180(A). Since the children who made the hearsay statements here did not testify, the statements had to meet the requirements of § 19-1-180(B)(2). Under (B)(2), the family court must find the child is unavailable pursuant to at least one of the statutory reasons [(B)(2)(a)(1) through (v)] and that the hearsay statement "is shown to possess particularized guarantees of trustworthiness." § 19-1-180(B)(2)(b).

Subsection (D) of the statute lists ten factors the family court may consider in determining whether the hearsay statement has "particularized guarantees of trustworthiness under subsection (B)2)(b)" and subsection (E) requires the family court to support its unavailability and trustworthiness rulings with "findings on the record." §§ 19-1-180(D) and (E).

Finally, subsection (G) provides:

> If the parents of the child are separated or divorced, the hearsay statement shall be inadmissible if (1) one of the parents is the alleged perpetrator of the alleged abuse or neglect and (2) the allegation was made after the parties separated or divorced. Notwithstanding this subsection, a statement alleging abuse or

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that DSS did not give statutory notice of its intent to rely upon them as substantive evidence as required by § 19-1-180(C), and the fact that the family court judge did not rely on them in her written order.

[2] Or by a person who functions as a child under the age of twelve. § 19-1-180(A). The children who made the statements at issue here were both under twelve.

> neglect made by a child to a law enforcement official, an officer of the court, a licensed family counselor or therapist, a physician or other health care provider, a teacher, a school counselor, a Department of Social Services staff member, or to a child care worker in a regulated child care facility is admissible under this section.

Father contends that since the person to whom the videotaped hearsay statements were made (Houston) was not a qualified person under (G), the videotapes themselves were inadmissible.

Section 19-1-180 creates a narrow exception to the hearsay rule in family court proceedings for statements made by certain child sex abuse victims. In the first sentence of subsection (G), however, the legislature has restored the hearsay bar where the accused is a divorced or separated parent of the child and the allegation arose after the separation or divorce.[3] The second sentence of (G) then allows for the admission of a hearsay statement made by this class of child accuser if the statement otherwise meets the requirements of § 19-1-180, and the statement was made to:

> a law enforcement official, an officer of the court, a licensed family counselor or therapist, a physician or other health care provider, a teacher, a school counselor, a Department of Social Services staff member, or to a child care worker in a regulated child care facility . . . .

Here, it is conceded that Houston is not licensed by the State of South Carolina in any field, nor is there any suggestion that she is a law enforcement official, an officer of the court, a physician or other health care provider, a teacher, a school counselor, a DSS staffer or a child care worker. Rather, she is a child forensic interviewer with a bachelor's degree in sociology and a master's degree in rehabilitative counseling. Houston also has a certificate in the RATAC model through her participation in a program called Finding Words.

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[3] As the Court of Appeals recognized in *Lisa C.*, "the purpose of (G) is to protect a parent from potentially false accusations instigated by the other parent as part of a contentious divorce or custody battle." 380 S.C. at 413, 669 S.E.2d at 650. In this case visitation is at stake as the children's mother is the custodial parent.

Houston was not a qualified person under § 19-1-180(G) and thus the videotape of her forensic interviews with these children was not admissible. Although Little testified to certain statements made by the children to him, this testimony was not offered for the truth of these statements. *State v. Brown*, *supra*. The only substantive evidence at trial that the children were abused by Father was found in the erroneously admitted tape, and the taped statements were the sole basis for the family court's finding of abuse against Father. On this record, the erroneous admission of the children's statements made to Houston prejudiced Father, and requires that we reverse the appealed order.

CONCLUSION

The appealed order is

REVERSED.

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

CHIEF JUSTICE TOAL: I respectfully dissent. I agree with the majority's conclusion regarding the admissibility of the videotaped forensic interviews. However, in my view, the DSS employee's testimony in this case is sufficient to affirm the family court's finding.

The instant case is an abuse and neglect action, regarding a determination that Appellant's name should be entered into the Central Registry. The purpose of the Central Registry is to identify abused and neglected children and those responsible for their welfare, and provide a coordinated reporting system concerning abused and neglected children. S.C. Code Ann. § 63-7-1910 (2010). The family court may place an individual's name into the Central Registry upon finding, by a preponderance of the evidence, that the person abused or neglected a child. *Id.* § 63-7-1940.[4] Section 19-1-180 of the South Carolina Code allows introduction of out-of-court statements made by children under the age of twelve, regarding an act of alleged abuse or neglect, irrespective of whether the statement would be otherwise inadmissible provided certain conditions are met. *Id.* § 19-1-180(A) (Supp. 2012).

One of those conditions provides that the out-of-court statement may be admitted if the child is found by the court to be unavailable to testify because of the "substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of videotaped deposition or closed-circuit television." *Id.* § 19-1-180(2)(a)(v). The family court in this case found the victims incompetent to testify and unavailable based on "the inability to

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[4] *See also* S.C. Code Ann. § 63-7-1930 (2010) ("[T]he department may petition the family court for an order directing that the person named as a perpetrator be entered into the Central Registry . . . . The petition must have attached a written case summary stating facts sufficient to establish by a preponderance of the evidence that the person named as perpetrator abused or neglected the child and that the nature and circumstances of the abuse indicate that the person named as perpetrator would present a significant risk of committing physical or sexual abuse or willful reckless neglect if placed in a position or setting outside of the person's home that involves or substantial contact with children.").

communicate because of fear" and the substantial likelihood that "severe emotional trauma" would result from recounting the alleged abuse. Moreover, subsection (G) of section 19-1-180 specifies that:

> [i]f the parents of the child are separated or divorced, the hearsay statement shall be inadmissible if (1) one of the parents is the alleged perpetrator of the alleged abuse or neglect and (2) the allegation was made after the parties separated or divorced. *Notwithstanding this subsection*, a statement alleging abuse or neglect made by a child to a law enforcement official, an officer of the court, a licensed family counselor or therapist, a physician or other health care provider, a teacher, a school counselor, *a Department of Social Services staff member*, or to a child care worker in a regulated child care facility is admissible under this section.

S.C. Code Ann. § 19-1-180(G) (Supp. 2012) (emphasis added). In this case, the victims made the statements alleging abuse to a Department of Social Services staff member as contemplated by the statute.

I disagree with the majority's conclusion that "the hearsay statements of the children were admitted during the DSS employee's testimony not for their truthfulness, but rather to explain why further investigation was warranted." In my opinion, the Record in this case demonstrates otherwise.

The DSS employee initially testified regarding his conversation with one of the two victims in this case, discussing their sexual abuse allegations. The DSS employee then began to testify concerning information he received about one of the victims and the victim's behavior following the alleged abuse. Appellant's defense counsel objected, and argued that unless the DSS employee revealed the source of the information, the testimony constituted inadmissible hearsay. The DSS employee testified that the information came from Appellant's ex-wife. Appellant's defense counsel then raised a hearsay objection. DSS countered that this information was not being offered for the truth of the matter asserted, but that the DSS employee was "just stating what he did in his investigation and what they told him." The family court sustained the objection as to any information the DSS employee gained from Appellant, but *not* with regard to Appellant's wife or the victims. The DSS employee further described his conversations with Appellant's ex-wife and the other victim. According to the DSS employee's testimony, under

both direct and cross-examination, both victims stated that Appellant sexually abused them.

It is well-established that when a family court order is appealed, this Court reviews that order de novo, and may find facts based on our view of the preponderance of the evidence. *Lewis v. Lewis*, 392 S.C. 381, 384, 390, 709 S.E.2d 650, 651, 654–55 (2011) ("De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings."). A preponderance of the evidence means "evidence which, when fairly considered, is more convincing as to its truth than the evidence in opposition." S.C. Code Ann. § 63-7-20 (13).

In my opinion, this Court should find that the DSS employee's testimony is more convincing as to its truth than the evidence offered by Appellant, and thus, affirm the family court's determination. From my perspective, the majority's application of *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994), is erroneous.[5] The Central Registry proceeding is "a civil action aimed at protection of a child,

[5] The facts of *Brown* are inapposite the instant case, as Brown was a criminal prosecution. In *Brown*, police conducted video surveillance of the defendant's apartment, and obtained a search warrant based on activity observed during the surveillance. *Brown*, 317 S.C. at 57, 451 S.E.2d at 890. At trial, the court admitted two police officers' statements regarding the reason for that surveillance. *Id.* at 63, 451 S.E.2d at 893–94. These statements related to receiving certain information before establishing surveillance, receiving complains while in the neighborhood, and being "familiar with" the neighborhood. *Id.* The defendant alleged these statements were hearsay and argued that the trial court erred in failing to direct a mistrial following the admission of these statements. *Id.* This Court disagreed, holding that an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation is undertaken. *Id.* at 63, 451 S.E.2d at 894. However, the Record in this case does not demonstrate that the family court admitted the DSS employee's testimony regarding the victims' statements for this limited purpose. Moreover, in *Brown*, the police officers' statements did not describe the actual conduct supporting the defendant's arrest and conviction. Thus, the analysis in that case, regarding a criminal investigation, is inapplicable to the facts *sub judice*.

not a criminal action geared toward punishing a defendant." *S.C. Dept. of Social Services v. Wilson*, 352 S.C. 445, 451–52, 574 S.E.2d 730, 733 (2002) (citation omitted). Thus, in my view, it is inappropriate to view this case through the lens of the admissibility of hearsay statements in the criminal context.

For the foregoing reasons, I respectfully dissent. I would affirm the family court's order.

JUSTICE KITTREDGE: I concur in part and dissent in part. I concur with the Court's construction of section 19-1-180(G) and the erroneous admission of the videotaped forensic interviews. I agree with the dissent that similar incriminating evidence was admitted without objection. I further agree with the dissent that such unchallenged additional evidence was admitted without any limitation. Specifically, like the dissent, I respectfully disagree with the majority's finding that the unchallenged incriminating "testimony was not offered for the truth of these statements." Yet, unlike the dissent, I would not affirm the finding of sexual abuse, notwithstanding our de novo review. Because the family court judge's order relies exclusively on the section 19-1-180(G) testimony, I would remand to the family court judge on the existing record. It may be that the family court judge believed the unchallenged evidence of sexual abuse and merely saw no need to cite to this cumulative evidence. If so, I would have the family court judge issue a supplemental order reaffirming her initial finding of abuse based on the unchallenged evidence, thereby ending this matter. However, if the family court judge (as the fact-finder) was not persuaded by this cumulative evidence, Appellant would be entitled to a new trial.

The Supreme Court of South Carolina

RE: Amendments to Rule 31, RLDE, Rule 413, SCACR

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 31(c) of Rule 413 of the South Carolina Appellate Court Rules (SCACR) is hereby amended as follows:

> **(c) Duties.** The receiver shall:
>
> **(1)** Take custody of the lawyer's active and closed files and trust, escrow, operating and any other law office accounts. The chair or vice chair may issue such orders as may be necessary to assist the receiver in obtaining custody over such files and accounts, to include orders compelling the lawyer or a third party to take specific action regarding the files and accounts. The willful failure to comply with such an order may be punished as a contempt of the Supreme Court. A party who wishes to challenge such an order must immediately seek review of the order by petition to the Supreme Court;

This amendment shall be effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
September 10, 2013

The Supreme Court of South Carolina

In the Matter of Michael Anthony Walker, Respondent.

Appellate Case No. 2013-001907

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. Respondent consents to being placed on interim suspension.

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. Respondent shall promptly respond to Ms. Gleason's requests for information and/or documentation and shall fully cooperate with Ms. Gleason in all other respects.

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

September 11, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bernard D. Lee, Respondent,

v.

Bondex, Inc., and Great American Alliance Insurance Company, Appellants.

Appellate Case No. 2011-203326

Appeal From The Workers' Compensation Commission

Opinion No. 5173
Heard May 8, 2013 – Filed September 25, 2013

AFFIRMED

E. Ros Huff, Jr. and Shelby H. Kellahan, both of Huff Law Firm, LLC, of Irmo, for Appellants.

Ann McCrowey Mickle, Mickle & Bass, LLC, of Columbia, and Michael Joseph O'Sullivan, Richardson Plowden & Robinson, PA, of Conway, for Respondent.

FEW, C.J.: Bondex, Inc. and its workers' compensation insurance carrier appeal the decision of the workers' compensation commission awarding Bernard Lee temporary total disability compensation.[1] Bondex argues the commission erred in (1) finding Lee's injuries were compensable, (2) finding Lee was entitled to

[1] We refer to the appellants collectively as Bondex.

temporary total disability compensation, and (3) holding its decision on parts of Lee's claim in abeyance. We affirm, and remand for disposition of the remainder of Lee's claim.

I. Facts and Procedural History

Lee worked for Bondex in a position that required heavy lifting, pushing, and pulling.

On June 2, 2009, Lee and four other Bondex workers installed a large metal hood onto a machine in Bondex's plant. The hood weighed between 1500 and 2000 pounds. Lowell Simpkins, Lee's supervisor, lifted the hood using a forklift. Simpkins drove the forklift to the machine, where Lee and the three other workers were to guide the hood into place.

Lee testified that once they moved the hood into position, Simpkins had to hold it above the machine with the forklift while one worker installed a part between the machine and the hood. However, the forklift had a hydraulic fluid leak and could not hold the hood high enough to install the part. Lee testified that when he and the other workers attempted to lift the hood manually, it fell and a sharp edge of it landed on his left shoulder, pinning him to the ladder on which he was standing. Lee testified he then lifted the hood "up enough to ease out from under it."

Lee immediately told Simpkins his shoulder did not feel right. He tried to continue working, but pain began shooting down his back. After Lee and Simpkins reported the injury, Lee's father picked him up and drove him to the hospital.

Bondex initially paid for Lee's medical care. Dr. Jeffrey Broder restricted Lee from doing any work with his left hand. Bondex placed Lee on light duty, so initially he did not miss any work. His light-duty assignments involved working with bales of polyester fiber, spraying them with water, and then loading the fiber onto a table. He also cleaned machines twice a week.

In late July 2009, Bondex stopped paying for Lee's medical care. He continued working light duty, but he testified his arm would be swollen by the end of his shift each day. Simpkins assigned Lee to change labels on pallets, but because that activity also caused Lee's arm to hurt, he was assigned to sweeping floors.

The day after Bondex discontinued his medical payments, Lee filed a claim with the commission. After a hearing, Lee and Bondex submitted a consent order in which Bondex agreed to pay Lee $5,000 and provide him additional medical treatment. Dr. Timothy Shannon, an orthopedist, imposed additional work restrictions on Lee. When Lee presented Dr. Shannon's work restrictions to Bondex's vice president and an employee from its human resources department, Bondex terminated him.

Lee then filed a claim for temporary total disability benefits, alleging he injured his neck, shoulders, arms, and back. Lee and Simpkins testified at a second hearing before a single commissioner. Both parties submitted medical evidence, including the opinions of doctors, regarding the nature of Lee's injuries and whether they were caused by the hood falling on his shoulder. The commissioner found Lee had not sustained a compensable injury and denied the claim.

A divided appellate panel reversed. Relying on Lee's testimony and the opinions of four doctors, the majority of the appellate panel found that the falling hood caused the injuries to Lee's neck, left arm, and left shoulder, and thus the injuries were compensable. The panel then found that because Bondex did not offer Lee any light-duty work after he presented Dr. Shannon's restrictions, he was entitled to temporary total disability compensation. Finally, noting that Lee was also seeking compensation for injuries to his right shoulder, right arm, and lower back, the panel decided to hold those parts of Lee's claim in abeyance pending further review.

II. Finding Lee Sustained a Compensable Injury

Bondex argues the appellate panel's factual finding that Lee sustained compensable injuries to his neck, left shoulder, and left arm was "clearly erroneous in view of the reliable, probative, and substantial evidence" in the record. S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2012). We disagree. In addition to Lee's testimony that the hood falling on his shoulders caused his injuries, the appellate panel specifically relied on four doctors who examined Lee, each of whom gave the opinion that the accident caused his injuries. The appellate panel specifically found the four doctors' opinions were "more persuasive on the issue of causation" than other medical evidence indicating the injury was not work-related. This credibility determination by the appellate panel, if supported by substantial evidence, is binding on the court. *See* § 1-23-380(5) ("The court may not substitute its

judgment for the judgment of the agency as to the weight of the evidence on questions of fact."). We find the appellate panel's decision is supported by substantial evidence, and therefore not clearly erroneous. *See Johnson v. Rent-A-Ctr., Inc.*, 398 S.C. 595, 600-01, 730 S.E.2d 857, 860 (2012) (defining substantial evidence as that "which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached"); *Jones v. Harold Arnold's Sentry Buick, Pontiac*, 376 S.C. 375, 378, 656 S.E.2d 772, 774 (Ct. App. 2008) (stating this court's review of a decision by the commission is limited to determining whether the decision is supported by substantial evidence or is controlled by some error of law). We affirm the commission's finding that Lee sustained compensable injuries to his neck, left shoulder, and left arm.

III. Awarding Temporary Total Disability Compensation

Bondex next argues the appellate panel erred in ruling Lee was entitled to temporary total disability compensation. Specifically, Bondex contends the factual finding that Lee was temporarily and totally disabled is clearly erroneous in light of the reliable, probative, and substantial evidence in the record. We find substantial evidence in the record to support the finding.

After the accident, Bondex assigned Lee to light-duty work with bales of polyester fiber. When Lee told Simpkins this job made his arm hurt, Simpkins assigned Lee to a job removing old labels from pallets and putting new labels on them. Lee told Simpkins his arm pain prevented him from doing that job, so Bondex had Lee sweep floors.

Later, Dr. Shannon placed Lee under a number of work restrictions. Under these restrictions, Lee could not perform frequent pushing or pulling; he could only occasionally bend, stoop, squat, crouch, reach above his left shoulder, drive, or lift up to ten pounds; he could only infrequently crawl, use stairs, or lift up to twenty pounds; and he could not use a ladder, operate hazardous equipment, or lift anything heavier than twenty pounds. However, Dr. Shannon did not restrict Lee from continuously standing, sitting, walking, reaching above his right shoulder, or performing repetitive work with his hands or feet. Based on these restrictions, Bondex told Lee not to come back to work. We find this evidence sufficient to support the appellate panel's finding that Lee was temporarily and totally disabled, and we affirm its decision to award Lee temporary total disability.

The claimant bears the burden of proving entitlement to temporary disability compensation. In its brief to this court, Bondex states, "To show that one is entitled to temporary total disability benefits, one must prove that 'the incapacity for work resulting from an injury is total.'" (quoting S.C. Code Ann. § 42-9-10 (Supp. 2012)). To meet this burden in a claim for temporary disability benefits, Bondex argues, a claimant must go into the marketplace and seek from other employers a job that does not conflict with his work restrictions. We disagree. This is not a claim for permanent disability compensation. For temporary disability benefits, a claimant must prove only that work restrictions prevent him from performing the job he had before the injury, and that his current employer has not offered him light-duty employment. For sound policy reasons, the workers' compensation system encourages an injured employee who is still able to perform light-duty work to continue working for his current employer until he reaches maximum medical improvement and then, if possible, to return to his previous position. Therefore, while a claimant must prove disability, he is not required to prove he could not find employment with another employer in order to receive temporary disability benefits. Rather, the claimant satisfies his burden by proving work restrictions that prevent him from performing his regular job and the unavailability of light-duty employment through the same employer.

Bondex relies on *Coleman v. Quality Concrete Products, Inc.*, 245 S.C. 625, 142 S.E.2d 43 (1965), in support of its argument that Lee failed to meet his burden of proving entitlement to temporary total disability compensation. We find *Coleman* is not applicable to this case. In *Coleman*, the industrial commission awarded total disability compensation. 245 S.C. at 627-28, 142 S.E.2d at 44. The employer appealed to the county court, which reversed the commission's award "only insofar as the employee was awarded compensation for total disability beyond the date of his discharge by the operating surgeon." 245 S.C. at 628, 142 S.E.2d at 44. The employee, not the employer, appealed that decision to the supreme court. *Id.* Therefore, the only issue before the supreme court in *Coleman* related to disability compensation *after* maximum medical improvement. Since the issue in this case is how the claimant must meet his burden of proof before that point, *Coleman* is inapplicable.

IV. Holding Parts of Lee's Claim in Abeyance

Finally, Bondex argues the appellate panel erred by "holding in abeyance" any decision as to whether Lee also sustained a compensable injury to his back, right

shoulder, or right arm. We agree with Bondex that the commission should have decided the entire claim. However, we cannot review a decision that has not been made. *See* § 1-23-380 (providing "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case" may seek judicial review of that final decision in this court); *Bone v. U.S. Food Serv.*, 404 S.C. 67, 73-74, 744 S.E.2d 552, 556 (2013) (stating "'[a]n agency decision which does not decide the merits of a contested case'" is not a final decision under section 1-23-380 (quoting *S.C. Baptist Hosp. v. S.C. Dep't of Health & Envtl. Control*, 291 S.C. 267, 270, 353 S.E.2d 277, 279 (1987))).

V. Conclusion

The order of the workers' compensation commission is **AFFIRMED**. We remand for disposition of the remainder of Lee's claim.

GEATHERS, J., concurs.

LOCKEMY, J., concurring in part, dissenting in part: I concur with the majority that there is substantial evidence in the record to support the Appellate Panel's finding that Lee suffered a work-related accident. I also agree that we cannot review a decision that has not been made with regard to any remaining alleged injuries. However, I respectfully disagree with their decision to affirm the Appellate Panel's conclusion that Lee was entitled to temporary total disability. I do not believe the Appellate Panel made the necessary findings of fact for this court to determine the issue.

The Appellate Panel found Lee was not offered light duty work by Bondex, and, as a result, it found he was entitled to temporary total compensation. Appellants argue that fact is not conclusive on the issue of Lee's entitlement to total disability compensation.[2] Appellants maintain Lee presented no evidence to establish a total loss of earning capacity, and thus, he was not entitled to temporary total disability compensation.

[2] In their initial brief, Appellants argue against the factual finding that they did not offer Lee any light duty work. However, the only support they offer for their argument is the light duty work offered in the days after the incident until Lee received his work restrictions. They do not specifically dispute that Lee was not offered any more work after they received his work restrictions.

Regulation 67-503(A)(1) of the South Carolina Code (2012) provides "[t]emporary total or temporary partial compensation is incurred on the eighth calendar day of incapacity and from the first day of incapacity if the injury results in incapacity for more than fourteen calendar days. The seven and fourteen day periods need not be consecutive days." Further, "[i]f the employer's representative does not pay temporary compensation, the claimant may request a hearing to receive benefits . . . ." Reg. 67-503(D).

"Disability in compensation cases is to be measured by loss of earning capacity." *Coleman v. Quality Concrete Prods., Inc.*, 245 S.C. 625, 628, 142 S.E.2d 43, 44 (1965) (citing *Keeter v. Clifton Mfg. Co.*, 225 S.C. 389, 392, 82 S.E.2d 520, 522 (1954)). "Total disability does not require complete helplessness." *Id.* "Inability to perform common labor is total disability for one who is not qualified by training or experience for any other employment." *Id.* (citing *Colvin v. E. I. DuPont de Nemours Co.*, 227 S.C. 465, 474, 88 S.E.2d 581, 585 (1955)). The burden is upon the claimant "to prove, in accordance with the generally acceptable test of total disability, that he was unable to perform services other than those that were so limited in quality, dependability, or quantity that a reasonably stable market for them did not exist." *Id.* at 630, 142 S.E.2d at 45; *see also Watson v. Xtra Mile Driver Training, Inc.*, 399 S.C. 455, 463-64, 732 S.E.2d 190, 195 (Ct. App. 2012). "An award in his favor may not rest on surmise, conjecture or speculation and must be founded on evidence of sufficient substance to afford a reasonable basis for it." *Coleman*, 245 S.C. at 630-31, 142 S.E.2d at 45.

In contrast to the majority, I believe *Coleman* is applicable to this case. In *Coleman*, the claimant sustained a work-related injury and consequently was not offered any further work from his employer because he could not perform his usual duties. *Id.* at 627, 142 S.E.2d at 43. He was awarded temporary total disability until the date of his hearing before a single commissioner and continuing until the claimant returned to "gainful employment suitable to his capacity," or until it was found the total disability had ceased. *Id.* at 627-28, 142 S.E.2d at 44. The employer appealed the award, contending the employee had not sustained a compensable injury. *Id.* at 628, 142 S.E.2d at 44. The award of temporary total disability was reversed "only insofar as the employee was awarded compensation for total disability beyond the date of his discharge by the operating surgeon," and the case was remanded for determination of any partial disability that the employee might have suffered. *Id.* The employee appealed, and on appeal, the employer

argued there was no competent evidence to support the finding that the employee's earning capacity was totally destroyed as a result of his injury. *Id.*

Our supreme court found the employee proved he had made "not only reasonable, but diligent efforts to secure employment." *Id.* at 631, 142 S.E.2d at 45. The question became whether the evidence was of sufficient substance to afford a reasonable basis for the Appellate Panel to conclude as a matter of fact "that the employee's inability to obtain employment was due to his injury and resultant partial physical incapacity," such that he was entitled to temporary total disability. *Id.* The court found the employee could have offered stronger evidence showing a causal connection between his partial physical incapacity and his unemployment but after considering his efforts in the relatively short period of three months through an employment service and some eighteen possible employers, the court could not say "the evidence was not susceptible of the reasonable inference . . . that his unemployment and inability to obtain work of any kind was the direct result of his injury and resultant limited capacity." *Id.* at 631, 142 S.E.2d at 45-46.

Despite the majority's assertion that the award in *Coleman* is not analogous to the award in this case, our supreme court explicitly stated that "[i]t should be remembered that the award here for total disability was not a permanent one, but a temporary one." *Id.* at 632, 142 S.E.2d at 46. With that in mind, I believe the Appellants present a valid argument. The Appellate Panel granted temporary total disability based solely on Bondex's refusal to offer work. I acknowledge that if Bondex had offered Lee a job, Appellants might have relieved themselves of the burden of paying compensation. *See* S.C. Code Ann. § 42-9-190 (1985) ("If an injured employee refuses employment procured for him suitable to his capacity and approved by the Commission he shall not be entitled to any compensation at any time during the continuance of such refusal."). However, while Bondex's refusal to offer work is a contributing factor to the decision of whether Lee was entitled to temporary total disability, it is not conclusive.

I find that similar to *Coleman*, the decision of temporary total disability must be based upon evidence that Lee is unable to perform services other than those that were so limited in quality, dependability, or quantity that a reasonably stable market for them did not exist to receive temporary total disability compensation. Here, the Appellate Panel did not make this crucial finding as to Lee's inability to find other work and based their decision solely on the fact that Bondex did not offer any further light duty work. Because the Appellate Panel is the sole fact

finder in workers' compensation cases, I think it is appropriate to remand for a determination of whether Lee's earning capacity created a total disability or partial disability.

I want to make clear that I am not making a determination as to whether evidence in the record establishes Lee is unable to obtain work of any kind. The majority appears to make findings of fact to reach their decision, and I believe that is a function of the Appellate Panel and not this court. *See Bartley v. Allendale Cnty. Sch. Dist.*, 392 S.C. 300, 310-11, 709 S.E.2d 619, 624 (2011) (finding this court arguably made improper findings of fact instead of remanding the issue to allow the Appellate Panel to make the necessary factual findings and legal conclusions to resolve the claims); *see, e.g.*, *Fox v. Newberry Cnty. Mem'l Hosp.*, 319 S.C. 278, 280, 461 S.E.2d 392, 394 (1995) ("The duty to determine facts is placed solely on the Commission and the court reviewing the decision of the Commission has no authority to determine factual issues but must remand the matter to the Commission for further proceedings. The reviewing court may not make findings of fact as to basic issues of liability for compensation, where, to do so, would impose upon the court the function of determining such facts from conflicting evidence." (internal citation omitted)); *cf. Smith v. NCCI, Inc.*, 369 S.C. 236, 252, 631 S.E.2d 268, 276-77 (Ct. App. 2006) ("When an administrative agency acts without first making the proper factual findings required by law, the proper procedure is to remand the case and allow the agency the opportunity to make those findings."). I simply believe it is the function of the Appellate Panel to make additional findings of fact as to Lee's ability or inability to obtain other work. Accordingly, I would reverse and remand this issue for the Appellate Panel's determination.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

David Jakes, Appellant.

Appellate Case No. 2011-198747

Appeal From Colleton County
Perry M. Buckner, Circuit Court Judge

Opinion No. 5158
Heard April 3, 2013 – Filed July 10, 2013
Withdrawn, Substituted and Refiled September 25, 2013

AFFIRMED

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

Attorney General Alan McCrory Wilson and Assistant Attorney General Julie Kate Keeney, both of Columbia, for Respondent.

PER CURIAM: A grand jury indicted Appellant David Jakes for three counts of attempted murder, three counts of attempted armed robbery, and one count of possession of a weapon during the commission of a violent crime.[1] During the subsequent trial's *voir dire*, the trial judge asked, *inter alia*, whether any potential juror: (1) was a member of a law enforcement agency; (2) was related to, or had a close relationship with, any of the named witnesses; or (3) was biased, prejudiced, or otherwise unable to give either party a fair trial. Based upon the responses, the trial judge excused a few panel members and, thereafter, Jakes utilized three of his five allocated strikes. Among the seated jurors was Juror 102 (Juror).

After three witnesses testified, the trial judge informed counsel, *in camera*, about a note he received from Juror expressing concern about her qualification, in light of her husband's employment as a reserve deputy. The trial judge called in Juror; Juror confirmed her husband was a reserve deputy and that she had not discussed the case with him. The trial judge then asked Juror if her husband's employment affected her ability to give either party a fair and impartial trial. Juror responded, "No, it wouldn't," and was allowed to return to the jury room.

Defense counsel then objected to Juror's continued service, noting the juror information sheet, which the Clerk's Office prepared, listed the occupation of Juror's spouse as only "Environmental Health Management." Defense counsel further contended that he would have utilized Jakes' strikes differently had he known Juror's husband was a reserve deputy. Shortly thereafter, the trial judge verified that Juror did fully disclose her husband's employment on the *juror questionnaire* as including both "Environmental Health Management" and "reserve deputy," but "the Clerk's Office didn't transmit everything" that Juror filled out on her *juror questionnaire* when the Clerk's Office provided counsel with the *juror information sheet*. The trial judge then declined to excuse Juror due to this "Scri[ve]ner's error," noting that defense counsel did not request any *voir dire* question about spousal employment and that a compilation of information from the juror questionnaires was available, upon request, from the Clerk's Office.

The jury subsequently convicted Jakes on three counts of assault and battery in the first degree (a lesser-included offense), three counts of attempted armed robbery,

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[1] The State tried Jakes and Antwan McMillan together. McMillan was indicted for three counts of attempted murder, three counts of attempted armed robbery, and one count of possession of a weapon during the commission of a violent crime.

and one count of possession of a weapon during the commission of a violent crime. Jakes was sentenced to thirty-five years' incarceration. This appeal followed.

LAW/ANALYSIS

Jakes alleges the trial judge erred in refusing to excuse Juror and replace her with an alternate because, had Jakes known Juror's husband was a reserve deputy, Jakes would have exercised his peremptory challenges differently. Thus, Jakes essentially argues that because he would have been permitted to exercise a peremptory strike against Juror, even if she was impartial, based solely upon the occupation of Juror's husband, the omission of such alleged material information constituted prejudice that required replacing Juror with an alternate when the information later came to light.

Notably, Jakes cites no authority for the specific proposition that a trial court abuses its discretion in not removing a juror when a defendant contends he would have exercised his peremptory challenges differently had he known "material," but previously omitted, facts about any particular juror, regardless of that juror's professed impartiality. Because Jakes cites no authoritative support for his specific contention, we proceed to determine solely whether Juror was impartial. *See State v. Porter*, 389 S.C. 27, 35, 698 S.E.2d 237, 241 (Ct. App. 2010) (requiring an appellant to cite authority in "specific support of his assertion"). Thus, to the extent Juror was impartial, the trial court did not err in refusing to excuse Juror.

Section 14-7-1020 of the South Carolina Code (Supp. 2012) requires a trial judge, upon motion of either party, to determine whether a juror is impartial:

> The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein . . . If it appears to the court that the juror is not indifferent in the cause, he must be placed aside . . . and another must be called.

Accord State v. Cochran, 369 S.C. 308, 321, 631 S.E.2d 294, 301 (2006) (citing section 14-7-1020). While such determinations are within the sound discretion of

the trial judge, "[t]here is no rule of the common law, nor is there a statute disqualifying a juror on account of his relationship to a witness, either by affinity or consanguinity, within any degree." *State v. Burgess*, 391 S.C. 15, 18, 703 S.E.2d 512, 514 (Ct. App. 2010) (citation omitted); *accord State v. Mercer*, 381 S.C. 149, 158, 672 S.E.2d 556, 560-61 (2009).

Accordingly, the mere fact that a juror's spouse is a law enforcement officer, who is not involved in the case, does not, in and of itself, render a juror biased and, thus, unable to serve on a jury; rather, the crux of that determination is whether it "appears to the court that the juror is not indifferent in the cause." *See* § 14-7-1020 (stating the trial judge must determine whether a proposed juror is related to either party or is otherwise interested in, formed an opinion about, or is biased or prejudiced toward a party). Moreover, even jurors related by affinity or consanguinity to a testifying witness or those who closely knew the putative victim of a crime are not, absent an inability to maintain impartiality, unqualified. *See State v. Wells*, 249 S.C. 249, 259-60, 153 S.E.2d 904, 909-10 (1967) (finding a juror who directly employed victim qualified); *Burgess*, 391 S.C. at 18, 703 S.E.2d at 514 ("There is no rule of the common law, nor is there a statute disqualifying a juror on account of his relationship to a witness, either by affinity or consanguinity, within any degree." (citation omitted)).

In the instant matter, Juror was unrelated to the defendants and the potential witnesses, and she did not know the victims; she was merely related to a non-testifying law enforcement officer. Furthermore, once the trial judge learned Juror's husband was a reserve deputy, he asked Juror whether her husband's employment would "in any way affect [her] ability to give the [State] or [Jakes] . . . a fair and an impartial trial." Juror confirmed "it wouldn't." Because Juror appeared neither biased nor partial, the trial court did not err in finding Juror appeared impartial, despite her husband's status as a reserve deputy.

Additionally, because Juror did not conceal any information, partiality cannot be imputed to her on such a basis. *State v. Woods*, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001) (recognizing that a court may infer that a juror who intentionally *conceals* information inquired into is not impartial). "[I]ntentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." *Id.*

At the outset, Juror disclosed her husband's status as a law enforcement officer on her self-completed *juror questionnaire*. Thus, Juror unquestionably did not conceal her husband's occupation at this phase of the jury selection process. Additionally, the trial judge asked no question during *voir dire* that required Juror to respond with her husband's occupation. While the trial judge did ask whether any potential juror was a member of law enforcement or was related to or a close personal friend of the named potential witnesses, which did include some law enforcement officers, neither inquiry required Juror to disclose the employment status of her non-testifying husband. Moreover, while Jakes could have requested the trial judge to ask whether any panel members were related to law enforcement officers, Jakes concedes he made no such request. Because no *voir dire* question required Juror to respond with her husband's occupation, no concealment occurred and, thus, it cannot be inferred that juror was not impartial.[2] *See id.* at 587, 550 S.E.2d at 284 (requiring a new trial when an identified *concealment* of information (a) was intentional and (b) would have supported a challenge for cause or would have been a material factor in the use of peremptory challenges). "As we find no intentional concealment on Juror's part, we need not further determine whether the information would have been a material factor in the exercise of . . . peremptory strikes." *State v. Guillebeaux*, 362 S.C. 270, 276, 607 S.E.2d 99, 102 (Ct. App. 2004). Hence, the trial court did not err in refusing to dismiss Juror and to replace her with an alternate.

CONCLUSION

Based on the foregoing, the decision of the circuit court is

AFFIRMED.

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

[2] Both parties conceded in their briefs that juror concealment did not exist.