The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF DALLAS D. BALL, PETITIONER

On October 15, 2001, Petitioner was indefinitely suspended from the practice of law. In the Matter of Ball, 347 S.C. 122, 554 S.E.2d 36 (2001). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than January 23, 2006.

Columbia, South Carolina

November 22, 2005

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF VANNIE WILLIAMS, JR., PETITIONER

Vannie Williams, Jr., who was indefinitely suspended 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 Friday, January 13, 2006, beginning at 2:00 p.m. in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

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
November 28, 2005

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF GLENN SCOTT THOMASON, PETITIONER

Glenn Scott Thomason, who was indefinitely suspended 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 Friday, January 13, 2006, beginning at 1:00 p.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

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
November 28, 2005

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF T. ALADDIN MOZINGO, PETITIONER

T. Aladdin Mozingo, 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 Friday, January 13, 2006, beginning at 12:00 Noon, in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

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
November 28, 2005

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 45

November 28, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Brackenbrook North Charleston, LP, North Bluff North Charleston, LP, Riverwoods, LLC, Ashley Arbor, LLC, et al., Appellants,

v.

The County of Charleston, Andrew Smith in his official capacity as Charleston County Treasurer, Peggy A. Moseley in her official capacity as Charleston County Auditor, and D. Michael Huggins in his official capacity as Charleston County Assessor, Respondents.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 26070
Heard October 19, 2005 - Filed November 28, 2005

AFFIRMED

G. Trenholm Walker, Andrew K. Epting, Jr., and Francis M. Ervin, II, all of Pratt, Thomas, Epting & Walker, PA, of Charleston, for Appellants.

Bernard Eugene Ferrara, Jr. and Joseph Dawson, III, both of North Charleston, and M. Dawes Cooke, Jr. and P. Gunnar Nistad, both of Barnwell Whaley Patterson & Helms, of Charleston, for Respondents.

PER CURIAM: The circuit court found it lacked jurisdiction to entertain Appellants' post-remittitur request for attorneys' fees because this Court's mandate instructed the circuit court to dismiss the appeal without prejudice. The circuit court also declined to entertain Appellants' "Motion to Shorten Time and Determine Compliance with Supreme Court Order." Appellants appeal. We agree with Appellants that the circuit court had jurisdiction over the attorneys' fees request, but hold that Appellants were not prejudiced by the circuit court's ruling since they are not entitled to attorneys' fees here, and agree with the circuit court that it lacked jurisdiction to determine compliance with our Order. We therefore affirm.

FACTS/PRODECURAL HISTORY

In Brackenbrook North Charleston, LP v. County of Charleston, 360 S.C. 390, 602 S.E.2d 39 (2004) (Brackenbrook I), the parties cross-appealed from a number of circuit court orders, including one denying Respondents' motion to dismiss the matter pursuant to S.C. Code Ann. § 12-60-3390 (2000 and Supp. 2003). We found this issue dispositive of both appeals, and "reverse[d] the circuit court orders and remand[ed] this matter with instructions to dismiss the suit without prejudice to [Appellants'] rights to pursue their refund requests" through administrative remedies. Id. at 399, 602 S.E.2d at 44-45. Following this disposition of the appeals, the Court ordered the following extraordinary relief to, as Appellants characterize them in their brief, "wronged non-party taxpayers:"

> We are deeply concerned that other taxpayers within the class certified by the circuit court judge in this case may have forgone their administrative remedies in reliance on the orders issued in this case. For this reason, and because County concedes, as it must, that it is required to return the unlawfully collected taxes, we instruct that all taxpayers within the class who have not yet filed administrative refund actions shall have 120 days after the remittitur is sent to file such claims. Notice of this right shall be given to all eligible taxpayers, in writing, by County within thirty days of the filing of this opinion.
>
> Id. at 399-400, 602 S.E.2d at 45.

After the remittitur in Brackenbrook I was returned to the circuit court, Appellants filed a "Petition and Motion for Award of Attorneys' Fees" and a "Motion to Shorten Time and Determine Compliance with Supreme Court Order." The Compliance Motion sought to have the circuit court decide whether Respondents had properly identified and notified all eligible non-party taxpayers as required by this Court in Brackenbrook I; to determine whether Respondents had accurately calculated the amount of the refunds; to determine when those refunds would be received; and to hear any other issues which might arise from the implementation of this Court's order requiring Respondents to give notice.

On November 16, 2004, a circuit court order was filed which implemented this Court's mandate in Brackenbrook I by dismissing Appellants' suit without prejudice pursuant to § 12-60-3390. Several days later, the circuit court issued an order denying Appellants' request for attorneys' fees and their Compliance Motion, finding that the "case is ended and the action concluded" by the November 16, 2004 dismissal order. Appellants appeal from this order.

ISSUES

1) Whether the circuit court properly dismissed Appellants' motion for attorneys' fees?

2) Whether the circuit court properly declined to entertain Appellants' motion to determine compliance with our order?

ANALYSIS

A. Attorneys' Fees

Appellants' requests for attorneys' fees pursuant to S.C. Code Ann. § 15-77-300 (2005)[1] was dismissed by the circuit court, apparently because the court concluded that once the underlying civil action had been dismissed, it no longer had jurisdiction over the request. Appellants contend this was error, and we agree. Under the fee shifting statutes at issue here,[2] a request for attorneys' fees shall be made "within thirty days following final disposition of the case." S.C. Code Ann. § 15-77-310 (2005). Where there has been an appeal, "final disposition of the case" occurs when the remittitur is filed in the circuit court. McDowell v. S.C. Dep't of Soc. Serv., 300 S.C. 24, 386 S.E.2d 280 (Ct. App. 1989). Appellants' attorneys' fees request was made within thirty days of the circuit court's filing of the Brackenbrook I remittitur and was therefore timely under § 15-77-310.

The circuit court erred in finding it lacked jurisdiction to consider Appellants' statutory attorneys' fees request. Jurisdiction over the case vests in the circuit court upon receipt of the remittitur from the appellate court. See e.g. Martin v. Paradise Cove Marina, Inc., 348 S.C. 379, 559 S.E.2d 348 (Ct.

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[1] Appellants also sought to recover attorneys' fees under a "common fund" theory. See e.g. Petition of Crum, 196 S.C. 528, 14 S.E.2d 21 (1941) (under certain circumstances court has equitable jurisdiction to award an attorney's fee to a party creating or preserving a common fund). At oral argument, however, Appellants informed the Court they were no longer pursuing this theory as the basis for a fee award.

[2] S.C. Code Ann. §§ 15-77-300 through -340 (2005).

App. 2001) (jurisdiction of the circuit court to hear matters related to case after the issuance of remittitur is well-established). We find, however, that Appellants cannot show prejudice warranting reversal stemming from the circuit court's error.

Section 15-77-300 permits the prevailing party in a civil action to recover attorneys' fees from an opposing political subdivision party under certain conditions. Attorneys' fees may be awarded if the court finds the agency acted without substantial justification in pressing its claim, and if there are no special circumstances that would make an attorney's fee award unjust. Id. Here, the "claim" pressed by Respondents in Brackenbrook I was that the circuit court was not the proper forum for adjudicating Appellants' tax refund request, the very issue upon which Respondents prevailed on appeal. Appellants cannot meet the statutory requirement of demonstrating that Respondents acted without substantial justification.[3] Accordingly, they are not entitled to reversal on this ground. Owners Ins. Co. v. Clayton, 364 S.C. 555, 614 S.E.2d 611 (2005) (error without prejudice does not require this Court to reverse).

B. Motion to Shorten Time and Determine Compliance

Appellants contend that upon receipt of the remittitur, the circuit court was vested with authority to enforce this Court's mandate in Brackenbrook I. We agree. E.g., Martin v. Paradise Cove, *supra*. The mandate is the "[o]fficial mode of communicating judgment of appellate court to lower court, directing action to be taken or disposition to be made of cause by trial court." Black's Law Dictionary 867 (5th Ed. 1978). Here, the 'disposition of the cause' was the dismissal of Appellants' suit without prejudice since it had been brought in the wrong forum. On the other hand, our instruction to Respondents to promptly notify all affected taxpayers[4] who had not already

[3] We do not suggest that Respondents' conduct throughout this entire tax fiasco has been 'substantially justified.' The statutory attorneys' fees relate to the civil action only, where Respondents' defense was successful.

[4] Appellants, having already filed for an administrative refund, were not beneficiaries of the Court's notification directive to Respondents.

brought an administrative action of their right to a refund was not a part of Appellants' cause, and thus not a part of our mandate. It was instead a directive to a party to take action for the benefit of non-parties.

The notification requirement originated with this Court in an effort to treat non-parties fairly, and to expedite the refunds due them. Respondents' failure to comply with this directive would offend this Court, not the circuit court. If a person within the class created by our directive were aggrieved by Respondents' failure to comply with it, then her remedy would be a Rule to Show Cause filed in this Court.

The circuit court did not err in finding it lacked jurisdiction over Appellants' "Motion to Shorten Time and Determine Compliance with Supreme Court Order."

CONCLUSION

The circuit court properly declined to entertain Appellants' Motion to Shorten Time and Determine Compliance. While it erred in refusing to hear Appellants' motion for a statutory attorneys' fee, Appellants cannot demonstrate any resulting prejudice. Accordingly, the circuit court order is

AFFIRMED.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

The South Carolina Court of Appeals

The State, Respondent,

v.

William Max Nicholson, Appellant.

The Honorable Alexander S. Macaulay
Oconee County
Trial Court Case No. 2001-GS-37-00236
2001-GS-37-00237
2001-GS-37-00238

ORDER DENYING PETITION FOR REHEARING

GOOLSBY, J.: The appellant William Max Nicholson petitions this court for a rehearing. After careful consideration of the petition, the court concludes there is no basis for granting a rehearing.

The court acknowledges it did not give a full treatment to Nicholson's argument that the trial judge erred in limiting defense counsel's cross-examination of his accuser about the accuser's sexual abuse history. We take this opportunity to advise that, after examination of the record citations provided in Nicholson's brief as well as our own review of the transcript, we are unable to ascertain that the issue of the scope of cross-examination had been raised to and ruled on by the trial judge or that the proposed cross-examination had been proffered at trial. See Rules 208(b)(4) and 211(b)(1), SCACR (requiring briefs to provide references to where relevant objections

and rulings occurred in the transcript); State v. Hicks, 330 S.C. 207, 216, 499 S.E.2d 209, 214 (1998) (stating that to be preserved for appeal, an issue must be raised to and ruled on by the trial judge); Baber v. Greenville County, 327 S.C. 31, 41, 488 S.E.2d 314, 319 (1997) ("Absent a proffer, it is impossible for this Court to determine the effect of the excluded testimony."); McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344-45, 479 S.E.2d 67, 76 (Ct. App. 1996) (noting the appellant failed to "point to specific objections and rulings" as required by the South Carolina Appellate Court Rules, thus leaving the court to "'grope in the dark' concerning the specific allegations of error") (quoting Connolly v. People's Life Ins. Co. of S.C., 299 S.C. 348, 352, 384 S.E.2d 738, 740 (1989)). We therefore conclude that, although the argument concerning the scope of the cross-examination of Nicholson's accuser may have been overlooked in the prior opinion, the omission did not concern a material fact or point of law so as to warrant rehearing the case.

It is therefore ordered the petition for rehearing is denied.

REHEARING DENIED.

HUFF and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

William Max Nicholson, Appellant.

Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 4011
Heard June 7, 2005 – Filed July 5, 2005

AFFIRMED

Larry C. Brandt, of Walhalla, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General W. Rutledge Martin, all of Columbia; and Solicitor Christina T. Adams, of Anderson, for Respondent.

GOOLSBY, J.: William Max Nicholson appeals his convictions for three counts of second-degree criminal sexual conduct. We affirm.

FACTS

The trial in this case revolved around the accusations of a young adult male who was born March 25, 1980. In late 2001, he told his mother that Nicholson sexually assaulted him several years earlier.

On December 21, 2001, the accuser gave a written statement about the alleged assaults to the Oconee County Sheriff's Department. According to the statement, the accuser first met Nicholson, a high school science teacher, when he was a ninth-grade student in Nicholson's physical science class at West Oak High School. The accuser participated in tasks such as setting up labs and cleaning up chemical spills. Eventually, he began to receive small sums of money from Nicholson for this work. At that time, the accuser was not approached in a sexual manner.

After the school year ended, the accuser, at Nicholson's request, began doing odd jobs around Nicholson's house and receiving payment from Nicholson for his services. Although the accuser could not remember exactly how Nicholson approached him, he related that the "incidents" began only after "a few times of doing the work" and that they were "in the nature of oral sex" performed by Nicholson on him.

The following school year, the accuser was initially enrolled at Walhalla High School, but later transferred back to West Oak High School. After he transferred back to West Oak, he visited Nicholson's classroom frequently even though he did not have Nicholson for class. During the summer, the accuser helped Nicholson move to another residence. Although the move was completed before the end of the summer, Nicholson offered the accuser additional work, promising the pay would be fair and a bonus was possible. Throughout the completion of those tasks, the oral sex continued, probably at least every other day, for the duration of the summer. When the accuser reached eleventh grade, he continued his relationship with Nicholson

and claimed that he received at least a thousand dollars per month for his companionship. The incidents became less frequent when the accuser reached twelfth grade, and he surmised this was because he was approaching adulthood and Nicholson's "fascination was strictly adolescent males." Even so, the accuser claimed that he visited Nicholson at various times in the month preceding the investigation and that Nicholson paid him a total of about one thousand dollars during that time.

As part of the investigation, law enforcement officers outfitted the accuser with a recording device and sent him to Nicholson's home on two occasions for the express purpose of eliciting incriminating statements from Nicholson. They also videotaped Nicholson's home while Nicholson and his accuser were inside talking and filmed the accuser on the porch talking with Nicholson as the accuser was preparing to leave the premises. Although Nicholson made no direct admissions on the tape, he did not refute statements by the accuser.

Authorities arrested Nicholson on January 2, 2002. After a preliminary hearing on February 22, 2002, and February 26, 2002, the Oconee County Grand Jury issued three indictments against Nicholson for second-degree criminal sexual conduct, charging him with committing acts of fellatio on his accuser during the periods of June 1 through June 30, 1995; July 1 through July 31, 1995; and August 1 through August 18, 1995.

After a jury trial commencing October 21, 2002, Nicholson was convicted on all three indictments and sentenced to twelve years. After the trial judge denied his post-trial motions, Nicholson filed this appeal.

LAW/ANALYSIS

1. Nicholson argues the trial judge should have dismissed the indictments because the time periods alleged were not sufficiently specific. In particular, he complains that without more specific dates in the indictments, he could not avail himself of the defense of alibi and other testimony that could have refuted his accuser's claims or impeached his accuser's credibility. We reject these arguments.

"Where time is not an essential element of the offense, the indictment need not specifically charge the precise time the offense allegedly occurred."[1] "[T]he sufficiency of an indictment must be judged from a practical standpoint, with all of the circumstances of the particular case in mind."[2]

In this case, time was not an essential element of the charged offenses.[3] Moreover, although Nicholson argued in his brief that the trial judge should have, in the alternative, required the State to make the dates of the offenses more definite and certain, we do not see any indication in the record that this issue was clearly raised at trial.[4]

2. We disagree with Nicholson's argument that the trial judge erred in denying his directed verdict motion.

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[1] State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App. 1991).

[2] State v. Wade, 306 S.C. 79, 83, 409 S.E.2d 780, 782 (1991) (citing State v. Adams, 277 S.C. 115, 125, 283 S.E.2d 582, 588 (1981)).

[3] Cf. State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 423 (1991) ("The specific date and time is not an element of the offense of first degree criminal sexual conduct."); 65 Am. Jur. 2d Rape § 34, at 582 (2001) ("Because time is not an essential ingredient of either forcible or statutory rape, the exact date of the commission of the offense need not be alleged unless a statute provides otherwise."); 75 C.J.S. Rape § 45, at 515-16 (1952) (stating it is proper and sufficient to prove the commission of a sexual assault on any day before the indictment and within the period of limitations and, in cases involving a victim under the age of consent, on a day when the victim was still under the statutory age).

[4] See State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 913 (2004) (stating that an issue must be "raised to the trial court with sufficient specificity" to be preserved for appellate review) (citing Jean Hoefer Toal, et al., Appellate Practice in South Carolina 57 (2d ed. 2002)).

Under Rule 19(a) of the South Carolina Rules of Criminal Procedure, "the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment."[5] In considering a directed verdict motion, the court "shall consider only the existence or non-existence of the evidence and not its weight."[6] "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury."[7]

At the close of the testimony, Nicholson moved for a directed verdict on the ground that there was "no credible evidence as to all the elements upon which the burden of proof lies upon the State." On appeal, he alleges there were inconsistencies and time gaps in the accuser's testimony and suggests, among other things, that the evidence supported a finding that the alleged abuse occurred after the accuser's sixteenth birthday and was therefore outside the statutory age limit for the offense with which he was charged.[8] We agree with the trial judge, however, that, viewing the evidence in the light most favorable to the State, Nicholson was not entitled to a directed verdict.

The accuser testified Nicholson performed oral sex on him "throughout the summer" of 1995. Specifically, he averred the oral sex happened in June, July, and August of 1995, and at a frequency of two to three times per week.

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[5] Rule 19(a), SCRCrimP (emphasis added).

[6] Id.

[7] State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004).

[8] Nicholson was charged under South Carolina Code section 16-3-655(3), which requires that the victim be at least fourteen years of age but less than sixteen years of age. S.C. Code Ann. § 16-3-655 (2003).

There was no dispute that the accuser's date of birth was March 25, 1980, which would have made him under the age of sixteen during the summer of 1995. It further appears uncontested that he was younger than Nicholson and had been a student in Nicholson's class, which would have placed Nicholson in a "position of familial, custodial, or official authority to coerce the victim to submit."[9] Any concerns about contradictory statements by the accuser, whether on the stand or outside the courtroom setting, were ultimately about his credibility and therefore in the domain of the jury.[10]

3. Nicholson also contends he was deprived of a fair trial because the presiding trial judge instructed the solicitor on how to introduce a piece of evidence against him. We disagree.

During the trial, the solicitor sought to introduce into evidence a composite audiotape recording of conversations between Nicholson and his accuser that took place on December 20 and 27, 2001. While the solicitor was attempting to lay a foundation for admission of the recording, the trial judge, apparently dissatisfied with the solicitor's line of questioning, undertook to advise her outside the presence of the jury about the particulars that he viewed as necessary steps in this procedure. Nicholson objected to the "depth and detail" of the assistance to the State. After a recess, the

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[9] Id.

[10] See State v. Buckman, 347 S.C. 316, 324 n.6, 55 S.E.2d 402, 406 n.6 (2001) (mentioning whether a witness was credible goes to the weight of the evidence and is therefore not considered by the trial court when it considers a directed verdict motion); State v. Copeland, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982) (allowing testimony of prior inconsistent statements to be used as "substantive evidence when the declarant testifies at trial and is subject to cross examination"); State v. Crawford, 362 S.C. 627, 634, 608 S.E.2d 886, 890 (Ct. App. 2005) (noting that a contradiction between a witness's "sworn statement to police and his later testimony in court is a matter of weight for the jury to decide").

solicitor, following the trial judge's advice, made a successful proffer of the tape.

We find no error in the trial judge's intervention in this case. In State v. Gaskins, the supreme court, quoting State v. Anderson, reiterated the following "duties and limitations" that a trial judge must observe while conducting a trial:

> A grave responsibility rests upon a trial judge. It is his duty to see to it that justice be done in every case, if it can be done according to law; and, if he thinks that the attorney for either party, either from inadvertence or any other cause, has failed to ask the witnesses the questions necessary and proper to bring out all the testimony which tends to ascertain the truth of the matter under investigation, we can see no legal objection to his propounding such questions; but, of course, he should do so in a fair and impartial manner, and should not by the form or manner of his questions express or indicate to the jury his opinion as to the facts of the case, or as to the weight or sufficiency of the evidence.[11]

In our view, the trial judge did not exceed the limits recognized in Gaskins. The jury was absent from the courtroom when the exchange at issue took place and thus could not have been affected by the trial judge's remarks. Moreover, the trial judge, when explaining to counsel what he required to lay a foundation, did not show any favoritism or otherwise indicate he had an opinion about the case. We therefore hold that, contrary to

[11] State v. Gaskins, 284 S.C. 105, 119, 326 S.E.2d 132, 140-41 (1985) (quoting State v. Anderson, 85 S.C. 229, 233, 67 S.E. 237, 238 (1910)), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (emphases added).

Nicholson's argument, the instructions did not result in the trial judge's assumption of an adversarial role in the case.[12]

4. Nicholson next argues the trial judge erred in refusing to strike a juror for cause. We disagree.

In the voir dire, the trial judge asked if any members of the jury panel or their close personal friends or family members had been victims or claimed to be victims of any type of sexual offense or child abuse. Among those answering the question in the affirmative was Juror Number 98, who advised the trial judge that his sister-in-law had been raped and the perpetrators "got away with it" and "[i]t was pretty ugly." Notwithstanding this information, Juror Number 98 was not dismissed for cause. Nicholson argues on appeal that, during jury selection, he was forced to use one of his peremptory challenges to excuse this particular juror, which ultimately resulted in the seating of another juror whom he maintains he would have excused but for the exhaustion of all his peremptory strikes.

Nicholson's argument before the trial judge and on appeal focuses on the juror's apparently "deeply troubled" demeanor and answer to a follow-up question from the trial judge that suggested that he could not be fair and impartial. In the colloquy, it is evident that, when initially examining the juror, the trial judge asked two questions in immediate succession. Whereas

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[12] See People v. Robinson, 603 N.E.2d 25, 29 (Ill. App. Ct. 1992) ("A trial judge may remind the prosecutor of the necessity to prove additional elements, examine witnesses to clarify material issues or eliminate confusion, and advise counsel on the proper phrasing of questions."); Village of Lodi v. McMasters, 511 N.E.2d 123, 124 (Ohio Ct. App. 1986) ("During the trial, a judge may, in the interest of justice, act impartially in developing facts germane to an issue of fact to be determined by the jury."); 23A C.J.S. Criminal Law § 1180, at 51 (1989) (noting the trial judge "is the governor of the trial" and it is therefore "his duty[ ] to participate directly in the trial and to facilitate its orderly progress[ ] and insure that the issues are clearly presented to the jury").

the first question called for a negative response from a qualified juror, the second question called for an affirmative answer. To clear up the confusion, the trial judge impressed upon the juror the importance of a fair trial for both sides, inquiring of him, "Could you do that?" The juror responded affirmatively. The trial judge also rephrased the other question, asking the juror, "And it would not interfere with your ability to be fair to the State and the defendant?" To this question the juror replied, "I don't think so." Based on these exchanges, we hold the trial judge conducted an adequate examination into the juror's impartiality and acted within his discretion in qualifying Juror Number 98.[13]

5. During closing argument, the solicitor referred to Nicholson's counsel as an "experienced defense attorney," which, Nicholson contends, may have suggested to the jury he was guilty because he hired experienced counsel. The solicitor also made references about "justice for all" and advised the jurors that, in reaching a verdict, they could consider the trauma of the trial on Nicholson's accuser. Nicholson asserts the trial judge erred in denying his motion for a mistrial based on these allegedly improper comments. We find no abuse of discretion.[14] Nicholson failed to make a

[13] See State v. George, 323 S.C. 496, 503, 476 S.E.2d 903, 907 (1995) ("A venireperson must be excused only if her opinions would prevent or substantially impair the performance of her duties as a juror in accordance with her oath and instructions."); State v. Tucker, 320 S.C. 206, 211, 464 S.E.2d 105, 108 (1995) ("The determination whether a juror is disqualified is within the discretion of the trial judge and will not be reversed on appeal unless wholly unsupported by the evidence."); id. ("[I]n reviewing the trial judge's disqualification of prospective jurors, the responses of a challenged juror must be examined in light of the entire voir dire.").

[14] See State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) ("The trial court has broad discretion when dealing with the propriety of the solicitor's argument, including the question of whether to grant a defendant's mistrial motion.").

contemporaneous objection to either remark,[15] and, although the trial judge declined to declare a mistrial, he issued a curative instruction.[16]

6. We reject Nicholson's argument that the trial judge erred in refusing to grant his motion to suppress the testimony of an expert witness offered by the State or, in the alternative, to grant a continuance so he could obtain his own expert on the subject. The witness was called to testify about the general characteristics of a sex abuse victim. Nicholson contends the notice he received from the State about this witness was too close in time to the trial for him to prepare his defense. The State, however, is not required to provide its witness list to a criminal defendant,[17] and the disclosure in the present case of this witness to the defense before trial was nothing more than a professional courtesy. We therefore hold that the trial judge properly declined to suppress the expert testimony and acted within his discretion in refusing to continue the case.[18]

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[15] See In re McCracken, 346 S.C. 87, 93, 551 S.E.2d 235, 238-39 (2001) (stating a contemporaneous objection is required to preserve issues regarding a closing argument for review); State v. Moultrie, 316 S.C. 547, 555-56, 451 S.E.2d 34, 39 (Ct. App. 1994) (holding the lack of a contemporaneous objection could not be salvaged by a motion for a mistrial).

[16] See State v. Cooper, 334 S.C. 540, 554, 514 S.E.2d 584, 591 (1999) (deeming the solicitor's impermissible closing remarks about the defendant's failure to present a case cured by the trial court's instructions).

[17] See Brady v. Maryland, 373 U.S. 83 (1963) (requiring the State to divulge to a criminal defendant exculpatory or mitigating information); Rule 5, SCRCrimP (requiring the State to disclose certain statements of the defendant, the defendant's prior record, certain documents and tangible objects, and certain reports of examinations or tests).

[18] See State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) ("A trial judge's denial of a motion for continuance will not be disturbed absent a clear abuse of discretion.").

7. Next, Nicholson asserts the trial judge should have required the State to release records concerning two psychological evaluations that had been performed on his accuser during a family court proceeding between the accuser's parents. Nicholson further alleges the trial judge erred in limiting cross-examination of the accuser about his mental health history and in denying the defense "sufficient time and opportunity to effectively process certain information." We find no error.

The records that Nicholson sought were not in the State's possession; and the trial judge did not allow full access of the documents to either the State or to the defense. After receiving the records under seal and reviewing them for admissibility, the trial judge "declined to admit it based on the confidential nature of the report" and further noted that any probative value in the records would be outweighed by the fact that they were "remote" and "somewhat cumulative." We hold the trial judge followed the correct procedure in determining whether Nicholson could have access to his accuser's psychological evaluations and whether the evaluations were admissible.[19] Moreover, we have reviewed the records, which were submitted to this court under seal, and concur with the trial judge that the

[19] See S.C. Code Ann. § 16-3-659.1(1) (2003) (providing that evidence of specific incidents of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct are not admissible in prosecutions for criminal sexual conduct; id. § 19-11-95(D)(1) (Supp. 2004) (stating a mental health provider shall reveal confidences "when required . . . by court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding); id. § 44-115-40 (2002) (prohibiting a physician from releasing medical records without the written consent of the patient); State v. Bryant, 307 S.C. 458, 461, 415 S.E.2d 806, 808 (1992) (noting the State is required to disclose evidence in its possession favorable to the accused and material to guilt or punishment and stating that the trial court must inspect contested material to determine if it should be available to a defendant under a Brady request).

evaluations were so remote in time they would render questionable any probative information they might yield in the present case.

8. Nicholson asserts recordings by law enforcement of the conversations between him and his accuser should have been suppressed because they amounted to a denial of his right to counsel, an invasion of his privacy, and an unreasonable search and seizure. We disagree. When the tapes were made, Nicholson was not in police custody and had not been indicted.[20] In addition, there was no dispute that the accuser in this case consented to have his conversations with Nicholson recorded.[21]

9. Finally, Nicholson contends the cumulative effect of the errors he has alleged warrants a new trial.[22] Because, however, we have determined that the trial judge did not err in any of the particulars alleged in this appeal, we likewise hold the cumulative error doctrine is inapplicable.

AFFIRMED.

HUFF and KITTREDGE, JJ., concur.

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[20] See State v. Owens, 346 S.C. 637, 661, 552 S.E.2d 745, 758 (2001) ("The Sixth Amendment right to counsel attaches when adversarial judicial proceedings have been initiated and at all critical stages."), overruled on other grounds by State v. Gentry, 346 S.C. 637, 552 S.E.2d 745 (2005); State v. Sprouse, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct. App. 1996) (stating the focus of an investigation on a suspect who is not in custody does not trigger Miranda warnings).

[21] State v. Andrews, 324 S.C. 516, 519-21, 479 S.E.2d 808, 810-11 (Ct. App. 1996) (holding a tape of a telephone call was admissible because one party to the call consented to the recording).

[22] See State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (noting the cumulative error doctrine provides relief when a combination of errors, each of which may be considered insignificant by itself, has the collective effect of preventing a party from receiving a fair trial).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mary Lizee, Employee, Respondent,

v.

South Carolina Department of Mental Health, Employer, and State Accident Fund, Insurance Carrier, Appellants.

Appeal From Charleston County
Mikell R. Scarborough, Special Circuit Court Judge

Opinion No. 4048
Heard September 13, 2005 – Filed November 21, 2005

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Matthew C. Robertson, Ajerenal Danley, and Cynthia Polk, all of Columbia, for Appellants.

E. Courtney Gruber and R. Walter Hundley, both of Charleston, for Respondent.

KITTREDGE, J.: This is a workers' compensation appeal in which Respondent Mary Lizee was awarded benefits by the Workers' Compensation Commission. Lizee's employer, the South Carolina Department of Mental Health (the Department), appealed unsuccessfully to the circuit court and now appeals to us. We join the circuit court in affirming the Commission's finding that Lizee is permanently and totally disabled as a result of her July 15, 2000, work-related injury. We, however, reverse the Commission's finding that Lizee timely notified her "employer" of the injury as required by section 42-15-20 of the South Carolina Code and remand to the Commission for the purpose of determining (1) whether "reasonable excuse" has been made "for not giving [timely] notice," and (2) whether the employer has been "prejudiced thereby." S.C. Code Ann. § 42-15-20 (1985).

FACTS/PROCEDURAL HISTORY

Mary Lizee alleged she was injured on July 15, 2000, while working as a nurse for the Department's Crisis Stabilization Unit. Lizee testified that a patient suffering from a severe diabetic reaction was running toward her and began to fall. According to Lizee, she "caught [the patient] and gently put her down on the floor," which caused Lizee pain in her neck and back.

Lizee spoke with two Department employees about the incident on the day it occurred. The first of these was Matt Dorman, a health counselor for the Department. Dorman was part of the Department's "Mobile Crisis Unit," another mental health facility separate from where Lizee worked. On the day of the incident, however, Dorman was working with Lizee at the Crisis Stabilization Unit on a temporary, "fill-in" basis. Lizee described Dorman as "another mental health counselor," and she testified that Dorman had no supervisory authority over her and normally worked at a separate facility.

Dorman was present immediately following the incident. After the patient's needs had been addressed, Lizee told Dorman "what happened." Dorman suggested she complete a report of the incident.

A report was completed, but Lizee was not sure whether she or Dorman filled it out. When asked if she reviewed the report, Lizee stated, "I kind of remember and don't remember." Although Dorman delivered a report of the incident "downtown," the record is devoid of evidence that the report contained any reference to Lizee's injury.

Lizee also reported the incident of the patient's fall to Julie Taylor, the program director for the Crisis Stabilization Unit and Lizee's immediate supervisor. Taylor was not working on the day of the incident. However, Lizee telephoned Taylor at her home shortly after the incident occurred and described what had happened. It is undisputed that Lizee did *not* inform Taylor of the injuries she suffered as a result of the incident, either on July 15 or the following Monday when Taylor returned to work or any other time.

Fourteen months later, Lizee filed a workers' compensation claim form (Form 50). The Department disputed the claim, contending that Lizee did not sustain a compensable injury and alternatively that she failed to provide timely notice of her alleged injury to the Department. The single commissioner found that Lizee was permanently and totally disabled as a result of the July 15, 2000 incident, and further found that Lizee gave timely and proper notice of the injury to the Department. The Department sought review to an appellate panel of the Commission, which affirmed the order of the single commissioner. Appeal was taken to the circuit court, which affirmed the Commission. The Department now appeals to this court.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Any review of the full commission's factual findings is governed by the substantial evidence standard. Bursey v. South Carolina Dep't of Health & Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004); S.C. Code Ann. § 1-23-380(A)(6)(e) (2005). Accordingly, when confronted with a challenge to a factual

determination by the Commission, this court's review is limited to deciding whether the Commission's decision is supported by substantial evidence. Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d 488, 490 (2005). "Substantial evidence is not a mere scintilla of evidence, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." Pratt v. Morris Roofing, Inc., 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004). Conversely, where the Commission's decision is controlled by an error of law, this court's review is plenary. Grant v. Grant Textiles, 361 S.C. 188, 191, 603 S.E.2d 858, 859 (Ct. App. 2004) (noting that "[a] reviewing court will not overturn a decision by the Workers' Compensation Commission unless the determination is unsupported by substantial evidence or is affected by an error of law").

LAW/ANALYSIS

The Department argues the Commission's finding that Lizee is permanently and totally disabled as a result of the July 15, 2000 injury is not supported by substantial evidence and that the Commission's findings are not "sufficiently detailed." We disagree on both counts. The Commission, as the fact finder, found Lizee's testimony credible and assigned weight to the opinion of her treating physician, Dr. Donald Johnson, II. As to Lizee's claim of injury and disability, the record provides a sufficient basis under the substantial evidence standard of review to affirm the Commission. Moreover, the claim of a deficient order—in connection with the injury and resulting disability—is manifestly without merit. Accordingly, the Commission's determination that the July 15 work-related injury rendered Lizee permanently and totally disabled is affirmed pursuant to Rule 220(b)(2), SCACR.[1]

[1] We address the merits of Lizee's disability claim in the interest of judicial economy and to increase the opportunity for finality on remand. See Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 26, 602 S.E.2d 772, 781 (2004); Floyd v. Horry County School Dist., 351 S.C. 233, 234, 569 S.E.2d 343, 344 (2002).

The Department also argues the Commission's finding that Lizee provided timely and proper notice of her injury to her employer is erroneous and unsupported by substantial evidence. We agree.

Section 42-15-20 of the South Carolina Code (1985) initially provides that "notice of the accident" shall be given to the employer "within ninety days after occurrence of the accident." The claimant bears the burden of proving compliance with these notice requirements. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 537-38, 324 S.E.2d 87, 89 (Ct. App. 1984).

At issue here is the status of Matt Dorman. During oral argument, Lizee conceded that her ability to establish compliance with the notice provision of section 42-15-20 turns on whether Dorman may be fairly characterized as a "supervisor." Etheredge v. Monsanto Co., 349 S.C. 451, 459, 562 S.E.2d 679, 683 (Ct. App. 2002) (construing section 42-15-20 and concluding "that notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim") (emphasis added); see also Bass v. Isochem, __ S.C. __, 617 S.E.2d 369, 379 (Ct. App. 2005) (noting that "[w]hile the notice requirement must be construed liberally in favor of claimants, it is 'not to be treated as a mere formality or technicality and dispensed with as a matter of course.'" (quoting Mintz v. Fiske-Carter Constr. Co., 218 S.C. 409, 414, 63 S.E.2d 50, 52 (1951)); 7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 126.03[2][a] (2005) (noting that "[g]enerally, in order that the knowledge be imputed to the employer, the person receiving it must be in some supervisory or representative capacity, such as foreman, supervisor . . . ." (footnotes omitted)).

In the instant case, Lizee admitted she did not inform her supervisor, Julie Taylor, of the injury she suffered as a result of the July 15, 2000, incident. Indeed, Lizee testified she telephoned Taylor on

July 15 to report that an incident had occurred involving a patient, but she did not inform Taylor of any injury she had sustained:

> DEFENSE COUNSEL: Now, on Saturday, July 15, 2000, you did call Ms. Taylor at home, correct?
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> LIZEE: Yes.
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> DEFENSE COUNSEL: And you told Ms. Taylor that you had caught a patient from falling; is that correct?
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> LIZEE: Yes.
>
> DEFENSE COUNSEL: You didn't tell Ms. Taylor that you had injured yourself; is that correct?
>
> LIZEE: Right.
>
> DEFENSE COUNSEL: And Ms. Taylor then came back to work on that following Monday; isn't that correct?
>
> LIZEE: Yeah.
>
> DEFENSE COUNSEL: And after you called Ms. Taylor on Saturday, July 15, and told her that you had caught a patient falling, you never told her that you had in fact had an accident on the job and that you had injured your back or your neck or any part of your body? You never told her that you injured yourself on Saturday, July 15th, isn't that correct?
>
> LIZEE: Yes.

> DEFENSE COUNSEL: And you never reported that you had injured yourself to anybody else at the Department of Mental Health; isn't that correct?
>
> LIZEE: Yes.

The only person Lizee purportedly informed of her injury was Dorman, an individual Lizee described as "another counselor at the center" who Lizee admits did not serve in any supervisory capacity over her. As noted above, Dorman usually worked at another mental health facility and was working with Lizee on a temporary or "fill-in" basis on the day of the incident. Indeed, when asked at the hearing who was "in charge" at the Crisis Stabilization Center on the July 15, 2000, Lizee testified she was.

After carefully reviewing this testimony and the record as a whole, we find Lizee's claimed attempt to notify the Department of her injury does not meet the standard contemplated under section 42-15-20. Under the facts and circumstances of this case, Lizee's decision to inform only Dorman deprived the Department of the notice it was entitled to receive under the statute. Generally, a mere co-worker has no duty to report or follow-up on an injury sustained by a fellow employee—especially in a large, complex organization such as the Department of Mental Health. There is certainly no evidence in the present case that Dorman, as simply "another counselor" from a separate facility, was under any such obligation. The requirement that notice be sufficient to put a "reasonably conscientious supervisor" on notice recognizes the fact that those charged with managing and supervising employees bear the responsibility of taking action and informing others in the organization's leadership structure of the need to take action to protect the interests of the employee and the organization. The record before us is devoid of any evidence that notice was provided to any supervisor or other person of comparable standing at the Department.

We now turn to the final provision in section 42-15-20 which provides that the failure to timely notify the employer does not automatically defeat a claim. The statute specifically states that the failure to provide notice precludes compensation "unless reasonable excuse is made to the satisfaction of the Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby." S.C. Code Ann. § 42-15-20 (1985). In the present case, the Commission did not address this "reasonable excuse" and "prejudice" provision of the statute. Lizee's entitlement to compensation hinges on this very determination. We decline to make findings in this regard. Gray v. Laurens Mills, 231 S.C. 488, 491-93, 99 S.E.2d 36, 38 (1957) (noting that the Commission is required to make findings on the "reasonable excuse" and "prejudice," and a remand is appropriate when the Commission fails to make such findings); Harpe v. Kline Iron & Metal Works, 219 S.C. 527, 532-33, 66 S.E.2d 30, 32 (1951) (holding that it is the Commission's function to make findings concerning the defense of reasonable excuse for failure to give notice and prejudice to the employer). Accordingly, we remand to the Commission to make findings as to the "reasonable excuse" and "prejudice" provision of section 42-15-20.[2]

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[2] The Department opposes a remand since the claimant relied on having provided timely notice at the hearing. We believe remand is appropriate for four reasons. First, the informal nature of administrative proceedings before the Commission is inconsistent with the exacting procedural hurdles the Department seeks to impose on Lizee and claimants like her. See 82 Am. Jur. 2d Workers' Compensation § 516 (2005) ("Informal proceedings are encouraged in workers' compensation cases and are so designed that the commission can best ascertain the rights of the parties and prevent unnecessary delays, costly appeals, and rehearings."). Second, we adhere to the principle that workers' compensation laws in general, and notice requirements in particular, are to be liberally construed in favor of claimants and coverage. Etheredge v. Monsanto Co., 349 S.C. 451, 458, 562 S.E.2d 679, 683 (Ct. App. 2002). Third, the Commission's adoption of Lizee's position on notice removed the need for her to pursue the alternative "reasonable excuse" and "prejudice" prong of

CONCLUSION

For the above stated reasons, the judgment of the circuit court—and hence the Commission—is affirmed in part, reversed in part and the case is remanded to the circuit court, which shall send the case back to the Commission. The Commission shall make specific findings as to the "reasonable excuse" and "prejudice" provision of section 42-15-20. The Commission may, in its discretion, take additional evidence to accomplish the remand objective.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

HEARN, C.J., and STILWELL, J. concur.

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section 42-15-20. See Harpe, 219 S.C. at 533, 66 S.E.2d at 32 (noting that in cases where timely notice was found there was no discussion of "reasonable excuse" or "prejudice"). Finally, we recognize that it is not the claimant's burden to show the absence of prejudice, but it is the employer's burden to prove the presence of prejudice. Dawkins v. Capitol Const. Co., 252 S.C. 536, 539, 167 S.E.2d 439, 440 (1969) (the burden of proving prejudice lies with the employer).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Patrick B. Walker, **Appellant.**

Appeal from Greenville County
J. Mark Hayes, Circuit Court Judge

Opinion No. 4049
Submitted November 1, 2005 – Filed November 28, 2005

AFFIRMED

Susannah Ross, of Greenville, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Derrick K. McFarland, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

ANDERSON, J.: Patrick B. Walker appeals his conviction for the murder of Rodrekus King. We affirm.[1]

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

FACTUAL/PROCEDURAL BACKGROUND

On Thursday, March 21, 2002, Earnetta King served dinner to her boyfriend, Patrick Walker, and to her three children: Rodrekus, Brittany and Javario. As the family gathered to eat, King tasted the food and accused someone of "adding something." After denying that he had added anything, Walker blamed Rodrekus. Rodrekus refuted the accusation. Walker responded by slapping Rodrekus in the head. At that point, King sent Brittany and Javario to their rooms. At 2:15 a.m. on Friday, March 22, 2002, Rodrekus was pronounced dead as a result of multiple blunt-force injuries.

Brittany King was nine years old at the time of her brother's death. She testified that after getting sent to her room, she proceeded into Rodrekus's room to watch cable television. Before long, Brittany observed Walker pushing Rodrekus into the bedroom where she was. According to Brittany, Walker was kicking and punching Rodrekus in the head, back and stomach. Shocked, Brittany watched as Walker hit her brother with a metal broom stick on the left side of his body. Rodrekus, who was naked, begged Brittany to help him, but Walker laughed, told her to "shut up," and pushed her away. Finally, Walker ordered Brittany out of Rodrekus's room, but she could hear the fighting continue as she went to sleep that night. Later, Brittany was awakened by a loud "booming" sound. She went back to sleep but woke up again when she heard ambulance sirens. Shortly thereafter, King's father came to pick up Brittany and Javario. Before they left, Walker kissed Brittany on the cheek and threatened her saying, "[d]on't tell the police anything. If you do, then I'll kill you and your momma."

At 12:47 a.m. on March 22, paramedics were alerted that a thirteen-year-old boy had fallen, hit his head in the kitchen, and was having a seizure. By 12:54 a.m., the EMS workers had arrived at Earnetta King's residence. They found Rodrekus unclothed, pulseless, and unresponsive, laying face-up on the floor. A shirtless Walker was attempting CPR. Immediately, the EMS workers prepped Rodrekus for transport to the Greenville Memorial Hospital. At 2:15 a.m., Dr. Allison Jones, an emergency room pediatric physician, declared Rodrekus dead.

As Rodrekus was rushed to the hospital, Deputy Tangie Saylors escorted King to the Law Enforcement Center where she gave her statement to Investigator Paul Silvaggio. King admitted whipping her son with a belt, thick switch, and metal-handled broom because she was upset with him for getting suspended from school. Additionally, King confessed that she was "out of control" and could not stop hitting Rodrekus on his side and shoulder. Because Rodrekus kept moving around as she was hitting him, King accidentally struck his head with the metal handle. King stated Rodrekus fell in the kitchen and hit his head on the counter. At that point, she ran him a bath. As he was getting out of the bathtub, Rodrekus slipped, fell, and hit his head again. According to King, Rodrekus went into convulsions. She asked Walker for help, while she called 911.

At trial, King changed her testimony. King professed that Walker was the sole assailant. When she attempted to intervene, Walker hit her.

Patrick Walker drove himself to the police station after Rodrekus was transported to the hospital. Around 5 a.m. on March 22, Walker issued a statement to Investigator Silvaggio denying any culpability. After Investigator Silvaggio received statements from both King and Walker, he allowed them to leave. Investigator Silvaggio explained that they were not under arrest, but requested that they go home and stay there in case the police needed more information.

On the afternoon of March 22, Investigator Silvaggio attempted to serve Walker with an arrest warrant at his residence. Neither he nor King was home. Over the following weekend, Investigator Silvaggio visited Walker's cousin while looking for Walker. Investigator Silvaggio found Walker's clothing at the cousin's house. At that point, Investigator Silvaggio notified the fugitive squad because he feared that Walker could be on the run. Walker turned himself in on Monday morning, March 25, 2002.

Dr. Allison Jones and Dr. Michael Ward were called as expert witnesses for the State. Dr. Jones stated that she and the emergency room staff at Greenville Memorial were "horrified" by the number of bruises and cuts on Rodrekus' body. According to the coloration of the bruises and the

absence of any healing, most of the bruises "looked fairly fresh." In addition, half of Rodrekus' back was one big bruise.

Dr. Jones testified in detail regarding the injuries sustained by Rodrekus:

> Large freshly bleeding abrasion . . . with [extensive] scalp hematoma . . . . He also had a . . . scabbed over abrasion to the top of the left ear . . . . Had . . . multiple scabbed cuts and abrasions over the tops of both of his shoulders, a very linear bruise in the middle of his chest, and an area with some superficial cuts and abrasions with a surrounding bruise. The center area, he had a circular shaped bruise with these two linear pieces off of the edge of that circular bruise. Another one-by-one centimeter abrasion or scrape to the inner surface of his arm, and a bruise with a circular or a crescent-shaped end and two linear streaks extending from that crescent-shaped area. . . . And another extensive massive bruise that had a lot of linear marks that overlapped and were through this area in different directions, indicating that there was some contact with something to make these lines in a variety of directions.
>
> He also had some torn skin with bruised edges, some reddish subcuticular tissue . . . . Another linear bruise [on] . . . the inner surface of his knee, and multiple scabbed cuts and abrasions across the front parts of both of his legs.
>
> . . . .
>
> This also was another large bruised area that again covers—this is the bottom of his scapula or his shoulder blade, and this . . . is the top of the hip or the top of his buttocks, and the bruise was about half of his back and obviously covered to the midline again. . . . .
>
> He had another avulsed or torn piece of skin, J-shaped or circular in shape to the top of it with a linear or small cut that . . . appeared to . . . have the same pattern as the bruising on the front, but the skin was torn with a cut from that.
>
> Another small cut to the soft tissue or the fleshy tissue of his buttocks, a three centimeter bruise up here on the back of his

> right arm. Also interesting was that he had a lot of avulsed, torn skin into his fingers and his hand . . . where the skin looked like it had been torn not cut. He had two side-by-side linear bruises . . . looking much like the pattern on the front that we saw with the lines. . . . [A] bruise . . . took up a good portion of his right side with a lot of that bruising over soft, fatty tissue over the buttocks.

Dr. Jones documented an extensive hematoma that covered half of Rodrekus's head. The skin on his entire body was torn with bruised edges. When asked if the bruises on Rodrekus's body would correspond with a fall in the kitchen or bathtub, Dr. Jones answered: "Absolutely not."

Dr. Ward, a forensic pathologist and the medical examiner for Greenville County, examined Rodrekus post-mortem. Dr. Ward explained:

> [I]n the chest and abdomen region there are multiple contusions and abrasions, or bruises and scratches. . . . This is a patterned bruise of the skin which is often made by a cylindrical object that when it strikes the skin pushes the blood out to either side, causing a parallel type of bruise. . . . So this is here on the left anterior chest or the left front portion of the chest.
>
> There are . . . deep scratches or abrasions on the chest and upper arm here at the shoulder, just to the left of nipple, and overlying the ribs . . . . [T]here was blood within the underlying subcutaneous tissues and musculature of the chest. . . . .
>
> Down on the abdomen there is a similar, again, parallel contusion of the skin. . . . .
>
> . . . .
>
> . . . [T]here was hemorrhage in basically three layers as we went down deeper . . . into the body. First, the fat of the large intestine, then the small intestine, and then the deep tissues surrounding the pancreas and actually hemorrhage into the pancreas itself.
>
> . . . [On the thighs], there are . . . patterned contusions or bruises of the skin. . . . All of these . . . injuries [except one] showed no indication . . . that they were old, . . . they all appeared fresh with no healing.

> The skin of the buttocks was diffusely bruised, much like the hands and the wrists. And multiple incisions were made into the skin and underlying musculature of the buttocks, and there was a great deal of hemorrhage within the skin and musculature of both sides of the buttocks. . . .
>
> . . . .
>
> . . . [T]he injuries to the head of Rodrekus were limited to the left side and left back of his scalp. There were three separate distinct injuries . . . . [There was] an area of abrasion or a scratch right in front of the left ear, right at the top portion of the left ear. This is a linear abrasion right here, and this larger wound is a laceration or a tear in the skin, . . . caused by a blunt object with enough force to actually split the skin open or cause a laceration. . . . Rodrekus' scalp . . . was detached from the underlying bone.
>
> . . . [T]here was a collection of blood [in the scalp] called subgaleal hemorrhage . . . . [O]n top of the brain there was a collection of blood called subdural blood. And then overlying the surface of the brain on the right and left . . . sides and overlying the cerebellum, . . . there was subarachnoid hemorrhage. . . . The brain was swollen . . . .

Dr. Ward found: (1) bruising and hemorrhaging on Rodrekus's arms, which were characteristic of defense-type injuries; and (2) bruising and abrasions on Rodrekus' back. When Dr. Ward was asked if Rodrekus' injuries were consistent with him "having fallen down in the bathroom . . . and struck his head on the bathtub," Dr. Ward responded: "I think it would be inconsistent with that. . . . This is not simply from a fall. This is from multiple impacts to the side of the head. . . . [T]o receive this total constellation of injuries to the head region is not consistent with the fall but from several blows." During the autopsy, Dr. Ward was provided with "possible weapons" to compare to Rodrekus' injuries. He stated several of the injury patterns were consistent with the "possible weapons" provided to him: a broom and a belt buckle. When questioned as to how Rodrekus received the injuries to his intestines and pancreas, Dr. Ward opined:

> A particular pattern of injury that we see in forensics is a blow with a fairly blunt object, often described as either a fist or a

> foot, from a punch or a stomp will leave an injury pattern like this. . . . [I]f the abdomen is soft enough or if the musculature of the abdomen is flaccid, then this fist or foot can completely compress the skin in the abdomen and basically squash or compress the organs between the skin and the backbone. And I think that's what happened in this case, that the large intestine and its fat were trapped; the small intestine and its fat were trapped; and the pancreas were all basically compressed by this striking object, causing the hemorrhage within that region. . . . It would have to be a very hard blow to cause hemorrhage around the pancreas, which is very deep.

Walker and King were convicted of murder. Both were sentenced to life imprisonment.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973); State v. Butler, 353 S.C. 383, 577 S.E.2d 498 (Ct. App. 2003). On appeal, we are limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998); State v. Bowie, 360 S.C. 35, 503 S.E.2d 112 (Ct. App. 2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (Ct. App. 2003); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003).

This Court does not reassess the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003). Furthermore, this Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000); State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004).

LAW/ANALYSIS

I. Evidence of Defendant's Flight

Walker claims the trial court erred in admitting evidence of his flight. We disagree.

Flight from prosecution is admissible as evidence of guilt. State v. Crawford, 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005); State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004), cert. granted (Oct. 5, 2005); State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003); see also State v. Ballenger, 322 S.C. 196, 200, 470 S.E.2d 851, 854 (1996) (stating flight is "at least some evidence" of defendant's guilt); State v. Freely, 105 S.C. 243, 89 S.E. 643 (1916) (declaring the flight of one charged with crime has always been held to be some evidence tending to prove fault). Likewise, evidence of flight has been held to comprise proof and signify evidence of defendant's guilty knowledge and intent. See State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); Town of Hartsville v. Munger, 93 S.C. 527, 77 S.E. 219 (1913); Pagan, 357 S.C. 132, 591 S.E.2d 405; State v. Brownlee, 318 S.C. 34, 455 S.E.2d 704 (Ct. App. 1995); see also State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982) (finding evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Grant, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980) ("[A]ttempts to run away have always been regarded as some evidence of guilty knowledge and intent.") (internal quotation marks omitted); State v. Davis, 354 S.C. 348, 580 S.E.2d 778 (Ct. App. 2003) (noting that circumstances of defendant's flight from police after the attempted traffic stop allowed reasonable inference of guilty conduct). Unexplained flight is admissible as indicating consciousness of guilt, for it is not as likely that one who is blameless and conscious of that fact would flee. See Crawford, 362 S.C. at 635, 608 S.E.2d at 890; State v. Williams, 350 S.C. 172, 564 S.E.2d 688 (Ct. App. 2002).

Flight or evasion of arrest is an issue for the jury to consider. See Beckham, 334 S.C. at 315, 513 S.E.2d at 612; State v. Turnage, 107 S.C. 478, 93 S.E. 182 (1917). "In South Carolina, we recognize that evidence of flight

[is] proper. We also recognize that it is oftentimes appropriate for counsel to argue to the jury the inferences growing out of flight." State v. Byers, 277 S.C. 176, 177-78, 284 S.E.2d 360, 361 (1981) (internal quotations omitted); see also Grant, 275 S.C. at 408, 272 S.E.2d at 171 (stating that while a jury charge on flight as evidence of guilt is improper, admission of evidence and argument by counsel concerning it are allowed). The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities. Beckham, 334 S.C. at 315, 513 S.E.2d at 612; Crawford, 362 S.C. at 636, 608 S.E.2d at 891. It is sufficient that circumstances justify an inference that the accused's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose. Crawford, 362 S.C. at 636, 608 S.E.2d at 891.

There is ample evidence that Walker fled his residence after Investigator Silvaggio asked him to stay at or nearby his home. First, Investigator Silvaggio tried to serve the arrest warrant at his domicile, but neither Walker nor King was there. At that time, Investigator Silvaggio searched for Walker at his relatives' homes, but instead of finding Walker, he found the clothes Walker had been wearing the night Rodrekus was killed. Because of Walker's unexplained absence, Investigator Silvaggio was forced to notify the fugitive squad. Although Walker argues he was not aware that he had been charged with a crime and therefore could not have been avoiding arrest, he turned himself into the police on Monday. Moreover, it can be inferred from his sudden disappearance that Walker was either expecting the police to arrest him or he was planning his escape.

In South Carolina, a defendant's flight is admissible evidence. Thus, the trial judge in the instant case did not abuse his discretion by allowing evidence of Walker's flight.

II. Severance

A. Abuse of Discretion

Walker argues the trial court abused its discretion in failing to sever his trial from that of Earnetta King. We find no error.

Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997); see also State v. Garrett, 350 S.C. 613, 567 S.E.2d 523 (Ct. App. 2002) (clarifying that codefendants are not entitled to separate trials as a matter of right). A motion for severance is addressed to the sound discretion of the trial court. State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002). The trial court's ruling will not be disturbed on appeal absent an abuse of that discretion. Tucker, 324 S.C. at 164, 478 S.E.2d at 26; State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993); Simmons, 352 S.C. at 350, 573 S.E.2d at 860. An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. State v. Lopez, 352 S.C. 373, 574 S.E.2d 210 (Ct. App. 2002).

There can be no clearly defined rule for determining when a defendant is entitled to a separate trial, because the exercise of discretion means that the decision must be based upon a just and proper consideration of the particular circumstances which are presented to the court in each case. State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952); State v. Castineira, 341 S.C. 619, 535 S.E.2d 449 (Ct. App. 2000), aff'd, 351 S.C. 635, 572 S.E.2d 263 (2002). A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt. Harris, 351 S.C. at 652-53, 572 S.E.2d at 273; State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999). An appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial. Hughes v. State, 346 S.C. 554, 552 S.E.2d 315 (2001).

A defendant who alleges he was improperly tried jointly must show prejudice before this court will reverse his conviction. Dennis, 337 S.C. at 281, 523 S.E.2d at 176; State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972); see also State v. Thompson, 279 S.C. 405, 308 S.E.2d 364 (1983) (noting that for reversal, a defendant who was tried jointly must show prejudice). The general rule allowing joint trials applies with equal force when a defendant's

severance motion is based upon the likelihood he and a codefendant will present mutually antagonistic defenses, i.e., accuse one another of committing the crime. Hughes, 346 S.C. at 559, 552 S.E.2d at 317; Dennis, 337 S.C. at 281, 523 S.E.2d at 176. The rule allowing joint trials is not impugned simply because the codefendants may present evidence accusing each other of the crime. Dennis, 337 S.C. at 281, 523 S.E.2d at 176; State v. Smith, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004).

The trial judge must act cautiously in allowing a joint trial. Dennis, 337 S.C. at 281, 523 S.E.2d at 176. The judge must carefully consider problems that may arise from a joint trial, such as redacted statements, and must assure protection of each defendant's constitutional right to confront witnesses against him. Id. at 281-82, 523 S.E.2d at 176; State v. Singleton, 303 S.C. 313, 400 S.E.2d 487 (1991). A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial. Hughes, 346 S.C. at 559, 552 S.E.2d at 317; State v. Stuckey, 347 S.C. 484, 556 S.E.2d 403 (Ct. App. 2001); see also State v. Holland, 261 S.C. 488, 494, 201 S.E.2d 118, 121 (1973) (finding trial court's cautionary instructions to the jury in a joint trial "protected the rights of each individual appellant").

Walker asserts he should have been granted a separate trial because of antagonistic defenses between himself and King. Each blames the other for the murder of Rodrekus. These antagonistic defenses do not constitute the requisite prejudice. More importantly, the trial judge had discretion to determine whether Walker should have been granted a separate trial. Based on the evidence, the judge determined that separate trials were not needed. Walker is not entitled to a separate trial as a matter of right. We find no error in the trial judge's determination.

B. Curative Instruction

Walker alleges he was denied a fair trial based on the cross-examination testimony elicited from Investigator Silvaggio; the self-serving testimony of the co-defendant, Earnetta King; and testimony from the EMS worker. Therefore, he maintains his motion for severance should have been granted. We disagree.

Generally, a curative instruction is deemed to have cured any alleged error. State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999); State v. Greene, 330 S.C. 551, 499 S.E.2d 817 (Ct. App. 1997). "If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured." State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996); State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976); State v. McCord, 349 S.C. 477, 562 S.E.2d 689 (Ct. App. 2002). A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission. See State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996).

Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient or move for a mistrial to preserve an issue for review. George, 323 S.C. at 510, 476 S.E.2d at 912; Patterson, 337 S.C. at 226, 522 S.E.2d at 850. Therefore, this issue may not be preserved for review because the trial court sustained defense counsel's objections and gave a thorough curative instruction without objection or request for a mistrial.

Assuming arguendo the issue is preserved, adverting to the merits in the case sub judice, on four separate occasions the judge gave a curative instruction to the members of the jury. Each time, the curative instruction was timely and complete.

As Investigator Silvaggio was being questioned, the judge determined that a question and an answer were both inappropriate and should be stricken from the record. The judge elucidated:

> [T]here was a question that was asked of this witness and the response was given by the witness. The question was: "do you remember what she said?" And the response was: "She indicated that Patrick Walker was the one that was beating Rodrekus and that she was trying to intervene in the assault between Patrick Walker and Rodrekus. As a result of that, she too sustained

> injuries to her head, and that Patrick Walker was the sole assailant in the case." . . . I have made a ruling that that question as well as the response was inappropriate at that stage and, therefore, you will disregard that question and also the witness's response.

During King's testimony, the judge properly gave a curative instruction: "Prior to the break in the testimony, the defendant made an unsolicited statement about some prior bad acts of Mr. Walker, and I will instruct you and you are ordered that you will disregard that statement by this defendant, and you are not to consider that statement in any form during your deliberations."

The EMS worker testified regarding Walker's intimidating demeanor. Immediately, the judge charged: "I ask the jury be instructed to disregard. You may disregard the last statement by the witness." Prior to deliberations, the judge instructed:

> As the trial judge it is my responsibility to preside over the trial of this case. And I have also the duty to rule on the admissibility of evidence offered during this trial. You are to consider only the competent evidence before you. If there was any testimony offered stricken from the record in this case during this trial, you must disregard that testimony. You are to consider only the testimony which has been presented from this witness stand, any evidence which has been made part of the record in this case and any stipulations of counsel.

In compliance with the law extant on curative instructions, the trial judge responded with alacrity and exactitude when the inadmissible evidence was offered. The potency of the judge's curative instructions expunged and extirpated any alleged error. Concomitantly, the motion for severance was properly denied.

C. Closing Argument

Walker contends improper statements made by the co-defendant's attorney during closing argument deprived him of a fair trial. Thus, he claims his motion for severance was erroneously denied.

Initially, we note this issue may not be preserved for appellate review. An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review. See State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2002); State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005); see also State v. Passmore, 363 S.C. 568, 611 S.E.2d 273 (Ct. App. 2005) (instructing that general rule of issue preservation states that if issue was not raised and ruled upon below, it will not be considered for first time on appeal). Failure to object to comments made during argument precludes appellate review of the issue. Carlson, 363 S.C. at 606, 611 S.E.2d at 293; State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000). Walker did not contemporaneously object to the comments made by co-defendant's counsel during closing argument. Consequently, this issue is not preserved.

III. Subject Matter Jurisdiction

Walker claims the trial court lacked subject matter jurisdiction due to a faulty indictment. We disagree.

In State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), our Supreme Court edified:

> [I]f an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards. See S.C. Code Ann. § 17-19-90 (2003) ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards."). However, a defendant may for the first time on appeal raise the issue of the trial court's jurisdiction to try the class of case of which the defendant was convicted.

. . . .

> The indictment is a notice document. A challenge to the indictment on the ground of insufficiency must be made before the jury is sworn as provided by § 17-19-90. If the objection is timely made, the circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged. In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances. Further, whether the indictment could be more definite or certain is irrelevant.

Id. at 101-03, 610 S.E.2d at 499-500 (internal citations and footnote omitted).

There was no challenge to the indictment prior to the jury being sworn. Based on Gentry, because Walker did not raise the sufficiency of the indictment before the jury was sworn, he cannot now raise this issue on appeal. The issue is not preserved for our review.

CONCLUSION

Accordingly, Walker's conviction and sentence are

AFFIRMED.

GOOLSBY and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Roof Doctor, Inc., Appellant,

v.

Birchwood Holdings, Ltd., Respondent.

Appeal From Colleton County
John C. Few, Circuit Court Judge

Opinion No. 4050
Submitted October 1, 2005 – Filed November 21, 2005

AFFIRMED IN RESULT

Bruce Robert Hoffman, of St. Helena Island, for Appellant.

James E. Weatherholtz, of Charleston, for Respondent.

STILWELL, J.: The Roof Doctor, Inc. filed this action in magistrate's court alleging Birchwood Holdings, Ltd. breached a contract. Birchwood's answer contained a general denial and a counterclaim. The magistrate entered judgment for Roof Doctor, but reduced the award based on Birchwood's counterclaim. The magistrate denied Roof Doctor's motion for reconsideration. Roof Doctor appealed to the circuit court. The circuit court ruled that an alleged unauthorized practice of law by Birchwood was not a ground for reversal or voidance of the magistrate's judgment. Roof Doctor appeals. We affirm in result.[1]

FACTS

Roof Doctor sued Birchwood alleging it failed to pay for roofing work done pursuant to contract. Birchwood answered, counterclaiming for damages allegedly caused by Roof Doctor. Birchwood's answer was accompanied by a letter to Chief Magistrate Richard B. Wood. The letter, written by counsel for Birchwood, stated in part:

> I have assisted with the drafting of this Answer, but Defendant Birchwood Holdings, LTD has decided to appear for this hearing without representation. As I understand the law, a corporation is permitted to appear and defend itself in Magistrate's Court without an attorney. In the present case, Mr. Ray Jacobs would like to appear on behalf of Birchwood Holdings, LTD. Please let me know if this will pose a problem. In addition, should you require further proof of Mr. Jacobs' status as a company employee or specific authorization from Birchwood Holdings, LTD, please notify me at your convenience.

Michael J. McEachern, who signed the complaint as the president of Roof Doctor, was sent a copy of the letter.

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

Magistrate Kenneth A. Campbell, Jr. presided over the bench trial. In his return, the magistrate found:

> Present at the hearing was [Roof Doctor] represented by Mr. Michael J. McEachern and [Birchwood] being represented by Mr. Ray Jacobs. Prior to the start of the hearing [Roof Doctor] raised the issue of the representation by Mr. Jacobs. [Roof Doctor] was given the opportunity to continue the matter to allow [Birchwood] to [r]etain an attorney or authorization. [Roof Doctor] indicated [it] did not wish to have the case continued.

The magistrate found for Roof Doctor, but reduced the award because he found for Birchwood on its counterclaim. Following the magistrate's ruling, Roof Doctor moved for reconsideration, arguing, inter alia:

> **Neither the lower courts nor the parties appearing before them can waive certain rulings of the Supreme Court.** Finally, a technical point: Mr. Jacobs was not authorized by Birchwood . . . to represent their interests in the case here. While we went ahead despite this deficiency, it was neither my right nor yours [the magistrate's] to waive the requirement. This is so simply because the proceeding could never be binding on Birchwood . . . i.e. if the judgment did not suit them, they were entirely free under our Supreme Court's ruling in In re the Unauthorized Practice of Law, 309 S.C. 304, 422 S.E.2d 123 (1992), to disavow it.

Roof Doctor asked for additional damages or a rehearing before a jury. The magistrate denied the motion for reconsideration.[2]

On appeal to the circuit court, Roof Doctor raised issues of merit regarding the breach of contract action and again raised the issue of Mr. Jacobs' authorization to represent Birchwood. At the hearing, Roof Doctor abandoned all issues except the issue of Mr. Jacobs' alleged unauthorized practice of law. Roof Doctor argued that any actions by Birchwood at the trial in magistrate's court, as allegedly unauthorized, were invalid and therefore Birchwood did not appear at the hearing and the circuit court should enter judgment in favor of Roof Doctor. The circuit court stated on the record:

> I think that it is within the Magistrate's discretion as to decide whether or not the authorization has been properly made, and that . . . on the circumstances of this case, the judgment cannot be collaterally attacked based on the Magistrate's . . . alleged failure to properly decide this question.
>
> Once the Magistrate decides that the authorization is proper, that ends it. And . . . secondly, . . . I think there's a reasonable basis on which the Magistrate could have found that . . . Jacobs was properly authorized to represent Birchwood.

In the written order, however, the circuit court merely stated: "The decision to allow Jacobs to represent Birchwood is supported by the evidence. Appeal affirmed."

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[2] Roof Doctor initially appealed directly to the South Carolina Supreme Court. The supreme court issued an order dismissing the appeal, stating "Because these issues can be raised to the lower courts in the course of this action, we deny McEachern's request to address them in this Court's original jurisdiction."

LAW/ANALYSIS

Roof Doctor argues the order on appeal is invalid because Birchwood participated in the unauthorized practice of law.[3] In support of its argument, Roof Doctor asserts the letter from Birchwood's counsel does not satisfy In re Unauthorized Practice of Law, which lists specific representatives that may provide written authorization on behalf of the business entity for non-lawyer representation. Roof Doctor also argues the magistrate did not have the authority to allow the matter to proceed absent such written authorization.

Our supreme court has the constitutional duty to regulate the practice of law in South Carolina and accordingly has the power to define what constitutes the unauthorized practice of law. See S.C. Const. Art. V, § 4; Renaissance Enters. v. Summit Teleservices, Inc., 334 S.C. 649, 651-52, 515 S.E.2d 257, 258 (1999). Modifying the long-standing rule that prohibited non-lawyers from representing businesses, the South Carolina Supreme Court now permits business entities to be represented by non-lawyers in civil magistrate court proceedings. In re Unauthorized Practice of Law, 309 S.C. 304, 306, 422 S.E.2d 123, 124 (modifying State v. Wells, 191 S.C. 468, 5 S.E.2d 181 (1939)).

In allowing the non-lawyer representation, the court mandated: "The magistrate shall require a written authorization from the entity's president, chairperson, general partner, owner or chief executive officer . . . before permitting such representation." Id. The court did not address the issue of a remedy if the written authorization was not obtained. Id. The court has, however, visited the issue of remedies where, unlike here, the unauthorized practice of law constituted part of the underlying contract in dispute. See Linder v. Ins. Claims Consultants, Inc., 348 S.C. 477, 560 S.E.2d 612 (2002).

In Linder, Mr. and Mrs. Linder suffered property loss from a fire at their home. While their claim was being adjusted by their insurance carrier, the Linders consulted a public insurance adjusting firm, Insurance Claims

[3] Although Roof Doctor argues the order is invalid, it does not request the order be declared void. Rather, it requests this court reverse and remand for either a new trial or for entry of default.

Consultants (ICC), regarding its interpretation of what items should be covered under their policy. The Linders entered into a contract with ICC and requested their insurer deal directly with ICC. After executing the contract with ICC, the Linders released the lawyer they had retained. Id. at 483-84, 560 S.E.2d at 616. When the Linders failed to pay the fee to ICC, ICC sued them. The Linders answered, asserting, inter alia, that ICC engaged in the unauthorized practice of law and the contract between them was void. In addition, the Linders sought damages in tort from ICC. The Linders also filed a declaratory judgment action in the South Carolina Supreme Court. Id. at 485-86, 560 S.E.2d at 617.

The supreme court found that public insurance adjusting did not, per se, constitute the unauthorized practice of law. Id. at 491, 560 S.E.2d at 620. The court found, however, that ICC did more than public adjusting and that some of its activities constituted the unauthorized practice of law. Id. at 494-95, 560 S.E.2d at 621-22. The court found the contract between the Linders and ICC was not void as a matter of law. The court concluded that ICC was not entitled to the compensation for ICC's services to the Linders that constituted the unauthorized practice of law. Id. at 495-96, 560 S.E.2d at 622. The court stated:

> The most appropriate manner in which to sanction [ICC] for [its] transgressions is for the trial court, in the underlying action, to determine the value of [ICC's] work which did not constitute the unauthorized practice of law. [ICC is] entitled to that amount, but [is] not to be compensated for any amount attributable to [its] unauthorized activities.

Id. at 496, 560 S.E.2d at 622. In considering the Linders' claim for damages in tort, the court found no private right of action for the unauthorized practice of law. Id. at 496-97, 560 S.E.2d at 622.

We need not determine if Birchwood participated in the unauthorized practice of law because we agree with the trial court that the issue of unauthorized practice of law in this case is a collateral matter. Unlike in

Linder, the services performed pursuant to the contract in this case are not alleged to involve the unauthorized practice of law. Rather, the alleged unauthorized practice of law occurred during Birchwood's defense of the action on the contract. Furthermore, the supreme court dismissed Roof Doctor's petition of this matter under the court's original jurisdiction. We conclude our supreme court has not yet addressed the issue of a remedy in the circumstances present in this case. We accordingly look to foreign jurisdictions for guidance.

In Sawyer Co. v. Boyajian, the Supreme Judicial Court of Massachusetts discussed this issue. 5 N.E.2d 348 (Mass. 1936). As we have here, the Sawyer court found it unnecessary to determine whether the alleged improper actions constituted the unauthorized practice of law and stated:

> It may be assumed without decision that the alleged conduct . . . was an unauthorized practice of the law. It is the contention of the defendant, in substance and effect, that the entire proceedings . . . were rendered void . . . even though there was no objection until after a finding had been made. But few authorities support this position. . . . The authorities indicate that proceedings in an action, before any objection is made . . . are not vitiated by . . . [the unauthorized practice of law].

Id. at 350. The court also stated: "The case at bar is distinguishable from those wherein objection is made to further proceedings conducted by an unauthorized attorney." Id. In this case, although Roof Doctor raised the issue before the magistrate, Roof Doctor agreed to proceed on the merits.

In a similar case, the North Carolina Court of Appeals likewise assumed, without finding, that there was unauthorized practice of law. In re Stroh Brewery Co., 447 S.E.2d 803, 806 (N.C. Ct. App. 1994). The court concluded that dismissal of the appeal on the ground of unauthorized practice of law was not "an appropriate remedy." Id. The court found the issue was a collateral matter, unrelated to the merits of the appeal. Id. The Ninth Circuit

Court of Appeals also found a judgment rendered in a case where an unauthorized attorney practiced law is neither void nor subject to reversal. Alexander v. Robertson, 882 F.2d 421, 425 (9th Cir. 1989).

CONCLUSION

We agree with the circuit court that any unauthorized practice of law before the magistrate was a collateral matter not entitling Roof Doctor to reversal on appeal. We decline to address whether the circuit court erred in finding Jacobs was authorized to represent Birchwood in magistrate's court. For the foregoing reasons, the order on appeal is

AFFIRMED IN RESULT.

HEARN, C.J., and KITTREDGE, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sharon L. Brunson, Appellant,

v.

American Koyo Bearings, Employer, and Tokio Marine and Fire Ins. Co., Carrier, Respondents.

Appeal From Orangeburg County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 4051
Submitted September 1, 2005 – Filed November 28, 2005

APPEAL DISMISSED

Vernon F. Dunbar, of Greenville, for Appellant.

Andrea Pope, of Columbia, for Respondents.

KITTREDGE, J.: This is an appeal from an interlocutory order of the Workers' Compensation Commission. American Koyo Bearings and its insurance carrier, Tokio Marine and Fire Insurance Company, (collectively "Employer") appealed from an adverse ruling of the single commissioner to an appellate panel of the Commission. The Commission vacated the single commissioner's order and remanded for a de novo hearing. The claimant, Sharon Brunson, appealed from the Commission's remand order to the circuit court, which dismissed the appeal as interlocutory. We find this interlocutory order is not immediately appealable and join the circuit court in dismissing the appeal.

FACTS / PROCEDURAL HISTORY

Brunson worked for American Koyo Bearings for approximately three years on an assembly line—where she was exposed to chemicals—sorting and cleaning parts. Brunson filed a Form 50 claiming that she developed contact dermatitis to her hands, arms, and other body parts as a consequence of her employment duties. She further contended that she sustained injuries to her lungs, throat, voice box, vocal cords, nasal passages, and head arising from the scope of her employment.

In response, Employer filed a Form 51 admitting that Brunson suffered from contact dermatitis, and further acknowledging the injury was compensable. However, Employer denied any permanent impairment and further denied injury to the other body parts.

The single commissioner determined that Brunson sustained multiple injuries by accident in the course of her employment, including the finding that Brunson suffered or contracted an occupational disease with respect to her dermatitis and respiratory problems. As a result, Employer was ordered to pay temporary total disability benefits plus all causally related medical treatment and treatment recommended by Brunson's physicians.

Employer sought review by the Commission. In its application for review and supporting memorandum, Employer did not challenge the compensability of the contact dermatitis. The Commission vacated the single commissioner's order and remanded for a de novo hearing.

Brunson appealed to the circuit court, arguing that certain findings made by the single commissioner were not cited as grounds for appeal and consequently should not be revisited on remand. The circuit court ruled the Commission's order interlocutory and not immediately appealable on the basis that the remand order neither affected the merits nor deprived Brunson of a substantial right. The appeal was therefore dismissed. We are now presented with the appealability of the Commission's interlocutory order and Brunson's claim that the Commission's order affected her substantial rights.

LAW / ANALYSIS

South Carolina adheres to the final judgment rule. Accordingly, with certain exceptions, an appeal lies only from a final judgment. Hagood v. Sommerville, 362 S.C. 191, 194-195, 607 S.E.2d 707, 708 (2005); S.C. Code Ann. § 14-3-330(1) (1976 and Supp. 2004); Rule 72, SCRCP; Rule 201(a), SCACR. 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." S.C. Code Ann. § 14-3-330(1) and (2). 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.[1] Green v. City of Columbia, 311 S.C. 78, 79-80, 427 S.E.2d 685, 687 (Ct. App. 1993). 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. Chastain v. Spartan Mills, 228 S.C. 61, 65-67, 88 S.E.2d 836, 837-38 (1955).

[1] Brunson attempts to raise numerous grounds on appeal beyond the appealability issue. However, the only ruling obtained from the circuit court relates to the appealability of the Commission's order. Thus, the remainder of the issues are not properly preserved for appeal. See, e.g., Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-780 (2004) (holding that issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court). Our dismissal of this appeal as interlocutory, in any event, precludes us from addressing the remaining issues.

Brunson's claim of "substantial right" springs from the fact that Employer admitted the compensability of the contact dermatitis injury and took no exception to this ruling in the appeal to the Commission. Brunson apparently believes the de novo hearing before the single commissioner includes all issues, including those *not* challenged in Employer's appeal to the Commission. Brunson, however, is not required to relitigate unchallenged findings—which are the law of the case—including Employer's admission in connection with the contact dermatitis injury. "The findings of fact and law by the hearing commissioner become and are the law of the case, unless within the scope of the appellant's exception to the full commission . . . ." Green, 311 S.C. at 80, 427 S.E.2d at 687. "Only issues within the application for review under S.C. Code Ann. § 42-17-50 (1976) are preserved for appeal to the commission." Id.

Employer candidly acknowledges in the final brief that remand to the single commissioner is limited to the "contested issues." See Sellers v. Pinedale Residential Ctr., 350 S.C. 183, 189 n.1, 564 S.E.2d 694, 697 n.1 (Ct. App. 2002) (stating that any issues not argued in the brief are deemed abandoned). As concerns the admitted injury, Employer concedes as follows:

> The contact dermatitis was admitted by the employer. Nothing in the full commission's order or the circuit court's order alters or eliminates that admission. Because the employer admits the contact dermatitis is compensable, the claimant may request medical treatment at any time from the employer. Therefore, any unappealed finding regarding medical treatment or the compensability of the contact dermatitis does not affect the remand because it is already admitted.

Respondents' final brief at 10.

In light of the Commission's regrettably conclusory remand order, Brunson's reliance on Green v. City of Columbia is understandable, but nevertheless misplaced. There, the single commissioner required the employee to make an election of remedies under the Workers' Compensation

Act, and the employee did not object. Green, 311 S.C. at 79, 427 S.E.2d at 686. The employee made the election, and the single commissioner denied benefits. Id. An appeal was made to the Commission, but no challenge was lodged with respect to election of remedies. The Commission, sua sponte, held the election requirement to be erroneous. Id. The Commission affirmed the denial of benefits but remanded the case for a hearing to determine if benefits were due under the other, previously abandoned claim. Id. The circuit court dismissed the appeal, finding the order interlocutory and not immediately appealable. Green, 311 S.C. at 79, 427 S.E.2d at 687.

We reversed and held the Commission's error in reaching an issue not raised in the application for review affected the merits. Green, 311 S.C. at 80, 427 S.E.2d at 687. We therefore found the remand order immediately appealable.

Here, unlike Green, the Commission did not rule on any issue, but merely entered a remand order for a de novo hearing. Since the Commission's authority, by operation of law, extends only to those issues within the application for review, the hearing on remand is similarly restricted. In short, the compensability of Brunson's contact dermatitis is the law of the case, and thus the remand order neither involves the merits nor affects a substantial right.

CONCLUSION

Since the remand to the single commissioner is limited to those matters included in Employer's appeal to the Commission, the compensability of Brunson's contact dermatitis claim will not be relitigated. Accordingly, the Commission's remand order neither involves the merits nor affects a substantial right. The circuit court correctly dismissed the appeal from this interlocutory order.

APPEAL DISMISSED.

HEARN, C.J., and STILWELL, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Berrien W. Smith,	Appellant,
v.	
J. Drayton Hastie, Jr., and Everett L. Smith, Jr.,	Defendants,
of whom J. Drayton Hastie, Jr. is	Respondent.

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 4052
Heard October 4, 2005 – Filed November 28, 2005

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Thomas A. Pendarvis, of Beaufort, for Appellant.

Richard S. Rosen and Kevin R. Eberle, both of Charleston, for Respondent.

GOOLSBY, J.: This is a legal malpractice action. Berrien W. Smith appeals the grant of summary judgment to attorney J. Drayton Hastie, Jr., in her action for breach of fiduciary duty, professional negligence, civil conspiracy, fraud, and fraud in the inducement, all arising from Hastie's

creation of a family limited partnership for Smith and her family. We affirm in part, reverse in part, and remand.

FACTS

In July 1991, Smith and her husband, Everett L. Smith (Everett), began marriage counseling because of unspecified marital difficulties. During August and September 1991, Everett and Hastie, with whom Everett had developed a close professional relationship, formulated plans for the creation of a family limited partnership. Neither Everett nor Hastie informed Smith of these plans. Although the Smiths' marital problems remained unresolved, Everett ended the marital counseling in the spring of 1992.

In November 1992, Smith met briefly with Everett and Hastie on two separate occasions. During these meetings, each of which lasted approximately thirty to forty minutes, Smith was given a brief overview of the partnership. Hastie informed Smith the partnership was a tool by which she and Everett could reduce their estate taxes and protect their assets from creditors. Smith was also led to believe that both she and Everett would have access to the assets in the partnership during their lifetimes.

At no time during the meetings did Hastie advise Smith about the potential loss of her right to claim the assets in the partnership or the income from these assets in the event of a divorce. In fact, Smith specifically asked Hastie on two occasions how she would be affected in case of a divorce and Hastie told her both times she would be just fine.

As a result of these assurances from Hastie and representations made by Everett, Smith executed the documents necessary to form the family limited partnership. The partnership was funded with the Smiths' property. Hastie advised both Smith and Everett to place significant portions of their jointly owned assets into the partnership. At Hastie's direction, Smith also conveyed to the partnership numerous assets in her name alone as well as assets that she held jointly with Everett.

During the spring of 1994, Everett moved out of the marital bedroom and took residence in a guest bedroom in the marital home. On July 30, 1997, Everett initiated an action in the Charleston County Family Court in which he requested to live separate and apart from Smith. Smith initially did not obtain counsel in this action because of assertions and representations from Everett that he would be fair and equitable with her. Also, notwithstanding the family court litigation, on August 12, 1997, Smith, following Hastie's advice, executed documents prepared by Hastie that amended the partnership.

In early 1998, during a meeting with Everett and Hastie, Hastie informed Smith that he intended to file a petition to force her to relinquish her shares in the partnership because she and Everett were divorcing. During that meeting, Hastie verbally threatened Smith to the point of tears and then attempted to negotiate a settlement between Smith and Everett. It was only after this meeting that Smith began to suspect that Hastie's advice to enter into and contribute property to the family limited partnership had not been in her best economic interest.

Smith later retained counsel to represent her in the family court action and filed an amended answer, counterclaim, and third-party complaint dated February 5, 1999. Her third-party complaint named as defendants the family limited partnership; Everett, individually and as officer of the family limited partnership; the Broughton Corporation, which was the managing general partner of the family limited partnership; and the Smiths' two children and Everett's daughter by a prior marriage, each of whom had an interest in the family limited partnership. Smith alleged among other things: (1) the family limited partnership and the Broughton Corporation and their respective holdings and assets were subject to equitable apportionment; and (2) the family limited partnership and its managing general partner "were formed and structured in a deliberate effort by Everett . . . with the aid and assistance of his business and personal attorney . . . to fraudulently and wrongfully deprive [her] of her rightful claim to marital assets . . . and to give Everett . . . an unfair advantage"; and (3) she was misled about the consequences of her agreement to convey assets to the family limited partnership, particularly in the event of a divorce.

On March 10, 1999, however, Smith and Everett, both of whom were represented by counsel, executed a marital settlement agreement in conjunction with the pending family court litigation. In the agreement, Smith agreed to relinquish her interest in the family limited partnership and in the Broughton Corporation based on certain specific representations from Everett, including an assurance that her shares would be gifted to their three children. The family court approved the settlement in a "Final Decree of Separate Maintenance and Final Order Approving Agreement," which was filed the same day.

On August 11, 2000, Smith filed and served the complaint in the present action, naming both Everett and Hastie as defendants.[1] In her complaint, Smith asserted claims against Hastie for breach of fiduciary duty, professional negligence, civil conspiracy, and fraud.

On July 13, 2001, Smith's affidavit was filed with the trial court and served on Hastie's attorney. In August 2001, Hastie moved for summary judgment.

The trial court heard the motion on May 3, 2002. By order dated May 27, 2002, and filed May 28, 2002, the trial court granted summary judgment to Hastie and dismissed all Smith's claims with prejudice. In dismissing the action, the trial court held as a matter of law: (1) Smith failed to commence her lawsuit within the applicable limitations period; (2) Smith's malpractice claims failed for lack of evidence; and (3) Smith's claims were barred by the doctrine of collateral estoppel. After the denial of her post-trial motions, Smith filed this appeal.

[1] Everett was dismissed from the lawsuit before the issuance of the order now on appeal. Smith does not appeal this adjudication.

LAW/ANALYSIS

A. Civil Conspiracy, Fraud, and Fraud in the Inducement

As to Smith's causes of action for civil conspiracy, fraud and fraud in the inducement, we affirm the trial court's holding that these claims fail as a matter of law.

"A civil conspiracy is a combination of two or more persons joining for the purpose of injuring the plaintiff and causing special damage to the plaintiff."[2] To recover on a claim for fraud in the inducement, the plaintiff must show the defendant made a false representation relating to a present or preexisting fact, the defendant intended to deceive the plaintiff, and the plaintiff had a right to rely on the false representation.[3] Similarly, the intent to deceive is an essential element of an action for fraud.[4]

We agree with the trial court that Smith failed to present evidence showing that Hastie was aware that she and Everett were experiencing marital problems when he set up the family limited partnership. Absent such evidence, there would be no reason for Hastie to mislead her or otherwise knowingly fail to act in her best interest.

In her brief, Smith argues that her affidavit contradicts Hastie's claims that until at least 1997 he was unaware of any marital problems between her and Everett. She also contends that the longstanding close relationship between Everett and Hastie is evidence of this assertion. To support her position, Smith stated the following in her affidavit: (1) she believed Hastie knew that she and Everett were having marital problems earlier than Hastie

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[2] LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 69, 370 S.E.2d 711, 713 (1988).

[3] Darby v. Waterboggan of Myrtle Beach, Inc., 288 S.C. 579, 584, 344 S.E.2d 153, 155 (Ct. App. 1986).

[4] Lancaster v. Smithco, Inc., 238 S.C. 15, 17, 119 S.E.2d 145, 145 (1961).

acknowledged; and (2) after the divorce settlement, Everett told her he and Hastie had planned to intimidate her. We agree with Hastie that these statements do not create an issue of fact for the purpose of defeating summary judgment. The first assertion was not based on Smith's personal knowledge, and the second contained hearsay.[5]

Because we affirm the grant of summary judgment as to Smith's fraud and conspiracy claims on the ground that these causes of action failed for lack of sufficient evidence, we need not address whether they are also barred by the statute of limitations or collateral estoppel.[6]

B. Negligence and Breach of Fiduciary Duty

We disagree, however, with the grant of summary judgment on Smith's claims for negligence and breach of fiduciary duty.

"One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation."[7] "In South Carolina, attorneys are required to render services with the degree of skill, care, knowledge, and judgment usually possessed and

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[5] See Rule 56(e), SCRCP (stating "[s]upporting and opposing affidavits shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence"); Russell v. Wachovia Bank, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) (stating a nonmoving party must do more than show a metaphysical doubt about the material facts and must set forth specific facts showing a genuine issue for trial).

[6] See Weeks v. McMillan, 291 S.C. 287, 292, 353 S.E.2d 289, 292 (Ct. App. 1987) ("Where a decision is based on alternative grounds, either of which independent of the other is sufficient to support it, the decision will not be reversed even if one of the grounds is erroneous.").

[7] Moore v. Moore, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004).

exercised by members of the profession."[8] "To prevail in a legal malpractice claim, the plaintiff must satisfy the following four elements: (1) the existence of an attorney-client relationship; (2) breach of duty by the attorney; (3) damage to the client; and (4) proximate causation of [the] client's damage by the breach."[9]

Smith alleged Hastie was liable for negligence and breach of fiduciary duty in the following particulars: (1) improperly undertaking joint representation of her and Everett; (2) failing to inform her of any potential conflict; (3) failing to recommend that she seek independent counsel; (4) failing to advise her about the consequences of the transfer of assets to the partnership in the event of a divorce between her and Everett; (5) improperly attempting to force her to relinquish her shares in the partnership; (6) improperly attempting to negotiate a settlement of the domestic dispute between her and Everett; and (7) acting solely on Everett's behalf.

At the hearing on the summary judgment motion, Smith presented an affidavit from attorney H. Dewain Herring, a certified specialist in estate planning, probate, and trust law.[10] In the affidavit, Herring stated that, even if

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[8] Holy Loch Distributors, Inc. v. Hitchcock, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000).

[9] Id.

[10] Hastie objected to the affidavit on the basis that it was untimely. In the appealed order, the trial court, although noting it had the discretion to reject the affidavit under Jernigan v. King, 312 S.C. 331, 334 n.1, 440 S.E.2d 379, 381 n.1 (Ct. App. 1993), nevertheless considered Herring's statements. Given the recognition that the trial court has the discretion to reject an untimely affidavit in a summary judgment motion, it follows that acceptance of a late affidavit would also be within its discretion. Although Hastie argues in his brief that parties should not be permitted to "blindside the court and opposing counsel with late affidavits," he does not argue that the affidavit at issue prejudiced him. We further note that Hastie submitted affidavits from two lawyers attesting to the propriety of his services to the Smith family. See

Hastie had no initial knowledge of marital problems between Smith and her husband, he should have advised her of the ramifications of the family limited partnership in the event of a divorce and should have advised her to seek at least a second opinion because he had represented her husband substantially in the past. In conjunction with this opinion, Herring also stated that Hastie "should have probed further into existing conflicts between the spouses" and suggested that this could have been done by an engagement letter asking the clients to identify any conflicts that exist at the outset of joint representation. Herring was emphatic that the present case called for such a letter, noting this precaution was advisable in cases in which one spouse has most of the financial wealth, tends to be the dominant person in the planning process, or is the client of longer standing with the lawyer.

Herring further stated the following: (1) devices such as family limited partnerships could be used to "freeze out" unit holders and devalue assets because of the lack of marketability and closely held nature of the unit; and (2) there was no written documentation showing that Smith was informed of this possibility. In addition, Herring opined that, based on his review of the case, Smith's participation in the family limited partnership caused her to lose control over the assets placed in the partnership while her estranged husband, because of his control of the Broughton Corporation, seized control over these assets.

Herring's affidavit squarely calls into dispute the trial court's reasoning that, because Hastie was unaware of any marital dispute between the Smiths, there was no problem with his undertaking to represent both of them in the family limited partnership. To the contrary, Herring's opinion was that, even if the Smiths' marriage appeared harmonious, Hastie should have at least made inquiries to ascertain that they had no existing conflicts and kept both clients adequately informed. Moreover, it appears from Herring's affidavit

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Learch v. Bartell, 504 N.Y.S. 918, 920 (N.Y.A.D. 1986) (finding no abuse of discretion in the consideration of untimely affidavits and exhibits in a summary judgment motion when there was no showing of prejudice to the opposing party), cited in Black v. Lexinton Sch. Dist. No. 2, 327 S.C. 55, 60, 488 S.E.2d 327, 329 (1997).

that the possibility of a freeze out in the event of a divorce was a recognized risk of a family limited partnership that Hastie should have, in response to Smith's inquiries, disclosed to her. We therefore hold Smith presented adequate evidence on the merits of her claims for negligence and breach of fiduciary duty.

We further disagree with the trial court's finding that Smith had knowledge of an injury when she relinquished her assets to the partnership in 1992. The injury to which Herring refers in his affidavit, namely, the "freezing out" of a unit holder, did not occur until 1998, when Hastie advised Smith of his intent to file a petition to force her to relinquish her shares in the partnership. Until then, based on assurances from Hastie and Everett, Smith had understood that she would have access to the partnership assets during her lifetime regardless of how they were titled.[11] Because Smith filed her action against Hastie in 2000, we hold her action was timely filed.

Finally, we hold the trial court incorrectly determined that Smith's claims for negligence and breach of fiduciary duty were barred by collateral estoppel.

Irby v. Richardson,[12] an attorney malpractice case cited by the trial court in support of the grant of summary judgment, is distinguishable from the present case. In Irby, the issues that the plaintiff was deemed collaterally estopped to relitigate were the validity of his consent to his former wife's having custody of their children and his former wife's fitness as a custodial parent.[13] After approval of the custody agreement but before he sued his

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[11] See True v. Monteith, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997) ("[A]bsent other facts, the client should be able to rely on the attorney's advice and should be able to follow this advice without fear the attorney is not acting in the client's best interest.").

[12] 278 S.C. 484, 298 S.E.2d 452 (1982).

[13] Id. at 486, 298 S.E.2d at 453-54.

attorney for malpractice, Irby had brought several proceedings in the family court during which he actually litigated the issues that he attempted to raise in the malpractice action.[14] In contrast, the precise issues of whether Hastie was negligent or breached a fiduciary duty in advising Smith regarding the family limited partnership have never been actually litigated in any judicial forum until the present lawsuit.[15]

Furthermore, contrary to the statement in the appealed order that "the malpractice claims rest on alleged facts which would be indicia of fraud supporting Plaintiff's case to reclaim her gifts to her children," Herring's affidavit supports a finding that, even in the absence of any unethical conduct, Hastie failed to fulfill his fiduciary responsibilities to Smith. Agency principles would ordinarily have prevented Smith from raising

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[14] Id. at 485-86, 298 S.E.2d at 453. See also Beall v. Doe, 281 S.C. 363, 371, 315 S.E.2d 186, 191 (Ct. App. 1984) ("[T]o assert collateral estoppel successfully, the party seeking issue preclusion . . . must show the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment."); Restatement (Second) of Judgments § 29 cmt. a (1982) ("[P]reclusion may be imposed only if . . . the issue was the same as that involved in the present action and was actually litigated and essential to a prior judgment that is valid and final.").

[15] See Restatement (Second) of Judgments § 27 cmt. e (1982) ("In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. . . . The judgment may be conclusive, however, with respect to one or more issues, if the parties have entered an agreement manifesting such an intention."); 46 Am. Jur. 2d Judgments § 539, at 811 (1994) (citing the question of whether the precise issue was actually litigated and decided by the factfinder in the first action as a criterion for determining whether collateral estoppel is appropriate under the identity of issue test).

during the family court proceedings the issues of Hastie's exercise of due care, leaving her the sole recourse of a lawsuit for legal malpractice.[16]

CONCLUSION

We affirm the grant of summary judgment on Smith's causes of action for civil conspiracy and fraud. We reverse the dismissal of Smith's causes of action for negligence and breach of fiduciary duty and remand these claims for a trial on the merits.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

BEATTY and SHORT, JJ., concur.

[16] See Crowley v. Harvey & Battey, 327 S.C. 68, 70-71, 488 S.E.2d 334, 335 (1997) (stating that "where a client alleges his former attorney was negligent in advising him to accept a settlement, that alleged negligence is not a ground for attacking the settlement itself but rather is a matter left for a malpractice suit between the client and his attorney" and further holding that the client's acceptance of the settlement and attempt to enforce its terms do not bar a malpractice claim); cf. Brown v. Butler, 347 S.C. 259, 265, 554 S.E.2d 431, 435 (Ct. App. 2001) (acknowledging the rule that clients are bound by their attorneys' acts and omissions "is not a hard and fast rule").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Chris A. Spivey, by his
Appointed Guardian ad Litem
Jerry Spivey, Appellant/Respondent,

v.

Carolina Crawler, Employer, and
Travelers Property & Casualty
Company, Carrier, Respondents/Appellants.

Appeal From Richland County
Deadra L. Jefferson, Circuit Court Judge
Reginald I. Lloyd, Circuit Court Judge

Opinion No. 4053
Heard October 11, 2005 – Filed November 28, 2005

AFFIRMED IN PART and DISMISSED IN PART

David T. Pearlman and J. Kevin Holmes, of Charleston, for Appellant-Respondent.

Byron P. Roberts and Tommy Evans, Jr., of Columbia; M. Dawes Cooke, Jr., Andrea Brisbin, of Charleston, for Respondent-Appellants.

HEARN, C.J.: Chris Spivey brought this action against Carolina Crawler, his employer, and Travelers Property and Casualty Co., insurance carrier for Carolina Crawler, seeking review of a clincher settlement that limited his recovery of compensation under the South Carolina Workers' Compensation Act. This appeal consolidated Spivey's appeal from the circuit court's dismissal of the action for lack of jurisdiction, and the Employer and Carrier's appeal from the full commission's reopening of the clincher agreement on the issue of fraud. We affirm in part and dismiss in part.

FACTS

On October 9, 1997, Spivey sustained an injury in an accident arising out of and in the course of his employment with Carolina Crawler ("Employer"). Spivey fractured his skull when his head became stuck between the blade and track of a bulldozer. The accident resulted in brain damage, deafness, double vision, cognitive and psychological problems, joint pain, and other injuries.

A couple of years later, Spivey returned to work. Travelers Property and Casualty Co. ("Carrier"), carrier for Employer, approached Spivey about settling his workers' compensation claim. On June 3, 1999, the parties held a conference before a single commissioner that resulted in the approval of a clincher settlement agreement ("clincher") for $32,201. Counsel did not represent Spivey when he consented to the clincher agreement. The full commission approved the clincher on June 9, 1999.

Spivey continued to have medical problems. Upon learning of the clincher, Spivey's family sought legal representation. On May 8, 2000, Spivey's mother petitioned to be appointed as Spivey's Guardian ad Litem, and initiated this action by filing a Form 50 seeking relief from and/or seeking to set aside the clincher. The full commission dismissed the Form 50

in a consent order signed by the parties stating the commission lacked jurisdiction to review the claim.

On January 19, 2001, Spivey filed an action in the circuit court arguing the clincher should be set aside. The circuit court dismissed the action on the basis that it lacked jurisdiction to review a clincher. Spivey filed a motion to reconsider. At the hearing on Spivey's motion, the circuit court stated it "simply had no jurisdiction to review the agreement," but "there's nothing that divests the [full commission] from reviewing the clincher based on any allegations of fraud or incapacity." The judge added, "I do not believe that I have the ability or the jurisdiction to remand this. I don't think that it is necessary. I think that you just need to rebring your action."

In response to the circuit court's recommendation, Spivey once again filed a Form 50 with the full commission. In addition, Spivey appealed the circuit court's dismissal of his action to this court. Spivey next filed a motion to stay the appeal pending the full commission's decision concerning its jurisdiction to review the clincher. This court granted the stay.

On November 12, 2003, the full commission granted Spivey a hearing to review the clincher solely on the issue of fraud and remanded the matter to the single commissioner for the hearing. Employer and Carrier filed a motion to reconsider, and the full commission denied the motion. Employer and Carrier then filed a notice of appeal to the circuit court. The circuit court dismissed the appeal stating "any issue about jurisdiction under the full commission has to be taken up with the full commission and/or the Court of Appeals."

Thereafter, Employer and Carrier filed a notice of appeal to this court, a motion to consolidate their appeal with Spivey's previously filed appeal, and a motion to lift the stay on Spivey's appeal. Spivey filed a motion to dismiss Employer and Carrier's appeal and a return to both the motion to consolidate and the motion to lift the stay. This court denied the motion to dismiss, granted the motion to lift the stay, and consolidated the appeals.

LAW/ANALYSIS

I. Spivey's Appeal

Spivey argues the circuit court erred in granting Employer and Carrier's motion to dismiss his original cause of action for lack of jurisdiction. He contends the circuit court has jurisdiction to grant relief from unfair clinchers. We disagree.

A clincher is a final release agreement that "relieves the employer and its representative from any further responsibility for payment of compensation or medical expenses." 25A S.C. Code Ann. Reg. 67-801(E) (1990). When the claimant signs the clincher and it is approved, the claimant can no longer ask for additional payments. Id. If an attorney does not represent the claimant, the full commission must approve the agreement. S.C. Code Ann. § 42-9-390 (Supp. 2004); 25A S.C. Code Ann. Reg. 67-803(B)(1)(d) (1990). The full commission will not approve a clincher that is not fairly made. 25A S.C. Code Ann. Reg. 67-803(C). Our supreme court has held the full commission has the power to approve a clincher and make it final and binding and not subject to review by the courts under any conditions. Atkins v. Charleston Shipbuilding & Drydock, 206 S.C. 63, 68, 33 S.E.2d 46, 48 (1945); see also Singleton v. Young Lumber Company, 236 S.C. 454, 114 S.E.2d 837 (1960) (holding settlement agreements, when approved by the full commission, are binding on the parties as an unappealed order, decision, or award of the full commission, or an award of the full commission affirmed on appeal).

Here, Spivey entered into a clincher with Employer and Carrier. Both a single commissioner and the full commission approved the clincher. Through the full commission's approval of the agreement, the statutory clincher scheme precluded appellate review. The agreement specifically provides "upon such approval this Agreement and Release shall not be subject to review or amendment by the South Carolina Workers' Compensation Commission or the Courts of this State." The full commission, therefore, validly approved the clincher and intended the clincher to be final and binding. Thus, the circuit court correctly held that it was without jurisdiction to review the clincher.

Spivey alleges Rule 60 of the South Carolina Rules of Civil Procedure provides the circuit court with the jurisdiction to reopen the clincher agreement. Rule 60 permits a party to collaterally attack a final judgment by moving to set aside the judgment on various grounds, including fraud and mistake. Section 42-17-70 of the South Carolina Code (2004) does use the term "judgment" to refer to approved settlement agreements (clinchers). The statute, however, refers to the settlement agreement as a "judgment" solely for enforcement purposes. The statute does not provide a settlement agreement constitutes a judgment for purposes of review. See Wall v. C.Y. Thomason Co., 232 S.C. 153, 156, 101 S.E.2d 286, 288 (1957) (holding "the language [Section 72-357 (now §42-17-70)] is mandatory; and the rendition of judgment in such case is ministerial rather than judicial for the award is subject to review only by the appeal process to which we have referred")(emphasis added).

Nor does the Administrative Procedures Act (APA) provide authority for judicial review of clinchers. Under the APA, circuit courts may review final decisions of the full commission to determine if the decision was affected by an error of law in view of the evidence on the whole record. See Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). The Workers' Compensation Act, however, does not require the full commission to create a formal record of its approval of a clincher agreement. Therefore, the full commission's approval of a clincher does not constitute a final decision that the circuit court can meaningfully review under the APA.

Spivey next contends the Uniform Declaratory Judgments Act, S.C. Code Ann. §§ 15-53-10 et seq, authorizes judicial review of clinchers. We agree with the circuit court judge that because the court was without jurisdiction to reopen Spivey's claim before the commission, he had no cognizable claim under the Uniform Declaratory Judgments Act.

Accordingly, the circuit court correctly dismissed Spivey's action for lack of jurisdiction.

II. Employer and Carrier's Appeal

Employer and Carrier raise several issues concerning the full commission's jurisdiction to review the clincher. They argue the clincher is not subject to review and, in addition, res judicata bars review. They also note the parties agreed by a consent order that the full commission lacked jurisdiction.

"The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation." Sloan v. Greenville County, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003). In general, this court may only consider cases when a justiciable controversy exists. See Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct. App. 1998) (holding "a threshold inquiry for any court is a determination of justiciability"). "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983); see also Kiawah Property Owners Group v. The Public Service Comm'n of South Carolina, 357 S.C. 232, 593 S.E.2d 148 (2004); Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996). Accordingly, issues that are not ripe are not proper subjects of review.

Here, although the full commission has granted a hearing to review the clincher on the issue of fraud, it has not yet held the hearing. The full commission has neither articulated the basis by which it asserts its jurisdictional authority, nor has it decided whether the clincher was procured by fraud. The rights of the parties have not been finally adjudicated, and any decision by this court would be premature. Therefore, pending the outcome of the hearing before the full commission, we find this issue not ripe for our review.[1]

[1] We express no opinion on whether the full commission has jurisdiction to reopen a clincher agreement based on fraud. However, we would note other South Carolina tribunals have the inherent power to reopen agreements and judgments procured by fraud. See Raby Const., L.L.P. v. Orr, 358 S.C. 10,

Likewise, we do not consider Employer and Carrier's argument that Spivey failed to prove his grounds for relief because the full commission has not held the hearing to review the clincher. This issue, therefore, is not ripe for appeal. See Pee Dee Elec. Coop., Inc., 279 S.C. at 66, 301 S.E.2d at 762.

In their reply brief, Employer and Carrier argue the full commission erred in appointing Spivey's mother as his Guardian ad Litem without first holding a hearing on the issue. Employer and Carrier also argue the full commission erred in granting Spivey a hearing to review the clincher without first holding a hearing. We do not consider these issues because Employer and Carrier did not raise these issues in their initial brief. See Lister v. NationsBank of Delaware, N.A., 329 S.C. 133, 153, 494 S.E.2d 449, 460 (Ct. App. 1997) (holding an appellant may not use the reply brief to argue issues not argued in the appellant's initial brief).

CONCLUSION

Based on the foregoing, we affirm the circuit court's dismissal of Spivey's appeal for lack of jurisdiction. We dismiss all issues concerning the full commission's jurisdiction, as these issues are not ripe for appeal. Accordingly, this case is

AFFIRMED IN PART and DISMISSED IN PART.

STILWELL and KITTREDGE, JJ., concur.

18, 594 S.E.2d 478, 482 (2004) (citing Bryan v. Bryan, 220 S.C. 164, 66 S.E.2d 609 (1951); see also Greenfield v. Greenfield, 245 S.C. 604, 141 S.E.2d 920 (1965) (holding "the inherent powers of a court, which are essential to its existence and protection and to the due administration of justice within the scope of the jurisdiction expressly conferred, do not depend upon express constitutional or legislative grant").