OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 7

February 21, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent

v.

Clinton Robert Northcutt, Appellant.

Appeal From Lexington County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 26271
Heard October 17, 2006 – Filed February 20, 2007

REVERSED AND REMANDED

David I. Bruck and Robert E. Lominack, both of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of the South Carolina Office of the Attorney General, of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

JUSTICE BURNETT: Clinton Robert Northcutt (Appellant) was convicted of killing his infant daughter and sentenced to death. We reverse and remand for a new sentencing proceeding.

FACTUAL/PROCEDURAL BACKGROUND

Appellant, his wife, Angie, who was pregnant with their second child, and their four-month old daughter, Breanna, resided in Lexington County, South Carolina. In early January 2001, Ms. Northcutt threatened to leave Appellant, but he took her car keys and prevented her from doing so. Two days later, Appellant shook, squeezed, slapped, punched, bit, strangled, and beat his infant daughter to death in an apparent fit of rage when she would not stop crying.

Appellant fled the home and was arrested near Atlanta later that day. Ms. Northcutt returned home from work that evening and found Appellant's wedding ring lying on a table and a message on the answering machine in which Appellant told his wife the baby was dead and apologized for what he had done. He also told her he was leaving and going far away so he would no longer hurt anyone. Ms. Northcutt then found the baby's body in the crib, and called emergency personnel.

An autopsy revealed severe and extensive trauma to the child's body and significant bruising, internal hemorrhaging, and bone fractures indicative of shaken baby syndrome. According to the examining pathologist, more than one of the baby's injuries alone were potentially fatal. He estimated the injuries were inflicted over a seven to fifteen minute time frame, although it could have been as little as two to three minutes. He testified there were no old bruises or injuries on her body and that all injuries stemmed from this single event.

The jury found Appellant guilty of murder. In the sentencing phase the State introduced evidence in aggravation of punishment including: (1) suspensions and school vandalism by the Appellant when he was in middle school; (2) an incident, for which he served one year in the Department of Juvenile Justice (DJJ), in which Appellant brought a loaded handgun to school; and (3) three disciplinary infractions Appellant committed during his two-and-a-half years in pre-trial confinement. Appellant presented evidence in mitigation showing he

suffered physical violence and emotional abuse at the hand of his alcoholic father who, at the time of Appellant's trial, was serving an eight-year prison sentence for sexually molesting Appellant's nine-year-old half-sister. Evidence also showed Appellant failed to receive help or treatment from the Department of Social Services (DSS), despite numerous child abuse complaints and injuries to Appellant from the time he was age five until age fourteen. The jury returned a death sentence.

ISSUES

I. Did the trial judge err in denying Appellant's request to submit homicide by child abuse as a lesser-included offense of murder?

II. Did the trial judge err in requiring Appellant to direct his expert witnesses to generate written reports for the prosecution?

III. Did the trial judge err in admitting evidence that the baby had suffered a broken leg at age ten-weeks while Appellant was removing her from a swing-seat, in the absence of any evidence that the injury was the result of child abuse?

IV. Did the trial judge err in admitting a letter from Ms. Northcutt to a defense social worker in which Ms. Northcutt stated she had "no sympathy" for Appellant?

V. Should Appellant have been permitted to introduce a letter to his wife expressing remorse for the death of their baby in response to the wife's testimony that Appellant's post-arrest phone calls to her had shown a lack of remorse and concern?

VI. Did the solicitor's closing argument so infect the jury's sentencing determination with passion and prejudice that it requires reversal of the death sentence?

STANDARD OF REVIEW

In criminal cases, this Court sits to review errors of law only. State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973). This Court is bound by the trial judge's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001).

LAW/ANALYSIS

I. Lesser-Included Offense

Appellant argues the trial judge erred in failing to submit homicide by child abuse as a lesser-included offense of the murder of a child under age twelve. We disagree.

The indictment charged Appellant with the crime of murder under S.C. Code Ann. § 16-3-20 (Supp. 2005). The State submitted a notice of evidence in aggravation of punishment listing the following statutory aggravators: (1) the murder was committed in the commission of physical torture; and (2) the victim was a child eleven years of age or under.[1]

The test for determining whether a crime is a lesser included offense of the crime charged is whether the greater of the two offenses includes all the elements of the lesser offense. Hope v. State, 328 S.C. 78, 492 S.E.2d 76 (1997). If the lesser offense includes an element not included in greater offense, then the lesser offense is not included in the greater. *Id*.

Homicide by child abuse requires proof of the death of a child under age eleven during the commission of child abuse or neglect and the death occurs under circumstances showing extreme indifference to human life. S.C. Code Ann. § 16-3-85 (2003). Murder is the "killing

[1] S.C. Code Ann. § 16-3-20(C)(a)(1)(h) and (10) (2003).

of any person with malice aforethought, either express or implied." *Id.* § 16-3-10.

Homicide by child abuse is not a lesser included offense of murder. An element of homicide by child abuse, the death of a child under age eleven, is not an element of murder. Thus, the elements test has not been met. "A lesser offense is included in the greater only if each of its elements is *always* a necessary element of the greater offense." Knox v. State, 340 S.C. 81, 530 S.E.2d 887, *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).[2]

When an offense fails to meet the elements test, this Court will nevertheless construe it as a lesser included offense if the offense has traditionally been considered a lesser included offense of the greater offense charged. State v. Burton, 356 S.C. 259, 264, 589 S.E.2d 6, 8 (2003) (citing State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002)). There is no historical antecedent suggesting homicide by child abuse is a lesser included offense of murder. Because homicide by child abuse is not a lesser included offense of murder under either the elements test or the historical antecedent test, the trial judge did not err in denying Appellant's request to submit homicide by child abuse as a lesser included offense of murder.

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[2] Compare State v. Mitchell, 362 S.C. 289, 296, 608 S.E.2d 140, 144 (Ct. App. 2005) ("The crime of homicide by child abuse only applies in cases where the decedent is under the age of eleven whereas the application of involuntary manslaughter is not affected by the age of the decedent."); State v. Elliott, 475 S.E.2d 202, 218 - 219 (N.C. 1996) ("[F]irst-degree murder and felony child abuse each 'requires proof of a fact which the other does not.'") (citation omitted); State v. Molina, 713 N.W.2d 412, 432 (Neb. 2006) ("It is clear … that child abuse resulting in death requires proof of an element that second degree murder does not: that the death was that of a minor child.").

II. Expert Reports

Appellant argues the trial judge erred by requiring him to direct his expert witnesses to generate written reports for the benefit of the prosecution. We agree.

Before trial, the State submitted a motion requesting the names and addresses of all potential expert witnesses upon whom Appellant intended to rely to establish a mental defense or "any other mental deficiency." The State also requested Appellant "disclose the conclusions and reports of any and all potential expert witnesses reduced to writing and accompanied by any and all written materials and all other materials upon which such an opinion is based." The motion failed to cite any South Carolina rule governing pretrial discovery. The trial judge ordered Appellant to comply with the State's request, noting the "standard procedure has been to require both sides to produce reports."

Rule 5(b)(1)(B) of the South Carolina Rules of Criminal Procedure creates a right of reciprocal discovery:

> If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the prosecution, the defendant, on request of the prosecution, shall permit the prosecution to inspect and copy any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to his testimony.

The rule requires the production of reports "within the possession" of the defense. However, it does not authorize the trial judge to require parties to generate written reports solely for the benefit of the opponent.

Therefore, the trial judge erred in requiring Appellant to direct his expert witnesses to prepare written reports for the prosecution.

Determining the trial judge committed error is the first step of our analysis. Next we must determine whether the error was harmless. Franklin v. Catoe, 346 S.C. 563, 572, 552 S.E.2d 718, 723 (2001) ("the harmless error rule and a prejudice analysis are no strangers to cases involving the death penalty").

> Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it "could not reasonably have affected the result of the trial."

State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (citing State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

Appellant argues the State was unfairly benefited by the reports and was able to prosecute and cross-examine more vigorously because of the reports. The State contends, and we agree, the written reports generated by Appellant's experts did not advantage the State any more than the notes, data, and other materials properly disclosed under Rule 5, SCRCrimP. The written reports only summarized the contents of other discoverable materials.

Appellant also argues the erroneous extension of Rule 5(b), S.C.R.Crim.P., by the trial judge resulted in the prejudicial exclusion of certain testimony from Dr. Tracy Gunter. Dr. Gunter performed a family court-ordered evaluation of Appellant at DJJ in 1995.[3] Although she diagnosed appellant with conduct disorder in 1995, she changed her diagnosis to Post-Traumatic Stress Disorder before the 2003 litigation in light of new information. The trial judge excluded

[3] Appellant was at DJJ because he had been found delinquent on a charge of bringing a firearm to school.

any testimony not related to the 1995 evaluation because Dr. Gunter's written report was based only on her 1995 encounter with Appellant.

Although Dr. Gunter's entire testimony was critical in establishing mitigating evidence for Appellant, there was no prejudice to Appellant. Dr. Gunter was able to convey the crux of her testimony by stating she was hampered in her evaluation of Appellant in 1995 by a lack of DSS records showing the abuse Appellant had endured at the hand of his father. Dr. Gunter expressed concerns at the time of the evaluation that Appellant might have Post-Traumatic Stress Disorder or some type of dissociative disorder. She further stated her 1995 diagnosis was not reliable or credible due to the lack of DSS records made available to her. Because the erroneous extension of Rule 5, S.C.R.Crim.P., by the trial judge could not reasonably have affected the result of the trial, we conclude the error was harmless beyond a reasonable doubt.

III. Evidence of the Baby's Prior Injury

Appellant argues the trial judge erroneously admitted evidence the baby suffered a broken leg at age ten-weeks when Appellant removed her from a swing-seat. We agree.

During the sentencing phase of Appellant's trial, the State introduced evidence that in October, 2000, nearly two months prior to the baby's death, Appellant accidentally injured her while removing her from a swing-seat. The baby was diagnosed with and treated for a spiral fracture of the leg. The diagnosis of such an injury at a hospital is a "red flag" for possible child abuse; however, the treating physician did not refer the matter to DSS, the logical inference being the physician ruled out child abuse after treating the baby and meeting the parents.[4] The State argued the fact Appellant caused the injury was

[4] The pathologist who performed the baby's autopsy noted a healing fracture of the femur. He stated such an injury is "one of the signals to the emergency room and to pediatricians to investigate the possibility of child abuse." He presumed an investigation had occurred

sufficient to warrant the introduction of the evidence as relevant to the issue of his character and his relationship with his baby. Appellant argued the jury would interpret "an accident that could have happened to anybody" as child abuse through "the distorting lens of hindsight."

The admission of evidence is left to the sound discretion of the trial judge whose decision will not be reversed on appeal absent an abuse of discretion. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000). The trial judge abused his discretion in admitting evidence of the prior injury because it unfairly prejudiced Appellant. Not only is such evidence arguably irrelevant, it is highly prejudicial and should have been excluded pursuant to Rule 403, SCRE. Further, the error in admitting evidence the baby had suffered this injury was not harmless. The State's purpose in introducing the evidence was to shed light on Appellant's relationship with the baby and to highlight the family tension that ensued during the two months prior to the baby's death. The baby's prior injury was, under all accounts, an accident. However, in light of Appellant's outburst of violence against his baby two months after this injury, the jury likely misperceived the evidence resulting in unfair prejudice to Appellant. The erroneous admission of this evidence requires reversal of Appellant's death sentence. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) (in order for an error to warrant reversal, the error must result in prejudice to the appellant).

IV. Letter from Ms. Northcutt

Appellant argues the trial judge erred by admitting a letter from Ms. Northcutt to a defense social worker in which Ms. Northcutt stated she had "no sympathy" for Appellant. We disagree.

On cross-examination, Dr. Arlene Andrews, a defense social worker, testified she tried to talk with Ms. Northcutt about the parental care of the baby; however, Ms. Northcutt declined to be interviewed. In an effort to impeach the witness, the solicitor read a letter written to

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here and multiple physicians had considered and ruled out child abuse as the cause of the baby's injury.

Dr. Andrews by Ms. Northcutt in which Ms. Northcutt stated: "I have no sympathy for him and his actions, nor do I have any recollections or thought (*sic*) that would be sympathetic to him in any way." The trial judge overruled Appellant's objection and allowed the letter into evidence.

Appellant argues the State improperly introduced evidence of the victim's family member's opinion in violation of Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), *overruled on other grounds by* Payne v. Tennessee, 501 U.S. 808, 830 n.2, 111 S.Ct. 2597, 2611 n.2, 115 L.Ed.2d 720, 721 (1991) ("admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment"). Expressing a lack of sympathy, however, does not offend the Booth proscription. Rather than expressing her opinion of Appellant, Ms. Northcutt was responding to Dr. Andrew's inquiry.

The trial judge did not err in admitting the letter from Ms. Northcutt to Dr. Andrews. Even if the admission of the letter were error, the error was harmless. In light of Ms. Northcutt's testimony and the record before us, the admission of the letter did not prejudice Appellant nor did it affect the result of the trial.

V. Letter from Appellant

Appellant argues he should have been permitted to introduce a letter he wrote to his wife expressing remorse for the death of their child in response to Ms. Northcutt's testimony that his post-arrest phone calls to her showed a lack of remorse and concern. We agree.

Ms. Northcutt testified of a series of phone calls she received from Appellant while he was in pre-trial confinement. Ms. Northcutt's testimony implied Appellant never expressed concern for her or their deceased child or remorse for his actions. On cross-examination, counsel for Appellant attempted to question her about a letter she received from Appellant nine days following the murder. The letter written by Appellant expressed remorse and sorrow for his actions.

The trial judge erroneously excluded the evidence. The prosecution had opened the door for Appellant to present evidence of his remorse. Appellant is entitled to rebut the State's argument and correct the false impression the State conveyed to the jury. The portion of the letter directly addressing Appellant's remorse was admissible. The State cannot preclude the jury from considering "any relevant mitigating evidence" the defendant proffers in support of sentence less than death. Payne, 501 U.S. at 822, 111 S.Ct. at 2606, 115 L.Ed.2d at 721 (citing Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S.Ct. 869, 877, 71 L.Ed.2d 1, 1 (1982)). The letter, as a whole, however, is subject to redaction because portions are inadmissible hearsay.[5] A portion of the letter is admissible for the limited purpose of rebutting the State's argument Appellant had no remorse.

Although it was error for the trial judge to exclude the letter written from Appellant to Ms. Northcutt expressing remorse, the error was harmless. The record contains evidence of Appellant's remorse. Appellant was not prejudiced, nor was the outcome of the trial affected.

VI. Closing Argument

Appellant argues the solicitor's sentencing-phase closing argument so infected the jury's sentencing determination with passion

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[5] Appellant fails to cite any exception to the hearsay rule which would allow the introduction of the entire letter. Appellant's reliance on Rule 803(3), SCRE, is misplaced because the letter does not qualify as Appellant's then existing state of mind.

Also, Appellant's reliance on State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (2004), is misplaced. In Cabrera-Pena, the Court applied the "rule of completeness" to allow the defendant to develop the full substance of a conversation when the prosecution witness testified to only portions of the conversation. The instant case lacks the contemporaneous quality of the conversation in Cabrera-Pena.

and prejudice that it requires reversal of Appellant's death sentence. We agree.

A trial judge is vested with broad discretion in dealing with the range of propriety of closing argument, and ordinarily his rulings on such matters will not be disturbed. State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997). We must review the argument in the context of the entire record. *Id.* The appellant has the burden of showing that any alleged error in argument deprived him of a fair trial. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990). The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Solicitors are bound to rules of fairness in their closing arguments as we explained in State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981):

> While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based upon this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.

We evaluate the closing argument in light of S.C. Code Ann. § 16-3-25(C)(1) (2003) to determine "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor."

Appellant argues the solicitor violated this well-established rule by (1) crying numerous times throughout the argument; (2) telling the jury "we will kick the baby some more" if they returned a life sentence; (3) dehumanizing Appellant ("I don't even call him a person"); (4) threatening the jury ("it will be on your heads if he kills someone else [during his life sentence in prison]"); (5) declaring an "open season on babies;" (6) telling the jury he "expects" the death penalty; and (7)

enacting a funeral procession complete with a black shroud covering the baby's crib.

Three of the solicitor's arguments require reversal of the sentence.[6] First, the solicitor suggested declaring an "open season on babies in Lexington County" if the death penalty was not returned. The sole purpose of this statement was to inflame the jury. The solicitor also repeatedly told the jury he "expects" the death penalty and, in doing so, ignored our precedent which rebukes such an imposition of the solicitor's personal belief.[7] Finally, he concluded his argument by producing a large black shroud and draping it over the baby's crib. He wheeled the crib from the courtroom in a staged funeral procession.

Any one of these three miscues requires reversal of Appellant's sentence. The State admits the solicitor's comments constituted error, but contends the brutality of the crime and the fact Appellant himself asked for the death penalty require this Court uphold the sentence.[8] While it is difficult to determine the impact of the evidence on the jury

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[6] The first four alleged mistakes are permissible arguments because they were based on the record and reasonable inferences from it. See State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996) ("A solicitor's closing argument … should stay within the record and reasonable inferences to it.").

[7] See State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982) (reversing a death sentence because of the same error by the same solicitor), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984) (finding prejudicial error where prosecutor's argument put his personal opinion before the jury regarding the death penalty in murder cases and requiring a new sentencing proceeding).

[8] After the solicitor's closing argument, Appellant told the jury: "I killed a defenseless, helpless, four-month-old baby, my daughter. All I ask is do the right thing and bring back the right sentence. Under the law, that would be the death sentence."

and the Appellant's own request for a death sentence, it is clear the solicitor was overly zealous in his argument. State v. White, 246 S.C. 502, 507, 144 S.E.2d 481, 483 (1965) ("In view of the absolute discretion of the jury with regard to the issue of mercy, it is impossible to determine whether the argument actually had a prejudicial effect upon the verdict."). We conclude the solicitor's closing argument requires reversal of Appellant's death sentence because the sentence was imposed under the influence of passion and prejudice in violation of S.C. Code Ann. § 16-3-25(C).

CONCLUSION

Because of the solicitor's prejudicial closing argument and the inclusion of evidence of the child's prior leg injury, we reverse Appellant's death sentence and remand for further sentencing proceedings.

REVERSED AND REMANDED.

MOORE and WALLER, JJ., concur. TOAL, C.J., dissenting in a separate opinion. PLEICONES, J., concurring in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent. In my view, the trial court did not err in admitting evidence regarding the victim's prior leg injury. Furthermore, I disagree with the majority's conclusion that the solicitor's conduct during his closing argument rose to the level of a constitutional violation or otherwise requires reversal.

The relevant jurisprudence instructs that "the Constitution requires the jury to make an individualized determination as to whether the defendant should be executed based on the 'character of the individual and the circumstances of the crime.'" *Payne v. Tennessee*, 501 U.S. 808, 818 (1991) (quoting *Booth v. Maryland*, 482 U.S. 496, 502 (1987), and *Zant v. Stephens*, 462 U.S. 862, 879 (1983)). Accordingly, it is well established that evidence which is probative of the defendant's character is admissible in a capital sentencing proceeding. *See State v. Gaskins*, 284 S.C. 105, 124, 326 S.E.2d 132, 143 (1985)[9] (quoting *Woodson v. North Carolina*, 428 U.S. 280 (1976), and citing *Barefoot v. Estell*, 463 U.S. 880 (1983)). In my view, this practice derives from the command that the decision to impose the death penalty be based on who the defendant is and what he has done. In my opinion, the majority incorrectly posits that the evidence regarding the victim's prior leg injury was irrelevant and mistakenly concludes that this evidence, if admitted improperly, prejudiced Appellant.

Of course, the evidence of the victim's prior leg injury was clearly relevant to Appellant's character. The State did not offer the injury as evidence that Appellant was guilty of child abuse, but instead, offered the injury as evidence that Appellant's actions with his child, prior to his brutally murdering her, were occasionally reckless and callous. The majority's bald assertion that this evidence is "arguably irrelevant" is unavailing.

[9] Overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 70 n.13, 406 S.E.2d 315, 329 n.5 (1991).

Furthermore, assuming, as the majority seems to, that Rule 403, SCRE, required the trial court to exclude this evidence as substantially more prejudicial than probative, I fail to see how this error prejudiced Appellant.[10] Although Appellant may be correct in that the circumstances of this possibly accidental injury could have been viewed differently by the jury through the "distorted lens of hindsight," the trial court gave extensive instructions to the jury regarding this particular evidence, regarding evidence of character generally, and regarding the factors the jury was required to consider in deciding on the appropriate penalty in this case. As this Court has noted, it is the duty of the jury to take the law from the court in the case on trial and "[i]t must be presumed that they do so." *State v. Queen*, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975).

The majority's finding of prejudice in this case is all the more remarkable given the brutal events which were the subject of this sentencing proceeding.[11] The solicitor referred to the victim's prior injury only once in his closing argument, remarking that it demonstrated that Appellant was not handling the victim "carefully" and "lovingly" two months prior to the victim's death. As a notable jurist once stated, "[s]urely this brief statement did not inflame [the jury's] passions more than did the facts of the crime." *Payne*, 501 U.S.

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[10] I note that such an assumption is odd given that we have said that an abuse of discretion occurs only when the trial court's decision is controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support. *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 564, 274 S.E.2d 290, 291 (1981) (citing *Stewart v. Floyd*, 274 S.C. 437, 265 S.E.2d 254 (1980)).

[11] As the record reveals, in administering the beating which ultimately took the life of the four month old victim, Appellant slapped the victim with such force that his wedding ring left marks on the victim's scalp, punched the victim, choked the victim, shook the victim, bit the victim with such force that it left an imprint in the victim's bone, threw the victim on nearby household furniture, and ultimately broke the victim's back across the railing of the victim's crib.

at 831. Furthermore, in the final testimony offered to the jury before the court's charges, Appellant himself requested that the jury sentence him to death for the murder of his daughter. In my view, Appellant has not demonstrated how any error the trial court committed in the admission of evidence prejudiced his case, and under these facts, I believe such a showing would indeed be a tall order.

The majority also concludes that three aspects of the solicitor's closing argument require reversal in this case "because the [death] sentence was imposed under the influence of passion and prejudice in violation of S.C. Code Ann. § 16-3-25(C)." I disagree.

As a primary matter, Appellant did not contemporaneously object to the solicitor's use of the black cloth and crib during closing argument. Thus, Appellant did not preserve any argument for our review as it relates to this conduct. *See Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 159, 345 S.E.2d 711, 714 (1986) (stating that "the proper course to be pursued when counsel makes an improper argument is for opposing counsel to *immediately* object . . . .").

As I explained in my dissenting opinion in *State v. Burkhart*, Op. No. 26243 (S.C. Sup. Ct. filed Jan. 8, 2007) (Shearouse Adv. Sh. No. 1 at 36), I believe this Court's jurisprudence which suggests that § 16-3-25(C) imposes a separate standard by which this Court should judge the conduct of capital sentencing proceedings is misguided and mistaken. The soundness of my position as it would apply here is underscored by the fact that, when registering objections during the solicitor's closing argument, Appellant did not argue that the argument was improper under South Carolina's statutory law. Instead, Appellant argued that the solicitor's arguments "were inflammatory" and "violat[ed] the Eighth Amendment." Perplexingly, the majority's analysis begins by discussing the well-established constitutional guideposts that characterize capital jurisprudence, only to end with the naked conclusions that the argument was "overzealous" and in violation of a provision of the South Carolina Code.

The Eighth Amendment is violated when the decision to impose the death penalty is made in an arbitrary manner, or "out of a whim, passion, prejudice, or mistake." *Caldwell v. Mississippi*, 472 U.S. 320, 329-30 (1985); *State v. Copeland*, 278 S.C. 572, 587, 300 S.E.2d 63, 72 (1982). Violations of the Fourteenth Amendment occur when something "so infects the trial with unfairness as to make the resulting conviction a denial of due process." *See Darden v. Wainwright*, 477 U.S. 168, 181 (1986). A trial court is vested with great discretion in dealing with the propriety of a closing argument to the jury, and, on appeal, a reviewing court must view the alleged impropriety of the closing argument in the context of the entire record. *State v. Woomer*, 277 S.C. 170, 174-75, 284 S.E.2d 357, 359 (1981) (citing *State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975), and *State v. Lindler*, 276 S.C. 304, 278 S.E.2d 335 (1981)).

When viewed in the context of the entire record, I do not believe that the solicitor's comments so infected Appellant's sentencing proceeding with unfairness as to result in a denial of due process. Regardless of whether the majority is correct in its assertion that the sole purpose of the solicitor's "open season" comment was to inflame the jury, the relevant inquiry is whether the argument, taken as a whole, resulted in a violation of the Fourteenth Amendment.

Likewise, I disagree with the assertion that the solicitor's remark in which he expressed that he expected the death penalty requires reversal. The solicitor's closing argument fills thirty-five pages of the record. I seriously doubt that either of these two comments, each filling only one line on separate pages of the record, permeated the sentencing proceeding with any degree of unfairness.

The majority cites two cases as examples of jurisprudence from this Court "rebuk[ing]" such an imposition of the solicitor's personal belief into a capital sentencing proceeding. As I stated in my *Burkhart* dissent, these cases are but examples of a line of this Court's precedent which is based upon what I believe is a skewed reading of § 16-3-25(C). Of course, the introduction of overly inflammatory evidence as well as arguments which impermissibly appeal to the passions or

prejudices of a jury have the potential to violate the Eighth or Fourteenth Amendments. Interestingly, the relevant federal precedent rejects a steadfast rule of reversal whenever "personal opinion" is injected into a closing argument in a capital sentencing proceeding. *See Darden*, 477 U.S. at 178 n.8, 181-82 (affirming, on habeas corpus review, a death sentence over the claim that the prosecutor's remark that he believed the state had carried its burden to support such a penalty violated the Fourteenth Amendment). At least from a constitutional perspective, we have nonchalantly adopted a rule that the United States Supreme Court has rejected.

Affirming a conviction which follows an argument containing improper components is an unpleasant task. Appellant's sentencing proceeding was not perfect, but few are. On the record presented for our review, however, I cannot conclude that Appellant's sentencing proceeding was fundamentally unfair. Our jurisprudence unwaveringly provides that we are to presume that juries follow their instructions and that proper instruction of the jury by the court cures most errors. *See State v. Ard* , 332 S.C. 370, 386, 505 S.E.2d 328, 336 (1998) (citing *State v. Pierce*, 289 S.C. 430, 346 S.E.2d 707 (1986)).[12] Instead of following this jurisprudence in the capital arena, I believe we have ignored it. We ought to be more dutiful and genuine in our analysis. The jury was instructed that it was the sole finder of facts in the proceeding; that it was to give Appellant every benefit of every reasonable doubt; that the burden of proof rested entirely upon the State; and that the jury was to make its decision dutifully, fairly, impartially, without passion, without prejudice, and without excessive emotion. I would presume that the jury followed these instructions, and I would find that the jury's verdict calling for the death penalty was not imposed in violation of the Eighth Amendment.

[12] Though not relevant to my analysis, *Ard* was overruled on other grounds by *State v. Shafer*, 340 S.C. 291, 304 n.12, 531 S.E.2d 524, 531 n.12 (2000). Similarly, *Pierce* was overruled on other grounds by *Torrence*, 305 S.C. at 70 n.13, 406 S.E.2d at 329 n.5 (1991).

For the foregoing reasons, I would hold that even if the trial court erred in admitting evidence relating to the victim's prior injury, Appellant has not shown prejudice to warrant reversal of his sentence. Also, I would hold that the solicitor's closing argument was not so improper as to violate the Eighth or Fourteenth Amendments to the Constitution.

JUSTICE PLEICONES: I concur in the majority's decision to reverse appellant's capital sentence but write separately because I would decide certain issues differently.

Specifically, I view the admission of Ms. Northcutt's letter to Dr. Andrews as error, and would find the solicitor's closing argument improper in at least one aspect deemed acceptable by the majority. As to the letter, I find Ms. Northcutt's reason for declining to speak with Dr. Andrews simply irrelevant. See e.g., State v. Burkhart, Op. No. 26243 (S.C. Sup. Ct. filed Jan. 8, 2007) (Shearouse Adv. Sh. No. 1 at 36), (evidence in the sentencing phase must be relevant to the defendant's character or the circumstances of the crime). As to the solicitor's closing argument, in my view it was improper for him to argue the jury would be responsible for any future criminal acts of appellant if a life sentence were returned. This argument, which projects personal responsibility upon jurors and plays to their fear, "injects an arbitrary factor" into the sentencing decision. State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003). I cannot agree with the majority that it was a "permissible argument . . . based on the record and reasonable inferences from it." Technically, perhaps, the crying, the "kick the baby some more," and the dehumanizing of appellant arguments are within allowable parameters, but it is beyond dispute that the closing argument here repeatedly transgressed firmly established boundaries and precedents. It does not serve justice for a prosecutor to engage in such histrionic gamesmanship, especially where a jury is being asked to make a life or death decision.

With these qualifications, I concur in the majority's decision to reverse appellant's capital sentence and remand the matter for a new proceeding.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Clear Channel Outdoor, f/k/a
Eller Media, Petitioner,

v.

The City of Myrtle Beach, and
The City of Myrtle Beach
Board of Zoning Appeals, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
John L. Breeden, Jr., Circuit Court Judge

Opinion No. 26272
Heard January 4, 2007 – Filed February 20, 2007

AFFIRMED

Howell V. Bellamy, Jr., and Douglas M. Zayicek, both of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., of Myrtle Beach, for Petitioner.

Frances I. Cantwell, and William B. Regan, both of Regan and Cantwell, LLC, of Charleston, for Respondents.

JUSTICE BURNETT: Clear Channel Outdoor (Petitioner) filed an application with the Zoning Administrator for the City of Myrtle Beach (the City) to replace its billboard. The application was denied. The City's Zoning Board of Appeals (the Board) upheld the Zoning Administrator's denial of the application. The circuit court initially upheld the Board's decision. The circuit court later vacated its first order and reversed the Board's decision. The Court of Appeals reversed. We granted Petitioner's writ of certiorari to review Clear Channel Outdoor v. City of Myrtle Beach, 360 S.C. 459, 602 S.E.2d 76 (Ct. App. 2004), and we affirm.

FACTUAL/PROCEDURAL BACKGROUND

On July 6, 2001, a tornado destroyed a billboard owned and operated by Petitioner. Petitioner applied for a permit to replace the billboard and the Zoning Administrator for the City denied the permit based on Section 902.9.1 of the city's zoning ordinances. Section 902.9 was adopted in February 1998. It prohibits the construction of new billboards.

Petitioner appealed to the Board, maintaining its billboard did not qualify as a new billboard, but as a replacement of an existing, conforming sign. Petitioner argued the replacement of the billboard would not violate Section 902.9.1's prohibition of new signs. Petitioner emphasized the billboard was conforming prior to its destruction according to the City's own inventory of billboards. Petitioner argued the permit should not be denied because it did not receive notice pursuant to Section 902.4.6 that its sign was in disrepair. Petitioner also argued that under Section 902.4.6.e, it had the right to restore, reconstruct, alter or repair the billboard as long as the reconstructed billboard conformed with all provisions of the current zoning ordinances.

The City argued the billboard was nonconforming prior to its destruction. This nonconformance was not discovered until the City

inspected the site of the billboard after it was removed[1]. Upon inspection, the City determined the billboard was actually two billboards inches apart in violation of Section 902.7.2.c.2 which prohibits the placement of billboards within 750 feet of one another. Section 902.8.3.d[2], therefore, applied to prevent the reconstruction of the billboard.

The City claimed it relied on Section 902.7.2.c.2 merely as a reply to Petitioner and the only section applicable to the controversy was Section 902.9.1. The City regarded Petitioner's application as one for a new billboard and not one to repair an existing billboard because there was nothing left to repair after Petitioner completely removed the destroyed billboard. The Zoning Administrator stated:

> I can't approve a permit to erect a billboard in the city …. I could only issue a permit as long as [the proposed billboard] complied with all the other provisions of the ordinance and there's no way it could comply with 902.9.1 because that says there are no more billboards in the city.

The Zoning Administrator also claimed Section 902.9.1 rendered all existing billboards nonconforming. She noted, however, Petitioner's billboard had not been placed on an amortization schedule as had other nonconforming billboards.

The Board affirmed the Zoning Administrator and based the denial of the permit on Sections 902.9, 902.4.6, and 902.8.3. Petitioner appealed to the circuit court, arguing the Board erred by considering ordinances other than

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[1] An employee for Petitioner removed the billboard out of concern for the dangerous condition resulting when the billboard was destroyed by a tornado.

[2] Section 902.8.3 states, in pertinent part, "[t]he right to maintain any nonconforming sign shall terminate and shall cease to exist whenever the sign structure is destroyed, or is damaged as described in subsection 902.4.6.e…." Section 902.4.6.e states that a sign is damaged when the structural support has failed either by fracture or by exceeding its yield point.

Section 902.9.1 when Section 902.9.1 was the Zoning Administrator's only basis for denying the permit. The circuit court affirmed but subsequently vacated its order, agreeing with Petitioner that "Section 902.9.1 was the sole basis for the Zoning Administrator's denial of a permit, and no other issue was properly before the Board…."

Respondent appealed and the Court of Appeals reversed. Clear Channel Outdoor v. City of Myrtle Beach, 360 S.C. 459, 602 S.E.2d 76 (Ct. App. 2004). The Court of Appeals held the circuit court erred in limiting the Board's review to Section 902.9.1 and noted "few restrictions encumber the scope of the Board's authority." *Id*. at 465, 602 S.E.2d at 79. The Court of Appeals cited S.C. Code Ann. § 6-29-800(E) (Supp. 2005) which confers upon the Board "all the powers of the officer from whom the appeal is taken." *Id*. The Court of Appeals also held Petitioner did not have a vested right to reconstruct a billboard. *Id*. at 467, 602 S.E.2d at 80.

ISSUES

Did the Court of Appeals' decision violate Petitioner's procedural due process rights and is the City estopped from alleging Petitioner's sign was nonconforming when Petitioner allegedly had no notice of the nonconformity issue?

STANDARD OF REVIEW

Under S.C. Code Ann. § 6-29-840(A) (Supp. 2005), "[t]he findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." In reviewing questions presented on appeal, the court must determine only whether the decision of the board is correct as a matter of law. *Id*. A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision. Rest. Row Assocs. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). However, a decision of a city zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion. *Id*.

LAW/ANALYSIS

Petitioner argues the Court of Appeals' decision violates its procedural due process rights because Petitioner allegedly had no notice of the issues decided by the City. Petitioner's argument fails because it had actual notice of the nonconformity issue and, therefore, the City is not estopped from alleging Petitioner's sign was nonconforming.

Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses. In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003). Petitioner argued its due process rights were violated because it neither received notice of the nonconformity issue nor had a meaningful opportunity to be heard. We disagree.

First, the record contains a memorandum from Petitioner to the Zoning Administrator written prior to the hearing before the Board in which Petitioner expresses its understanding that its billboard was nonconforming under Section 902.9.1. An affidavit from Petitioner's real estate manager confirms it knew of the nonconformity issue prior to the hearing before the Board. Second, Petitioner affirmatively argued before the Board that its billboard was conforming. The Record shows Petitioner had both notice of the nonconformity issue and an opportunity to be heard. Petitioner's due process rights, therefore, were not violated.

Petitioner's estoppel argument also fails. Petitioner argues the City is estopped from finding Petitioner's sign is nonconforming because the City inspected the sign and determined it was conforming, and because the City failed to notify Petitioner of any nonconformity. According to Petitioner, the City inspected all signs within the City limits and kept an inventory showing Petitioner's sign was conforming. The inventory led Petitioner to believe its sign was conforming and deprived Petitioner of the opportunity to cure any defect before the sign was destroyed. The City, on the other hand, maintains the inventory was merely an unofficial, staff-maintained record that predated Section 902.9.1.

To claim equitable estoppel, a party must show: "(1) a lack of knowledge and the means of knowledge of truth as to facts in question; (2) justifiable reliance upon the conduct of the party estopped; and (3) prejudicial change in the position of the party claiming estoppel." Evins v. Richland County Historic Pres. Comm'n, 341 S.C. 15, 532 S.E.2d 876 (2000). Petitioner is charged with knowledge of the law. See Labruce v. City of North Charleston, 268 S.C. 465, 234 S.E.2d 866 (1977). Petitioner was in the business of outdoor advertising and had ample means of knowing its sign violated the City's ordinance. Section 902.9.1 has been in effect since 1998. An unofficial inventory list does not excuse Petitioner from knowledge of ordinances which have a direct bearing on its business. Petitioner knew or had means to know its sign was nonconforming under Section 902.9.1. Therefore, Petitioner's reliance on the doctrine of estoppel is misplaced.

CONCLUSION

We affirm the decision of the Court of Appeals. We also affirm Petitioner's remaining issues pursuant to Rule 220(b)(1), SCACR, and the following authorities: Issues 1 and 2: S.C. Code Ann. § 6-29-800(A), (E) (Supp. 2005); Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) ("The cardinal rule of statutory construction is that words used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation."); Issues 4 and 5: Gurganious v. City of Beaufort, 317 S.C. 481, 490, 454 S.E.2d 912, 918 (Ct. App. 1995) ("While a property owner has a constitutionally protected right to continue the use following enactment of a zoning ordinance, provisions terminating the nonconforming use upon destruction of a specified portion of the premises … are proper, so long as the maximum amount of destruction permitted and the time allowed is reasonable."); and Issues 7 and 8: Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953) ("[A local zoning board's] construction of its own ordinance, the enforcement of which it is charged with, should be given some consideration and not overruled without cogent reason therefore."); Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("The circuit court should not disturb the findings of the board unless the board has acted

arbitrarily or in an obvious abuse of discretion, or unless the board has acted illegally or in excess of its lawfully delegated authority.").

AFFIRMED.

MOORE, WALLER, JJ., and Acting Justices James W. Johnson, Jr. and L. Casey Manning, concur.

The Supreme Court of South Carolina

Gary L. Wise, Appellant,

v.

South Carolina Department of Corrections, Respondent.

ORDER

By order dated October 12, 2006, this appeal was dismissed by the Court of Appeals. On October 27, 2006, the Court of Appeals received a petition to reinstate from appellant; however, he failed to provide proof of service. The remittitur was sent to the lower court by order dated October 30, 2006.

On December 28, 2006, appellant filed a motion for enlargement of time in this Court. By order dated January 4, 2007, the motion was denied because the sending of the remittitur ended appellate jurisdiction over the matter.

Appellant has now filed a "59(e) Motion to Alter or Amend a Judgement [sic]," an affidavit and memorandum of law in support of appellant's "Notice of Right to Appeal," and a document that we have

construed as a petition for a writ of certiorari.

Whenever it appears that an appellant has failed to comply with the requirements of the SCACR, an order of dismissal shall be issued. Rule 231(a), SCACR. The Clerk of Court shall remit the case to the lower court in accordance with Rule 221, SCACR, unless a motion to reinstate the appeal has been actually received by the court within fifteen days of filing of the order of dismissal. Id.

When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. Mickle v. Blackmon, 255 S.C. 136, 177 S.E.2d 548 (1970); Thomas v. Lynch, 87 S.C. 44, 68 S.E. 817 (1910); Carpenter v. Lewis, 65 S.C. 400, 43 S.E. 881 (1903); State v. Keels, 39 S.C. 553, 17 S.E. 802 (1893). The only exception to this rule is when the remittitur is sent down by mistake, error or inadvertence of the Court. Keels, supra.

The remittitur in this case was not sent down by mistake, error or inadvertence of the Court of Appeals. Instead, it was correctly sent after fifteen days had elapsed from the date of the order dismissing the appeal without the *proper* filing of a petition for reinstatement. See Rule 224,

SCACR (certificate of service shall be filed with all motions and petitions). Accordingly, this Court does not have jurisdiction to act in this matter. The documents filed by appellant are hereby dismissed.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

January 31, 2007

The Supreme Court of South Carolina

RE: Suspension of Fee Required by Rule 7.2(b) of the Rules of Professional Conduct, Rule 407, SCACR.

ORDER

By order dated June 20, 2005, we substantially amended the Rules of Professional Conduct (RPC), Rule 407, SCACR, to incorporate many of the changes made by the ABA to the Model Rules of Professional Conduct as part of its Ethics 2000 initiative, as well as other changes. These amendments became effective October 1, 2005. We are now considering amendments to the advertising rules proposed by the South Carolina Bar's Commission on Lawyer Advertising. While these amendments are being considered, we suspend the fee required by Rule 7.2(b), RPC, until further order of the Court. However, the filing requirement set forth in Rule 7.2(b) is not suspended.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

February 15, 2007

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Anthony Hardee,
Employee/Claimant,

v.

W.D. McDowell, Uninsured Employer, and S.E. Smith Construction Co., Inc., Alleged Statutory Employer,

And

Companion Property & Casualty Insurance Company, Carrier/Defendant/Appellants,

With

the South Carolina Uninsured Employers' Fund, Appearing/Respondents,

of whom

W.D. McDowell is a Respondent,

S.E. Smith Construction Co., Inc., and Companion Property & Casualty Insurance Co. are Appellants,

And

the South Carolina Uninsured Employers' Fund is a Respondent.

Appeal From Horry County
B. Hicks Harwell, Jr., Circuit Court Judge

Opinion No. 4206
Heard January 9, 2007 – Filed February 12, 2007

AFFIRMED

Weston Adams, III, of Columbia and Brian O'Keefe, of Charleston, for Appellants.

Terri M. Lynch, of Mt. Pleasant and W.D. McDowell, of Loris, for Respondents.

STILWELL, J.: S.E. Smith Construction Co., Inc. and Companion Property & Casualty Insurance Co. (Smith Construction) appeal the order affirming the Workers' Compensation Commission's finding that they must provide coverage for injuries sustained by an employee of Smith Construction's subcontractor. We affirm.

FACTS

Smith Construction, a general contractor, routinely subcontracted with W.D. McDowell (McDowell) for framing work. Because McDowell could not afford the lump sum payment to provide workers' compensation insurance for its employees, Smith Construction offered to pay the premium up front and deduct the insurance payments weekly from McDowell's pay. On March 11, 2002, McDowell presented Smith Construction with a

certificate of insurance indicating coverage from January 30, 2002 to January 30, 2003.

During the spring and summer of 2002, McDowell worked on various jobs for Smith Construction. Smith Construction, relying on the certificate of insurance on file as of March 11, did not ask McDowell for proof of insurance on these jobs. In the summer of 2002, McDowell started construction of the Socastee library for Smith Construction.

On September 6, 2002, Anthony Hardee, an employee of McDowell, sustained an injury at the Socastee site. Several weeks later, McDowell discovered the insurer had canceled coverage on September 5, the day before Hardee's accident.

On January 16, 2003, Hardee filed a workers' compensation claim against Smith Construction and McDowell. Smith Construction admitted the injury but sought indemnification from the South Carolina Uninsured Employers' Fund (the Fund) pursuant to section 42-1-415(B) of the South Carolina Code.

After a hearing on Hardee's compensation claim, the single commissioner found, inter alia, neither McDowell nor Smith Construction was aware the policy had been canceled. Further, the single commissioner found although McDowell provided Smith Construction with proof of workers' compensation insurance for 2002, it did not request a certificate of insurance for the particular job in question. The single commissioner therefore concluded Smith Construction failed to comply with section 42-1-415 and, accordingly, found Smith Construction liable for Hardee's claim. On appeal to the commission, Smith Construction maintained because it had collected proof of insurance prior to McDowell being "engaged to perform work," per section 42-1-415(B), it was not liable for Hardee's injury. The commission and circuit court affirmed.

STANDARD OF REVIEW

The question of whether Smith Construction met the requirements of section 42-1-415 is a mixed question of law and fact. There is a question of law in determining the meaning of the statute's phrase: "at the time the [subcontractor] was engaged to perform work." See Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) (determining legislative intent is a matter of law); Thompson v. Ford Motor Co., 200 S.C. 393, 431-32, 21 S.E.2d 34, 50 (1942) (interpretation of a statutory term is not a finding of fact). There is a question of fact regarding whether the work under construction at the time of the employee's injury was the continuation of previous work or a new job.

"In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court." Sloan v. South Carolina Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 466-67, 636 S.E.2d 598, 605-06 (2006) (stating the appellate court is free to decide the question based on its consideration of law, public policy, and the court's sense of justice). Notwithstanding, this court will accord the most respectful consideration to the interpretation of a statute by the agency charged with its administration. Bursey v. South Carolina Dep't of Health & Envtl. Control, 369 S.C. 176, ___, 631 S.E.2d 899, 905 (2006).

As to questions of fact in workers' compensation actions, this court reviews factual findings of the commission under the substantial evidence standard and may reverse a factual finding only if the finding is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or is affected by error of law. S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006).

LAW/ANALYSIS

Smith Construction argues the commission erred by requiring a contractor to collect proof of insurance from its subcontractor for each job the

subcontractor performs. Smith Construction contends that a contractor complies with section 42-1-415 by obtaining proof of insurance from its subcontractor once a year. We disagree.

Under section 42-1-415(A) a contractor may transfer liability to the Fund when its subcontractor's employee is injured if the contractor submitted "documentation to the commission that a . . . subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance at the time the . . . subcontractor was engaged to perform work." S.C. Code Ann. § 42-1-415(A) (Supp. 2006).

Smith Construction, relying on this court's decision in South Carolina Uninsured Employer's Fund v. House, 360 S.C. 468, 602 S.E.2d 81 (Ct. App. 2004), contends the statute is satisfied if the contractor obtains proof of insurance the first time it hires a subcontractor in any given year regardless of the number or variety of jobs the subcontractor performs for the contractor throughout the year. Hardee conversely argues House does not precisely address this issue and a common sense reading of the statute demands a contractor ask for proof of insurance at the beginning of each new job rather than once a year.

We agree with Hardee's interpretation of the statute. In House, a subcontractor, "[w]hen he was initially engaged to perform the work," presented the contractor with proof of workers' compensation coverage from June 5, 1997 to June 5, 1998. House, 360 S.C. at 469, 602 S.E.2d at 81. When the original policy expired, the subcontractor provided a certificate indicating continuing coverage. Id. at 469-70, 602 S.E.2d at 81. The policy's history indicated several cancellations and reinstatements for nonpayment of premiums until March of 1999 when the insurer sent the subcontractor a notice of cancellation for refusal to pay the renewal premium. Id. at 470, 602 S.E.2d at 81-82. The subcontractor failed to pay the premiums necessary to reinstate the policy and was refused coverage by another carrier but continued to verbally advise the contractor that it had workers' compensation coverage. Id. at 470, 602 S.E.2d at 82.

The issue presented in House was whether the contractor satisfied its obligation under section 42-1-415 when it requested a certificate of insurance at the beginning of the work or whether the contractor had a continuing duty to collect proof of insurance throughout the term of the work. We found the contractor satisfied its burden under the statute by collecting proof of insurance "at the time the . . . subcontractor was engaged to perform work." Id. at 471, 602 S.E.2d at 82 (quoting section 42-1-415(A)). Further, we found that under 42-1-415(C) the subcontractor had a duty to notify the contractor of any lapse in coverage. Id. at 472, 602 S.E.2d at 83. House does not address the situation presented here, where a contractor employs a subcontractor for a series of separate jobs in a single year. However, the court in House concluded: "The statute does not require a prime contractor to continue collecting proof of its subcontractor's insurance coverage after the subcontractor is engaged to perform the work." Id. (emphasis added). Our reading of the House case leads us to conclude the work performed in House was on a continuous job rather than a series of separate jobs. In this case, the work performed at the time of the injury was at a new job site, the Socastee project. Accordingly, House does not control.

Turning to the statute, we find the plain language contemplates the contractor require proof of insurance for each job the subcontractor performs regardless of the number of jobs the subcontractor performs in a given year. To qualify for reimbursement under section 42-1-415, the contractor must collect proof of insurance at the time the subcontractor "is engaged to perform work." S.C. Code Ann. § 42-1-415(B) (Supp. 2006). We find the phrase "engaged to perform work" refers to when a subcontractor begins work at a construction site. The statute is plain and unambiguous and, therefore, it is not our place to change the meaning of the statute. See Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 891 (1995) (finding that if a statute's language is clear and unambiguous the rules of statutory construction are unnecessary and the court cannot impose another meaning). If the state legislature had intended for a contractor to collect documentation of insurance from a subcontractor once a year, it could have drafted the statute to reflect that intent. See Croft v. Old Republic Ins. Co., 365 S.C. 402, 413, 618 S.E.2d 909, 914 (2005) (considering legislature's options in wording a statute when interpreting the statute). We find some

support from our sister state, North Carolina, in arriving at this interpretation. See generally Spoone v. Newsome Chevrolet-Buick, 309 S.C. 432, 434, 424 S.E.2d 489, 490 (1992) (giving weight to North Carolina precedent in interpreting workers' compensation legislation); Robertson v. Hagood Homes, Inc., 584 S.E.2d 871, 878 (N.C. Ct. App. 2003) (interpreting the North Carolina statute requiring proof of insurance and concluding: "Having chosen voluntarily to sublet a series of individual contracts, [contractor was] required . . . to obtain a certificate for each separate contract.").

Having concluded the statute requires proof of insurance for each job, we review the factual findings of the commission under the substantial evidence standard. The single commissioner found, and the commission concurred, that neither McDowell nor Smith Construction was aware the policy lapsed and that, although McDowell provided Smith Construction with proof of workers' compensation insurance for 2002, it did not provide a certificate of insurance for the Socastee project. Accordingly, Smith Construction failed to comply with the statute. We find no error in these findings. We therefore agree with the commission that because Smith Construction failed to comply with the statutory provisions, it was not entitled to shift the burden of coverage to the Fund.

AFFIRMED.

GOOLSBY and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State **Respondent,**

v.

Cedric A. Colden **Appellant.**

Appeal From Aiken County
Reginald I. Lloyd, Circuit Court Judge

Opinion No. 4207
Submitted February 1, 2007 – Filed February 20, 2007

AFFIRMED

Appellate Defender Aileen P. Clare, Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, of Columbia; and Solicitor Barbara R. Morgan, of Aiken, for Respondent.

ANDERSON, J.: Cedric Ali Colden appeals his conviction for kidnapping, armed robbery, and murder. Colden argues the trial court erred

in denying his motion for a continuance and refusing to order a mental competency evaluation. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

On December 21, 2003, Cedric Ali Colden was involved in the kidnapping and armed robbery of Alexander Gorman, as well as the kidnapping, armed robbery, and murder of Christopher Carroll. Colden was arrested and detained shortly thereafter.

Colden's trial was initially scheduled for Aiken County's September 7 and 14, 2004 terms of court. Just before the trial was set to begin, in late August of that year, Colden changed lawyers. He released his public defender and hired private counsel, who he believed "would have the time to put into the case and focus on it and not be overloaded."

On September 7, the day the case was scheduled to be called, Colden's recently retained attorneys moved for a continuance, relying primarily upon the fact they had become involved in the case only ten days earlier. Further, they indicated discovery motions had been recently filed and they did not know, at the present time, what evidence or witnesses would be involved in the trial. The deputy solicitor stated that he would like to try the case during the October 18 term; however, Colden's counsel responded that "given the seriousness of the case," they felt four to five additional weeks was too short a time to allow for proper preparation. The trial judge ordered the case carried over until the October 18 term, although subsequent discussions between the two sides would later move the case to the October 25 term of court.

On October 6, Colden's lawyers moved for another continuance, asking the case be set for December. Emphasizing the severity of the charges against their client, Colden's counsel argued they had not had sufficient time to prepare and noted they had not yet received or reviewed the police

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

investigation notes regarding the case. Additionally, the attorneys inculcated that Colden had recently provided them with the name of an "exoneration" witness whom they were uncertain they would be able to locate and interview within the next nineteen days.

In response, the solicitor stressed that the date was originally set for the September term of court and Colden's prior counsel, the assistant public defender, had been notified two terms prior that the case would be called at that time. He emphasized it was Colden who waited until late August to make the decision to retain new representation. Additionally, the prosecutor indicated he would provide Colden with all discovery the State possessed.

The judge denied the motion for a continuance. However, he noted that if another issue material to the defense developed, particularly one involving the witness Colden had not yet located, he would consider changing his ruling. Although they provided no new information, Colden's attorneys renewed the motion for continuance at both the beginning and end of the trial. The motions were denied.

During a motion hearing on October 6, Colden's counsel moved for an order for a competency and criminal responsibility evaluation. Colden's lawyers declared: "Oftentimes when we talk to Mr. Colden, he is not really responsive to the questions that we put to him. He has a tendency sometimes to ramble on with things that are unrelated to our discussions." The prosecution objected, asseverating they did not know of any reason why Colden should be evaluated.

Colden was subject to voir dire by the judge. The colloquy with the court included discussion about his family and childhood. Colden provided rational responses regarding his age (thirty-three) and education (high school graduate). He described and discussed his four years of service in the Navy, previous job at a fiberglass plant, and work selling automobiles.

Mrs. Jennings, Colden's maternal grandmother, took part in the voir dire. After providing some brief information about her grandson's family background, she testified she had not noticed Colden needed a doctor, although she had asked for someone, such as a minister, to speak with him.

Similarly, Ms. Dickerson, Colden's girlfriend of four years, stated she had requested for a social worker to see Colden. Dickerson believed, at the time he was first arrested, Colden had "a lot of angry feelings, probably family-wise, that should have been resolved years ago that weren't." Colden informed the court that he had not received any mental counseling, but had participated in an Alcohol and Drug Safety Program in 1994 and completed an Alcoholics Anonymous class in 1995.

Colden's criminal record was discussed. His only prior offenses were relatively minor, magistrate-level misdemeanors, handled without the assistance of counsel. The judge covered the various actors within the trial setting. Colden stated he understood the trial judge was there to "listen to both parties' sides" and the jury "basically decide[d] whether you're guilty or not . . . ." He explained his lawyers' duty was to "represent [him] to the best of their ability." When the judge elucidated the specific role of the solicitor as being the person who would present witnesses and evidence to try to convince the jury of his guilt, Colden replied that he comprehended.

Colden advised the court that he was aware he was being charged with one count of murder and two counts of armed robbery and kidnapping. He described armed robbery as "basically robbing somebody . . . with a weapon and so forth" and kidnapping as "abducting somebody." Colden affirmed he understood the need to talk with his lawyers regarding witnesses and facts. He stated he had not yet discussed with his attorneys what the state would have to prove at trial for him to be convicted. Colden reported he, "for the most part," understood the things his counsel and the court had gone over with him.

In support of their request, Colden's attorneys vouched they had explained to their client the role of the judge, burdens of proof, and elements the solicitor would have to prove, and Colden's inability to better discuss these issues with the judge left "no doubt" a competency evaluation should be performed. Counsel admitted to the court their client's demeanor during the hearing was similar to what they had observed earlier, but added that at times Colden was "not very responsive or would ramble on about something that may not be relevant to the questions that were asked." They asked the court to look past his answers and consider his "herky, jerky movement" and

inability to know what to do with his hands. Counsel conceded they felt Colden potentially understood what was happening, but felt the potential sentence of life without parole supported the need for the evaluation and should be made "out of a precaution."

In response, the solicitor offered that during the judge's questioning, Colden "answered very rationally and thoughtfully and noted "his ability to speak and his ability to enunciate and his ability to answer questions." Although acknowledging he had no way of knowing if Colden suffered from any "un-surfaced mental illness," he stated nothing in his investigation indicated its existence. The solicitor opined that he detected a level of [mental] competence" in Colden and requested the evaluation be refused.

The court determined Colden to be "a very articulate, intelligent young man," and, noting his "good grasp of dates and history," found him "to be probably more lucid and articulately aware of his surroundings and proceedings against him than a number of defendants seen when this issue is raised." The judge felt Colden maintained good eye contact, "seem[ed] fairly relaxed in answering questions about his past," and appeared to be very forthright with court. In conclusion, the court held:

> I detected nothing here today that would, I believed, indicate the need for further evaluation or any evaluation. I do certainly have a lot of respect for Mr. Simmons and Mr. Grant and their abilities as lawyers, but without something specific in terms of his behavior as well as his inability to assist you all, at this point especially, I do not believe I have before me - - I'm going to deny any of the [McNaughten] issues. Again, I think the burden is on the defense to bring that forward. At this point, that has not been brought forward. It was not really argued to the court by counsel nor his grandmother and fiancé raised anything in my questioning of them related to either issue, his competency at this time or anything in his past that might indicate some mental health issues.

> There was just no indication at this point in time that would cause the court to inquire an evaluation.

The motion for a mental evaluation was denied.

At the outset of the trial, prior to jury selection, Colden's attorneys renewed their request for a competency evaluation. This, as well as another re-assertion of the motion just before jury instructions, was refused. In expounding upon his decision, the trial judge stated:

> The previous motion for a psychological evaluation was denied, and I stand by that ruling as well and, again, note that I do believe that based on the court's interview of Mr. Colden a few weeks ago as well as his time in this courtroom during the course of this trial, I do not believe that any psychological evaluation was needed.

STANDARD OF REVIEW

The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion. State v. Tanner, 299 S.C. 459, 462, 385 S.E.2d 832, 834 (1989); State v. Mansfield, 343 S.C. 66, 72, 537 S.E.2d 257, 260 (Ct. App. 2000); State v. White, 311 S.C. 289, 293, 428 S.E.2d 740, 742 (Ct. App. 1993). Reversals for the denial of a continuance "are about as rare as the proverbial hens' teeth." State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) (citing State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859, (1957)).

The ordering of a competency examination is within the discretion of the trial judge. State v. Drayton, 270 S.C. 582, 584, 243 S.E.2d 458, 459 (1978); State v. Singleton, 322 S.C. 480, 483, 472 S.E.2d 640, 642 (Ct. App. 1996). The refusal to grant such an examination will not be disturbed on appeal absent a clear showing of an abuse of that discretion. Drayton, 270 S.C. at 584, 243 S.E.2d at 459; State v. Buchanan, 302 S.C. 83, 85, 394 S.E.2d 1, 2 (Ct. App. 1990). "This is so, because the determination of

whether there is 'reason to believe' a defendant lacks a certain mental capacity necessarily requires the exercise of discretion. State v. White, 364 S.C. 143, 147-48, 611 S.E.2d 927, 929 (Ct. App. 2005) (citing and quoting State v. Bradshaw, 269 S.C. 642, 644, 239 S.E.2d 652, 653 (1977)).

An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-50 (Ct. App. 2006). If there is any evidence to support the trial judge's decision, the appellate courts will affirm it. State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 829 (2001); State v. Taylor, 360 S.C. 18, 598 S.E.2d 735 (Ct. App. 2004). Even without any evidentiary support, "[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant." State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005); see also State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000); State v. Wyatt, 317 S.C. 370, 453 S.E.2d 890 (1995) (error without prejudice does not warrant reversal).

LAW/ANALYSIS

A. Continuance

Colden argues the trial court abused its discretion by rejecting his motion for a continuance. He alleges his guarantee of effective assistance of counsel required the continuance because his attorneys: (1) were retained approximately two months prior to trial; (2) only recently learned of a potential "exoneration" witness they had not yet been able to locate; (3) did not have ample opportunity to interview witnesses; and (4) had not received or reviewed the state's evidence or "critical" police investigation notes. We disagree.

The South Carolina Rules of Criminal Procedure state:

> No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the

> support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because he cannot go safely to trial without such testimony; and has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay.
>
> (1) When a subpoena has been issued, the original shall be produced with proof of service or the reason why not served endorsed thereon or attached thereto; or if lost the same proof shall be offered with additional proof of the loss of the original subpoena.
>
> (2) A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matter what fact or facts he believes the witness if present would testify to and the grounds for such belief.

Rule 7(b), SCRCrimP.

The granting or denial of a motion for a continuance is within the sound discretion of the trial judge. State v. Babb, 299 S.C. 451, 454, 385 S.E.2d 827, 829 (1989) (citing State v. Dingle, 279 S.C. 278, 306 S.E.2d 223 (1983)). Our appellate courts have shown great deference to trial judges in this matter. See State v. Nicholson, 366 S.C. 568, 623 S.E.2d 100 (Ct. App. 2005) (no abuse of discretion in denial of alternate motion for a continuance to obtain new expert witness on characteristics of sexual abuse victim after the state, shortly before trial, gave notice to defense "as a professional courtesy" where it was not required to provide the information either under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) or Rule 5, SCRCrimP); State v. Asbury, 328 S.C. 187, 493 S.E.2d 349 (1997) (finding no abuse in denying a continuance in a second trial where the first trial transcript would be beneficial, but not essential, and where backup tapes were available and could have been used for impeachment purposes; but see McMillian, 349 S.C. 17, 561 S.E.2d 602 (holding the trial judge abused his

discretion in denying a continuance request to obtain a transcript of first trial to use in impeaching a witness where retrial occurred only two weeks later, no backup tapes were available, and the credibility of the "retrial" witness was shown to be crucial).

In State v. McKennedy, 348 S.C. 270, 559 S.E.2d 850 (2002), our Supreme Court found the defendant was not entitled to a continuance. Like the present case, the defendant merely referred to a neighbor he hoped to interview, but did not name the witness or indicate how that witness would be beneficial to his case. McKennedy, who had less than one month to prepare for trial, argued he may have been able to produce additional witnesses, but could not make a specific showing of how any additional time would have been beneficial to his case. The Supreme Court took note that it "has repeatedly upheld denials of motions for continuances where there was no showing that any other evidence on behalf of the defendant could have been introduced, or that other points could have been raised, if more time had been granted to prepare for trial." McKennedy, 348 S.C. at 280, 559 S.E.2d at 885 (citing State v. Williams, 321 S.C. 455, 459, 469, S.E.2d 49, 51 (1996)).

The court, in Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997), looked at defense counsel's failure to request a continuance. It determined there was no error because there was no evidence presented that additional time to prepare would have made any possible impact on the result. In that case, counsel declared he would have liked to have consulted with his own medical expert to help him prepare for the cross-examination of a witness for the state, but could not suggest how this would have ultimately made any difference. The court noted its reliance upon Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1992), and State v. Motley, 251 S.C. 568, 164 S.E.2d 569 (1968), where it found "no reversible error because the petitioner did not point to any other evidence or witnesses which could have been produced if a continuance had been granted." Skeen, 325 S.C. at 214, 481 S.E.2d at 132; see also State v. Register, 323 S.C. 471, 482, 476 S.E.2d 153, 160 (1996) (no abuse of discretion in denying a continuance where counsel waited until one month prior to trial to investigate DNA evidence).

Regarding the issue of the "exoneration" witness, whose existence Colden's counsel claimed at the October 6 hearing to have only recently been

made aware, the record is silent as to whether they were still pursuing this witness at the time of the trial. Despite the fact the judge expressly left the door open for reconsideration of the request for a continuance for the lack of this witness, at no time during the motions to continue, both before and at the conclusion of the trial, did Colden expressly state the name or need for this or any other witness. His attorneys' concern about the witness was inadequate to support a motion for a continuance. All components of Rule 7(b), SCRCrimP, including that of the attestation under oath, are strictly required, and a party asking for a continuance must show due diligence in trying to procure the testimony of the witness, as well as what the party believes the absent witness would testify to and the basis for that belief. See State v. White, 311 S.C. 289, 292, 428 S.E.2d 740, 742 (Ct. App. 1993) (holding a continuance was not required where there was no compliance with Rule 7(b), SCRCrimP after an expert witness unexpectedly went on vacation and neither the defendant nor counsel offered under oath what facts they believed the absent witness would have testified, the grounds for that belief, that the continuance not intended to delay, or that due diligence was used in their efforts to make the witness available). It is paramount that the party asking for the continuance show "due diligence" was used in trying to procure the absent witness. See State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595-96 (Ct. App. 2005) (witness's sudden decision not to cooperate did not mandate a continuance where no evidentiary hearing was necessary and, alternatively, where due diligence in asserting an attempt to acquire affidavits was not shown). Not only was there no showing that by the time of trial counsel had been unable to locate the unnamed witness, but it is evident that the requirements of Rule 7(b) were never satisfied.

The record reveals Colden's counsel had adequate time to investigate. As the court noted at the very outset of the trial, the case had previously been continued from two earlier start dates. Colden's trial attorneys were hired on August 28, ten days before the September 7 motion hearing. At that time, the public defender's office had participated in a preliminary hearing on July 7. A transcript of the hearing had been filed in the clerk of court's office on July 16. During this proceeding, Colden's attorneys complained that the police report had not been received. This record was thoroughly reviewed at the hearing and essentially revealed the entirety of the state's case ultimately

presented at trial. Furthermore, the trial did not begin until October 27, nearly two months after Colden's counsel had been retained.

A plethora of pre-trial motions reveals the depth of the attorneys' understanding of the nature of both the State's and defense's cases, and the opening statement reveals a strong knowledge of the prosecution's strategy. During trial, Colden's attorneys presented a number of complicated and detailed motions and objections that, in order to make, required a thorough understanding of the case and a familiarity with the police investigation notes. Their request for the jury to view the crime scene rather than rely on a video representation shows a strong grasp of the facts of the case. The trial court noted: "Colden has been represented more than ably by two very experienced and two very good attorneys. Y'all did a very good job in defending Mr. Colden." Thus, the lawyers' very performance further eviscerates the argument that Colden was denied effective assistance of counsel. The request for a continuance lacked foundation.

B. Competency Evaluation / Competency to Stand Trial

Colden contends the trial court erred in denying his attorneys' request that a mental examination for competency to stand trial be ordered. Because his attorneys opined their conversations with him "had been disjointed and confused," that there had been difficulty communicating with him, and that he frequently gave non-responsive answers and "rambled on," Colden asserts he was entitled to the evaluation. He takes the position that the "defense counsel's representations alone should have invoked S.C. § 44-23-410" because, due to their "frequent conversation and interaction" with him, the attorneys were in a unique and better position to evaluate his ability to assist them with his case. He opines their concern about his capacity was supported by the uncharacteristic nature of the charge since he had a relatively clean record until he was thirty-three years old. Finally, he avers that since the issue was raised "well before trial" (three weeks prior), the prosecution would not have suffered any harm had the evaluation been ordered, and it was therefore an abuse of discretion to deny the request. We disagree.

"Due process of law prohibits the conviction of a person who is mentally incompetent." Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594,

595 (1992) (citing Bishop v. United States, 350 U.S. 961, 76 S.Ct. 440 (1956)); State v. Singleton, 322 S.C. 480, 482, 472 S.E.2d 640, 641 (Ct. App. 1996). South Carolina law provides:

> Whenever a judge . . . has reason to believe that a person on trial before him, charged with the commission of a criminal offense or civil contempt, is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity, the judge shall:
>
> (1) Order examination of such person by two examiners designated by the Department of Mental Health or the Mental Retardation Department or both . . . .

S.C. Code Ann. § 44-23-410 (2002). Thus, if the judge believes the person may be unfit to stand trial, a competency evaluation is compulsory. See State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) (finding the trial judge correctly ordered a competency evaluation where he felt the mental condition of the defendant might be called into question at trial and the defense stated it intended to offer expert testimony that the defendant suffered from a mental condition). However, great deference is given to trial judge who sits in a better position to ascertain the defendant's faculties. See State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2002) (holding the court did not err in refusing to order a second competency evaluation where deference was given to the trial judge who was able to view the appellant's demeanor); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998); State v. Bell, 293 S.C. 391 360 S.E.2d 706 (1987).

In State v. Burgess, 356 S.C. 572, 590 S.E.2d 42 (Ct. App. 2003), this court identified three factors to be considered in determining whether further inquiry into a defendants' fitness to stand trial was warranted. These are: (1) evidence of irrational behavior; (2) demeanor at trial; and (3) prior medical opinion regarding ability to stand trial. In some instances, the presence of just one of the factors may justify further inquiry requiring a mental

evaluation. In Burgess, the defendant's demeanor during the motion was very appropriate and at the hearing she understood the proceedings, the roles of the various trial participants, and the charges leveled against her. "Beyond counsel's statements regarding his inability to talk intelligently with Burgess and his opinion that she could not assist in her defense, counsel offered nothing to demonstrate that Burgess's mental retardation was such as to render her unfit for trial." Burgess, 356 S.C. at 576, 590 S.E.2d at 44. This court noted the trial judge did not experience any difficulty in conversing with Burgess and her testimony at a Jackson v. Denno hearing "seem[ed] to undercut any question of her competency." Id.

This case has great similarities to the situation in Burgess. The reasoning behind the competency request did not rely upon any pre-existing history of mental illness (although in Burgess the defendant was mentally handicapped), but was instead based upon a perceived difficulty counsel faced in discussing matters with their client. Colden's voir dire conclusively revealed his ability to answer questions rationally, appropriately, and on point. He demonstrated a manifest understanding of the proceedings, the roles of the various participants, and the charges he was facing. Colden's counsel offered nothing to demonstrate that his mental state was such as to render him unfit for trial. As in Burgess, the court's questioning of Colden in the pre-trial voir dire, his examination during a Jackson v. Denno hearing, and the court's inquiry during the waiver of his right to testify, indicated that Colden had no difficulty conversing effectively. Similarly, pre-existing evidence of the audiotaped statement of Colden did not raise any mental health concerns. Finally, the trial court's assessment of Colden's demeanor throughout the trial was supportive of the court's conclusion that the evaluation was not required.

There was no evidence of irrational behavior before or during the trial, nor prior medical opinion concerning competency as to require an evaluation under the Burgess factors. Both after the hearing at the outset of the trial and at the close of the evidence, the trial judge specifically articulated that he saw nothing to indicate a need for an evaluation or any indication of a mental issue, past or present. Pellucidly, a review of the record and circumstances brings us to the ineluctable conclusion that the trial judge did not abuse his discretion in denying the motion.

CONCLUSION

The trial judge did not abuse his discretion in denying Colden's motion for a continuance. This denial was supported by the facts and mandated by the law. Absent any showing of the existence of a mental illness, the court properly denied Colden's counsel's request for a mental examination for competency to stand trial. Accordingly, Colden's convictions are

AFFIRMED.

KITTREDGE and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Christopher Lee Pride, Appellant.

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

Opinion No. 4208
Submitted January 1, 2007 – Filed February 20, 2007

AFFIRMED

Appellate Defender Robert M. Dudek, of Columbia, Fletcher N. Smith, Jr., of Greenville, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Thomas E. Pope, of Rock Hill; for Respondent.

BEATTY, J.: Christopher Lee Pride was tried in absentia and without counsel for the charges of possession of crack cocaine with intent to distribute and possession of crack cocaine with intent to distribute within the proximity of a school. After the jury convicted Pride of both offenses, the circuit court judge issued a sealed sentence. Pride appeals, arguing the circuit court judge erred in finding he waived his right to counsel. We affirm.[1]

FACTS

As a result of an on-going narcotics investigation, detectives with the Union Police Department identified Pride as a crack cocaine dealer. On the morning of April 2, 2003, detectives went to Pride's residence and served him with a search warrant. Upon entering the residence, Detective Brian Bailey read Pride his Miranda[2] rights. Bailey then questioned Pride as to whether there were any illegal drugs in the house. According to Bailey, Pride admitted there were illegal drugs in the house and there was a bag of crack cocaine in his blue jeans which were located in his bedroom. While conducting a search of the area identified by Pride, the detectives found $1,875 in cash and a bag containing 3.62 grams of crack cocaine. Detectives then placed Pride under arrest and transported him to the police station. Pride gave a written statement in which he confessed to dealing crack cocaine and acknowledged the result of the detectives' search of his residence. Subsequently, a Union County grand jury indicted Pride for possession of crack cocaine with intent to distribute (PWID) and PWID within proximity of a school.

On October 13, 2004, Pride's case was called for trial. Although Pride was not present, William All, the public defender assigned to his case, appeared in court. When the circuit court judge inquired about Pride's absence All outlined the history of his representation of Pride. All explained

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[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

that he was appointed to represent Pride on September 13, 2004, the first day of the term of court for which Pride was originally scheduled to go to trial. On that day, Pride was represented by Fletcher Smith, a private attorney. The circuit court judge, however, granted Smith's motion to be relieved and informed Pride that he needed to retain an attorney. Because Pride qualified for the public defender's office, All was appointed to his case.

Pride failed to appear for two scheduled appointments with All. Each time, Pride informed All that he could not attend the appointments because of his work schedule. After the two missed appointments, All sent Pride a letter on October 1, 2004, indicating that his trial was scheduled for the week of October 11, 2004, and that he could not adequately represent him without speaking with him. Additionally, All asked Pride to advise him if he had retained private counsel. In response, Pride scheduled another appointment for October 7th. Pride again failed to appear for this appointment and offered no explanation.

On October 11th, Pride went to the Union County courthouse to report for roll call and was arrested for a driving under suspension charge. When officers searched Pride's person, they discovered $5,000 in his pocket. While in custody, law enforcement transported Pride to the courthouse so that he could speak with All. At that time, Pride told All that Smith was again representing him and he had intended to give Smith the $5,000 after he reported for roll call. Later that evening, Pride was released from custody. The next morning at the courthouse, All told Pride that Smith needed to come to the courthouse to review the pre-trial motions that the solicitor intended to use during his case. According to All, Pride indicated that Smith would come to the courthouse. All then contacted Smith's office in the afternoon and discussed the matter with Smith's administrative assistant. The administrative assistant informed All that Pride had attempted to pay $250 for Smith's representation. In response, All stated that Pride had indicated to him that he had $5,000 for Smith. Although Smith's administrative assistant stated that she would contact Pride about payment and then call All back, she did not contact All and there is no evidence in the record of an agreement by Smith to represent Pride. On the morning of trial, the solicitor contacted All

and told him that Smith's office had informed him that Smith did not represent Pride.

Upon hearing this factual recitation, the solicitor moved to have Pride tried in his absence. The circuit court judge then inquired whether All wished to make a motion to be relieved as counsel. Although All was hesitant to make the motion out of an ethical obligation to his client, he made the motion which was granted by the judge. In so ruling, the judge specifically found that Pride waived his right to counsel by his conduct. Pride was then tried and convicted for the drug offenses. After the jury returned a verdict, the judge issued a sealed sentence.

On January 18, 2005, Pride appeared in court to be sentenced. Pride admitted that he did not have an attorney for the sentencing hearing. All appeared at the hearing and again explained his history of representing Pride. He indicated that he could "perfect an appeal for [Pride] if he wants to raise the issue of whether or not he shouldn't have been tried in his absence." All indicated that he would move for appellate defense to represent Pride in his appeal. The judge then asked All to stand with Pride as he imposed the sentence. The judge sentenced Pride to twenty-five years imprisonment and a $50,000 fine for PWID and fifteen years imprisonment and a $10,000 fine for PWID within proximity of a school. The sentences were to be served concurrently. This appeal followed.

DISCUSSION

Pride argues the circuit court judge erred in relieving All as his counsel and proceeding with the trial in his absence. He contends his conduct was not sufficient to establish that he waived his right to counsel.[3]

[3] Although Pride was tried in his absence and without counsel, we believe Pride only challenges the waiver of his right to counsel. Accordingly, we confine our analysis to this limited issue.

As a threshold matter, we initially question whether Pride adequately preserved this issue for our review. Although Pride's lack of trial representation was discussed at his sentencing hearing, Pride never moved for a new trial on the ground that he did not knowingly waive his right to counsel. Moreover, as we read the record, All offered to perfect an appeal for Pride only on the issue of whether a trial in his absence was appropriate. See State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991)(holding defendant, who was tried and convicted in his absence without counsel, failed to preserve issue of whether he waived his right to trial counsel where neither he nor his sentencing attorney raised this issue to the circuit court); cf. State v. White, 305 S.C. 455, 456, 409 S.E.2d 397, 397 (1991) (finding defendant, who was tried and convicted in his absence without counsel and appeared pro se at the sentencing hearing, could raise the issue of whether he waived his right to trial counsel because defendant's first opportunity to raise the issue was on appeal).

Assuming the general discussion during the sentencing hearing was sufficient to preserve this issue, we find the circuit court judge correctly found Pride waived his right to counsel by his conduct.

"The Sixth Amendment guarantees criminal defendants a right to counsel. This right may be waived." State v. Gill, 355 S.C. 234, 243, 584 S.E.2d 432, 437 (Ct. App. 2003)(citations omitted). This court has explained that "[a] defendant may surrender his right to counsel through (1) waiver by affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture." State v. Thompson, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003).

In support of his argument, Pride appropriately relies on our decision in State v. Thompson, 355 S.C. 255, 584 S.E.2d 131 (Ct. App. 2003). However, as will be more fully discussed, neither Thompson nor our more recent case of State v. Roberson, No. 4172, 2006 WL 3066198 (S.C. Ct. App. Oct. 30, 2006), require reversal of Pride's convictions and sentences.

In Thompson, the defendant was tried in absentia and without counsel for the offenses of discharging a firearm into a dwelling and malicious injury to personal property over $1,000 but less than $5,000. After the jury

convicted Thompson, the judge issued a sealed sentence. At sentencing, Thompson's counsel moved for a new trial because he was denied the right to counsel. Counsel claimed that Thompson had appeared at four or five roll calls after his arrest. Additionally, counsel alleged that Thompson, despite his request, had been turned down for a public defender because he did not meet the financial requirements to qualify. In terms of Thompson's failure to appear at trial, his counsel informed the court that Thompson was not given adequate notice of the trial date. Id. at 260, 584 S.E.2d at 133. The court denied Thompson's motion for a new trial. Id. at 260, 584 S.E.2d at 134. On appeal, this court reversed the decision of the circuit court. We held that Thompson's failure to appear at trial did not rise to the level of waiver. Id. at 266, 584 S.E.2d at 136. Our decision was based on the following factors: (1) Thompson had not been advised of the dangers and disadvantages of self-representation under Faretta; (2) there was no inference in the record that Thompson understood the dangers and disadvantages of self-representation; and (3) Thompson did not have a prior record which would have familiarized him with the criminal court system. Id. at 267, 584 S.E.2d at 137.

Recently, this court had the opportunity to apply Thompson in reaching its decision in State v. Roberson, No. 4172, 2006 WL 3066198 (S.C. Ct. App. Oct. 30, 2006). In Roberson, the defendant was arrested and then released on bond for failing to register as a sex offender. The terms of the bond required the defendant to appear for roll call at the term of general sessions court in Dorchester County beginning on November 29, 1999. By signing the bond, the defendant acknowledged that he would be tried in his absence if he failed to appear in court. The Dorchester County Solicitor's office mailed to the defendant's last known address two notices of appearances for the terms of court scheduled for November 29, 1999, and January 10, 2000. On February 16, 2000, the defendant was tried in his absence without counsel. After the jury convicted the defendant, the circuit court judge issued a sealed sentence.

Approximately three years later, the defendant, who was represented by counsel, appeared before the circuit court to be sentenced. During this hearing, the defendant's counsel moved for a new trial on the grounds the defendant did not knowingly and voluntarily fail to appear for his trial and he was denied his right to be represented by counsel at trial. Because it was

unclear whether the defendant had been represented at trial, the judge continued the motion until a trial transcript could be located. At the final hearing, the defendant's counsel moved to vacate the defendant's conviction and sentence primarily on the ground that he was not represented by counsel at trial. In response, the solicitor asserted the defendant waived his right to counsel by failing to appear and that he was apprised of his right to counsel at the bond hearing. The judge denied the motion for a new trial finding the defendant waived his right to counsel because the terms of his bond indicated that he would be tried in his absence if he failed to appear and he had been informed of his right to counsel at the bond hearing. Roberson, 2006 WL 3066198, at *1.

On appeal, we reversed the circuit court judge's decision and remanded for a new trial. Id. at *2. Applying Thompson, we found the defendant's failure to appear at trial did not constitute an affirmative waiver of his right to counsel. Moreover, because the defendant was never advised of proceeding without representation, we declined to infer that the defendant's conduct, i.e., his failure to appear at trial, constituted a waiver of his right to counsel. Id. at *3.

Although a cursory reading of above-outlined cases would appear to warrant a reversal of Pride's convictions and sentences, upon closer review we find a crucial difference between the facts in Pride's case and those of Thompson and Roberson. Significantly, unlike Pride, the defendants in Thompson and Roberson were not represented by counsel until the sentencing hearing. Thus, the finding that the defendants in Thompson and Roberson waived their right to trial counsel was based solely on their failure to appear for trial. Here, Pride not only failed to appear for trial but he also failed to cooperate with his appointed counsel. Pride was represented by appointed counsel and given additional time to prepare for trial after his private attorney was relieved. Pride repeatedly failed to appear for his scheduled appointments with the public defender or offer any assistance in preparation for his defense. Pride also gave assurances to his appointed counsel up to the day before trial that a private attorney would represent him. Pride, however, was aware this private attorney had been relieved as counsel when the case was initially scheduled to be tried. Despite the knowledge of

his trial date, Pride failed to cooperate with his appointed counsel and failed to retain a private attorney by the date of the scheduled trial. Based on the foregoing, we find Pride's deliberate and dilatory conduct was sufficient to waive his right to counsel.

We believe our decision is consistent with case law in this State where our appellate courts found the defendant's conduct constituted a waiver of his right to counsel. See State v. Cain, 277 S.C. 210, 210-11, 284 S.E.2d 779, 779 (1981) (inferring waiver of counsel and affirming defendant's conviction and sentence where defendant, who was tried in absentia and without counsel for third-offense driving under the influence, failed to fulfill the conditions of his appearance bond and neglected to keep in contact with his attorney despite knowing the trial was imminent); see also State v. Jacobs, 271 S.C. 126, 126-28, 245 S.E.2d 606, 607-08 (1978) (inferring defendant waived his right to counsel where: (1) trial court allowed defendant, a non-indigent, reasonable time to retain counsel; (2) trial court urged defendant on several occasions to retain counsel and provided defendant access to a telephone and additional time to make the arrangements; (3) defendant on the day of trial did not name his attorney; and (4) defendant failed to make a sufficient showing of reasons for his failure to have counsel present at trial); State v. Gill, 355 S.C. 234, 245, 584 S.E.2d 432, 437-38 (Ct. App. 2003) (inferring defendant waived his right to counsel where defendant failed to retain counsel for trial despite his repeated assurances to the court that he intended to hire private counsel and did not require the appointment of a public defender).

Accordingly, Pride's convictions and sentences are

AFFIRMED.

ANDERSON and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joseph H. Moore, **Appellant,**

v.

M. M. Weinberg, Jr. and
Weinberg and Brown, L.L.P. **Respondents.**

Appeal From Sumter County
Diane S. Goodstein, Circuit Court Judge

Opinion No. 4209
Submitted February 1, 2007 – Filed February 20, 2007

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

A. Camden Lewis, Peter D. Protopapas and Brady R. Thomas, all of Columbia, for Appellant.

Harry C. Wilson, Jr. and David C. Holler, both of Sumter, for Respondents.

ANDERSON, J.: Joseph Moore (Moore) appeals the grant of summary judgment with regard to his claims of negligence, conversion, and civil

conspiracy against M. M. Weinberg, Jr. and Weinberg and Brown, L.L.P. (collectively Weinberg). The trial court granted Weinberg's summary judgment motion based on the doctrine of novation. We affirm in part, reverse in part, and remand.[1]

FACTUAL/PROCEDURAL BACKGROUND

In the late 1980s, Clarence Wheeler and Joseph Moore entered into a business relationship where Wheeler placed video-poker machines in Moore's service stations. Moore loaned Wheeler small amounts of money on a yearly basis for business expenses, such as buying video-poker machines and licenses. Frequently, Moore and Wheeler either renegotiated these loans, or Wheeler paid the outstanding balance and he and Moore arranged a new loan.

In November 1999, Wheeler executed a note to Moore in the amount of $92,000. The note provided for a built-in premium of $12,000. From the $92,000, Moore gave Wheeler $80,000 and kept the $12,000 premium. In order to secure his obligation, Wheeler assigned Moore $80,000, to be deducted from the anticipated proceeds from litigation over the sale of Wheeler's music business. An escrow account containing $100,000 was held by the Clarendon County Clerk of Court pending the outcome of Wheeler's litigation. On November 18, 1999, Wheeler's attorney, M. M. Weinberg, Jr., the same attorney representing him in the litigation, prepared the Assignment, that provided, in part:

> Clarence Wheeler does by this instrument assign to Joseph Moore so much of any recovery that he may make from the debt owed to him by A&E, Inc. and the escrow account, which is pending as a result of said litigation, unto said Joseph Moore, his heirs and assigns to completely satisfy said debt.
>
> This assignment shall be and is to the extent of the money owed at the time of the execution of the assignment.

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

Wheeler settled the litigation and was to receive the $100,000 from the escrow account. The opposing party was to receive the $10,829.16 in interest the account had accrued. When Clarendon County Clerk of Court transferred the funds from the escrow account to Weinberg, he disbursed $74,458.24 to Wheeler, paid $520 to Wheeler's former secretary, and retained $25,000 as his attorney's fee.[2] In executing these disbursements Weinberg forgot or "overlooked [the] Assignment."

After receiving the settlement money from Weinberg, Wheeler tendered $50,000 to Moore's son in payment of the debt. Moore was out of town at the time. Subsequently, Moore notified Wheeler that he had not fully satisfied his loan obligation. In June, 2002, Moore and Wheeler added a handwritten note at the end of the 1999 original: "I Clarence Wheeler agree that I owe Joseph H. Moore $80,000.00 since March 17, 2000 and agree to pay him 6% [i]nterest on the $80,000.00 balance. Clarence Wheeler payed [sic] $50,000 on July 19, 2002." Both Moore and Wheeler signed the addition to the note.

In October 2002, attorney John Land contacted Weinberg by telephone on Moore's behalf concerning the release of the assigned funds.[3] Weinberg agreed to consult with Wheeler and respond to Moore's demand for payment of Wheeler's outstanding obligation. After receiving no response, Land informed Weinberg by letter, dated October 14, 2002, that Moore had an absolute security in the released funds through the Assignment and would not relieve Wheeler of his remaining indebtedness.

On April 15, 2003, Moore initiated this action against Weinberg, alleging negligence, conversion, and civil conspiracy. Weinberg answered and asserted, inter alia, a defense based on the doctrine of novation. Both Moore and Weinberg filed motions for summary judgment. The trial court

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[2] Weinberg represented Wheeler on a contingency fee basis. The fee agreement provided that Wheeler would pay Weinberg one-third of his recovery; they later renegotiated the fee to one-fourth of the recovery.

[3] Land clarified in his letter that, though he represented Moore, he would not take a case against Weinberg due to their relationship. Land emphasized he hoped the matter could be resolved without further action.

granted Weinberg's motion for summary judgment, finding the handwritten addendum to the 1999 original note constituted a novation, thus relieving Weinberg of any duty he may have owed Moore.

STANDARD OF REVIEW

"In reviewing the grant of summary judgment, [an appellate court] applies the same standard that governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005); Eagle Container Co., LLC v. County of Newberry, 366 S.C. 611, 622 S.E.2d 733 (Ct. App. 2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004). In determining whether any triable issue of fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005). If triable issues exist, those issues must go to the jury. Mulherin-Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005); BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party. Willis v. Wu, 362 S.C. 146, 607 S.E.2d 63 (2004); see also Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v.

Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005); Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Baugus v. Wessinger, 303 S.C. 412, 401 S.E.2d 169 (1991); Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). When reasonable minds cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). The nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rife, 363 S.C. at 214, 609 S.E.2d at 568.

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (quoting George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004). Summary judgment is a drastic remedy and should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004); Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004).

LAW/ANALYSIS

I. Novation

Moore argues the trial court erred in granting summary judgment based on novation as a defense to negligence, conversion, and civil conspiracy claims. We agree.

Novation is a defense to contract claims. "A novation is an agreement between all parties concerned for the substitution of a new obligation between the parties with the intent to extinguish the old obligation." Wayne Dalton Corp. v. Acme Doors, Inc., 302 S.C. 93, 96, 394 S.E.2d 5, 7 (Ct. App. 1990) (citing Ophuls & Hill Inc. v. Carolina Ice & Fuel Co., 160 S.C. 441, 158 S.E. 824 (1931)). There must be an intention to create a novation. Adams v. B & D, Inc., 297 S.C. 416, 377 S.E.2d 315 (1989). There can be no novation unless both parties so intend. Id. The party asserting a novation has the burden of proving it. Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 199 S.E.2d 719 (1973). "The circumstances attending the transaction alleged to be a novation must show the intention to substitute a new obligation in place of the existing one." Wellman, Inc. v. Square D Co., 366 S.C. 61, 72, 620 S.E.2d 86, 92 (Ct. App. 2005). An addendum that modifies a pre-existing agreement, but does not extinguish it, is not a novation. Parker v. Shecut, 340 S.C. 460, 531 S.E.2d 546 (Ct. App. 2000), rev'd on other grounds 349 S.C. 226, 562 S.E.2d 620 (2002).

In order to effectuate a novation by the substitution of a new obligation, both contracting parties must consent that the new agreement is to replace the old one and their consent must be apparent. See Superior, 261 S.C. at 263, and 199 S.E.2d at 722 (finding language appearing on the face of the "Modifying Agreement" was clear and unambiguous and negated an intention for there to be a novation). If only the debtor intends that the existing contract should be discharged by the new agreement, there is no novation; the creditor must concur.

A novation may be broadly defined as a substitution of a new obligation for an old one, thereby extinguishing the old debt. More specifically, novation is the substitution by mutual agreement of one debtor or one creditor for another, whereby the old debt is extinguished. It is a mode of extinguishing one obligation by creating another; the substitution, not of a new paper or note, but of a new obligation in lieu of an old one, with the effect of paying, dissolving, or otherwise discharging it.

Consequently, a novation may be accomplished in three ways:

(1) By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation;

(2) By the substitution of a new debtor in the place of the old one, with intent to release the latter;

(3) By the substitution of a new creditor in the place of an old one, with intent to transfer the rights of the latter to the former.

While Moore may have a cause of action in contract against Wheeler, his causes of action for conversion, negligence, and civil conspiracy against Weinberg sound in tort. Tort causes of action are not transformed into actions in contract simply because they arise out of circumstances involving a contract. As a matter of law, the trial court erred in granting summary judgment on the ground of novation.

Moore maintains that, even if novation were an applicable defense, the trial court erred in granting Weinberg summary judgment on novation when the trial court itself noted material issues of fact in dispute. Because we determine novation is not a defense in the case sub judice, we need not consider this issue. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

II. Assignment

An assignment is the act of transferring to another all or part of one's property, interest, or rights. Black's Law Dictionary 119 (6th ed. 1992). It includes transfers of all kinds of property, including negotiable instruments. Id. The assignment of an account involves the transfer to the assignee the right to have money, when collected, applied to the payment of his debt. Id. The interest in the property assigned can be present, future, or contingent; it may represent contract rights to money, property, or performance, or rights to causes of action. 5 S.C. Jur. Assignments § 2 (2006).

Three elements constitute an assignment: (1) an assignor; (2) an assignee; and (3) transfer of control of the thing assigned from the assignor to the assignee. Donahue v. Multimedia, Inc., 362 S.C. 331, 338, 608 S.E.2d 162, 165 (Ct. App. 2005) (citing Leon v. Martinez, 638 N.E.2d 511 (N.Y. 1994)). "An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance." Restatement (Second) of Contracts § 317(1) (1981). South Carolina jurisprudence has long recognized that a chose in action can be validly assigned in either law or equity. Slater Corp. v. S.C. Tax Comm'n, 280 S.C. 584, 587, 314 S.E.2d 31, 33 (Ct. App. 1984) (citing Forrest v. Warrington, 2 S.C. Eq. 254 (2 Des. Eq. 1804)); see also S.C. Jur. Assignments § 19 (2006) ("A chose in action is the right of proceeding in a court to procure the payment of a sum of money, or the right to recover a personal chattel or a sum of money by action . . . . In South Carolina a chose or thing in action is statutorily included in one's personal property and is assignable.").

An assignee stands in the shoes of its assignor. Twelfth RMA Partners, L.P. v. Nat'l Safe Corp., 335 S.C. 635, 639-40, 518 S.E.2d 44, 46 (Ct. App. 1999) ("[T]he assignee should have all the same rights and privileges, including the right to sue . . . as the assignor.").

In the present case, Wheeler assigned his right in the litigation proceeds and escrow account to Moore, thus giving Moore the right to the funds in payment of the debt Wheeler owed. At the conclusion of the litigation, the Clarendon County Clerk of Court transferred the funds held in escrow to Weinberg's trust account. He disbursed the funds to Wheeler. The Assignment, however, directed Weinberg to pay Moore the outstanding balance of Wheeler's debt from the assigned funds rather than releasing the funds to Wheeler.

Moore asserts the trial court erred in granting the motion for summary judgment because he presented evidence sufficient to prove all the elements for each of his three causes of action against Weinberg: (1) negligence; (2) conversion; and (3) civil conspiracy. As to negligence and conversion we agree. As to civil conspiracy, we disagree.

A. Negligence

In order to prevail in a negligence cause of action, the plaintiff must establish: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached the duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages. Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999); see also Thomasko v. Poole, 349 S.C. 7, 561 S.E.2d 597 (2002). "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Without a duty, there is no actionable negligence." Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998) (citing Rogers v. S.C. Dep't of Parole & Cmty. Corr., 320 S.C. 253, 464 S.E.2d 330 (1995)).

"The issue of negligence is a mixed question of law and fact." Miller v. City of Camden, 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct. App. 1994), aff'd as modified, 329 S.C. 310, 494 S.E.2d 813 (1997). First, the court must determine, as a matter of law, whether the law recognizes a particular duty. Ellis v. Niles, 324 S.C. 223, 479 S.E.2d 47 (1996). If there is no duty, the defendant is entitled to a judgment as a matter of law. Id. If a duty does exist, the jury then determines whether a breach of the duty that resulted in damages occurred. Miller, 317 S.C. at 31, 451 S.E.2d at 403; see also Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998).

Generally, duty is defined as the obligation to conform to a particular standard of conduct toward another. Murray v. Bank of America, N.A. 354 S.C. 337, 343, 580 S.E.2d 194, 197 (Ct. App. 2003) (citing Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977)).

Our search of South Carolina jurisprudence reveals the issues presented in this case are novel. However, many other jurisdictions have established that attorneys owe a duty to third parties in factually congeneric circumstances.

The Idaho Court of Appeals has determined that from the outset of the attorney-client relationship, a law firm is obliged to disburse, and the client has a right to receive, any funds that he is entitled to. Bonanza Motors, Inc. v. Webb, 657 P.2d 1102, 1104 (Idaho App. 1983). Moreover, the client's right to the future performance of the law firm's obligation may be assigned. Id. (citing Restatement (Second) of Contracts § 321(1) (1979); 3 S. Williston, A Treatise on the Law of Contracts § 413 (3d ed. 1960)). The fact that the performance of this obligation occurs later, when proceeds of the lawsuit arrive, does not defeat an assignment. Id. Nor is an assignment defeated by the fact that the client's right to receive money was conditioned upon the availability of proceeds from the action against the insurance company. Id. An adequately identified conditional right may be subject to assignment. Id. (citing Restatement § 320; 4 A. Corbin, Corbin on Contracts § 874 (1951)).

The Idaho court emphasized:

> Notice of an assignment puts the obligor on guard. The obligor is liable to the assignee if the funds assigned are subsequently paid to the assignor in violation of the assignment. Once a valid assignment has been made, the assignor cannot cancel or modify the assignment by unilateral action without the assent of the assignee; nor may he defeat the rights of the assignee.

Id. (citing Wymer v. Wymer, 16 B.R. 497 (B.A.P. 9th Cir. 1980); Shore v. Shore, 139 Cal. Rptr. 349 (Cal. Dist. Ct. App. 1977); Chapman v. Tyler Bank & Trust Co., 396 S.W.2d 143 (Tex. Civ. App. 1965); 4 A. Corbin § 890) (emphasis added).

Similarly, in Brinkman v. Moskowitz, 238 N.Y.S.2d 876, 876-77 (N.Y. App. Term. 1962), the court held where an attorney had notice of the assignment of a portion of the proceeds of his client's claim for personal injuries to the plaintiff, the attorney was liable to plaintiff for the resulting damage in distributing the proceeds without regard to the assignment. Moreover, the Nevada Supreme Court determined that when a client assigns rights to the proceeds of a tort action to a creditor, those proceeds no longer belong to the client and an attorney is not obligated to pay those funds to his client. Achrem v. Expressway Plaza Ltd. P'ship, 917 P.2d 447, 450 (Nev.

1996) (citing Bonanza Motors, 657 P.2d at 1104; Romero v. Earl, 810 P.2d 808 (N.M. 1991); Leon v. Martinez, 638 N.E.2d 511, 514 (N.Y. 1994); Aiello v. Levine, 255 N.Y.S.2d 921 (N.Y. App. Div. 1965); Brinkman, 238 N.Y.S.2d at 876-77). In addition, the Nevada Supreme Court concluded that if a conflict exists between the client's interests and the creditor's interests, the attorney should deposit the settlement proceeds in a trust fund account and request a court to direct the fund's distribution. Achrem, 917 P.2d at 450.

The Ohio Court of Appeals found a client who made a valid assignment of part of his right to settlement proceeds was no longer entitled to receive the full amount of the settlement. Hsu v. Parker, 688 N.E.2d 1099 (Ohio Ct. App. 1996). "After notice of the assignment has been given to the obligor, or knowledge thereof received by him in any manner, the assignor has no remaining power of release. The obligor must pay the assignee." Id. at 1102 (quoting 4 A. Corbin § 890). See also Berkowitz v. Haigood, 606 A.2d 1157, 1160 (N.J. Super. Ct. Law Div. 1992) ("Since the client has the power to validly assign the proceeds, the attorney has the obligation to honor such an assignment, if properly notified. The attorney does not violate the [Rules of Professional Conduct] because the funds in his trust account no longer belong to his client. The funds belong to the assignee of the client and, therefore, the client is not entitled to receive them under RPC 1.15(b).").

The South Carolina Supreme Court has recognized the relevance and admissibility of the South Carolina Rules of Professional Conduct, Rule 407, SCACR, in assessing the legal duty of an attorney in a malpractice action. Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 472 S.E.2d 612, 613 (1996). Adopting the position of the Georgia Supreme Court, the Smith court declared:

> This is not to say, however, that all of the Bar Rules would necessarily be relevant in every legal malpractice action. In order to relate to the standard of care in a particular case, we hold that a Bar Rule must be intended to protect a person in the plaintiff's position or be addressed to the particular harm.

Id. at 437, 472 S.E.2d at 613 (quoting Allen v. Lefkoff, Duncan, Grimes & Dermer, 453 S.E.2d 719, 721-22 (Ga. 1995)). Failure to comply with the Rules of Professional Conduct is not negligence per se, but merely one circumstance that may be considered along with other facts and circumstances in determining whether an attorney acted with reasonable care. Id. at 437 n. 6, 472 S.E.2d at 613 n. 6. Additionally, this court has found the Rules of Professional Conduct relevant in deciding what constitutes reasonable attorney's fees. See Weatherford v. Price, 340 S.C. 572, 581, 532 S.E.2d 310, 315 (Ct. App. 2000) ("We, therefore, conclude that our supreme court has not ruled that a fee agreement which violates Rule 1.5, RPC, is unenforceable in all circumstances as against public policy. This does not mean, however, that the Rules of Professional Conduct have no bearing on the issue.")

The applicable part of Rule 1.15 provides:

> (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive . . . .
>
> (e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Rule 1.15, RPC, Rule 407, SCACR. The comments provide the following clarification:

> Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty

> under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Rule 1.15, RPC, Rule 407, SCACR, cmt. 4.

Moore offered the opinion of licensed South Carolina attorney Mark Hardee as to the nature of Weinberg's duty. In his affidavit, Hardee advised that "[a]n attorney on notice of an escrow assignment has a duty to that person." Hardee elaborated:

> It is well settled under the ethics rules and South Carolina law that an attorney who has knowledge of an assignment cannot dishonor the assignment when disbursing funds if he has knowledge of the assignment. This is true even if his client instructs him to dishonor the assignment and disburse the funds. . . . Defendants had a duty to the Plaintiff to ensure that assignment was paid or that proper notice was given to the Plaintiff providing him the opportunity to protect his interests. Their failure to do either was a breach of that duty.

Weinberg drafted the Assignment and does not dispute that he had notice of it. He contends he either forgot it or overlooked it. The Rules of Professional Conduct specifically address this particular injury. Moore was a third party entitled to funds in an attorney's possession. Guided by the Rules of Professional Conduct and inculcated by precedent established in other jurisdictions, we conclude Weinberg owed Moore a duty to disburse the assigned funds to Moore.

Weinberg cited a Wisconsin Supreme Court case, Yorgan v. Durkin, 715 N.W.2d 160, 165 (Wis. 2006), in advancing his proposition that without

a letter of protection, an attorney is not bound to a third party. A letter of protection is a document by an attorney notifying a creditor that payment will be made when the case is settled or judgment is obtained. Id. at 163. In some circumstances, an attorney may agree to be contractually bound by proffering a letter of protection. Id. at 165. Such letters are "a common practice by which attorneys representing personal injury plaintiffs ensure their clients will receive necessary medical treatment, even if unable to pay until the case is concluded." Id. Weinberg contends Morgan's cause of action fails without a letter of protection binding Weinberg.

The facts in Yorgan are distinguishable from facts in this case. In Yorgan, the client signed a chiropractor's form "Authorization and Doctor's Lien" directing an attorney to pay the chiropractor and purporting to give the chiropractor a lien against any proceeds the client recovered on a personal injury claim. Id. at 162. The client subsequently retained his attorney, who neither acknowledged nor signed the agreement. Id. The chiropractor sought recovery under contract and equitable lien causes of action. Id. The Wisconsin court held the chiropractor could not enforce the purported lien against the attorney under a contract cause of action. Nor was the chiropractor entitled to an equitable lien enforceable against the client's attorney. In its decision, the court reasoned:

> [The chiropractor] should have known based on the plain language of the agreement that he might not be protected unless [the attorney] signed the agreement or took some other affirmative action. [The chiropractor] was, or should have been, aware of the potential for harm that an unsigned agreement could create. At the same time, he had at least some ability to seek to ensure his protection by insisting on an attorney's signature on the agreement or a letter of protection.

715 N.W.2d at 168.

A letter of protection offers one method protecting a creditor's interest. However, the absence of a letter of protection does not automatically relieve an attorney of a duty under an assignment. Moncrief v. Donohoe, 892 So. 2d 379 (Ala. Civ. App. 2003) (reversing the grant of summary judgment to an

attorney who failed to honor an assignment, noting the assignee's theory of liability was based on a claimed assignment of the settlement proceeds and not the unsigned letter of protection). Unlike the factual scenario in Yorgan, Weinberg drafted and executed the Assignment and acknowledged the validity of the Assignment in his testimony. Moore had no reason to believe Wheeler's obligation was not secured by the Assignment. In fact, both Moore and Wheeler indicated Moore would not have executed the $92,000 loan without the security the Assignment provided. Weinberg's notice of the Assignment is undisputed. Weinberg's duty to Moore arose out of his knowledge of the Assignment. A letter of protection was not necessary to create that duty.

We hold the trial court erred in granting summary judgment on the negligence cause of action and reverse and remand that cause of action for a trial.

B. Conversion

"Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights." Hawkins v. City of Greenville, 358 S.C. 280, 297, 594 S.E.2d 557, 566 (Ct. App. 2004) (citing Crane v. Citicorp Nat'l Servs., Inc., 313 S.C. 70, 73, 437 S.E.2d 50, 52 (1993) (superseded by statute on other grounds)). Conversion is a wrongful act that emanates by either a wrongful taking or wrongful detention. Kirby v. Horne Motor Co., 295 S.C. 7, 366 S.E.2d 259 (Ct. App. 1988). "Conversion may arise by some illegal use or misuse, or by illegal detention of another's personal property." Regions Bank v. Schmauch, 354 S.C. 648, 667, 582 S.E.2d 432, 442 (Ct. App. 2003) (citing Owens v. Andrews Bank & Trust Co., 265 S.C. 490, 496, 220 S.E.2d 116, 119 (1975); Castell v. Stephenson Fin. Co., 244 S.C. 45, 50-51, 135 S.E.2d 311, 313 (1964)). A plaintiff may prevail upon a claim for conversion by showing the unauthorized detention of property, after demand. Mackela v. Bentley, 365 S.C. 44, 614 S.E.2d 648 (Ct. App. 2005). The plaintiff must show either title or right to possession of the property at the time of conversion. Oxford Fin. Cos. v. Burgess, 303 S.C. 534, 402 S.E.2d 480 (1991).

The Alabama Civil Court of Appeals considered facts similar to those in the instant case to determine whether an attorney committed the tort of conversion. The court reasoned:

> The assignment of the judgment was a transfer of the money to be collected on it; it was an absolute and unconditional appropriation of it to the assignee. The money, when collected by the attorney, was the property of the assignee, and held for his use, and we can perceive no reason why he should not be allowed to maintain this action to recover it after demand made, notice of the assignment of the judgment, having previously been given. . . . [A]n attorney at law, is the agent of the party, and the principal may appropriate money in his hands to the use of another, after notice of which, if he pays it to the principal like any other agent, he will be responsible to the person to whom the fund really belongs, in an action for money had and received, founded on the implied promise.

Birmingham News Co. v. Chamblee & Harris, 617 So. 2d 689, 691 (Ala. Civ. App. 1993) (quoting Gayle & Saffold v. Benson, 3 Ala. 234, 235-36 (1841)).

When Weinberg received the funds transferred from Clarendon County Clerk of Court, a portion of the funds belonged to Moore under the Assignment. Weinberg had notice of the Assignment because he drafted it. John Land demanded, on Moore's behalf, payment of the money Wheeler owed. Weinberg's disbursement of the funds to Wheeler instead of Moore raises material questions regarding the claim of conversion. The trial court erred in granting summary judgment on this issue.

C. Civil Conspiracy

The elements a plaintiff must demonstrate in order to prove civil conspiracy include: (1) the combination of two or more people; (2) for the purpose of injuring the plaintiff; (3) causing special damages. Pye v. Estate of Fox, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006). "In order to establish a conspiracy, evidence, either direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the

minds of two or more parties to the prosecution of the unlawful enterprise." Cowburn v. Leventis, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005) (quoting First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 575, 511 S.E.2d 372, 383 (Ct. App. 1998)); see also Island Car Wash, Inc. v. Norris, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987). Conspiracy may be inferred from the nature of the acts committed, the relationship of the parties, the interests of the alleged conspirators, and other relevant circumstances. Id. Because civil conspiracy is "by its very nature covert and clandestine," it is usually not provable by direct evidence. Id.

"[A]n attorney is [generally] immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." Pye, 369 S.C. at 564, 633 S.E.2d at 509 (quoting Gaar v. N. Myrtle Beach Realty Co., 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986)). However, the South Carolina Supreme Court cautions that "an attorney may be held liable for conspiracy where, in addition to representing his client, he breaches some independent duty to a third person . . . ." Id. at 564, 633 S.E.2d at 509-10 (quoting Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)).

Our review of the record in Cowburn revealed no evidence of an agreement between the defendants or any indication they joined together for the purpose of injuring the plaintiff. Accordingly, we held no genuine issue of material fact existed to establish a claim for civil conspiracy. 366 S.C. at 49, 619 S.E.2d at 453. In this case, Moore provided no evidence that Weinberg and Wheeler colluded to deprive Moore of the funds he was entitled to under the Assignment. All the evidence contained in the record indicated Weinberg forgot about the Assignment. No material question of fact exists as to the civil conspiracy cause of action. Although the trial court erred in granting the summary judgment on the basis of novation, we may affirm the grant of summary judgment on any ground found in the record. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). Because no material question of fact as to the civil conspiracy cause of action existed, we affirm the trial court's grant of summary judgment solely as to that cause of action.

CONCLUSION

We hold novation is **NOT** a defense to causes of action sounding in tort. We rule Weinberg owed a legal duty to Moore based on Weinberg's notice of the Assignment. Consequently, the trial court erred in granting summary judgment on the negligence cause of action.

Additionally, we determine because Moore had a valid Assignment to a portion of the escrow account, accompanied by Weinberg's notice of the Assignment, the trial court erred in granting summary judgment on the issue of conversion. Finally, we conclude there is no material question of fact as to Moore's civil conspiracy cause of action. The trial court did not err in granting summary judgment on the civil conspiracy claim.

Accordingly, the order of the trial court is

Affirmed in Part, Reversed in Part, and Remanded.

KITTREDGE and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James M. Hull, **Appellant,**

v.

Spartanburg County Assessor, **Respondent.**

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

Opinion No. 4210
Submitted January 1, 2007 – Filed February 20, 2007

AFFIRMED

Timothy E. Madden, of Greenville, for Appellant.

Edwin C. Haskell, III, of Spartanburg, for Respondent.

CURETON, A.J.: James M. Hull appeals the circuit court's order affirming the Administrative Law Judge's (ALJ) order valuing Hull's property for the 2002 tax year. Hull contends the ALJ erred in failing to take into account the lessee's, K-Mart's, financial difficulties and the special purpose of the building in determining the value of the property. We affirm.

FACTS

This appeal arises from a dispute regarding the 2002 tax valuation of the land and buildings located on Spartanburg County, Tax Parcel 6-20-08-004.01. The owner of the leasehold estate for the property is H/S Super Spartanburg, L.P., which is represented by its president and general partner, Hull. Hull owns fifty percent of H.S. Super Spartanburg, L.P. Located on this property of approximately 21.7 acres is a special purpose 171,245 square-foot building, built in 1994, which is leased by K-Mart. A special purpose building of this type is referred to as a "big box."

The date that controlled the tax valuation for 2002 (tax control date) was December 31, 2001. The tax assessor valued the property at $12,343,400. Hull appealed the valuation to the ALJ.

The tax assessor testified he considered the physical location and the economic and financial characteristics surrounding the property. The tax assessor found the building was of good quality and very well located near an interstate, shopping mall, and many prime national tenants, such as Lowe's, Sam's, Circuit City, and Best Buy.

The tax assessor used the three standard approaches in valuing properties of this nature: cost approach, direct sales comparison approach, and income approach. According to the tax assessor the income approach "is of the utmost importance because buyers and sellers in essence buy such investment properties based on the income generating capacity of such properties." Utilizing the income approach, the tax assessor arrived at a value of $13,500,000 after considering the property's rent of $7.87 per square foot, which results in a yearly rent of $1,200,000, and then capitalizing the rental income.

Under the direct sales comparison approach, the tax assessor testified similar properties were selling from the high $50 to $80 per square foot on the tax control date. These findings led the tax assessor to value the property between $12,000,000 and $13,000,000 under the direct sales comparison approach. The tax assessor further emphasized the superiority of the income approach because on the tax control date, K-Mart was operating its business and paying rent according to its lease agreement. After using all three approaches, the assessor arrived at a valuation range of $12,000,000 to $13,500,000 and assessed the property at $12,343,400.

On the other hand, Hull's expert appraiser, Ashby Krouse, testified that the raw land was the only valuable aspect of the property. Krouse valued the property at $4,889,250. Krouse's valuation considered the history, anticipated actions by K-Mart, and credit worthiness of K-Mart. Krouse testified that on the tax control date, it was widely known that K-Mart was in financial trouble and that its stock had fallen to five dollars per share. K-Mart did not make its January 1, 2002 lease payment on this property, but was current in its lease payments on December 31, 2001. K-Mart filed Chapter 11 Bankruptcy on January 22, 2002. Not all K-Mart stores were closed. Hull testified K-Mart rejected its lease with Hull in February 2003.

At trial, the appropriate capitalization rate was heavily debated. Krouse explained "the net income from that property is capitalized by the capitalization rate to come up with a value of the subject property." Wal-Mart, a similar competitor, has a capitalization rate of approximately 8.5 to 9%, which according to Krouse, is indicative of Wal-Mart's high credit worthiness. A low capitalization rate results in a high value. Hull prepared his own appraisals of the property and included a 10% and 12.5% capitalization rate in his appraisals. At trial, Hull testified he believed 13.5% would be a more appropriate rate, but insisted the property was only worth the value of the land.

The ALJ valued the property for the 2002 tax year at $10,215,000 based on a capitalization rate of 12.5%. The ALJ concluded that the

9% capitalization rate suggested by the tax assessor was inappropriate because the suggestions of bankruptcy and the drop in the price of K-Mart shares would cause a potential buyer, cognizant of the risk, to seek a higher return than the 9% assigned to the relatively stable competitor, Wal-Mart.

The ALJ's order was appealed to the circuit court. The circuit court affirmed the ALJ's order finding that there was ample evidence in the record to support the ALJ's conclusion that K-Mart was solvent on the tax control date and in compliance with its lease obligations on the property. The ALJ accepted the tax assessor's evaluation with the exception of applying a 12.5% capitalization rate. The circuit court concluded the ALJ's findings were supported by substantial evidence in the record. This appeal followed.

STANDARD OF REVIEW

The review of an ALJ's order is confined to the record. See South Carolina Code §1-23-610(C) (2005). "The findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence." Kearse v. State Health and Human Servs. Fin. Comm'n, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995) (citation omitted). "'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981).

LAW/ANALYSIS

I. Property Valuation Regarding K-Mart's Financial Difficulties

Hull argues the ALJ erred by failing to fully consider K-Mart's financial difficulties in his property valuation. We disagree.

Section 12-37-930 of the South Carolina Code (Supp. 2005) requires:

> All property must be valued for taxation at its true value in money which in all cases is the price which the property would bring following reasonable exposure to the market, where both the seller and the buyer are willing, are not acting under compulsion, and are reasonably well informed of the uses and purposes for which it is adapted and for which it is capable of being used.

"At least four methods exist for determining fair market value of property for taxation purposes: analysis of comparable sales, capitalization of gross income, capitalization of net income, and reproduction cost less depreciation and obsolescence." 72 Am. Jur. 2d State and Local Taxation § 669 (2001). Under the income approach, the appraiser determines the net rental income the property will generate and then capitalizes the income at a rate a land purchaser would expect to obtain from the property. Id. Furthermore, the net income figure must reflect the appraiser's estimate of the property's earning potential, because the income approach "is based on the fundamental notion that the market value of income-producing property reflects the present worth of the future income stream." Id.

In the case at hand, the record reflects that the tax assessor used the cost approach, direct sales comparison approach, and the income approach in valuating the property. The tax assessor capitalized the projected rent of over $1,200,000 at an approximate rate of 9% and reached a figure of about $13,500,000 under the income approach. The record also reflects testimony from Hull that 13.5% would be a more appropriate capitalization rate, which would result in a value of $6,778,343 for the property. The record contains appraisals created by Hull for the property using capitalization rates of 10% and 12.5%. Conversely, Hull's expert, Krouse, testified that the property's value was only $4,889,250, the value of the land.

The income approach is a recognized method for valuing property, specifically when the property's value is largely based on rental income. See S.C. Tax Comm'n v. South Carolina Tax Bd. of Review, 287 S.C. 415, 339 S.E.2d 131 (Ct. App. 1985). The ALJ properly applied the income approach by identifying the annual gross income as $1,347,275 and subtracting expenses to reach a net annual income of $1,276,822. The ALJ then capitalized the net income rate by 12.5%. The ALJ accounted for K-Mart's financial difficulties on the tax control date by utilizing a capitalization rate within the range of testimony, consistent with the evidence, and reflective of K-Mart's financial situation on the tax control date. Therefore, the record supports the ALJ's utilization of the income approach to determine the fair market value and the use of a 12.5% capitalization rate.

The ALJ's valuation was additionally supported by comparable rents in the area. The tax assessor testified the property in question rents for about $7.87 per square foot and the market rent for the neighborhood is approximately $7 per square foot. The tax assessor explained the amounts differ because the location of this property is prime. Hull also testified that the property was in "the best location in the community." The property is near an interstate, a shopping mall, and other national stores. Therefore, the difference of $0.87 per square foot in the rent value used by the tax assessor and the market's rental value is supported in view of the property's superior location.

II. Deed Restrictions

Lastly, Hull argues the special purpose of the building is tantamount to a deed restriction restricting the building to use by K-Mart, which would affect the value of the property. We disagree.

In Long Cove Home Owners' Ass'n, Inc. v. Beaufort County Tax Equalization Bd., 327 S.C. 135, 141, 488 S.E.2d 857, 861 (1997), the court interpreted section 12-37-930 to say that, "regardless of [the] method used to determine true value, deed restrictions affecting the use of the land must be considered when determining value." Before the

ALJ, Krouse testified that a special purpose, big box building like this K-Mart store could not be adapted for a similar, new tenant. He insisted the building would instead need to be torn down and the land made suitable for a new, big box store. If the landlord chose not to tear down the building, Krouse testified an option would be to use the building as a flea market. Hull estimated that a lease for a flea market would earn between $2 and $3 per square foot, significantly less than the current $7.87 per square foot K-Mart lease rental for the property.

Despite the difficulty in adapting the property for a subsequent big box retailer, on the tax control date, K-Mart was not in default on its lease. On the tax control date, the special purpose property was fulfilling its intended purpose of housing a K-Mart store. K-Mart did not reject its lease until February 2003. The ALJ accounted for concerns about K-Mart's financial status in arriving at the proper capitalization rate. Therefore, on the tax control date the difficulty of adapting the big box building was not a factor because K-Mart was utilizing the special purpose building for the purpose indicated in its lease. Additionally, speculation regarding the continuation of K-Mart's use of the building was considered by the ALJ.

CONCLUSION

The property valuation by the ALJ considered the financial difficulties of K-Mart on the tax control date and substantial evidence supports the valuation. The special purpose building was being utilized for its intended purpose on the tax control date; therefore, the uniqueness of the building did not act as a deed restriction. Accordingly, the circuit court's order affirming the ALJ's decision is

AFFIRMED.

HUFF and BEATTY, JJ., concur.