The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF WILLIAM JEFFERSON McMILLIAN, III, PETITIONER

William Jefferson McMillian, III, who was disbarred from the practice of law, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Thursday, March 17, 2011, beginning at 9:30 a.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

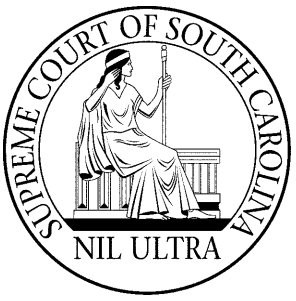
[1] The date and time for the hearing are subject to change. Please contact the Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

January 26, 2011



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 4
January 31, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Deborah J. Wiegand,
individually, and as Personal
Representative of the Estate of
Vincent Carroll Wiegand, Respondent,

v.

United States Automobile
Association, Appellant.

Appeal From Pickens County
Larry R. Patterson, Circuit Court Judge

Opinion No. 26919
Heard November 18, 2010 – Filed January 31, 2011

REVERSED

William O. Sweeny, III, Esquire & William R. Calhoun, Jr., both of Sweeny Wingate & Barrow, PA, of Columbia, for Appellant.

Samuel Darryl Harms, of Harms Law Firm, PA, of Greenville, for Respondent.

JUSTICE HEARN: We are asked to determine whether United States Automobile Association (USAA) made a meaningful offer of underinsured motorist coverage (UIM coverage) to Vincent Wiegand (Wiegand), who was killed in a car accident after multiple years of insurance coverage from USAA. Because we believe that USAA met its burden with regards to Section 38-77-350 of the South Carolina Code (1997), we reverse.

FACTUAL BACKGROUND

Wiegand was driving home from work when he was hit head-on and killed by a drunk driver. The drunk driver was at-fault and only had $50,000.00 in available liability insurance. While those policy limits were paid to Wiegand, his damages greatly exceeded the limits of the drunk driver's policy. Beginning in 1980, Wiegand's cars had been insured with USAA.

After the first ten years of receiving automobile insurance coverage from USAA, Wiegand received a form entitled "Offer of Optional Additional Uninsured and Underinsured Automobile Insurance Coverages." It is undisputed that Wiegand signed the form, but the parties disagree over who actually completed the form: Wiegand or another person. Regardless of who completed the form, next to the question "do you wish to purchase underinsured motorist coverage," the box marked "no" was checked. The form contained the following pertinent language:

> Underinsured motorist coverage compensates you, or other persons insured under your automobile insurance policy, including passengers within your

> motor vehicle, for amounts that you, or your passengers, may be legally entitled to collect as damages from an owner or operator of an at-fault underinsured motor vehicle. An underinsured motor vehicle is a motor vehicle that is covered by some form of liability insurance, but that liability insurance coverage is not sufficient to fully compensate you for your damages. His policy pays the limits first, then yours pays the lessor of (1) the remaining loss, or (2) your UIM limits.
>
> Your automobile insurance policy does not provide any underinsured motorist coverage. You have, however, a right to buy underinsured motorist coverage in limits up to the limits of liability coverage you carry under your automobile insurance policy. Limits of underinsured motorist coverage, together with the additional premiums you will be charged, are shown upon this form.
>
> . . . .
>
> In the future, if you wish to increase or to decrease your limits of additional uninsured or underinsured coverage, you must then contact us.

From 1990 to 2004, Wiegand had continuous USAA coverage. Wiegand's policy with USAA at the time of the accident had liability limits of $25,000.00 per person and $50,000.00 per accident. USAA paid Wiegand's estate $26,000.00 for personal injury protection benefits, and seatbelt and airbag benefits.

Deborah J. Wiegand (Wife), individually and as personal representative of Wiegand's estate, commenced this action against USAA to recover UIM benefits for the damages in excess of the amounts tendered by the other driver. Wife sought reformation of the policy to include UIM coverage in the same limits as the liability coverage. Both parties filed motions for summary judgment.

The circuit court granted Respondent's motion for summary judgment, finding USAA had not made a meaningful offer of UIM coverage to Wiegand. This appeal followed.

ISSUES

USAA raises three issues on appeal:

1. Did the circuit court err in failing to give USAA the benefit of the conclusive presumption that the UIM offer was meaningful based on section 38-77-350?

2. Did the circuit court err in holding that a meaningful offer of UIM coverage was not made to Wiegand as required by *State Farm Mutual Automobile Insurance v. Wannamaker*, 291 S.C. 518, 354 S.E.2d 555 (1987)?

3. Did the circuit court err in declining to hold that Wiegand waived his right to claim UIM benefits by specifically declining the limit of coverage to which the circuit court reformed the policy and by refusing to purchase UIM coverage?

LAW AND ANALYSIS

Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law. Whether a form complies with the requirements of section 38-77-350(A) is a question of law for this Court. *See Grinnell Corp. v. Wood*, 389 S.C. 350, 357 n.3, 698 S.E.2d 796, 799 n.3 (2010). "Questions of law may be decided with no particular deference to the trial court." *S.C. Dep't of Transp. v. M&T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008);

see also Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). USAA contends that under either section 38-77-350(A) or *Wannamaker*, a meaningful offer of UIM coverage was made to Wiegand. Wife contends that USAA cannot meet its burden under either the statute or *Wannamaker* to prove that a meaningful offer was made, and in addition, cannot take advantage of the presumption found in section 38-77-350(B). We agree with USAA that a meaningful offer was made and reverse the circuit court's grant of summary judgment.

The General Assembly, in response to *Wannamaker*, passed an act, codified as section 38-77-350, establishing requirements for forms offering UIM coverage. *See* Automobile Insurance Reform Act of 1989, § 22. Section 38-77-350(A) mandates the director of the Department of Insurance or his designee to approve a form, which at a minimum, must provide:

> (1) A brief and concise explanation of the coverage;
> (2) A list of all available limits and the range of premiums for the limits;
> (3) A space for the insured to mark whether the insured chooses to accept or reject the coverage and a space for the insured to select the limits of coverage he desires;
> (4) A space for the insured to sign the form which acknowledges that he has been offered the optional coverages; and
> (5) The mailing address and telephone number of the Insurance Department which the applicant may contact if the applicant has any questions that the insurance agent is unable to answer.[1]

This form must be used by insurers in offering optional coverages. *See id.* It is important to note "[f]ailure to comply with section 38-77-350(A) does not automatically require judicial reformation of a policy. Rather, even

[1] The version of section 38-77-350(A) in effect at the time of USAA's offer to Vincent contained the same language, except that "Chief Insurance Commissioner" was listed instead of "the director of the Department of Insurance or his designee."

where an insurer is not entitled to the presumption [in section 37-77-350(B)] that it made a meaningful offer, it may prove the sufficiency of its offer by showing that it complied with *Wannamaker*." *See Grinnell Corp.*, 389 S.C. at 357, 698 S.E.2d at 799-800 (citing *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 420, 618 S.E.2d 909, 918 (2005)).

USAA's form contains a brief and concise explanation of UIM coverage on the first page, detailing in one paragraph what UIM coverage pays for, who gets compensated, and what "underinsured motor vehicle" means. The form contains every UIM limit which USAA was approved to sell by the Department of Insurance, along with specific language on how to decrease or increase UIM coverage. There was a space for Wiegand to mark whether he chose to accept or reject coverage, select the limits of coverage he desired, and sign the form acknowledging he had been offered optional coverage. Finally, the form contained the mailing address and telephone number of the Department of Insurance.

Additionally, USAA's form was approved by the appropriate entity in Janaury 1990. While approval alone is not dispositive of whether a form meets section 38-77-350(A)'s requirements, *see Progressive Casualty Insurance Co. v. Leachman*, 362 S.C. 344, 608 S.E.2d 569 (2005), we believe it lends support to the view that USAA satisfied the requirements. Therefore, we conclude that USAA met section 38-77-350(A)'s requirements and now turn to whether USAA can take advantage of the presumption in section 38-77-350(B).

Section 38-77-350(B) provides a conclusive presumption of informed selection in favor of the insurer if specific criteria are met once the form is found to be in compliance with (A). Wiegand signed the form in 1990. Because of the presumption against retroactivity of statutes, our analysis will only deal with the section as it existed in 1990.[2] In that version of the statute,

[2] In 2006, the statute was amended so that the presumption applies if the form was completed by an insurance producer or representative of the insurer and the insured only signed the form. *See* S.C. Code Ann. § 38-77-350(B) (Supp.

the insured must have properly completed and executed the form. *See* S.C. Code Ann. § 38-77-350(B) (1990). The insurer has the burden of establishing that the requirements have been met in order to take advantage of the presumption. *See Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 262-63, 626 S.E.2d 6, 12 (2005).

Contrary to the circuit judge's finding, USAA presented sufficient evidence to show that Wiegand both completed and executed the form. The offer form was processed by USAA and never returned to Wiegand to complete, which it would have been if the form was not completed correctly. Wiegand signed the bottom of the form indicating whether he wished to purchase coverage and signed his name under the check marks, which were similar to check marks made by Wiegand on similar forms. Wiegand was insured by USAA from 1990 to 2005 with annual reports sent from USAA that stated no UIM coverage was applicable to his vehicles; Wiegand never informed USAA that a mistake had been made and he actually wanted UIM coverage.

Wife argues that USAA cannot meet its burden because no one can testify who checked the "no" boxes on the form signed by Wiegand. While this is true, nothing in the statutes, rules, or case law requires direct evidence as to who checked the boxes for the burden to be met. It is enough that Wiegand signed the acknowledgment which included the sentence "I have indicated whether or not I wish to purchase each coverage in the space provided" along with the other evidence mentioned above to find that USAA met its burden. We hold USAA can take advantage of the presumption found in section 38-77-350(B), and that a meaningful offer was made to Wiegand.

Because we find the matter dispositive on the issue of meaningful offer under the statute, we decline to address the remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). Therefore, we reverse the circuit court's grant of

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2009). At oral argument, Wife conceded that under this version of the statute, USAA would be entitled to the presumption.

summary judgment in favor of Wife and remand the case to the circuit court to enter judgment in accordance with this opinion.

REVERSED.

ACTING CHIEF JUSTICE PLEICONES, KITTREDGE, J., and Acting Justices James E. Moore and J. Ernest Kinard, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Trey Gowdy, as Solicitor for the Seventh Judicial Circuit, Respondent,

v.

Bobby Gibson, Jr., and Lillie Gibson, Petitioners.

IN RE:

$146,050.00 in U.S. Currency.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 26920
Heard October 6, 2010 – Filed January 31, 2011

AFFIRMED

J. Falkner Wilkes, of Greenville, for Petitioners.

Assistant Solicitor Robin C. File, of Spartanburg, for Respondent.

CHIEF JUSTICE TOAL: In this case, we granted a writ of certiorari to review the court of appeals' holding that the State established probable cause that a substantial connection existed between $146,050, confiscated from Petitioners' home, and illegal drug activity because the money was traceable to illegal transactions, as required by section 44-53-520(a)(7) of the South Carolina Code. We agree with the court of appeals, and therefore, affirm.

FACTUAL/PROCEDURAL BACKGROUND

This civil forfeiture action was initiated by Solicitor Trey Gowdy (the State) to confirm the seizure and forfeiture of $146,050 in cash that was found in a safe in the home of Bobby Gibson, Jr. (Bobby Gibson) and his mother Lillie Gibson (Ms. Gibson) (together, Petitioners).

In September 2004, Spartanburg County police obtained a warrant to search the home of Bobby Gibson based on suspicions raised from an ongoing investigation of his drug activity and earlier arrest for possession of crack cocaine. At the home, which Bobby Gibson shared with his mother, police found a small fire safe in the attic. This safe could only be accessed through a hole cut in the ceiling of Bobby Gibson's bedroom. After a narcotics canine sniffed the safe and alerted, officers forcibly opened the safe and found $146,050 in cash, organized in rubber-banded stacks, and a small metal box containing an unknown amount of currency and old coins. Ms. Gibson, who arrived shortly after the officers opened the safe, said she did not know the combination to the safe and did not make a claim to the money when officers informed her they would be confiscating it. Officers left the small metal box with Ms. Gibson.

Approximately 140 feet from the location of the safe, officers found a set of digital scales, a plastic medicine bottle containing 24.4 grams of crack cocaine, and a plastic bag containing 11.7 grams of marijuana. These items

were concealed beneath a stack of bricks found behind a detached garage in the back yard of the residence.

In addition, police obtained a warrant to search a building Bobby Gibson was remodeling, located several blocks away from his residence. There police found a plastic bag containing 713 grams of cocaine, also hidden in the ceiling.

In bringing this action, the State sought to confirm the propriety of the forfeiture, arguing it was Bobby Gibson's property and it was subject to forfeiture under section 44-53-520(a) of the South Carolina Code. In Bobby Gibson's March 2005 Answer to Respondent's Complaint, he admitted that he had an interest in the property. Prior to the December 2006 hearing, however, Ms. Gibson was added as a party, claiming that she, rather than her son, owned the property.

After a bench trial, the circuit court found that the State established probable cause for the forfeiture because the money was found in close proximity to the evidence of illegal drug activity, and because the money was traceable to illegal transactions based on the facts presented in the case. Additionally, the court found that Petitioners failed to establish by a preponderance of the evidence that the money belonged to Ms. Gibson. Having heard the testimony, the circuit court found that the Petitioners' position lacked credibility. The court of appeals affirmed.

ISSUES

Petitioners present the following issues for review:

I. Did the court of appeals err by not ruling on the issue of close proximity, as provided in section 44-53-520(a)(8) of the South Carolina Code?

II. Did the court of appeals err in finding there was probable cause to support civil forfeiture because the money was traceable to an illegal transaction?

III. Did the court of appeals err in holding that Petitioners failed to establish their claim to the currency by a preponderance of the evidence?

STANDARD OF REVIEW

"An action for forfeiture of property is a civil action at law." *Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006). When an action at law is tried without a jury, the standard of review extends only to the correction of errors of law. *Id.* The circuit judge's findings of fact will only be disturbed on appeal if the findings are wholly unsupported by the evidence or controlled by an erroneous application of the law. *Id.*

LAW/ANALYSIS

"The purpose of a forfeiture hearing is to confirm that the state had probable cause to seize the property forfeited." *Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006) (*citing Medlock v. One 1985 Jeep Cherokee VIN 1JCWB7828FT129001*, 322 S.C. 127, 131, 470 S.E.2d 373, 376 (1996) (validating the statutory standard for seizing property under section 44-53-520 is probable cause)). The initial burden lies with the state to show it had probable cause for believing a substantial connection exists between the property to be forfeited and the criminal activity. *Id.* Once probable cause is shown, the burden shifts to the property owner to show by a preponderance of the evidence that the property was innocently owned. *Medlock*, 322 S.C. at 131, 470 S.E.2d at 376 (*citing* S.C. Code Ann. § 44-53-586(b) (Supp. 1994)).

Section 44-53-520(a) enumerates eight instances when property is subject to forfeiture. S.C. Code Ann. § 44-53-520(a)(1)-(8) (2002 & Supp. 2007). Of these, only subsections (7) and (8) are at issue:

> (7) all property including, but not limited to, monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, and all proceeds including, but not limited to, monies, and real and personal property *traceable* to any exchange;
>
> (8) all monies seized in *close proximity* to forfeitable controlled substances, drug manufacturing, or distributing paraphernalia, or in close proximity to forfeitable records of the importation, manufacturing, or distribution of controlled substances and all monies seized at the time of arrest or search involving violation of this article. If the person from whom the monies were taken can establish to the satisfaction of a court of competent jurisdiction that the monies seized are not products of illegal acts, the monies must be returned pursuant to court order.

Id. (emphasis added).

Thus, a showing that the property to be forfeited was in close proximity to illegal drugs, or that there was probable cause to believe the property was traceable to illegal drugs, will satisfy the state's burden of proof.

I. The Issue of Close Proximity, as Provided in Section 44-53-520(a)(8) of the South Carolina Code

Petitioners argue the court of appeals erred by not definitively ruling on whether the currency in question was closely proximate to the illegal drugs and distributing paraphernalia found on the property. We disagree.

Under section of 44-53-520(a) of the South Carolina Code, the State must show that the property seized fits the description of one of the types of properties listed in subsections (1) through (8). Because the court of appeals affirmed the circuit court's holding that the money was traceable under subsection (7), it was unnecessary for the court of appeals to rule on whether the property was closely proximate under subsection (8). However, we defer to the circuit court's finding that the money seized was in close proximity to the contraband, as explained herein.

Petitioners submit that the drugs and money were not closely proximate because they were found approximately 140 feet apart, and not in the same building. South Carolina courts have not specifically addressed how close proximity should be measured. However, other states with forfeiture statutes that contain close proximity provisions have found that close proximity should not be defined in terms of measurement, but rather, on a case by case basis. *See City of Meridian v. Hodge*, 632 So. 2d 1309, 1312 (Miss. 1994) (declining to set rigid rules to fix close proximity, such as a particular number of feet, or a particular room); *see also Limon v. State*, 685 S.W.2d 515, 516 (Ak. 1985) (finding "close proximity" means "very near" and should therefore be determined on a case by case basis).

We, too, believe that close proximity, as provided in section 44-53-520(a)(8), should be decided on a case by case basis. We additionally note that by enumerating instances where property is subject to forfeiture, the General Assembly intended to limit the state's forfeiture power to clear situations where property was illegally obtained. We do not believe the General Assembly wished to encourage drug traffickers to strategically house their cash stores so as to evade seizure by the government. Establishing a bright line proximity measure would do just that.

Bearing in mind that the circuit judge's finding of close proximity is a question of fact, we will not disturb this finding on appeal unless it is wholly unsupported by the evidence. In making its proximity finding, the circuit court took into account: (1) the drugs and money were housed on the same property, and (2) that property was under the control of Bobby Gibson. We

are not prepared to say that, as a matter of law, money is forfeitable simply because it is found on the same property as contraband, or because it is found on property that is controlled by the criminal defendant. However, we are deferential to the circuit court's finding of facts in this case.

Therefore, we find that the circuit court's determination that the drugs and the money were closely proximate was supported by the evidence, and our standard of review precludes us from disturbing that finding.

II. The Issue of Traceability, as Provided in Section 44-53-520(a)(7) of the South Carolina Code

Petitioners argue that the court of appeals applied a totality of the circumstances test when determining whether the forfeiture complied with the traceability requirement of section 44-53-320(a)(7), and that it erred in doing so. More specifically, Petitioners argue the court of appeals placed too much emphasis on the drug dog alert to find the money was traceable to illegal drug activity. We disagree.

In *Pope v. Gordon*, we addressed the standard to be applied to section 44-53-520(a)(7). 369 S.C. 469, 633 S.E.2d 148 (2006). In that case, the police seized the bank accounts of Gordon's carwash business, pursuant to a conviction for trafficking in crack cocaine. *Id.* at 473, 633 S.E.2d at 150. To draw the connection between the money seized and illegal transactions, the state presented evidence that Gordon paid for his monthly rent in cash, he failed to pay taxes for his business for the period in question, and that the portion of expenses that exceeded his business income was paid for in cash. *Id.* at 475, 633 S.E.2d at 152. In essence, Gordon's tendency to transact in cash was the state's primary argument that the money in the bank account was illegally gained. This Court affirmed the court of appeals' holding that the state failed to show probable cause that the money in the bank accounts was traceable to illegal drug transactions. *Id.* at 476, 633 S.E.2d at 152.

In that case, the State urged this Court to follow the rationale used in *United States v. Thomas*, where the United States Court of Appeals for the

Fourth Circuit affirmed the government's seizure of property based on a totality of circumstances. 913 F.2d 1111 (4th Cir. 1990). In *Thomas*, the Fourth Circuit found that "the possession of unusually large amounts of cash" was significant, and "may be circumstantial evidence of drug trafficking." *Id.* at 1115. The court further relied on the fact that the defendant's cash expenditures vastly exceeded his legitimate income, he made numerous one way trips to Miami, and that he had a history of convictions for possession of drugs. *Id.* at 1115-16. This Court declined to use the *Thomas* rationale, finding that a totality of the circumstances analysis lessened the burden on the state to prove a nexus, and that it was in direct contravention to the traceable language used in the statute. *Gordon*, 369 S.C. at 152, 633 S.E.2d at 476.

In *Thomas*, the Fourth Circuit held that probable cause in the context of forfeiture cases is the same standard employed in search and seizure cases. *Thomas*, 913 F.2d at 1114. This requires the court to "'make a practical, common-sense decision whether, given all the circumstances set forth . . . there is a fair probability' that the properties to be forfeited are proceeds of illegal drug transactions." *Id.* (*quoting Illinois v. Gates*, 462 U.S. 213 (1983)). We agree there is a parallel between government seizure under the Fourth Amendment and government seizure in civil forfeiture cases. Therefore, in evaluating traceability, a court may weigh the evidence presented to draw its conclusion. What a court may not do, and what the State urged this Court to do in *Gordon*, is draw inferences based on evidence that is unrelated to the property being seized. Notably, in *Gordon*, this Court did not construe traceability so narrow as to require bills be marked or serial numbers be recorded. Neither did this Court require the State prove to an absolute certainty that the money in the bank account was a product of illegal drug transactions. Rather, in that case, this Court sought to prevent the State from confiscating legitimately owned property by presenting evidence that was unrelated to the property being seized. Our hesitancy in using a totality of the circumstances test for determining traceability derives from a concern that unrelated circumstantial evidence will become a substitute for real evidence that money or goods are products of illegal activity.

The concern that was present in *Gordon* is not present here. In this case, the court of appeals found that the probabilities, to the exclusion of all else, pointed to the conclusion that the money found in the safe was illegally gained. The courts below saw it significant that a large sum of cash was found hidden in a convicted drug dealer's bedroom, under his sole control, bundled in a way that is typical for drug transactions, and in close proximity to drug paraphernalia. The inferences made in *Gordon* need not be made here.

Furthermore, we disagree with Petitioners' contention that a drug dog's alert should bear no weight when evaluating traceability. Although many courts have questioned the probative value of dog alerts due to contamination of the nation's paper currency with drug residue, these courts have not completely disregarded it as a form of evidence. *See United States v. $78,850.00 in U.S. Currency*, 517 F.Supp. 2d 792, 797 (D.S.C. 2007) (declining to take a position on the probative value of a positive alert, but stating that, based on the alert, "it is more likely than not that the $433,890 was substantially related to a drug offense"); *United States v. Funds in the Amount of $30,670*, 403 F.3d 448 (7th Cir. 2005) (considering expert testimony that "'scientific results indicate that circulated currency, innocently contaminated with [microgram] quantities of cocaine would not cause a properly trained detection canine to signal an alert even if very large numbers of bills are present'"); *United States v. $22,474.00 in U.S. Currency*, 246 F.3d 1212, 1217 (9th Cir. 2001) (stating a "sophisticated dog sniff" and "other factors" can "tip the scales in favor of establishing probable cause"). *But see United States v. One Lot of U.S. Currency ($36,634)*, 103 F.3d 1048, 1056 (1st Cir. 1997) (finding that a dog reaction "weighs some, but not a great deal, on the scale").

While the drug dog's alert on the safe, standing alone, would not have proved the presence of drugs, the positive canine alert was a factor that the court of appeals rightly determined to be significant. Further, we note it is significant that the canine alerted on the safe and not the money. This fact alone distinguishes the case at hand from the cases cited above, and renders Petitioners' contamination theory questionable.

Thus, in our opinion, the State established there was probable cause to believe a substantial connection existed between the money contained in the safe and illegal drug activity, both because the money was found in close proximity to illegal drugs, and because the money was traceable to illegal transactions. Therefore, the court of appeals did not err.

III. Innocent Ownership

Petitioners argue that in the event the State shows probable cause for seizing the money, Petitioners proved by a preponderance of the evidence that the money was innocently owned by Ms. Gibson. We disagree.

Ms. Gibson contends that this money is a product of both her life savings and the proceeds from illegal gambling. Petitioners only offered the testimony of Ms. Gibson and Bobby Gibson to support this contention. Ms. Gibson stated she worked for the same company for twenty-seven years making $14.33 per hour. She testified that she sometimes worked sixty hour weeks, her house and car were paid in full, and her monthly bills and expenses were minimal. She insisted that she did not put this money in a bank because she lost money there in the past.

Discrediting her claim, Ms. Gibson did not know the combination to the safe, admitted that she could not reach the safe, and stated she always gave the money to her son to put in the safe. She then admitted that her son had been in prison for several years and had just recently been released. Ms. Gibson did not have tax returns or any other documents to support her claim of income.

The officers at the scene testified that Ms. Gibson looked surprised when she saw the money they were retrieving from the safe. When the officers told Ms. Gibson they would be confiscating the money, she did not make any claim to the money. Instead, the court did not hear of her claim to the money until she was added as a party shortly before the commencement of the trial. Taking Ms. Gibson's claim out of the equation, Petitioners

offered no evidence that Bobby Gibson had an alternate income source that would support this accumulation of cash.

The circuit judge, after hearing the testimony and considering the above facts, concluded that Ms. Gibson's position in the matter is likely "fabricated rather than true." He additionally found that the "officers appeared credible to the Court at trial." This Court recognizes that the circuit judge "heard the witnesses, [and] is in a better position to evaluate their credibility and assign comparative weight to their testimony." *Reed v. Ozmint*, 374 S.C. 19, 24, 647 S.E.2d 209, 211 (2007). We will not disturb the circuit judge's finding that Petitioners' failed to meet their preponderance of the evidence burden, as this finding of fact was supported by a bounty of evidence.

Therefore, the court of appeals did not err in affirming the circuit court's finding that Petitioners failed to prove the money was innocently owned.

CONCLUSION

For the above reasons, it is our view that the State established probable cause that a substantial connection existed between the money confiscated from the safe and illegal activity because the money was both closely proximate and traceable to illegal drugs. Further, we agree that Petitioners did not meet their burden for proving that the money was innocently owned. Therefore, we affirm.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ira Banks, James Bell, and Vernon Holmes, Appellants,

v.

St. Matthew Baptist Church, an unincorporated association, and Clinton Brantley, Respondents.

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

Opinion No. 4781
Heard May 20, 2010 – Filed January 26, 2011

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Thomas O. Sanders, IV, of Charleston, for Appellants.

P. Gunnar Nistad, Weston Adams, III, Richard Carson Thomas and Helen F. Hiser, all of Columbia, for Respondents.

KONDUROS, J.: Ira Banks, James Bell, and Vernon Holmes (collectively the Trustees) brought suit against St. Matthew Baptist Church (the Church) and its pastor, Clinton Brantley, for defamation, negligence, and intentional infliction of emotional distress (IIED), contending the pastor had informed the congregation the Trustees had mismanaged money and money was missing from the Church. The trial court dismissed the action because the court did not have jurisdiction to intervene in a church matter, and the Trustees appealed. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

The Trustees served on the board of trustees (the Board) at the Church, which was located in Charleston County. In 2000, the Church moved to a new location and shortly thereafter decided to purchase some nearby apartments to expand the Church's influence into the new neighborhood. The congregation approved the Board's request to borrow $200,000 to purchase and improve an apartment building located at 1925 Grayson Street. The Church purchased the apartment building as well as other buildings. After the purchase, the apartment building at 1925 Grayson Street caught fire and the Church learned it did not have insurance on the building. The Church also learned the Church building was serving as collateral for the loan used to purchase the apartment building.

On May 22, 2006, at a quarterly congregational meeting, Brantley made a presentation to the congregation providing the reasons he believed the Trustees should be removed from the Board. The minutes taken at the meeting reflect that Brantley stated "the Church had been mortgaged and there was no insurance on the buildings that had been purchased," a $300,000 mortgage he did not know about had been placed on the Church building, and he had been "constantly deceived throughout." A majority of the

congregation voted to remove the Trustees from the Board. The Trustees remained members of the Church. An audit performed in June 2006, revealed no money had been mismanaged.

The Trustees filed an action against Brantley alleging negligence, defamation, and IIED as well as against the Church alleging negligence. The Trustees alleged that at the congregational meeting, Brantley told the congregation the Trustees had placed a $300,000 mortgage on the Church property to purchase some nearby apartments without his knowledge and failed to insure them. They asserted Brantley also informed the congregation they had mismanaged money and money was missing from the Church. They further alleged Brantley informed the congregation he had been constantly deceived by the Trustees and they should be removed from the Board.

The Church and Brantley both moved to have the action dismissed for lack of jurisdiction. Following a hearing on the matter, the trial court granted the motions in a form order, finding:

> [A]ny alleged defamatory statements were made during the course of a congregational meeting where the [Trustees] continuing to serve as Trustees of the [C]hurch was being discussed. The [c]ourt finds that it is not appropriate for it to intervene in such a church matter and that the [c]ourt does not have jurisdiction to intervene. Further, with respect to the allegation of negligence against the [Church] the [c]ourt finds it does not have jurisdiction to try and impose a duty to do some independent investigation into alleged defamatory statements made by [Brantley].

This appeal followed.

LAW/ANALYSIS

The Trustees argue the trial court erred in dismissing the action for lack of jurisdiction because the Trustees' claims can be resolved by neutral principles of civil law without disturbing the Church's decision to remove the Trustees from their positions. We agree in part.

"The decisions of the Supreme Court of the United States concerning church dispute litigation make clear that there is no constitutionally prescribed rule for a civil court's disposition of such matters." All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S.C., 385 S.C. 428, 442, 685 S.E.2d 163, 170 (2009). "Nonetheless, there is a general constitutional command, based in the First Amendment, mandating . . . civil courts to 'decide church . . . disputes without resolving underlying controversies over religious doctrine.'" Id. at 442, 685 S.E.2d at 170-71 (quoting Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976)) (second omission by court).

The South Carolina Supreme Court has determined that when resolving church disputes, South Carolina courts apply the "neutral principles of law approach." See id. at 442, 685 S.E.2d at 171; Pearson v. Church of God, 325 S.C. 45, 478 S.E.2d 849 (1996); see also Jones v. Wolf, 443 U.S. 595, 602-04 (1979) (holding a state is constitutionally entitled to adopt the neutral principles of law approach as a means of adjudicating church disputes). "This method 'relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.'" All Saints Parish Waccamaw, 385 S.C. at 444, 685 S.E.2d at 172 (quoting Jones, 443 U.S at 603). "[T]he neutral principles of law approach permits the application of property, corporate, and other forms of law to church disputes." Id.

Pearson articulated the rule South Carolina civil courts must follow when adjudicating church dispute cases. Id. The Pearson rule provides:

> (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; [and] (3) in resolving such civil law disputes, courts must accept as final and binding the decisions of the highest religious judicatories as to religious law, principle, doctrine, discipline, custom, and administration.

325 S.C. at 52-53, 478 S.E.2d at 853 (footnote omitted). Under the Pearson rule, when "a civil court can completely resolve a church dispute on neutral principles of law, the First Amendment commands it to do so." All Saints Parish Waccamaw, 385 S.C. at 445, 685 S.E.2d at 172.

However, when a civil court is presented an issue that is a question of religious law or doctrine masquerading as a dispute over church property or corporate control, it must defer to the decisions of the proper church judicatories to the extent it concerns religious or doctrinal issues. Id. (citing Serbian E. Orthodox Diocese, 426 U.S. at 709 (finding the controversy before the Court "essentially involve[d] not a church property dispute, but a religious dispute the resolution of which . . . is for ecclesiastical and not civil tribunals")). "'[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.'" Pearson, 325 S.C. at 49, 478 S.E.2d at 851 (quoting Serbian E. Orthodox Diocese, 426 U.S. at 710).

I. Defamation

Under the Pearson rule "courts cannot avoid adjudicating rights growing out of civil law." 325 S.C. at 52, 478 S.E.2d at 853. Here, the Trustee's defamation claim can be resolved using solely legal principles

without examining any religious questions. "[T]he neutral principles of law approach permits the application of property, corporate, and other forms of law to church disputes." All Saints Parish Waccamaw, 385 S.C. at 444, 685 S.E.2d at 172. Because the circuit court can completely resolve a church dispute on neutral principles of law, the First Amendment commands it to do so.

Brantley provides several cases from outside jurisdictions that have found the court lacked subject matter jurisdiction over defamation claims.[1] However, by applying the neutral principles doctrine we can resolve whether the court has jurisdiction to address the defamation claim in the current case without looking to outside jurisdictions. 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. Therefore, the dismissal of the defamation action should be reversed and the action remanded for trial.

II. Negligence

As to the negligence causes of action, the trial court properly dismissed the action. The negligence cause of action against the Church alleges it was negligent in hiring Brantley and not conducting its own investigation into the facts before the congregational meeting was held. The negligence cause of action against Brantley contends he was negligent in asking the congregation to remove the Trustees from the Board and in not conducting his own investigation of the facts before the meeting was held. All of these allegations involve the administrative procedures of the Church, which Pearson specifically notes courts cannot examine. Accordingly, the trial court properly dismissed the negligence causes of action.

[1] In many of those cases, the courts could not determine if the claim was defamation without looking into the churches' beliefs.

III. IIED

Although the Trustees raised the IIED cause of action in their complaint, the trial court did not address it when it dismissed the action and the Trustees failed to make a Rule 59(e), SCRCP, motion. Accordingly, we cannot address the trial court's treatment of this cause of action. See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding when a trial court fails to address the specific argument raised by the appellant, the appellant must make a motion to alter or amend pursuant to Rule 59(e) to obtain a ruling on the argument or it is not preserved for appellate review).

CONCLUSION

We find the trial court can decide the defamation action without looking at religious principles and therefore reverse the dismissal of the defamation action and remand that claim for trial. Additionally, the negligence causes of action cannot be examined by the court without delving into the Church's administrative procedures. Therefore, we affirm the dismissal of the negligence causes of action. Further, because the trial court did not rule on the IIED cause of action in its order, the dismissal of that claim is unpreserved for appellate review. Accordingly, the trial court's order is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED IN PART.

GEATHERS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carolyn R. Church, Appellant/Respondent,

v.

Carroll E. McGee, Personal Representative of the Estate of William LuRue McGee; and Ted O. McGee, Jr., as Trustee of the Pearly Miles McGee and Ted O. McGee, Sr. Living Trusts; and Carroll E. McGee, Individually, Respondents/Appellants.

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

Opinion No. 4782
Heard October 6, 2010 – Filed January 26, 2011

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Matthew E. Steinmetz and Charles M. Black, Jr. both of Columbia, for Appellant-Respondent.

S. Jahue Moore, of West Columbia, for Respondents-Appellants.

GEATHERS, J.: Carolyn R. Church brought this quantum meruit action against Carroll E. McGee (Carroll), individually and as personal representative of the Estate of William LuRue McGee (Decedent),[1] as well as Ted O. McGee, Jr. (Ted), as trustee of the McGee family trust (collectively Respondents),[2] seeking compensation for caregiving services provided to Decedent in his final years. In these cross-appeals, Church challenges the circuit court's finding that she expected no compensation when she provided the caregiving services. She also challenges the circuit court's refusal to remove Carroll as personal representative of Decedent's estate. Carroll challenges the circuit court's failure to allow a setoff of $35,000 against Decedent's $100,000 bequest to Church. Carroll also challenges the circuit court's award of prejudgment interest on the amount the court determined the estate owed Church. We reverse the award of prejudgment interest and affirm the remainder of the circuit court's order.

FACTS/PROCEDURAL HISTORY

Decedent was a paraplegic from 1957, when he was sixteen years of age, until his death in 2003. In 1993, Decedent and Church began seeing each other socially, and they developed a bond. Subsequently, Church moved in with Decedent and his mother. In 1996, Church had to abandon her housecleaning occupation to provide full-time care to Decedent, whose health had significantly deteriorated.

After Decedent's death, Church removed several items of personal property from Decedent's primary residence and from the lake house

[1] We order that the case caption be amended to reflect the correct spelling of Decedent's middle name, which is "LuRue" rather than "LaRue."

[2] The official name of the trust is reflected in the case caption. For the sake of brevity, we will refer to the trust as "the McGee family trust."

belonging to Decedent's family.[3] Church considered some of these items to be gifts to her from Decedent and other items to be property purchased with their joint funds. Decedent's last will provided for Church to receive $100,000 and a Lexus automobile and for his siblings to receive the remainder of his estate. However, Carroll advised Church that Decedent's estate was insolvent.

Church filed a claim against Decedent's estate for $450,000 for caregiving services she allegedly rendered to Decedent, and the probate court granted her petition to remove the proceeding to circuit court. In September 2004, she filed separate petitions to remove Carroll as the personal representative of Decedent's estate and to appoint a special administrator to handle the estate under the continuing authority of the court.[4] The probate court granted Carroll's petition to remove these matters to circuit court.

Church then filed a complaint in circuit court asserting the following causes of action: Enforcement of Specific Bequest, Quantum Meruit, Fraud, Intentional Infliction of Emotional Distress, Unfair Trade Practices, and Constructive Trust. The circuit court conducted a non-jury trial and dismissed the causes of action for fraud, intentional infliction of emotional distress, and unfair trade practices. The court later issued a written order denying Church's request to remove Carroll as personal representative and concluding that Church was not entitled to compensation for her alleged caregiving services. The order also allowed a setoff of $6,000 against the $100,000 bequest to Church to compensate the estate for funds Decedent had invested in a mobile home sold by Church after Decedent's death. The circuit court denied Carroll's request for a $35,000 setoff to compensate the estate for personal property taken by Church and ordered Carroll to immediately pay to Church $94,000 plus prejudgment interest running from the date of Decedent's death. These cross-appeals followed.

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[3] Decedent's mother had died a few years before Decedent died.

[4] The specific provisions governing administration of an estate under the continuing authority of the court are in S.C. Code Ann. §§ 62-3-501 to -505 (2009).

ISSUES ON APPEAL

1. Did the circuit court err in failing to remove Carroll as personal representative of Decedent's estate when Carroll allegedly misrepresented the value of estate assets and engaged in self-dealing?

2. Did the circuit court err in concluding that Church was not entitled to relief under the theory of constructive trust when Carroll and Ted allegedly engaged in self-dealing concerning an asset that should have been included in the estate?

3. Did the circuit court err in concluding that Church was not entitled to relief in quantum meruit when she conferred a benefit on the estate?

4. Did the circuit court violate Rule 52(a), SCRCP, by failing to make separate findings of fact as to each issue?

5. Did the circuit court err in failing to allow a $35,000 setoff against the $100,000 bequest to Church to compensate the estate for personal property she kept?

6. Did the circuit court err in awarding prejudgment interest to Church?

STANDARD OF REVIEW

The standard of review applicable to cases originating in the probate court and removed to circuit court is controlled by whether the underlying cause of action is at law or in equity. Blackmon v. Weaver, 366 S.C. 245, 248-49, 621 S.E.2d 42, 43-44 (Ct. App. 2005). "When legal and equitable causes of action are maintained in one suit, the court is presented with a

divided scope of review." Id. "On appeal from an action at law that was tried without a jury, the appellate court can correct errors of law, but the findings of fact will not be disturbed unless found to be without evidence which reasonably supports the judge's findings." Id. "In an equitable action tried without a jury, the appellate court can correct errors of law and may find facts in accordance with its own view of the preponderance of the evidence." Id.

In the present case, the causes of action for removal of a personal representative, constructive trust, quantum meruit, and setoff are equitable causes of action. See Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 466, 684 S.E.2d 756, 764 (2009) (stating that quantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy); Lollis v. Lollis, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987) (holding that an action to declare a constructive trust is in equity); W. M. Kirkland, Inc. v. Providence Washington Ins. Co., 264 S.C. 573, 580, 216 S.E.2d 518, 521 (1975) (stating that a setoff belongs to the inherent power of a court in the exercise of its equitable jurisdiction); Blackmon, 366 S.C. at 248, 621 S.E.2d at 43 (holding that an action to remove a personal representative is equitable in nature).

Our equitable standard of review does not require this court to ignore the findings of the trial judge who heard the witnesses. Thomas v. Mitchell, 287 S.C. 35, 38, 336 S.E.2d 154, 155 (Ct. App. 1985). Decisions relative to the veracity and credibility of witnesses can best be made by the trial judge who heard the witnesses and observed their demeanor. Id.

LAW/ANALYSIS

I. Church's Appeal

A. Removal of Personal Representative

Church assigns error to the circuit court's failure to remove Carroll as personal representative of Decedent's estate. She asserts that Carroll willfully misrepresented the value of estate assets and engaged in self-dealing. In

particular, she argues that after Carroll and Ted purchased Decedent's interests in some of their real estate partnerships, they sold the partnership assets for much more than the value they had assigned to them for purposes of purchasing Decedent's interests. We find no malfeasance.

Section 62-3-611 of the South Carolina Code (2009) provides for the removal of an estate's personal representative for cause:

> (a) A person interested in the estate may petition for removal of a personal representative for cause at any time. . . .
>
> (b) Cause for removal exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office. . . .

(emphases added).

"[T]here is a strong deference shown to the personal representative chosen by the testator." Blackmon, 366 S.C. at 251, 621 S.E.2d at 45. "'The [c]ourts have ever been reluctant to take the management of an estate from those to whom it has been confided by the testator, for to that extent the intention expressed in his will would be defeated.'" Id. (quoting Smith v. Heyward, 115 S.C. 145, 164, 105 S.E. 275, 282 (1920)). "The power to remove a personal representative 'should be [exercised] with great caution, and not at all, unless it is made to appear to be necessary for the protection of the estate, to prevent loss or injury to it from misappropriation,

maladministration or fraud.'" Id. (quoting Smith, 115 S.C. at 164-65, 105 S.E. at 282).

We find no credible evidence of malfeasance on the part of Carroll. Additionally, Respondents' certified public accountant testified that it is a normal practice to pay capital account value for a decedent's small interest in a real estate partnership, as Carroll and Ted did when they paid for Decedent's 7.14 percent interest in one of their partnerships. Respondents also presented testimony showing that some of the assets of the partnerships in which Decedent had an interest increased in value after Decedent's death.

Based on the foregoing, we affirm the circuit court's rejection of Church's request to remove Carroll as personal representative.

B. Constructive Trust

Church argues that funds generated from Carroll's and Ted's alleged improper self-dealing should be considered held in a constructive trust from which Church should be compensated for her contributions to the McGee family's six-plex apartments. We disagree.

> A constructive trust results "[whenever] circumstances under which property was acquired make it inequitable that it be retained by the one holding legal title. These circumstances include fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution."

Macaulay v. Wachovia Bank of S.C., N.A., 351 S.C. 287, 294, 569 S.E.2d 371, 375 (Ct. App. 2002) (quoting Hendrix v. Hendrix, 299 S.C. 233, 235, 383 S.E.2d 468, 469 (Ct. App. 1989)).

For the reasons stated in the discussion of Church's request to remove Carroll as personal representative, we believe the preponderance of the

evidence supports the circuit court's finding that there was no malfeasance on Carroll's part. Therefore, we affirm the circuit court's rejection of Church's constructive trust claim.

C. Quantum Meruit

Church contends that the circuit court erroneously denied her quantum meruit claim. She maintains that the evidence shows she expected to be compensated when she rendered caregiving services to Decedent. We disagree.

In Myrtle Beach Hospital, Inc. v. City of Myrtle Beach, our supreme court adopted the following standard for a claim of compensation in quantum meruit: (1) a benefit conferred by the plaintiff upon the defendant; (2) the realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value. 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000). In Sauner v. Public Service Authority of South Carolina, the supreme court specified that the benefit conferred must be nongratuitous. 354 S.C. 397, 409, 581 S.E.2d 161, 167-68 (2003). The "nongratuitous" requirement may also be found in prior case law discussing compensation for caregiving services. See In re Limehouse's Estate, 198 S.C. 15, 21, 16 S.E.2d 1, 4 (1941) (holding that services rendered gratuitously cannot afterwards be converted into a charge).

Here, Church disputes the circuit court's finding that her love for Decedent was the only reason she performed services for him. However, her own testimony supports this finding. Because the testimony shows that Church's services were gratuitous, her quantum meruit claim must fail.

D. Rule 52(a), SCRCP

Church argues that the circuit court committed reversible error in failing to make specific findings of fact in violation of Rule 52(a), SCRCP. We disagree.

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon[.]" Rule 52(a), SCRCP. However, "[t]he rule is directorial in nature[,] so 'where a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding.'" In re Treatment and Care of Luckabaugh, 351 S.C. 122, 131, 568 S.E.2d 338, 342 (2002) (quoting Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 123-24 (1991)). "We do not require a lower court to set out findings on all the myriad factual questions arising in a particular case." Luckabaugh, 351 S.C. at 133, 568 S.E.2d at 343. "But the findings must be sufficient to allow this Court, sitting in its appellate capacity, to ensure the law is faithfully executed below." Id.

Church lists seven items that she contends are factual issues on which the circuit court erroneously failed to make findings of fact. The only one of these items that is not addressed in the circuit court's order is the following: "The refusal to grant an adverse inference and to question the credibility of Ted O. McGee, Jr. who avoided testifying at the final hearing by leaving and not being subject to subpoena . . . ." We do not believe that the circuit court was required to make an explicit finding of fact concerning its assessment of Ted's credibility. See Luckabaugh, 351 S.C. at 131, 568 S.E.2d at 342 (holding that when a trial court adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit factual finding).

Based on the foregoing, we do not believe the circuit court violated Rule 52(a), SCRCP.

II. Respondents' Appeal

A. Setoff

Respondents argue that the circuit court erred in failing to award them a setoff in an amount to compensate for the personal property Church kept. We disagree. Church testified that the items she took were either gifts from Decedent or purchased with their jointly owned funds. We defer to the circuit court's assessment of Church's credibility on this issue. See Thomas, 287 S.C. at 38, 336 S.E.2d at 155 (holding that decisions relative to the veracity and credibility of witnesses can best be made by the trial judge who heard the witnesses and observed their demeanor). Therefore, the circuit court's denial of a setoff for $35,000 is affirmed.

B. Prejudgment Interest

Respondents assert that the circuit court erred in awarding prejudgment interest because the standard for awarding prejudgment interest was not met in this case. They also argue that Church's "claim" for the $100,000 bequest did not arise on the date of Decedent's death as the circuit court concluded. We agree.

As an initial matter, Church contends that Respondents did not preserve for appellate review their grounds for assigning error to the award of prejudgment interest. Respondents assert that counsel's objection to the introduction of evidence concerning prejudgment interest sufficiently preserved for review the arguments presented on appeal and that the circuit court in essence ruled on these arguments. We agree.

Post-trial motions are not necessary to preserve issues that have already been ruled on; they are used to preserve those that have been raised to the trial court but not yet ruled on by it. Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998). Here, the circuit court's ruling that Church was entitled to prejudgment interest implied by necessity that she met the standard

for an award of prejudgment interest. Further, the circuit court's ruling that the interest would start running as of the date of Decedent's death implied that Church's claim arose on that date. Therefore, the grounds presented on appeal are preserved for review. Cf. Spence v. Wingate, 381 S.C. 487, 489-90, 674 S.E.2d 169, 170 (2009) (holding that the issue of a duty based on the existence of a prior attorney-client relationship was preserved for review because the trial court's order addressed the plaintiff's argument by ruling that the defendants "owed no duty or obligation" to the plaintiff and therefore the plaintiff was not required to file a Rule 59(e) motion to preserve the issue).

Moving on to the merits of the issue, prejudgment interest may be awarded pursuant to section 34-31-20(A) of the South Carolina Code (Supp. 2009) in the following cases:

> In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum.

Our supreme court has interpreted section 34-31-20(A) as follows:

> The law permits the award of prejudgment interest when a monetary obligation is a sum certain, or is capable of being reduced to certainty, accruing from the time payment may be demanded either by the agreement of the parties or the operation of law. Generally, prejudgment interest may not be recovered on an unliquidated claim in the absence of agreement or statute. The fact that the amount due is disputed does not render the claim unliquidated for purposes of awarding prejudgment interest. Rather, the proper test is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose.

Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 58, 691 S.E.2d 135, 154 (2010) (citations and internal quotation marks omitted) (emphasis added).

The question in the present case is whether the measure of recovery for the $100,000 bequest was fixed by conditions existing at the time the claim arose. To answer this question, this court must first determine when the claim arose,[5] and then decide if the measure of recovery was fixed by conditions existing at that time. Church maintains that the measure of recovery was fixed in time at Decedent's death and that Respondents have not provided proof showing otherwise. We disagree.

The point in time that a claim for the object of a bequest arises necessarily depends on when the legatee has a legal right to it. See Black's Law Dictionary 281 (9th ed. 2009) (defining "claim" as the aggregate of operative facts giving rise to a right enforceable by a court). Under the South Carolina Probate Code, a legatee has a legal right to the object of the bequest only when and if the estate has sufficient assets after all debts and expenses of administration have been paid. Section 62-3-101 of the South Carolina Code (2009) provides in pertinent part:

> Upon the death of a person, his real property devolves to the persons to whom it is devised by his last will . . . or in the absence of testamentary disposition, to his heirs . . . subject to the purpose of satisfying claims as to exempt property rights and the rights of creditors, and the purposes of administration

[5] The use of the term "claim" should not be confused with the claim that a creditor makes against the estate under the Probate Code. See S.C. Code Ann. §§ 62-3-801 to -816 (2009) (addressing creditors' claims against an estate). In the above discussion, the use of the term "claim" merely refers to Church's legal right to take possession or title to the property bequeathed to her in Decedent's will.

> . . . and his personal property devolves, first, to his personal representative, for the purpose of satisfying claims as to exempt property rights and the rights of creditors, and the purposes of administration . . . . and, at the expiration of three years after the decedent's death, if not yet distributed by the personal representative, his personal property devolves to those persons to whom it is devised by will or who are his heirs in intestacy, or their substitutes, as the case may be, just as with respect to real property.

(emphases added); see also S.C. Code Ann. § 62-3-711 (2009) (allowing a personal representative to apply personal property in the estate to the benefit of creditors); S.C. Code Ann. § 62-3-805 (2009) (setting forth payment priorities in the event that the estate's assets are insufficient to pay all creditors' claims in full). It is evident from a reading of section 62-3-101 that generally, a personal representative has up to three years after the decedent's death to distribute personal property to legatees.

Here, Decedent died on January 12, 2003. Pursuant to section 62-3-101, the $100,000, if left in the estate, could have devolved to Church, at the latest, on or about January 12, 2006, three years after Decedent's death. However, in the interim, Church initiated this litigation, and, therefore, administration of Decedent's estate is ongoing. Section 62-3-101 provides that the devolution of a decedent's property to a legatee is subject to a personal representative's power to shift title to himself where required in administration and to protect the rights of creditors or others. Whether justified or not, this very litigation has delayed the closing of the estate and has created additional expenses for the estate's administration.

Based on the foregoing, Church's "claim" for the $100,000 bequeathed to her has not yet arisen because its payment takes a back seat to the rights of creditors, taxing authorities, and expenses of administration, which have not yet been finally determined. Because the claim is not yet "due," it does not fall within the terms of section 34-31-20(A) authorizing prejudgment interest.

Therefore, the circuit court's award of prejudgment interest was inappropriate and should be reversed.

CONCLUSION

Accordingly, we **REVERSE** the award of prejudgment interest, **AFFIRM** the circuit court on the remaining assignments of error, and **REMAND** for further proceedings consistent with this opinion.

FEW, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Leslie M. Long, Respondent,

v.

Sealed Air Corporation, Employer, Liberty Insurance Corporation, Carrier, Appellants.

Appeal From Oconee County
Thomas A. Russo, Circuit Court Judge

Opinion No. 4783
Heard September 16, 2010 – Filed January 26, 2011

APPEAL DISMISSED

Jeffrey S. Jones, of Greenville, for Appellants.

R. Scott Dover, of Pickens, for Respondent.

FEW, C.J.: Leslie Long commenced this workers' compensation action alleging an injury to her cervical spine while working for Sealed Air Corporation. The single commissioner held Long failed to report the injury within ninety days as required by section 42-15-20 of the South Carolina Code (Supp. 2010). An appellate panel of the Workers' Compensation Commission affirmed. Initially, the circuit court affirmed. However, Long filed a motion for reconsideration, which the circuit court granted. In its

reconsideration order, the circuit court found Long complied with the notice requirement, reversed the appellate panel, and remanded "for further investigation." Sealed Air and its carrier Liberty Insurance Corporation appeal the circuit court's order. We dismiss the appeal because the circuit court's order is not immediately appealable.

In Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994), our supreme court dismissed an appeal from a circuit court order remanding to the Workers' Compensation Commission and stated "we have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable." 316 S.C. at 52, 446 S.E.2d at 618. In Leviner v. Sonoco Products Co., 339 S.C. 492, 530 S.E.2d 127 (2000), the supreme court cited Montjoy in dismissing a circuit court order remanding to the commission even though the supreme court characterized the order as "final." The court stated: "While final, this order was not directly appealable since it remanded the matter to the single commissioner for further proceedings." 339 S.C. at 494, 530 S.E.2d at 128. As we have been required to do, this court has consistently followed Montjoy when deciding the appealability of circuit court orders in workers' compensation cases. See, e.g., Foggie v. Gen. Elec., 376 S.C. 384, 388, 656 S.E.2d 395, 398 (Ct. App. 2008) (quoting above passage from Montjoy in holding remand order unappealable).

However, we have distinguished Montjoy in limited situations, which are not applicable on the facts of this case. In Hicks v. Piedmont Cold Storage, Inc., 324 S.C. 628, 479 S.E.2d 831 (Ct. App. 1996),[1] this court found the circuit court's order remanding to the commission appealable because "additional proceedings [were] not required . . . ." 324 S.C. at 632 n.2, 479 S.E.2d at 834 n.2. Noting the "order remanded the case merely for a mathematical calculation of death benefits, rather than for any judgment on the merits," this court stated "further proceedings on remand are purely

[1] This court also distinguished Montjoy in Brown v. Greenwood Mills, Inc., 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005). We discuss Brown below in light of the supreme court's recent decision in Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health & Environmental Control, 387 S.C. 265, 692 S.E.2d 894 (2010).

ministerial and do not require the exercise of independent judgment or discretion on the part of the commission." Id.

In this case, the commission's finding that Long did not report the injury within the statutory notice period ended the action. Under the circuit court's order in this case, the commission must determine on remand whether the injury occurred during the scope and course of employment, set the claimant's average weekly wage and compensation rate, and answer other questions which may arise. Therefore, we find no basis on which to distinguish Montjoy as we did in Hicks. Rather, we find the commission must conduct additional proceedings before a final judgment is reached. Thus, Montjoy controls, and this order is not appealable.

We find support for this conclusion in the recent decision of Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health & Environmental Control, 387 S.C. 265, 692 S.E.2d 894 (2010). In Charlotte-Mecklenburg, the supreme court dismissed an appeal from the Administrative Law Court because its order was "not a final decision which is immediately appealable under [section] 1-23-610 [of the South Carolina Code (Supp. 2010)]." 387 S.C. at 267, 692 S.E.2d at 895. The court held that the general appealability provisions in section 14-3-330 of the South Carolina Code (1976), which sometimes allow appeal of interlocutory orders, are "inapplicable" because section 1-23-610 is a more specific statute and "limits review to final decisions of the ALC." 387 S.C. at 266, 692 S.E.2d at 894. The reasoning of Charlotte-Mecklenburg applies to appeals from the Workers' Compensation Commission, which are governed by section 1-23-380 of the South Carolina Code (Supp. 2010). Like its ALC counterpart relied on in Charlotte-Mecklenburg, section 1-23-380 is a more specific statute that limits review to "a final decision . . . ." Id.[2] Under the reasoning of Charlotte-Mecklenburg and in light of section 1-23-380, the general appealability provisions of section 14-3-330 are "inapplicable" to the extent they "permit the appeal of interlocutory orders of . . . an administrative agency." 387 S.C. at 266, 692 S.E.2d at 894.

[2] See also S.C. Code Ann. § 1-23-390 (Supp. 2010) (providing for review of a "final judgment" of the circuit court).

Further, Charlotte-Mecklenburg specifically overruled two decisions of this court in which we found interlocutory orders appealable under section 14-3-330. 387 S.C. at 266, 692 S.E.2d at 894. The court stated:

> To the extent Canteen v. McLeod Regional Medical Center, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009) and Oakwood Landfill, Inc. v. South Carolina Department of Health and Environmental Control, [381] S.C. 120, 671 S.E.2d 646 (Ct. App. 2009) rely on § 14-3-330 to permit the appeal of interlocutory orders of the ALC or an administrative agency, those cases are overruled.

387 S.C. at 266, 692 S.E.2d at 894. Canteen is an appeal from the Workers' Compensation Commission, 384 S.C. at 619, 682 S.E.2d at 504, and Oakwood Landfill is an appeal from the Board of the Department of Health and Environmental Control reviewing the decision of the ALC. 381 S.C. at 127, 671 S.E.2d at 650. In Canteen we quoted at length from this court's opinion in Brown v. Greenwood Mills, Inc., 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005). We relied on Brown in finding the order appealable, stating "we find this case is similar to . . . Brown because the Appellate Panel finally determined the brain injury issue on the merits by denying compensation for Canteen's brain injury."[3] Canteen, 384 S.C. at 624, 682 S.E.2d at 507. As Canteen is based on the same reasoning as Brown, the supreme court's decision in Charlotte-Mecklenburg expressly overruling Canteen is at least an implicit rejection of Brown. In light of Charlotte-Mecklenburg, we can find no basis on which to distinguish any decisions, including Brown,[4] which rely

[3] We also relied on Green v. City of Columbia, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993) (holding an interlocutory order appealable because it "involved the merits," without specifically mentioning section 14-3-330), decided before Montjoy.

[4] We acknowledge that Brown does not specifically mention section 14-3-330. However, the Brown court's holding that the appealed order is a "final judgment" under section 1-23-390 is based on a finding that the order "involves the merits," a concept that is relevant only under section 14-3-330.

on section 14-3-330 in finding a decision of the commission appealable. Accordingly, we believe the supreme court has effectively overruled Brown, and we will no longer apply it.

In this case, the order on appeal remands the case to the commission for additional proceedings. Accordingly, it is not a final judgment and the order is not immediately appealable. The order may be appealed after final judgment.

APPEAL DISMISSED.

HUFF, J. concurs.

GEATHERS, J. (dissenting): Respectfully, I dissent. The majority dismisses this appeal on the ground that the circuit court's order is interlocutory. I disagree because I believe the circuit court's decision touches upon the merits and therefore constitutes a final judgment for purposes of our jurisdiction over a workers' compensation appeal. For a complete understanding of our jurisdiction in this matter, it is necessary to begin with the governing statute, S.C. Code Ann. § 1-23-390 (Supp. 2010), and then to trace the evolution of published opinions interpreting this statute.

Section 1-23-390 states:

> An aggrieved party may obtain a review of a final judgment of the circuit court or the court of appeals pursuant to this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases.

(emphasis added). Our supreme court quoted this statute in its opinion in Montjoy v. Asten-Hill Dryer Fabrics; however, in determining if the circuit court's order was appealable, the supreme court focused only on whether the order included language remanding the case for additional proceedings. 316

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366 S.C. at 387, 622 S.E.2d at 551. Therefore, we believe Brown relies on section 14-3-330.

S.C. 52, 446 S.E.2d 618 (1994). The court did not expressly evaluate the nature of the issues raised on appeal. Id. Under section 1-23-390, it was logical for our supreme court to hold that a circuit court ruling remanding a case to the Commission was not immediately appealable when the appeal challenged only the propriety of the remand. See Owens v. Canal Wood Corp., 281 S.C. 491, 491-92, 316 S.E.2d 385 (1984); Hunt v. Whitt, 279 S.C. 343, 343-44, 306 S.E.2d 621, 622 (1983). Such an appeal does not involve the merits of the case. On the other hand, a circuit court ruling on the merits has finality with respect to the issue decided and will become the law of the case if it is not immediately appealed.[5] Therefore, it is untenable to label such a ruling as interlocutory merely because it is accompanied by language remanding the case for further proceedings.

More recent published precedent, beginning with Brown v. Greenwood Mills, Inc., has carefully scrutinized the language in remand orders, recognizing the benchmark set forth by Montjoy's predecessors—whether an order "involves the merits"— and thus reaffirming the legislative intent behind the term "final judgment" as set forth in section 1-23-390:

> The question here is whether the circuit court order is a "final judgment" under section 1-23-390. Generally, an order is a final judgment on one or more issues if it constitutes an ultimate decision on the merits. In Owens v. Canal Wood Corp., 281 S.C. 491, 316 S.E.2d 385 (1984), one of the two cases cited by the Montjoy court,[6] the supreme court found the order of the circuit court does not involve the merits of the action. It is therefore interlocutory and not reviewable by this Court for lack of finality.

[5] Cf. McLendon v. S.C. Dep't of Highways & Pub. Transp., 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994) (interpreting S.C. Code Ann. § 14-3-330 (1976 & Supp. 1993) and holding that, like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings and, therefore, is not directly appealable).

[6] Montjoy, 316 S.C. at 52, 446 S.E.2d at 618.

> Similarly, in Hunt v. Whitt, 279 S.C. 343, 306 S.E.2d 621 (1983), the supreme court held that because the interlocutory order of the circuit court does not involve the merits of the action, it is not reviewable by this Court for lack of finality. Accordingly, in determining whether the court's order constitutes a final judgment, we must inquire whether the order finally decides an issue on the merits. An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case.

366 S.C. 379, 387, 622 S.E.2d 546, 551 (Ct. App. 2005) (internal citations and quotation marks omitted) (emphasis added); see also Foggie v. Gen. Elec. Co., 376 S.C. 384, 389, 656 S.E.2d 395, 398 (Ct. App. 2008) ("[W]here the circuit court's order constitutes a final decision on the merits and the remand order has no effect on the finality of the decision, the order is immediately appealable.") (emphases added).

This court followed the same analysis in Mungo v. Rental Uniform Service of Florence, Inc.:

> This Court has held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable. However, if the circuit court's order is a final judgment, then it is immediately appealable. Generally, an order is a final judgment on one or more issues if it constitutes an ultimate decision on the merits. An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case.

383 S.C. 270, 277-78, 678 S.E.2d 825, 829 (Ct. App. 2009) (internal citations and quotation marks omitted) (emphases added).[7] The more recent interpretation of section 1-23-390 in Brown and Mungo properly carries out the legislature's intent because allowing an immediate appeal of any ultimate decision on the merits gives the appellant an opportunity to prevent the decision from becoming the law of the case. See Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) ("We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention."); Foggie, 376 S.C. at 391, 656 S.E.2d at 399 (Pieper, J., dissenting) ("[T]he circuit court did not merely remand for further proceedings, but finally determined the defense of set-off or credit that ultimately will be binding on the parties and the Commission on remand.") (emphasis added).

In comparison to section 1-23-390, section 14-3-330(1) implicitly recognizes the danger of a ruling on the merits becoming the law of the case. Subsection (1) of section 14-3-330 allows the appellate court to review a ruling involving the merits when it is not appealed until final judgment is entered on the entire case:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions,

[7] The Mungo court found the circuit court's order, which reversed conclusions that the claimant had not proven a change of condition or entitlement to psychological benefits, was a "final judgment," despite the fact that it remanded the case to the single commissioner to determine the precise benefits owed to the claimant. 383 S.C. at 278, 678 S.E.2d at 829. The order decided "with finality whether [the] [c]laimant proved these changes in her condition" and, therefore, it was a "decision on the merits." Id. Notably, the supreme court denied certiorari in this case on April 8, 2010.

> brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided,* that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from[.]

Although section 1-23-390 has no such safeguard, in Brunson v. American Koyo Bearings, this court recognized the similarities between the application of 14-3-330 and that of statutes governing administrative law matters:

> South Carolina adheres to the final judgment rule. Accordingly, with certain exceptions, an appeal lies only from a final judgment. By statute, an appeal from an interlocutory order is permitted in certain circumstances, including when the order is one involving the merits ... [or] affecting a substantial right. Appeals from administrative bodies, such as the Workers' Compensation Commission, follow the same rules, such that an appeal will not lie from an interlocutory order of the Commission unless the order affects the merits or deprives the appellant of a substantial right. Orders from the Commission remanding a case to the single commissioner for further proceedings generally do not affect the merits and are not considered final.

367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005) (citations and quotation marks omitted) (emphases added).

In the present case, the majority relies on the supreme court's opinion in Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health and Environmental Control, 387 S.C. 265, 692 S.E.2d 894 (2010), for the proposition that Brown is no longer good law. The majority reasons that because Charlotte-Mecklenburg overruled Canteen v. McLeod Regional Medical Center, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009) and because

Canteen relied on the analysis in Brown, Charlotte-Mecklenburg implicitly rejected Brown. Significantly, our supreme court denied certiorari in Brown; and, on the same day the court issued its opinion in Charlotte-Mecklenburg, it denied certiorari in Mungo, specifically declining to address this court's analyses in Brown and Mungo when it had the opportunity to do so.

Further, the Charlotte-Mecklenburg opinion states that the opinions in Canteen and Oakwood Landfill, Inc. v. South Carolina Department of Health and Environmental Control are overruled only to the extent that they rely on section 14-3-330 to permit the appeal of an administrative agency's interlocutory order:

> To the extent Canteen v. McLeod Reg'l Med. Ctr., 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009) and Oakwood Landfill, Inc. v. S.C. Dep't of Health and Envtl. Control, 381 S.C. 120, 671 S.E.2d 646 (Ct. App. 2009), rely on § 14-3-330 to permit the appeal of interlocutory orders of the ALC or an administrative agency, those cases are overruled.

387 S.C. at 266, 692 S.E.2d at 894 (emphases added). Therefore, to the extent that Canteen and Oakwood do not rely on section 14-3-330, they are still good law. This includes their reliance on the definition of "final judgment" enunciated in Brown.

Because appeals from administrative bodies follow the same basic analysis in determining whether a ruling constitutes a "final judgment,"[8] it is safe to assume that Brown and those workers' compensation opinions citing Brown do not incorrectly rely on section 14-3-330, but rather those opinions properly rely on section 1-23-390 and simply follow the same jurisprudence employed to interpret section 14-3-330. In fact, Brown does not cite section 14-3-330, but explicitly cites section 1-23-390 and defines the term "final judgment" as used in that statute.[9] Charlotte-Mecklenburg, on the other

[8] Brunson, 367 S.C. at 165, 623 S.E.2d at 872.

[9] The majority contends that Brown found a decision of the Commission appealable and that Brown relied on section 14-3-330. This is inaccurate.

hand, does not address the appealability of a circuit court order under section 1-23-390, but rather examines the appealability of an administrative agency's order under another statute.

Applying our published case law interpreting section 1-23-390 to the present case, I would hold the circuit court's decision that Claimant gave timely notice of her accidental injury to Employer is the type of judgment that is an ultimate decision on the merits because it finally determines some substantial matter forming a defense available to Sealed Air. See Brown, 366 S.C. at 387, 622 S.E.2d at 551 ("An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case."). This is a final decision on the merits, and the remand language in the order has no effect on the finality of that decision. See Foggie, 376 S.C. at 389, 656 S.E.2d at 398 ("[W]here the circuit court's order constitutes a final decision on the merits and the remand order has no effect on the finality of the decision, the order is immediately appealable.").

The circuit court's order does not allow the Commission to pursue the issue of notice any further, and thus the decision is the law of the case unless immediately appealed. In other words, because the circuit court obviously meant for its decision on the issue of notice to be binding on the parties, it will become the law of the case if it is not immediately appealed. Cf. McLendon, 313 S.C. at 526 n.2, 443 S.E.2d at 540 n.2 (interpreting section 14-3-330 and holding that, like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings and, therefore, is not directly appealable); Foggie, 376 S.C. at 391, 656 S.E.2d at 399 (Pieper, J., dissenting) ("[T]he circuit court did not merely remand for further proceedings, but finally determined the defense of set-off or credit that ultimately will be binding on the parties and the Commission on remand.") (emphasis added). In enacting section 1-23-390,

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Brown found a decision of the circuit court appealable under section 1-23-390. Significantly, Brown also relied on case law cited by our supreme court in Montjoy to interpret 1-23-390. See Brown, 366 S.C. at 387, 622 S.E.2d at 551 (noting that the two cases cited by Montjoy determined appealability according to whether the order in question involved the merits).

the legislature could not have possibly intended to preclude the immediate appeal of a determination that will otherwise become the law of the case when such a result would deny parties to administrative proceedings a meaningful opportunity to be heard.

Accordingly, I would address the merits of the instant case.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jimmy Lee Duncan, Appellant/Respondent,

v.

The State, Respondent/Appellant.

Appeal From Colleton County
John C. Hayes, III, Circuit Court Judge

Opinion No. 4784
Submitted October 1, 2010 – Filed January 26, 2011

DISMISSED IN PART, REVERSED IN PART, AND REMANDED

Appellate Defender Robert M. Pachak, of Columbia, for Appellant/Respondent.

J. Benjamin Aplin, of Columbia, for Respondent/Appellant.

PER CURIAM: Jimmy Lee Duncan pled guilty to first-degree criminal sexual conduct (CSC) with a minor in 2000. The trial court sentenced him to fifteen years' imprisonment, suspended upon five years'

probation. In 2003, Duncan pled guilty to third-degree burglary, and the trial court sentenced him to five years' imprisonment, revoked his probation for the first-degree CSC with a minor conviction, and reinstated seven years of his fifteen-year CSC sentence. Upon his release in February 2008, Duncan began a community supervision program (CSP). In July 2008, the trial court revoked Duncan's CSP because he willfully violated the terms of his CSP and ordered him to serve 127 days' imprisonment. In addition, the trial court ordered Duncan to wear an active electronic monitoring device[1] when he resumed probation. In November 2008, a probation revocation hearing was held at which the trial court continued Duncan on probation, finding because Duncan was indigent, he did not willfully violate the conditions of his probation by failing to pay his fine. The trial court also imposed the standard sex offender conditions to Duncan's probation and terminated Duncan's electronic monitoring.

Duncan appeals the trial court's decision to add the sex offender conditions to the conditions of his probation. Duncan's counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), stating he reviewed the record and concluded this appeal lacked merit and asking to be relieved as counsel. After a thorough review of the record and counsel's brief pursuant to Anders v. California, 386 U.S. 738 (1967), and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss[2] the Anders appeal and grant counsel's petition to be relieved.

The State cross-appeals, arguing the trial court erred in terminating Duncan's electronic monitoring. We agree.

A person convicted of first-degree CSC with a minor must be monitored with an active electronic monitoring device by the Department of Probation, Parole and Pardon Services (the Department) upon release from incarceration, confinement, commitment, institutionalization, or when placed under the supervision of the Department. S.C. Code Ann. § 23-3-540(A)

[1] Electronic monitoring is often referred to as global positioning system (GPS) monitoring.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

(Supp. 2009). Additionally, a person convicted of first-degree CSC with a minor "who violates a [CSP] must be ordered by the court or agency with jurisdiction to be monitored by [the Department] with an active electronic monitoring device." S.C. Code Ann. § 23-3-540(C) (Supp. 2009) (emphasis added); see also S.C. Code Ann. § 23-3-540(E) (Supp. 2009) (noting electronic monitoring is required for a person with a conviction for first-degree CSC with a minor who violates any provision of the electronic monitoring statute). Further, section 23-3-540(H) of the South Carolina Code (Supp. 2009) requires the person to be monitored "for the duration of the time the person is required to remain on the sex offender registry [(the Registry)] . . . unless the person is committed to the custody of the State." An offender is required to register for the Registry biannually for life. S.C. Code Ann. § 23-3-460(A) (Supp. 2009). An offender may petition for termination of electronic monitoring after ten years from the date the electronic monitoring begins, and if denied, the offender may refile a petition for removal every five years from the date the court denies the petition or refuses to grant the order. § 23-3-540(H).

We find the trial court erred in terminating Duncan's electronic monitoring. Although section 23-3-540 was enacted after Duncan's conviction, Duncan was subject to electronic monitoring because he violated the terms of his CSP for his first-degree CSC with a minor conviction after the enactment of the statute. See § 23-3-540(C). Here, Duncan's CSP was revoked in July 2008. Furthermore, the trial court did not have the discretion to terminate Duncan's electronic monitoring because electronic monitoring is required "for the duration of the time the person . . . remain[s] on the [Registry]." See § 23-3-540(H). Accordingly, the trial court erred in terminating Duncan's electronic monitoring, and we remand the case to the trial court to reinstate the initial trial court's order requiring electronic monitoring.

For the foregoing reasons, the decision of the trial court is

DISMISSED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS, PIEPER, and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Wesley Smith, Appellant.

Appeal From Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 4785
Heard September 16, 2010 – Filed January 26, 2011

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Christina Catoe, all of Columbia; and Solicitor John Gregory Hembree, of Conway; for Respondent.

FEW, C.J.: Wesley Smith was convicted of aiding and abetting homicide by child abuse against his four-month-old daughter, Ebony. The trial judge sentenced him to twenty years. Smith raises two primary issues on appeal. First, he claims the judge committed error in admitting evidence of a prior incident of child abuse against Ebony. He also contends the judge erred in allowing the State to proceed under the aiding and abetting section of the homicide by child abuse statute. We affirm.

I. Facts

Ebony Kiandra Smith died on February 14, 2004, from a combination of an overdose of four times the adult therapeutic level of pseudoephedrine[1] and blunt force trauma to her chest. Her death culminated a four month saga of abuse and neglect for Ebony. Charlene Dandridge, Ebony's mother and Wesley Smith's live-in girlfriend, left Ebony at home with Smith that day while she went to work. Other than Dandridge's brief return home for lunch, the child was in Smith's sole custody the entire day. Smith was indicted for homicide by child abuse as a principal under section 16-3-85(A)(1) of the South Carolina Code (2003).

At trial, the State proved the history of Ebony's abuse. The State established through medical witnesses that Ebony had seventeen broken ribs at the time of her death. The pathologist testified that the rib fractures were "really classic for squeezing type of injury" caused by child abuse. Through a microscopic examination of each individual rib fracture, the pathologist determined by the extent of healing that the fractures had occurred between ten days and three weeks before Ebony's death.[2] The pathologist also found evidence of hemorrhaging over some of the fractures indicating new injuries at the site of the fractures that occurred approximately 24 hours before Ebony's death. The doctor testified that the older fractures resulted from

[1] Pseudoephedrine is a decongestant found in over-the-counter products such as Sudafed. It is not permitted to be given to children under the age of two.

[2] A radiologist testified that X-rays taken on January 15 showed no rib fractures.

squeezing, but the more recent injuries could have resulted from squeezing or striking. The pathologist testified: "It's inflicted trauma. . . . [T]here's no way that this occurred accidentally or naturally, no way whatsoever."

The State proved that Smith was Ebony's primary caretaker and that he was around her on a constant basis. From January 15 until the day of her death, the only adults with access to Ebony were Smith, Dandridge, and Smith's mother and father who saw Ebony on the weekends. On the day of her death, the only people who saw Ebony were Smith, Dandridge, and Dandridge's other two young children.

Importantly, Smith did not object to the introduction of any of the evidence described so far, nor does he challenge the admission of that evidence on appeal. He did object, however, to the admission of evidence of a broken femur Ebony suffered in November, 2003. Dandridge came home from work one day in November to find that Ebony's leg was immobile. Smith, who had sole custody of Ebony that day, explained to Dandridge that he was napping with Ebony on his chest when he heard someone knock on the door. Smith explained the injury by telling Dandridge that, as he reacted to the knock, Ebony fell backwards with her leg still in Smith's hand. Smith and Dandridge apparently knew the leg was broken because Smith concocted a homemade splint and put it on Ebony's leg. They did not initially take Ebony to the doctor because Dandridge was afraid Ebony would be taken away from her. On December 9, they finally took Ebony to the doctor. The pediatrician who examined Ebony that day testified that her "thigh was very swollen and painful" and explained that Ebony "started to cry every time I touched her leg." The pediatrician asked Smith how the injury occurred. At first, Smith told the doctor he "had no idea," but he later gave her the same story he told Dandridge, admitting he was holding Ebony when the injury happened.

The doctor ordered X-rays which demonstrated a "spiral fracture" of Ebony's femur with callus showing the bone had been healing for at least two weeks. The radiologist who examined the X-rays on December 9 testified a spiral fracture is "a twisting type injury that causes the bone to fracture in a spiral rather than just a crack" and that a spiral fracture is typically not accidental. During the autopsy, the pathologist was able to examine the

fractured femur in greater detail. She described the spiral fracture as one caused by "a twisting, yanking motion, and that's what we see more with abusive fractures." While showing the X-ray to the jury, she described the break of Ebony's femur as "a complete break. It's going from the inner part of the thigh down towards the outer part." She described the fracture as "abusive in that this is an inflicted fracture. This is not an accidental fracture." Finally, the pathologist testified that Smith's story about how the injury occurred is "absolutely not" consistent with the medical evidence she had just described. The trial judge admitted the evidence over Smith's objection.

At the close of all the evidence, the State asked the trial judge to charge the jury that it could find Smith guilty under both subsections of the homicide by child abuse statute. The indictment alleged he was guilty as a principal under subsection 16-3-85(A)(1). The trial judge also allowed the State to proceed under subsection 16-3-85(A)(2), the aiding and abetting subsection of the statute. The jury found Smith guilty of aiding and abetting homicide by child abuse, and the judge imposed the maximum penalty of twenty years.

II. Other Crimes, Wrongs, or Acts

The rule of evidence governing the admissibility of other crimes, wrongs or acts committed by a defendant has long been a part of our jurisprudence. In 1923, in the often cited case of State v. Lyle our supreme court described it as "the familiar and salutary general rule, universally recognized and firmly established in all English-speaking countries . . . ." 125 S.C. 406, 415-16, 118 S.E. 803, 807 (1923). The rule is based on the danger that the jury will reach a guilty verdict because of the defendant's bad character and not based on the evidence of the crime for which he is currently on trial. This danger was described in Lyle:

> Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption

> of innocence. It "compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it."

125 S.C. at 416, 118 S.E. at 807 (citations omitted).

The rule is often explained in terms of "propensity," in that the rule prevents a defendant from being found guilty simply because of his propensity to commit similar crimes. "The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." Michelson v. United States, 335 U.S. 469, 475 (1948). "It is in criminal cases that the law must be the most sternly on guard against allowing the doing of an act to be proved by a propensity to do it." James F. Dreher, A Guide to Evidence Law in South Carolina 35 (South Carolina Bar 1967). "[E]vidence of other crimes, wrongs, or acts is not admissible for purposes of proving that the defendant possesses a criminal character or has a propensity to commit the charged crime." State v. Fletcher, 379 S.C. 17, 26, 664 S.E.2d 480, 484 (2008) (Toal, C.J., dissenting).

When South Carolina adopted the Rules of Evidence in 1995, the law of admissibility of evidence of other crimes, wrongs and acts was incorporated into Rule 404(b). The first sentence of Rule 404(b) focuses the court's inquiry on the purpose for which the evidence is offered. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. When other acts of the defendant are offered to prove his character in order to show that he acted in conformity with his character, the evidence is offered for the prohibited purpose of showing a propensity to commit the crime, and is therefore not admissible. See Fletcher, 379 S.C. at 26, 664 S.E.2d at 484 (explaining "why certain prior bad act testimony is inadmissible, i.e., . . ." when "the only function of [the] testimony . . . was to demonstrate . . . bad

character" which was "used by the jury to infer that the defendant did in fact commit the crime").[3]

However, Rule 404(b) recognizes exceptions to the bar against using the evidence to prove propensity. When the evidence is offered for one of the five purposes listed in the second sentence of Rule 404(b), evidence of other crimes, wrongs or acts "may . . . be admissible." The five listed purposes are "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE.

In order to introduce evidence of some other act of the defendant under one of these exceptions, the State must lay the proper foundation. First, unless the act is the subject of a criminal conviction, the State must prove by clear and convincing evidence that the defendant committed the act. Fletcher, 379 S.C. at 23, 664 S.E.2d at 483.

The second element of the foundation requires the State to articulate the logical connection between the other act and at least one of the five purposes listed as exceptions in the rule. State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). In order to meet this element, the State must explain how evidence of the other act will assist the judge or the jury in understanding some material issue in the case related to one or more of the Rule 404(b) exceptions. When the State adequately explains how the evidence of the other act logically connects to an issue in the case, it demonstrates how the judge or jury can use the evidence without using it for the prohibited purpose of inferring guilt from the defendant's propensity to commit the crime. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("Stated differently, evidence which is logically relevant to establish a material element of the offense charged is not to be excluded merely because it

[3] Fletcher was actually decided on the basis of the State's failure to prove the other acts by clear and convincing evidence. 379 S.C. at 25 n.2, 664 S.E.2d at 484 n.2 ("We need not decide whether these acts, if proven by clear and convincing evidence, would otherwise be admissible under Rule 404(b), SCRE."). The court nevertheless explained the basis for the rule excluding propensity evidence.

incidentally reveals the accused's guilt of another crime." (internal citations omitted)).

If the trial judge finds the State has met the first two elements, the judge must consider Rule 403, SCRE. State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009). Under Rule 403, the trial judge must determine whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendency of the evidence to show propensity, or by some other form of unfair prejudice. If the trial judge determines not to exclude the evidence under this Rule 403 analysis, then the State may admit it.

Turning to the facts of this case, we are satisfied the judge acted within his discretion in ruling the evidence was clear and convincing that Smith committed child abuse in connection with Ebony's broken leg. While the record does not reflect the exact manner in which the injury occurred, the State's proof that Smith was guilty of the abuse that caused it is overwhelming. Smith was the only person with Ebony when the injury occurred. Smith admitted to Dandridge and to the pediatrician that the injury occurred while he held the child in his hands. Three treating physicians along with the pathologist testified that Ebony's spiral fracture was the result of child abuse, not accident. Moreover, the State presented evidence that Smith lied to Dandridge, the doctors, and investigators from the Department of Social Services about how the child's injury occurred in order to conceal his involvement in the injury. There is ample evidence to support the judge's ruling.

We review a circuit court's determination that evidence offered pursuant to Rule 404(b) is clear and convincing under the "any evidence" standard. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (reversing the court of appeals for not applying the any evidence standard in reviewing a circuit court's determination that Rule 404(b) evidence was clear and convincing). See also State v. Wallace, 384 S.C. 428, 432 n.2, 683 S.E.2d 275, 277 n.2 (2009) ("Bad act evidence that is not subject to a conviction must be shown by clear and convincing evidence and is reviewed under an 'any evidence' standard on appeal." (citing Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829)). Because there is evidence to support the judge's ruling

that the evidence was clear and convincing, we must affirm the trial court's ruling that the State satisfied the first element.[4]

The State also satisfied the second element of the foundation by explaining how the evidence logically related to two of the exceptions listed under Rule 404(b): motive and absence of mistake. See State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998) ("The acid test of admissibility is the logical relevancy of the other crimes. The trial judge must clearly perceive the connection between the other crimes and the crimes charged."). First, the State points to the indisputable facts that the untreated broken leg was painful and that the pain would have made Ebony cry. There is ample medical testimony in the record to support this point. Second, the State presented evidence that Smith was not able to handle being around Ebony when she was crying. Third, the State presented evidence that Smith gave Ebony medicine on the day of her death, despite the fact that she had no medical condition that warranted medication. Next, the State presented expert testimony that pseudoephedrine is often improperly used to "chemically restrain" children, meaning, as the State's forensic toxicologist and drug chemist testified, to "subdue the child so that the caregiver would not have to care for the child or tend to the child, or to quiet the child in some manner."

The State summarizes its "logical connection" argument in its brief:

> The child would have been crying continually and extensively because of her injuries, beginning at the time of the first known injury – the injury to the femur – and progressing with the subsequent injuries. In light of the testimony that Appellant could not "handle" the victim's crying, the femur injury was highly relevant to show Appellant's motive for . . .

[4] Contrary to the dissent's assertion, this case is not controlled by Fletcher. The Fletcher majority states "there is simply no evidence . . . that Fletcher was the perpetrator of the prior bad acts against Jaquan." 379 S.C. at 25, 664 S.E.2d at 483-84. Because there is evidence in this case to support the trial judge's ruling, Fletcher is distinguishable.

> attempting to "chemically restrain" the child with medicine. The femur evidence was thus critical to show that the overdose was not purely a mistake or accident.

This is precisely what our courts mean when requiring a "logical connection." The State has explained how the evidence can be used by the jury to determine motive and absence of mistake without relying on propensity. The State has proven the second element of the foundation.

Finally, we believe the trial judge's ruling not to exclude the evidence under Rule 403 was within his discretion. See State v. Holland, 385 S.C. 159, 171-72, 682 S.E.2d 898, 904 (Ct. App. 2009) (stating this court gives "great deference to the trial court's judgment" under Rule 403 and that the "trial court's determination should be reversed only in exceptional circumstances"). The trial judge acknowledged the unfair prejudice of the evidence, calling it "highly prejudicial, obviously." He concluded, however, that "the probative value . . . clearly outweighs the prejudicial effect." Smith made no Rule 403 argument to the trial judge other than the conclusory statement: "I still think we have the filter of the 403, the prejudicial and probative value." Smith's argument on appeal is equally conclusory. Given the State's articulation of the logical relevance of the femur injury, and thus its probative value, the judge acted within his discretion in concluding the unfair prejudice in admitting the evidence did not substantially outweigh the probative value.

Smith argues that because the trial court relied on this court's opinion in State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (Ct. App. 2005), which was subsequently reversed by the supreme court, 379 S.C. 17, 664 S.E.2d 480 (2008), Smith's conviction must also be reversed. We disagree. The supreme court's decision in Fletcher was based on the State's failure to prove the prior acts by clear and convincing evidence, and therefore does not control the outcome of this appeal. 379 S.C. at 25, 664 S.E.2d at 483-84 ("[T]here is simply no evidence, let alone clear and convincing evidence that Fletcher was the perpetrator of the prior bad acts . . . .").

One point warrants further discussion. The trial judge made several comments as to the reasons he was admitting the evidence of Ebony's broken femur which do not fit into the analysis set out above. For example, he stated "I'm admitting it to show clearly that someone committed child abuse on this child. The jury can determine whether or not this defendant did it." To the extent this and other comments by the trial judge have been argued to indicate an improper Rule 404(b) or Rule 403 analysis, it was Smith's duty to raise those arguments before the trial judge. Because the arguments were never presented to the trial judge, they are not preserved for our review. See State v. Russell, 345 S.C. 128, 133-34, 546 S.E.2d 202, 205 (Ct. App. 2001) (finding evidentiary argument was not preserved for review because the issue was never raised to or ruled upon by the trial judge).

III. Aiding and Abetting under Section 16-3-85(A)(2)

Smith contends that the trial judge erred in allowing the State to proceed on aiding and abetting homicide by child abuse under subsection 16-3-85(A)(2) of the South Carolina Code (2003). Smith was indicted as a principal under subsection 16-3-85(A)(1), not under subsection 16-3-85(A)(2). He claims he did not have notice of, and the evidence was not sufficient to support, the aiding and abetting charge. We disagree.

Under subsection 16-3-85(A)(2), a defendant is guilty of homicide by child abuse if he "knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven." Id. "It is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense." State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (citing State v. Leonard, 292 S.C. 133, 136, 355 S.E.2d 270, 272 (1987)). Thus, the indictment charging Smith with homicide by child abuse as a principal was effective to put him on notice that the State may request to proceed on aiding and abetting homicide by child abuse as well.[5]

[5] We recognize that this situation is different from Dickman in that here the statute contains a separate aiding and abetting subsection. However, the subsection does not add any elements necessary for conviction, and therefore

We find the State presented sufficient evidence to support various theories of Smith's guilt under the aiding and abetting section. Even if the jury found the State failed to prove beyond a reasonable doubt that Smith inflicted the fatal chest injuries, or personally administered the pseudoephedrine, they could nevertheless find him guilty of aiding and abetting if they found the State proved beyond a reasonable doubt that Smith knew about the injuries or about the pseudoephedrine but failed to seek medical care for her.

IV. Remaining Issues on Appeal

Smith raises two other issues related to the trial judge's exclusion of evidence. Smith sought to cross-examine Dandridge with evidence that she could also have been charged with homicide by child abuse as a principal, in which case she would have faced life in prison rather than thirty years.[6] Though the trial judge initially sustained the State's objection to the evidence, he later changed his mind and correctly allowed Smith to bring Dandridge back to the stand. See State v. Curry, 370 S.C. 674, 678-89, 636 S.E.2d 649, 651 (Ct. App. 2006) (explaining that possible sentences co-defendant witnesses face are admissible as evidence of bias). However, Smith never offered the evidence. We find no error. Smith also claims the judge erred in excluding the testimony of a psychiatrist Smith said would testify Smith has a very low I.Q. The psychiatrist was not present when the request was made, and Smith never offered the testimony into the record. The issue is not preserved for review. See State v. Santiago, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct. App. 2006) (explaining that appellate court will not consider alleged error unless the record shows what the testimony would have been).

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is governed by the same general aiding and abetting principles considered in Dickman.

[6] The record reveals that Dandridge faced thirty years, but does not include the specific charges she faced. Had she been charged with homicide by child abuse as a principal, she would have faced a minimum of twenty years and a maximum of life in prison. S.C. Code Ann. § 16-3-85(C)(1) (2003).

V. Conclusion

We find the trial judge acted within his discretion in admitting evidence of Ebony's broken femur and did not err in allowing the State to proceed under the aiding and abetting section of the homicide by child abuse statute. Regarding the other issues, Smith's claim that the trial judge erred in excluding evidence of bias fails because the judge did not exclude the evidence. Smith's argument that the judge erred in excluding evidence of his borderline intelligence is not preserved for our review.

AFFIRMED.

HUFF, J., concurs.

GEATHERS, J. (dissenting): I respectfully dissent. I am deeply troubled by the abuse visited upon this infant victim that resulted in her untimely death. I believe the trial court erred, however, in allowing the introduction of improper propensity evidence. Based on our supreme court's reasoning in State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008), I would hold the admission of evidence of the victim's fractured femur as a prior bad act amounts to reversible error. In the absence of this evidence, I would also hold the trial court should not have charged the jury with aiding and abetting homicide by child abuse.[7]

A. Prior Bad Act

On appeal, Smith argues the trial court erred in admitting evidence of a prior injury (a fractured femur) to the victim where the evidence was not clear and convincing and its probative value was substantially outweighed by the danger of unfair prejudice. The majority finds "overwhelming" evidence

[7] At the time the evidence of the broken femur was admitted, Smith was only being tried for homicide by child abuse. See S.C. Code Ann. § 16-3-85(A)(1) (2003). The State did not request and the trial court did not decide to charge aiding and abetting homicide by child abuse pursuant to section 16-3-85(A)(2) until the close of all evidence.

Smith inflicted the victim's broken leg by committing an intentional act of child abuse. I disagree.

Evidence of other crimes or bad acts is not admissible to show criminal propensity to commit the crime charged or to demonstrate the bad character of the accused. Rule 404(b), SCRE; State v. Nelson, 331 S.C. 1, 6-7, 501 S.E.2d 716, 718-19 (1998); State v. Lyle, 125 S.C. 406, 415-16, 118 S.E. 803, 807 (1923). However, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE. "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." Fletcher, 379 S.C. at 23, 664 S.E.2d at 483. "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." Id. "Even if the prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." Id. (citing Rule 403, SCRE).

The admission of this prior bad act conflicts with our supreme court's holding in Fletcher. Specifically, evidence of the victim's broken femur was inadmissible because (1) there was no evidence, let alone clear and convincing evidence, that Smith inflicted the victim's broken femur by committing an intentional act of child abuse; (2) there was no logical connection between the broken femur and the victim's resulting death; and, (3) the probative value of the victim's broken femur was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE.

During the Fletcher trial, a neighbor testified that approximately two weeks prior to the victim's death, he visited Fletcher's home, heard crying, and located the victim sitting alone in the attic drenched in sweat while Fletcher and the victim's mother were home. Id. at 21, 664 S.E.2d at 482. The same neighbor testified that approximately one month prior to the victim's death, he came to Fletcher's house and found the victim handcuffed by his feet to the bed on which Fletcher and the victim's mother slept. Id. at 22, 664 S.E.2d at 482.

The Fletcher court held that it was improper to admit the neighbor's testimony regarding these prior bad acts where there was no evidence, let alone clear and convincing evidence, as to which caretaker perpetrated the prior bad acts. Id. at 25, 664 S.E.2d at 483-84. Our supreme court defined clear and convincing evidence as follows:

> Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal.

Id. at 24, 664 S.E.2d at 483. The Fletcher court concluded that although there was evidence the victim had been abused, there was "not clear and convincing evidence in the record that Fletcher committed the prior bad acts . . . ." (emphasis added). Id.

In the instant case, the record does not contain any evidence that Smith intentionally inflicted the victim's broken femur. Dr. Cooper-Merchant, an attending physician, testified Smith informed him that he had no idea how the femur injury happened. Dr. Cooper-Merchant also testified Smith later stated the victim may have sustained the broken femur when she accidentally fell from his lap as Smith stood up from his chair one day upon hearing the doorbell ring.[8] Dr. Cooper-Merchant further testified Charlene Dandridge[9]

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[8] To the extent the majority characterizes Smith's inconsistent explanations as Smith having "lied" to conceal his involvement in the femur injury, I believe the majority misconstrues the facts. As I read the record, medical testimony merely indicated Smith's explanations were inconsistent with the victim's resulting injury. The State did not present any testimony that Smith fabricated stories to cover up for his own involvement in the injury.

[9] Dandridge was the victim's mother. She testified for the State during Smith's trial but was not tried simultaneously, and the State did not charge her with homicide by child abuse.

was afraid to take the victim to the hospital after the femur injury because "they might consider her a bad mother." Another attending physician, Dr. Crane, testified the femur fracture could have been anywhere between two and four weeks old when he took the victim's x-ray on December 9, 2003, and it was impossible to know exactly when or how the fracture occurred. Dr. Crane noted approximately 30% of spiral fractures are accidental, and not abusive. Dr. Rahter, a third attending physician, testified it was possible Smith was not even present when the spiral fracture occurred.

During the motion in limine to exclude evidence of the victim's broken femur, the trial court noted "either he or his wife or both of them had to do it." It appears from the record that the trial court focused on clear and convincing evidence of a pattern of abuse inflicted upon the victim by any perpetrator, versus clear and convincing evidence of abuse inflicted by Smith. I believe this was error.

An allegation of an accident does not equate to the admission of an intentional act of child abuse for purposes of demonstrating evidence of a prior bad act. See State v. Northcutt, 372 S.C. 207, 218-19, 641 S.E.2d 873, 879 (2007) (reversing a death penalty conviction when the trial court admitted evidence of the victim's spiral leg fracture at age ten-weeks despite the fact that the prior injury was, by all accounts, accidental and therefore not relevant to show the nature of defendant's relationship with the victim). This is particularly true where, as is the case here, Smith did not have exclusive custody and control over the victim. See State v. Cutro, 332 S.C. 100, 105-06, 504 S.E.2d 324, 326-27 (1998) (holding admission of prior bad acts of child abuse was reversible error when the defendant did not have exclusive control over the children during the period when the prior bad acts occurred). Indeed, DSS was unable to determine who caused the victim's broken femur after investigating the incident, and returned the victim to her parents.

Therefore, evidence of the victim's broken femur was inadmissible as a prior bad act because the State failed to present any evidence that Smith intentionally inflicted the injury. Compare State v. Pierce, 326 S.C. 176, 178-79, 485 S.E.2d 913, 914 (1997) (holding hospital employees' testimony regarding victim's previous injuries was inadmissible under the common scheme or plan exception because there was no clear and convincing

evidence defendant inflicted the injuries), with State v. Martucci, 380 S.C. 232, 241-42, 251-56, 669 S.E.2d 598, 603, 608-11 (Ct. App. 2008) (permitting evidence of prior bad acts of child abuse when there was eyewitness testimony that the defendant slapped victim, taped victim's mouth shut, and dunked victim's head in a bathtub until he choked to stop victim from crying).

The majority next contends there was a "logical connection" between the broken femur and one of the exceptions listed in Rule 404(b), specifically, evidence of motive or absence of mistake. However, the logical connection required is between the prior bad act and the crime with which the defendant has been charged. See Fletcher, 379 S.C. at 23, 664 S.E.2d at 483; State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006) ("To be admissible, the bad act must logically relate to the crime with which the defendant has been charged.").

Notably, the femur injury occurred three months before the victim's death. At the well-baby visit on February 12, 2004, two days before the victim's death, the attending physician did not note anything wrong with the victim. These facts are inconsistent with the majority's assertion that Smith "chemically restrained" the victim to keep her from crying because her leg was hurting. Moreover, the majority overlooks the fact that both Smith and Dandridge admitted to administering medication to the victim in the days prior to her death, and both parents were primary caregivers.[10] Finally, the victim's cause of death was an overdose of pseudoephedrine accompanied by blunt force trauma to her chest. In the absence of any evidence Smith intentionally inflicted the broken femur, this evidence was not in any way

[10] Dandridge had custody of the victim the entire two days prior to the victim's death (February 12-13th, 2004), and she admitted she could not recall every time she gave the victim medicine over that two day period. Dandridge further testified she could not remember whether or not she gave the victim pseudoephedrine over that two day period. In addition, Dandridge came home for lunch around 2 p.m. on the day of the victim's death, approximately five hours before Smith called 911 to report the victim was not breathing. Finally, Dandridge testified she lied to police during her initial interview but she declined to identify the content of her misstatement.

causally related or logically connected to the victim's death and was not necessary to prove res gestae. See Fletcher, 379 S.C. at 25 n.3, 664 S.E.2d at 484 n.3.

The majority holds the broken femur was admissible to show evidence of motive or absence of mistake. However, Smith never claimed the victim's death was a mistake. Smith's only defense during trial was that Dandridge committed the acts which resulted in the victim's death. The broken femur was not relevant to show Smith's motive to commit child abuse because there was no evidence that Smith intentionally or willfully inflicted the broken femur. See Northcutt, 372 S.C. at 218-19, 641 S.E.2d at 879. The only purpose for admitting this evidence was to demonstrate Smith's propensity to commit the acts which resulted in the victim's death in the absence of any direct evidence of abuse. This purpose is specifically prohibited by Rule 404(b), SCRE.

Lastly, evidence of the victim's broken femur was inadmissible pursuant to Rule 403, SCRE. See Rule 403, SCRE (stating that evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). This evidence was highly prejudicial and not harmless. See Fletcher 379 S.C. at 484, 664 S.E.2d at 26 (noting the admission of prior bad act evidence when the offender was unsubstantiated was not harmless error because the identity of the perpetrator was the essential issue at trial); see also Northcutt, 372 S.C. at 218-19, 641 S.E.2d at 879 (reversing a death penalty conviction due to unfair prejudice pursuant to Rule 403, SCRE, when the trial court admitted evidence of the victim's spiral leg fracture at age ten-weeks despite the fact that the prior injury was, by all accounts, an accident).

Smith's sole defense during trial was that Dandridge committed the acts which resulted in the victim's death. In addition, at the time the trial court admitted the evidence of the victim's broken femur, Smith was only being tried for homicide by child abuse, not aiding and abetting homicide by child abuse. The admission of this evidence was highly prejudicial to Smith as Dandridge was not on trial, and DSS was unable to determine who caused the spiral fracture after investigating the incident. Therefore, I would reverse.

B. Aiding and Abetting Jury Charge

Smith was indicted for homicide by child abuse under section 16-3-85(A)(1) of the South Carolina Code (2003). That section provides that a person is guilty of homicide by child abuse if the person "causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life." At the end of trial, the State requested and the trial court decided to charge the jury on section 16-3-85(A)(2) as well, which provides that a person is guilty of homicide by child abuse if the person "knowingly aids or abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven." Smith was acquitted of the charge for which he was indicted, but the jury found Smith guilty of aiding and abetting homicide by child abuse. On appeal, Smith argues it was error for the trial court to charge the jury on section 16-3-85(A)(2). I agree.

An appellate court will not reverse the trial court's decision regarding jury charges absent an abuse of discretion. State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005) (citation and quotation marks omitted). "It is well-settled the law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given." State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (emphasis added).

Setting aside evidence of the broken femur and any evidence collateral to that injury, there was not any evidence presented on which to charge the jury with aiding and abetting homicide by child abuse. Specifically, there was no evidence that Smith knowingly aided and abetted Dandridge or any other person to commit homicide by child abuse. See section 16-3-85(A)(2).

In conclusion, I would hold evidence of the victim's broken femur should have been excluded under Rule 404(b), SCRE, and Rule 403, SCRE, as it may have been used by the jury as propensity evidence to infer that Smith aided and abetted the acts that ultimately resulted in the victim's death, even though it acquitted him of homicide by child abuse. Because the prior bad act should not have been admitted, there was no evidence to charge the

jury with aiding and abetting homicide by child abuse. Accordingly, I would reverse on both grounds.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Miriam Rodriguez, as Personal Representative of the Estate of Francisco Martinez Marco, Respondent,

v.

Alexander Gutierrez, Ernesto Gutierrez, and Jose A. Reyes d/b/a Cinco de Mayo, Defendants, of whom Jose A. Reyes d/b/a Cinco de Mayo is the, Appellant.

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 4786
Heard June 8, 2010 – Filed January 26, 2011

AFFIRMED

Walter Christopher Castro, of Myrtle Beach, for Appellant.

William I. Diggs, of Myrtle Beach, for Respondent.

PER CURIAM: In this civil case, we must determine whether the circuit court abused its discretion in refusing to set aside a default judgment against Jose Reyes d/b/a/ Cinco De Mayo Restaurant (Reyes) because Miguel Vazquez's counsel (Vazquez's counsel) personally served notice of the damages hearing on Reyes rather than on Reyes's counsel. We affirm.

FACTS

On April 17, 2007, Alexander Gutierrez (Driver) was driving a vehicle owned by his father, Ernesto Gutierrez (Owner). In the vehicle with Driver were three others: Francisco Marco (Marco), Humberto Antonio Cruz (Cruz), and Miguel Vazquez (Vazquez). The four men had just left the Cinco De Mayo Restaurant (the Restaurant) in Horry County where they had been drinking. Driver lost control of the vehicle and drove off the road into a tree. Cruz and Marco were killed instantly. Vazquez suffered severe and permanent brain damage.

On June 12, 2007, Vazquez filed suit[1] against Driver and Owner based on negligence and against Reyes based on dram shop violations (the Vazquez Action).[2] On June 13, 2007, a companion case was filed on behalf of the Estate of Marco (the Marco Action).[3] On June 14, 2007, the Vazquez and Marco complaints were simultaneously served on Reyes. On July 2, 2007, an action (the Cruz Action) was filed on behalf of the Estate of Cruz containing the same allegations as the Vazquez and Marco actions.[4] Marco, Cruz, and

[1] Miriam Rodriguez served as personal representative for the Estates of Cruz and Marco as well as Next Friend for Vazquez in the underlying action. Although Rodriguez's name is listed on the case caption, the court references the substantive parties for purposes of this opinion.

[2] The Vazquez Action was filed as case number 2007-CP-26-3654.

[3] The Marco Action was filed as case number 2007-CP-26-3664.

[4] The Cruz Action was filed as case number 2007-CP-26-4066.

Vazquez were represented by the same attorney (hereinafter Vazquez's counsel). On July 12, 2007, the Axelrod Law Firm (Axelrod) served an answer and counterclaim in the Marco Action only.

Thereafter, Johanna Bufford (Bufford), a paralegal with Vazquez's counsel contacted Axelrod to ask if it was accepting service on behalf of Reyes in the Cruz Action. She was told, "No." Bufford then contacted process server Timothy Hecker (Hecker) to personally serve the Cruz complaint on Reyes at the Restaurant. According to Hecker, when he arrived at the Restaurant, a bartender told him Reyes was out of the country. However, the bartender was able to call Reyes on his cell phone and allowed Hecker to speak directly to Reyes. Hecker stated Reyes instructed him to serve the papers on his attorney at Axelrod. At that point, Hecker drove to Axelrod and attempted to serve Axelrod with the Cruz complaint; however, "the lady that answers the phone, who is a translator" told Hecker that Axelrod would not accept service on Reyes's behalf.[5] When Hecker reported this to Bufford, she instructed him again to personally serve Reyes. Knowing that Reyes was out of the country, Hecker waited for Reyes to return.

Meanwhile, on August 1, 2007, having received no responsive pleading from Reyes in the Vazquez Action, Vazquez's counsel filed a motion for entry of default against Reyes in the Vazquez Action. On the motion for entry of default, Vazquez's counsel listed W. Christopher Castro (Castro) of Axelrod as the "Defendant's Attorney." Bufford again called Axelrod and asked if it would accept service of the motion for entry of default on Reyes's behalf. An employee at Axelrod told Bufford that Axelrod would not accept service of the motion.[6] Accordingly, Bufford contacted Hecker (who, at that point, had still not been able to serve the Cruz complaint on Reyes), gave him a copy of the motion, and instructed Hecker to personally serve the Vazquez motion for entry of default on Reyes at the same time he served Reyes with the Cruz complaint. On August 2, 2007, at 6:30 a.m., Hecker finally made

[5] Although Hecker did not recall the exact date he went to Axelrod, he did state it was "late in July [2007]."

[6] In her affidavit, Bufford does not identify the position of the employee with whom she spoke on August 1, 2007; she only identifies her as "Karen."

contact with Reyes at his home and served him with the Cruz complaint and the motion for entry of default in the Vazquez Action.

On September 5, 2007, the circuit court entered default against Reyes in the Cruz and Vazquez Actions. On September 7, 2007, Vazquez's counsel sent a letter to Reyes at his home address informing him that a damages hearing in the Vazquez action had been scheduled for September 21, 2007, at the Horry County Courthouse. On September 19, 2007, however, the hearing date was moved to September 20, 2007. That same day, Vazquez's counsel sent Reyes another letter informing him of the change. On September 20, 2007, the damages hearing was held before the Honorable Doyet J. Early, III. Reyes did not appear, nor did anyone appear on his behalf. Judge Early heard evidence on the issue of Vazquez's brain injuries. On October 25, 2007, Judge Early entered a default judgment in favor of Vazquez against Reyes in the amount of $1,575,066.20.

On October 25, 2007, Castro filed motions to set aside the default judgment in both the Cruz and Vazquez Actions. On February 27, 2008, a hearing was held before the Honorable Michael J. Baxley to hear arguments on, among other things, the motions to set aside default in the Cruz and Vazquez Actions.[7] Vazquez's counsel argued Reyes was in default in both actions. In response, Castro presented evidence that on August 20, 2007, he filed an answer and counterclaim in the Cruz Action, which was within thirty days of the August 2, 2007 service of the Cruz complaint on Reyes. Vazquez's counsel countered that the answer and counterclaim were, in fact, directed to the Marco Action because even though they listed the Cruz number, they contained the Marco caption. Judge Baxley ruled the mismatch between the caption and the case number within the answer and counterclaim was a good faith error. Accordingly, Judge Baxley orally granted the motion

[7] Prior to ruling on the motions to set aside default, Judge Baxley consolidated the Cruz, Marco, and Vazquez cases, along with an interpleader action brought by Nationwide Insurance Company against Owner, Driver, Vazquez, Marco, and Cruz. Judge Baxley consolidated the cases under case number 2007-CP-26-3664, which was originally the case number for the Marco Action.

to set aside default as to Cruz, and allowed Reyes ten days to file a correctly captioned and numbered pleading in the Cruz Action.

When the circuit court addressed the motion to set aside default as to the Vazquez Action, Castro stated, "My motion was strictly under 4066 [the Cruz action], Your Honor, motion to set aside default 4066." On March 25, 2008, the circuit court entered a written order from the February 27, 2008 hearing, in which the court granted Reyes's motion to set aside default as to Cruz. The March 25, 2008 order did not, however, mention the default judgment in favor of Vazquez. Reyes did not appeal the March 25, 2008 order, nor did he move for reconsideration of that order.

A trial for the consolidated cases began on September 15, 2008. In an order dated September 15, 2008, the circuit court denied the motion to set aside the default judgment in the Vazquez Action. On September 25, 2008, Reyes filed a motion pursuant to Rule 59, SCRCP, and Rule 60, SCRCP, for reconsideration of the September 15, 2008 order.

On October 15, 2008, a hearing was held before Judge Baxley. Judge Baxley made no decision at that hearing, but he instructed the parties to return for a subsequent hearing on January 14, 2009, at which time they were to present testimony on the issue of service in the Vazquez Action. At the January 14, 2009 hearing, the court heard testimony from Hecker regarding his service of process on Reyes in the Vazquez and Cruz Actions.

After the testimony concluded, Castro argued the circuit court should grant the motion to set aside default because Vazquez's counsel had engaged in misconduct by serving Reyes personally when Vazquez's counsel knew Castro was Reyes's attorney. As evidence Vazquez's counsel knew Castro was Reyes's attorney, Castro pointed to the August 1, 2007 motion for entry of default, in which Vazquez had entered Castro's name in the space for "Defendant's attorney."

In response, Vazquez argued that leading up to the August 1, 2007 filing, there had been no responsive pleading in the Vazquez action at all, and

the only reason he entered Castro's name on the motion for entry of default was because Castro had already filed an answer and counterclaim in the Marco Action on July 12, 2007. Vazquez argued he was simply anticipating Castro's involvement in the Vazquez action when he entered Castro's name on the motion for entry of default because of his law firm's involvement in the Marco Action.

Judge Baxley denied the motion to set aside default as to Vazquez, stating:

> [W]hat I find here is it's just not fair for the [defendant]'s counsel to take the position that we don't accept service for our clients when the process server went to . . . try to serve it on the specific instructions of the [plaintiff], and then serve the defendant and then come forward and say there's no notice.

This appeal followed.

STANDARD OF REVIEW

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the circuit court. Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 902-03 (1989). The circuit court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. Mitchell Supply Co. v. Gaffney, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988). An abuse of discretion arises when the court issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support. Goodson v. Am. Bankers Ins. Co., 295 S.C. 400, 402, 368 S.E.2d 687, 689 (Ct. App. 1988).

ANALYSIS

A. Preservation

Vazquez argues Reyes has not preserved the issue of the motion to set aside default in the Vazquez Action because at the February 27, 2008 hearing, Reyes failed to argue the motion, and he failed to seek reconsideration of the circuit court's March 25, 2008 written order. We disagree.

When an issue or argument has been raised to but not ruled upon by the circuit court, a party must file a Rule 59(e) motion in order to preserve it for appellate review. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

On October 25, 2007, Reyes filed two motions to set aside default judgments: one in the Cruz Action and one in the Vazquez Action. At the February 27, 2008 hearing, Reyes declined to argue the motion in the Vazquez Action. Thereafter, the circuit court issued a written order in which it did not address the motion in the Vazquez case. Vazquez argues because Reyes failed to present arguments at the hearing or file a motion for rehearing of the March 25, 2008 order, Reyes abandoned the motion.

However, we find the circuit court intended to hear the motion in the Vazquez Action at a later time. After the discussion of the motion to set aside default in the Cruz Action at the February 27, 2008 hearing, the court asked if there were any further motions. In response, Castro asked, "[A]re we going to address [the motion in the Vazquez Action] I guess since everything has been re-captioned 3654 should those be left alone since they are already filed or how should they be addressed?" The circuit court responded, "Let's leave it alone since they are already filed . . . ." After briefly discussing the motion with counsel for both sides, the circuit court ultimately held, "I sense that you guys are talking to me and not talking to one another, clearly, so I'm

going to let y'all have some discussions on that. We'll leave it where it is and move on, all right. Have a good day. Thank you." (emphasis added).

We hold the circuit court was merely continuing the motion to set aside default in the Vazquez Action. Accordingly, Reyes did not abandon the motion at the February 27, 2008 hearing.

B. Rule 60(b), SCRCP

Reyes argues the circuit court erred in refusing to set aside the default judgment because Vazquez's counsel personally served Reyes, despite the fact that Vazquez's counsel affirmatively acknowledged in the motion for entry of default that Reyes was represented by counsel. We disagree.

"Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP." Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009). "The standard for granting relief from an entry of default is 'good cause' under Rule 55(c) . . . while the standard is more rigorous for granting relief from a default judgment under Rule 60(b) . . . ." Ricks v. Weinrauch, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987). Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party. Rule 60(b), SCRCP. In determining whether to grant a motion under Rule 60(b), the circuit court should consider: (1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party. Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct. App. 2001). "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief." Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991).

1. Promptness with which relief is sought

The original complaint in the Vazquez Action was served on June 14, 2007. Castro contended at oral argument that he undertook representation of Reyes on behalf of Axelrod at some time in early August 2007, soon after an Axelrod employee told Hecker that Axelrod did not represent Reyes. However, Castro made no attempts whatsoever to inform either the circuit court or opposing counsel of his representation until September 27, 2007, when Castro filed a purported answer. The answer did not contain a motion for relief from default. The first time Castro filed a motion to set aside the default in the Vazquez Action was on October 25, 2007, which was the same day Judge Early issued the $1,575,066.20 default judgment. At the subsequent February 27, 2008 hearing on the two motions to set aside default, Castro declined to argue the motion in the Vazquez Action. The issue of the Vazquez default does not appear to have been raised again until the trial in September 2008. In sum, Reyes failed to act promptly in seeking relief.

2. Reasons for the failure to act promptly

Reyes argues the default judgment should be set aside because Vazquez's counsel sent notice of the damages hearing to Reyes, who does not read English, instead of sending notice to Reyes's counsel. We disagree.

Vazquez presented evidence that Castro affirmatively denied representing Reyes in late July 2007; both Bufford and Hecker filed affidavits to that effect. Consequently, it was reasonable for Vazquez's counsel to thereafter serve notice on Reyes personally, particularly when Vazquez's counsel did not receive notice that Reyes was being represented in the Vazquez Action until September 27, 2007, when Castro served a purported answer in the Vazquez Action.

Reyes also argues because Vazquez's counsel wrote Castro's name on the motion for entry of default, Vazquez's counsel thereby acknowledged that

Reyes was represented by counsel, and this acknowledgment created a duty to serve Castro, as Reyes's counsel, rather than Reyes. We disagree.

Reyes cites Rule 5(b)(1), SCRCP, which states, in pertinent part: "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court." Castro contended at oral argument he had "no idea" of the default in the Vazquez Action until after the damages hearing. However, Castro admitted at the January 14, 2009 hearing that Reyes delivered two complaints to him in June 2007. Because the Cruz complaint was not filed until July 2, 2007, and not served until August 2007, it would appear the two complaints to which counsel referred were necessarily the Marco and Vazquez complaints.[8] Despite receiving these two complaints from Reyes in June, and undertaking to represent Reyes in early August, Castro made no attempt to inform Vazquez's counsel of his representation until the end of September. We hold that Rule 5(b)(1) does not require service upon an attorney when, as in this case, the attorney gives no indication of his representation to either the court or opposing counsel. Accordingly, there is evidence in the record that Reyes's reasons for failing to act promptly were inadequate.

3. Existence of a meritorious defense

To establish that he has a meritorious defense, a complainant need not show that he would prevail on the merits, only that his defense is meritorious. Thompson, 299 S.C. at 120, 382 S.E.2d at 903. A meritorious defense need only be one "worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation or a real controversy as to real facts arising from conflicting or doubtful evidence." Id. (quoting Graham v. Town of Loris, 272 S.C. 442, 248 S.E.2d 594 (1978)).

[8] The record supports this conclusion, as it contains two affidavits of personal service-one in the Marco Action, the other in the Vazquez Action-both of which state Reyes was served on June 14, 2007.

As stated above, "[t]he movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief." Bowers, 304 S.C. at 67, 403 S.E.2d at 129. Reyes does not appear to present a meritorious defense in his brief; rather, the brief is limited to his argument that notice should have been sent to Reyes's counsel rather than to Reyes directly. In his motion to set aside default, Reyes's only defense is that Reyes does not read English. As noted above, however, Reyes's counsel admitted Reyes relayed the pertinent pleadings served on Reyes to counsel in June. Consequently, Reyes did not meet his burden of establishing a meritorious defense.

4. Prejudice to the other party

Reyes does not discuss prejudice in his brief. Consequently, we find Reyes has failed to meet his burden as to this factor. See Bowers, 304 S.C. at 67, 403 S.E.2d at 129 ("The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief.").

CONCLUSION

We find Reyes failed to establish he was entitled to have the default judgment set aside in the Vazquez action. Thus, we hold the circuit court did not err in refusing to set aside the default judgment.

Accordingly, the circuit court's decision is

AFFIRMED.

HUFF, SHORT, and WILLIAMS, JJ., concur.