The Supreme Court of South Carolina

In the Matter John Roy Harper, II, Respondent.

ORDER

The Office of Disciplinary Counsel petitions this Court for an order transferring respondent to incapacity inactive status pursuant to Rule 17(b), RLDE, Rule 413, SCACR. Respondent consents to the petition.

IT IS ORDERED that respondent is transferred to incapacity inactive status until further order of the Court.

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

any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

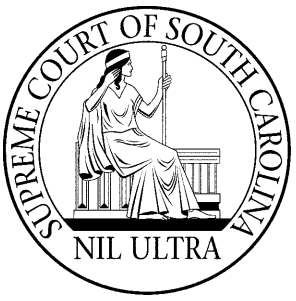
This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Vernon F. Dunbar, Esquire, has been duly appointed by this Court.

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

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

Costa M. Pleicones J.
FOR THE COURT
Toal, C.J., not participating

Columbia, South Carolina
March 12, 2003



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

March 17, 2003

ADVANCE SHEET NO. 10

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

R. J. Hendricks, II, Respondent,

v.

Clemson University, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Pickens County
Thomas J. Ervin, Circuit Court Judge

Opinion No. 25606
Heard September 18, 2002 - Filed March 17, 2003

REVERSED

Jack D. Griffeth and Amy G. Richmond, both of Love, Thornton, Arnold & Thomason, of Greenville, for petitioner.

Scott M. Anderson, of Anderson Law Firm, P.A., of

Greenville, for respondent.

CHIEF JUSTICE TOAL: Petitioner, Clemson University ("Clemson"), appeals from the Court of Appeals' reversal of summary judgment for Clemson.

FACTUAL/PROCEDURAL BACKGROUND

Respondent, R.J. Hendricks, II ("Hendricks") was recruited out of high school by several colleges to play baseball. He received a scholarship from St. Leo College, a Division II school in Florida, and chose to attend St. Leo because it was closest to home. In his junior year at St. Leo, Hendricks received permission to talk with Division I schools about transferring in order to play baseball for a Division I team in his final year of eligibility. Hendricks's father contacted Tim Corbin ("Corbin"), assistant coach at Clemson, to inquire about a transfer for his son.[1] Clemson pursued a one-time transfer exception for Hendricks from the NCAA, and Hendricks applied for admission and was accepted by Clemson.[2] Hendricks received a book scholarship for approximately $200 to $250, but no other scholarship, athletic or otherwise, from Clemson.

At the time of his transfer, Hendricks had earned 80 of the 130 credit hours required for the degree he was pursuing at St. Leo in Business Administration, with a cluster in Restaurant and Hotel Management. Clemson did not offer the same major. When Hendricks decided to transfer to Clemson, he knew he would

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[1] Hendricks and his father knew Corbin because Corbin attempted to recruit Hendricks out of high school to play for Presbyterian College, where Corbin was coaching at the time.

[2] The NCAA has a one-time transfer rule that permits students to transfer one time during their college career to another school without having to sit out for a year after being released from the previous school.

have to return to St. Leo for a final semester (in essence, for an extra semester) in order to graduate from St. Leo with his original major.

Sometime in August, prior to registration, Hendricks met with the athletic academic advisor assigned to him by Clemson's Student-Athlete Enrichment Program, Barbara Kennedy-Dixon ("Kennedy-Dixon"). As Clemson did not offer Hendricks's major, Kennedy-Dixon advised Hendricks to declare himself a Speech and Communications major. Pursuant to her advice, Hendricks enrolled in fifteen hours for the fall semester. A week and a half into the semester, however, Kennedy-Dixon realized she had not evaluated whether Hendricks was in compliance with the NCAA's fifty-percent rule, which required a student athlete to complete at least fifty percent of the course requirements toward his major to be eligible to compete during his fourth year of college enrollment. Recognizing her mistake, Kennedy-Dixon advised Hendricks to drop one class and add two speech classes, increasing his credit hours from fifteen to eighteen. Hendricks changed his classes as advised. Kennedy-Dixon discussed the mistake with her graduate assistant, but did not report it to the director of the program. A few days before the end of the semester, Kennedy-Dixon realized that she had miscalculated the total number of electives Hendricks could take and, consequently, that he would not comply with the NCAA's fifty percent rule.[3]

Upon discovering her mistake, Kennedy-Dixon filed a waiver application with the NCAA in which she claimed responsibility for Hendricks's failure to satisfy the rule, and requested that the NCAA waive the rule to allow Hendricks to play baseball. The NCAA denied the appeal. Hendricks passed all of his fall

[3] Hendricks had only twenty-one hours of electives available, rather than the thirty-two calculated by Kennedy-Dixon, due to certain foreign language requirements that Hendricks had not met. Accordingly, six of Hendricks' eighteen hours were excess electives, and he did not meet the fifty percent rule. To comply with the fifty percent rule, Hendricks needed to take twenty hours toward his Speech and Communications major in the fall semester.

course hours and remained at Clemson for the spring semester, but was not allowed to play baseball. He returned to St. Leo the next fall without a scholarship as planned. Hendricks graduated on schedule in December, but stayed on at St. Leo for the spring semester to play baseball because he had not used his final year of eligibility.

Clemson won the NCAA regional title that spring and went to the College World Series. In his deposition, Clemson's head coach, Coach Leggett, stated there was no limit on the number of players allowed on the non-traveling team, but that the traveling team was limited to 25 players. Based on Hendricks's performance in fall practice, Coach Leggett testified it would have been very hard for Hendricks to make the traveling team. Coach Leggett met with Hendricks at the end of the fall semester (before he was aware Hendricks was ineligible) and explained to him that there were 3 players ahead of him in the line-up for both of the positions Hendricks played, catcher and first base.

In her deposition, Kennedy-Dixon admitted her mistakes were likely caused by personal stress she was experiencing at the time. She gave birth to a premature baby in June (before advising Hendricks in August), and was traveling to Greenville daily to visit her baby who remained in neonatal intensive care until October of Hendricks's first semester at Clemson. Kennedy-Dixon described the purpose of her job as follows: "We have a two-fold purpose . . . . We try to help our students maintain academic excellence and certainly to make sure that they remain academically eligible according to the NCAA and graduate."

Hendricks sued Clemson for negligence, breach of fiduciary duty, and breach of contract for Kennedy-Dixon's mistakes that made him ineligible to play baseball at Clemson. The trial court granted Clemson's motion for summary judgment on all causes of action. The Court of Appeals reversed summary judgment, finding that genuine issues of material fact existed regarding the viability of each of Hendricks's causes of action. *Hendricks v. Clemson Univ.,* 339 S.C. 552, 529 S.E.2d 293 (Ct. App. 2000).

Clemson raises the following issues on appeal:

I. Did the Court of Appeals err in finding there was a genuine issue of material fact regarding the existence of a duty to support Hendricks's negligence claim?

II. Did the Court of Appeals err in finding there was a genuine issue of material fact regarding the existence of a fiduciary duty between Kennedy-Dixon and Hendricks, as advisor and student?

III. Did the Court of Appeals err in finding a genuine issue of fact regarding the existence of a contract between Hendricks and Clemson?

IV. Did the Court of Appeals err in partially reversing the trial court's holding that Hendricks suffered no measurable damages?

LAW/ANALYSIS

Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Hamiter v. Retirement Div. of South Carolina Budget and Control Bd.*, 326 S.C. 93, 484 S.E.2d 586 (1997). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party. *Id.*

I. Negligence

Clemson argues the Court of Appeals erred when it found Kennedy-Dixon's actions did not amount to gross negligence as a matter of law, and reversed summary judgment for Clemson. We agree that the Court of Appeals erred in reversing summary judgment on this issue, and find that summary

judgment was appropriate on the additional ground that Clemson owed no duty to Hendricks.

Both the trial court and Court of Appeals agree that the South Carolina Tort Claims Act ("Tort Claims Act") shields Clemson, as a state-supported university, from liability for loss resulting from "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student . . . except when the responsibility or duty is exercised in a *grossly negligent* manner."[4] The Court of Appeals discussed gross negligence at length and then addressed Clemson's claim that it had no duty to ensure students' athletic eligibility. Citing Kennedy-Dixon's description of her *job* duties and the proposition that if an act is voluntarily undertaken, the actor assumes the duty to use slight care, the Court of Appeals found there was at least a factual dispute as to whether Clemson undertook the duty to advise Hendricks concerning compliance with NCAA eligibility standards. *Hendricks,* 339 S.C. 552, 560-561, 529 S.E.2d 293, 297 (citing *Miller v. City of Camden*, 329 S.C. 310, 494 S.E.2d 813 (1997) (discussing assumption of duty by voluntary undertaking)).

"The determination of the existence of a duty is solely the responsibility of the court." *Miller,* 329 S.C. 310, 494 S.E.2d 813 (citing *Ellis v. Niles,* 324 S.C. 223, 479 S.E.2d 47 (1996). Whether the law recognizes a particular duty is an issue of law to be decided by the Court. *Id.* (citing *Carson v. Adgar*, 326 S.C. 212, 486 S.E.2d 3 (1997)). An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. *Carson.* Ordinarily, the common law imposes no duty on a person to act. Where an act is voluntarily undertaken, however, the actor assumes the duty to use due care. *Id.* (citing *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991)).

Hendricks's argument that Clemson affirmatively assumed a duty of care when it advised him on which courses to take in order to obtain NCAA eligibility does not fit into any of the causes of action previously recognized in South

[4] S.C. Code Ann. § 15-78-60(25) (Supp. 2002) (emphasis added).

Carolina. Under these circumstances, the Court must determine whether the law will recognize a new duty of care between advisor and student. *Ellis.*

In considering the same question, a California court found the issue of duty to be close, but leaned toward finding no duty due to significant policy concerns. *Brown v. Compton Unified Sch. Dist.,*80 Cal. Rptr. 2d. 171 (Cal. App. 1998). California represents the position of the majority of states in refusing to recognize the tort of "educational malpractice" in claims brought by students alleging they received an inadequate education. *Peter W. v. San Francisco Unified Sch. Dist.,* 131 Cal. Rptr. 854 (Cal. App. 1976) (seminal case); *Ross v. Creighton Univ.,* 957 F.2d 1140 (1992) (considering Illinois state law and citing cases from eleven other states that have considered and rejected educational malpractice claims). Courts addressing inadequate education claims, identify several policy concerns with recognizing an actionable duty of care owed from educators to students: (1) the lack of a satisfactory standard of care by which to evaluate educators, (2) the inherent uncertainties of the cause and nature of damages, and (3) the potential for a flood of litigation against already beleaguered schools. *Peter W.; Ross.*

Although Hendricks is not alleging he received an inadequate education while at Clemson, his claim regarding his advisor's negligence should fail for the same reasons courts have refused to recognize a duty in inadequate education cases. In *Brown v. Compton Unified Sch. Dist.*, a high school student sued his school for negligently advising him on which classes to take, resulting in his being ineligible to play basketball at the University of Southern California, and, consequently, in him losing his basketball scholarship from that university. 80 Cal. Rptr. 2d at 172. Although the court recognized his damages (the loss of the scholarship) were more readily identifiable than in the normal educational malpractice claim, the court gave great weight to the policy considerations discussed above. *Id*. Ultimately, the court found the school immune based on a statute granting immunity to public employees for negligent misrepresentations, but its analysis, recognizing the dangers of imposing a duty on student advisors, is instructive in this case. *Id.* at 173.

We believe recognizing a duty flowing from advisors to students is not required by any precedent and would be unwise, considering the great potential for embroiling schools in litigation that such recognition would create. Further, the Court of Appeals citation to *Miller*, indicating a duty may have been created by Clemson's voluntary undertaking to advise Hendricks to ensure NCAA eligibility, is inapposite. 329 S.C. 310, 494 S.E.2d 813. The line of cases *Miller* discusses have thus far been limited to situations in which a party has voluntarily undertaken to prevent physical harm, not economic injury.

Because we find Clemson did not owe a duty to Hendricks, it is unnecessary to discuss whether Kennedy-Dixon's mistakes *could* amount to gross negligence as required for recovery under the Tort Claims Act. S.C. Code Ann. § 15-78-60(25).

II. Fiduciary Duty

Hendricks argues there is a genuine issue of material fact regarding whether Clemson owed him a fiduciary duty. We disagree.

Whether there is a fiduciary relationship between two people is an equitable issue. *Island Car Wash, Inc. v. Norris,* 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987). Generally, legal issues are for the determination of the jury and equitable issues are for the determination of the court. *Id.* "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *O'Shea v. Lesser,* 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992) (citing *Island Car Wash,* 292 S.C. at 599, 358 S.E.2d at 152). This Court has recognized certain relationships are by nature fiduciary, such as the attorney client relationship. *O'Shea.* The relationship between advisor and student has not been so recognized thus far.

Although whether a fiduciary relationship has been breached can be a question for the jury, the question of whether one should be imposed between two classes of people is a question for the court. The Court of Appeals cites *Hotz v. Minyard* for the proposition that the existence of a fiduciary duty may be a factual question for the jury. 304 S.C. 225, 403 S.E.2d 634 (1991). In our opinion, they have misapprehended *Hotz*. In that case, the plaintiff alleged breach of a fiduciary duty by an attorney who had represented both her and her father. *Id.* The Court found evidence of the existence of a confidential, on-going attorney client relationship between plaintiff and the attorney, and then held there was a factual issue presented whether the attorney had *breached* a fiduciary duty under the circumstances presented. *Id.* The Court sent the issue of breach, not the existence of the relationship, to the jury. *Id.*

Historically, this Court has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters. We decline to recognize the relationship between advisor and student as a fiduciary one.

III. Breach of Contract

Hendricks argues there is at least a genuine issue of material fact regarding the existence of a contract between him and Clemson. We disagree.

A contract is formed between two people when one gives the other sufficient consideration either to perform or refrain from performing a particular act. *Benya v. Gamble,* 282 S.C. 624, 321 S.E.2d 57 (Ct. App. 1984). Offer and acceptance are essential to the formation of a contract. *Id.* (citing *Pierce v. Northwestern Mutual Life Ins. Co.*, 444 F. Supp. 1098 (D.S.C. 1978). If the evidence is conflicting or raises more than one reasonable inference, the issue should be submitted to the jury. *Benya.*

For support, Hendricks and the Court of Appeals cite cases from several jurisdictions that have acknowledged the possibility that "the relationship

between a student and a university is at least in part contractual." *Carr v. St. John's University*, 17 A.D. 632 (N.Y.A.D. 1962), *affirmed without opinion*, 187 N.E.2d 18 (N.Y. 1962). Many of these cases involve disputes between student athletes and their schools. *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992); *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379 (N.C. App. 1972). Other cases involve claims related to the quality of the education received by the student. *Cencor, Inc. v. Tolman*, 868 P.2d 396 (Colo. 1994); *Wickstrom v. North Idaho College,* 725 P.2d 155 (Idaho 1986).

All of these cases, however, recognize that not all aspects of the student/university relationship are subject to a contract remedy. *Cencor,* 868 P.2d 396; *Ross*, 957 F.2d 410. Just as courts have prohibited recovery in tort for educational malpractice claims, courts have been equally reluctant to permit claims relating to academic qualifications of students or to the quality of education received when they are brought in contract. In barring contract actions for educational malpractice claims, courts have noted that the policy concerns that preclude those claims in tort apply with equal force when the claim is brought in contract. In *Ross,* a student athlete sued the university alleging that the university accepted him knowing he was not qualified academically to participate in its curriculum, and made a specific promise to provide certain services to him to enable him to participate meaningfully in the academic curriculum. *Ross,* 957 F.2d at 411-12. The court allowed the claim to proceed as a breach of contract action, but made clear that the lower court would not reach the question of whether the university had provided *deficient* academic services. *Id.* at 417. The court limited the inquiry to a determination of whether the university had provided *any* real access to its academic curriculum at all. *Id.*

In *Cencor*, the court adhered to the same distinction, delineating between subjective and objective claims. In that case, the plaintiffs asserted that certain provisions of their enrollment agreements and the school's catalog constituted express contract terms. *Cencor*, 868 P.2d at 399. The court allowed plaintiffs' breach of contract claims to go forward to the extent it referenced "specific services for which the [plaintiffs] allegedly paid and which Cencor allegedly

failed to provide." The court placed no value on the plaintiffs' general allegations that they had not received the education they had been promised, and instead made clear that the claim was proceeding based on the plaintiffs' allegations that Cencor had obligated itself to provide such tangible things as modern equipment and computer training for all students. 868 P.2d at 400.

Clemson admits that some aspects of the student/university relationship are indeed contractual, but argues Hendricks has not pointed to an identifiable contractual promise that Clemson failed to honor in this case. We agree. Hendricks fails to point to any written promise from Clemson to ensure his athletic eligibility, and submits no real evidence to support his claim that such a promise was implied. He did not discuss NCAA academic eligibility until he was already enrolled at Clemson. His conversations with Kennedy-Dixon in June, according to both his deposition and Kennedy-Dixon's deposition, were limited to what major would most easily transfer back to St. Leo.

Hendricks's claim calls for an adjudication of the *deficiency* of Clemson's services. As such, allowing Hendricks's claim to proceed would invite courts to engage in just the type of subjective analysis that courts prohibiting educational malpractice claims in tort and contract have avoided.

IV. Damages

As discussed, we find no actionable duty or contract existed under the circumstances presented. Accordingly, it is unnecessary to address Hendricks' claim for damages.

CONCLUSION

For the foregoing reasons, we **REVERSE** the Court of Appeals and reinstate the trial court's grant of summary judgment in favor of Clemson on all causes of action.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Leroy Wilkes, Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal From Chester County
Costa M. Pleicones, Circuit Court Judge

Opinion No. 25607
Heard February 5, 2003 - Filed March 17, 2003

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General Melody J. Brown, of Columbia; and Solicitor John R. Justice, of Chester; for petitioner.

Assistant Appellate Defender Eleanor Duffy Cleary, of Columbia; for respondent.

JUSTICE MOORE: We granted the State's petition for a writ of certiorari to determine whether the Court of Appeals improperly vacated respondent's assault convictions. State v. Wilkes, 346 S.C. 67, 550 S.E.2d 332 (Ct. App. 2001). We reverse the Court of Appeals.

FACTS

Respondent was indicted on one count of resisting arrest and two counts of assault on a correctional facility employee. He was convicted as charged and sentenced to one year imprisonment for resisting arrest, two years consecutive for the first assault, and three years consecutive for the second assault. Respondent appealed on the basis the indictments on the two counts of assault on a correctional facility employee were insufficient to confer jurisdiction on the trial court.

The body of one indictment reads: "That Leroy Wilkes did in Chester County on or about April 24, 1999[,] assault Officer Marilyn K. Givens while she was attempting to process him after his arrest." The other indictment is identically worded, except it names a different victim, Eric Schmid. One indictment is captioned: "ASSAULT ON CORRECTIONAL FACILITY EMPLOYEE § 16-3-630."[1] The other is captioned: "ASSAULT ON CORRECTIONAL OFFICER." Both indictments contain a title of the charge in the body of the indictment that states: "ASSAULT ON CORRECTIONAL FACILITY EMPLOYEE § 16-3-630."

A majority of the Court of Appeals vacated the two assault convictions, finding the indictments did not contain a necessary element of the offense of assault upon a correctional facility employee because the officers were not identified as correctional facility employees in the body of the indictments.

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[1]S.C. Code Ann. § 16-3-630 (Supp. 2002) states: "A person convicted of assault upon an employee of a state or local correctional facility performing job-related duties must serve a mandatory minimum sentence of not less than six months nor more than five years. . . ."

The court ruled the term "officer" was insufficient because the term could have referred to the arresting officer and not the correctional facility employee. The court, citing State v. Tabory, 262 S.C. 136, 202 S.E.2d 852 (1974), further found the State could not rely on the caption of the indictments to bolster the fatally deficient indictments.

Chief Judge Hearn dissented. She found the indictments, viewed as a whole, were sufficient to confer jurisdiction because, while the body of the indictments did not allege the officers were correctional facility employees, that fact was so indicated by the caption and title of the indictments.

ISSUE

Were the indictments for assault on a correctional facility employee sufficient to confer jurisdiction upon the trial court?

DISCUSSION

A circuit court has subject matter jurisdiction to convict a defendant of an offense if there is an indictment that sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001). An indictment is sufficient if it apprises the defendant of the elements of the offense intended to be charged and apprises the defendant what he must be prepared to meet. Granger v. State, 333 S.C. 2, 507 S.E.2d 322 (1998). Further, an indictment is sufficient if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon. Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995).

We find the indictments, as a whole, were sufficient to confer jurisdiction upon the trial court. The indictments apprised respondent of the elements of the offense intended to be charged and apprised him of what he must be prepared to meet. *See* Granger v. State, *supra*. The bodies of the indictments indicate that respondent assaulted an officer while the officer was

attempting to process him after his arrest. This language is substantially in the language of § 16-3-630 which defines the offense charged. *See* State v. Shoemaker, 276 S.C. 86, 275 S.E.2d 878 (1981) (indictment phrased substantially in language of statute which creates and defines offense is ordinarily sufficient). The captions indicate the victim was a correctional facility employee or cite § 16-3-630. Both indictments contain titles of the charge in the bodies that state the victim was a correctional facility employee and both cite § 16-3-630. The indictments clearly stated the offense with sufficient certainty and particularity to enable the trial court to know what judgment to pronounce and respondent to know what he was being called upon to answer. *See* Browning v. State, *supra*.

We disagree with the Court of Appeals' reading of State v. Tabory, *supra*, that the caption of an indictment cannot be relied upon to confer jurisdiction upon the trial court. In Tabory, the Court held that "the State may not support a conviction for an offense intended to be charged by relying upon a caption *to the exclusion of the language contained in the body of the indictment*." Tabory, 262 S.C. at 141, 202 S.E.2d at 854 (emphasis added). In this case, the State is not relying on the captions of the indictments to the exclusion of the language contained in the bodies of the indictments. Tabory does not hold that the caption of an indictment may not be considered when, as here, it is consistent with the charging language, nor does it prohibit the court from looking at the title of an indictment when scrutinizing the indictment for legal sufficiency.

Because the indictments were sufficient, the Court of Appeals erred by vacating respondent's convictions for assault on a correctional facility employee.

REVERSED.

TOAL, C.J., WALLER, BURNETT, JJ., and Acting Justice James R. Barber, III, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Christopher Douglas Paris, Appellant.

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

Opinion No. 3611
Submitted January 10, 2003 - Filed March 17, 2003

AFFIRMED

John Dennis Delgado, of Columbia; for Appellant.

Attorney General Henry Dargan McMaster; Chief Deputy Attorney General John W. McIntosh; Assistant Deputy Attorney General Charles H. Richardson; Assistant Attorney General Deborah R. J. Shupe, of Columbia; Solicitor Thomas E. Pope, of York; for Respondent.

GOOLSBY, J.: Christopher Douglas Paris appeals his conviction for criminal sexual conduct with a minor in the first degree. The sole issue he raises on appeal is whether the trial court erred in refusing his plea of nolo contendere.[1] We find no abuse of discretion and affirm.[2]

After a jury was selected but before it could be sworn, Paris entered a nolo contendere plea to the indictment with a recommendation from the State that his sentence not exceed five years of "actual prison time" with probation to follow. The trial court determined Paris was making the plea freely, voluntarily, and intelligently. It found the facts as presented by the State and reflected in Paris' prior statements supported the plea.

When questioned by the trial court regarding whether he had anything to say to the court, Paris said he knew the crime had not happened but was not going to contest the charge because he did not feel like putting his child through a trial. Upon hearing this, the trial court altered course and told Paris it would not accept his plea after all. Paris again told the court he did not wish to contest the charge. The trial court, however, held to its position, notwithstanding Paris and his counsel urged the court to accept his plea. It refused to accept Paris' plea because Paris insisted on his innocence. The trial court told Paris it would not accept the plea unless Paris admitted he committed the crime. Paris would not do so, telling the trial court, "I couldn't sit up here and tell you I did do it."

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[1] For all practical purposes, a plea of nolo contendere is a plea of guilty in the particular case. State v. Munsch, 287 S.C. 313, 338 S.E.2d 329 (1985); Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976); see 21 Am. Jur. 2d Criminal Law § 728, at 703 (1998) (stating that a plea of nolo contendere is the functional or substantive equivalent of a guilty plea).

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

Thereupon, the jury was sworn, a trial was held, and Paris was convicted. The trial court sentenced Paris to ten years imprisonment but suspended the sentence upon service by Paris of five years imprisonment and five years probation. Paris appeals, claiming the trial court abused its discretion when it refused to accept his nolo contendere plea solely because he would not admit his guilt. Paris also claims the trial court deprived him of the benefit of his bargain with the State because he lost the "possibility" of receiving a lesser sentence.

Paris relies upon North Carolina v. Alford[3] and United States v. Gaskins[4] for the proposition that a trial court commits an abuse of discretion when it refuses to accept a defendant's guilty plea solely because the defendant will not admit the alleged facts of the crime.

As to the Alford case, the Supreme Court merely held the Constitution does not prohibit the acceptance of a guilty plea despite protestations by the defendant of his or her innocence. The case has nothing whatever to do with the rejection of guilty pleas.[5]

As to the Gaskins case, other courts have either rejected it outright or declined to follow it.[6] We likewise reject it and hold like a majority of the federal circuits who have considered the question that a trial court "can indeed reject a guilty plea because the defendant protests innocence."[7] As the

[3] 400 U.S. 25 (1970).

[4] 485 F.2d 1046 (D.C. Cir. 1973).

[5] 400 U.S. at 38 n.11; United States v. Cox, 923 F.2d 519, 524-25 (7th Cir. 1991).

[6] Cox, 923 F.2d at 525 n.3; United States v. Gomez-Gomez, 822 F.2d 1008, 1011 (11th Cir. 1987); United States v. O'Brien, 601 F.2d 1067, 1069-70 (9th Cir. 1979); United States v. Biscoe, 518 F.2d 95, 96 (1st Cir. 1975); United States v. Bednarski, 445 F.2d 364, 366 (1st Cir. 1971).

[7] Cox, 923 F.2d at 524.

court pointed out in Bednarski, "a conviction affects more than the court and the defendant; the public is involved . . . . [T]he public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail . . . ."[8]

Paris argues he "lost the bargain offered by the State of the possibility of receiving a sentence [of] less than five years" when the trial court refused to accept his plea. First, the trial court was not required to accept the State's recommendation as to the sentence Paris should receive.[9] Second, he got essentially the same sentence the State had agreed to recommend to the trial court, i.e., five years of actual imprisonment followed by probation.

AFFIRMED.

HEARN, C.J., and SHULER, JJ. concur.

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[8] Bednarski, 445 F.2d at 366.

[9] See State v. Riddle, 278 S.C. 148, 292 S.E.2d 795 (1982).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Patrick Jackson, Appellant.

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

Opinion No. 3612
Heard January 16, 2003 - Filed March 17, 2003

AFFIRMED

Chief Attorney Daniel T. Stacey, of SC 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; Assistant Attorney General Derrick K. McFarland, of Columbia; Solicitor Walter M. Bailey, Jr., of Summerville; for Respondent.

GOOLSBY, J.: Patrick Jackson was convicted of and received concurrent sentences for murder, kidnapping, armed robbery, and carjacking.[1] Jackson appeals. We affirm.

FACTS

Prior to the commencement of trial, defense counsel put a motion for recusal on the record, having made the original motion in the trial judge's chambers. The basis for the motion was that the trial judge was the deputy solicitor in Orangeburg County both when the crimes were committed and when Jackson was arrested. The judge was sworn in two days after Jackson's arrest. Defense counsel argued that the judge should recuse himself because he had been the "chief law enforcement officer" for the county during crucial points in the history of the case. The judge denied the motion, stating he had no knowledge of the case and had never discussed it with anyone from the solicitor's office or "any law enforcement agency."

LAW/ANALYSIS

Jackson contends the trial judge erred in denying the motion to recuse. We find this contention is without merit.

Pursuant to Canon 3(E)(1)(a) of Rule 501, SCACR, a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.[2] It is not enough for a party seeking disqualification to simply allege bias or prejudice. The party must show some evidence of that bias or prejudice.[3] The alleged bias or prejudice must stem from an extra-judicial source and result in a decision based on

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[1] Jackson also received a consecutive sentence for contempt of court.

[2] See also Murphy v. Murphy, 319 S.C. 324, 461 S.E.2d 39 (1995).

[3] Roche v. Young Bros., Inc., of Florence, 332 S.C. 75, 504 S.E.2d 311 (1998).

information other than what the judge learned from his or her participation in the case as a judge.[4] If there is no evidence of judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal.[5]

The fact that the trial judge in this case was a deputy solicitor at the time Jackson allegedly committed the crime did not automatically warrant his recusal from the case without more.[6] The trial judge was unfamiliar with the

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[4] Payne v. Holiday Towers, Inc., 283 S.C. 210, 321 S.E.2d 179 (Ct. App. 1984).

[5] Ellis v. Procter & Gamble Distrib. Co., 315 S.C. 283, 433 S.E.2d 856 (1993).

[6] See Commw. v. Darush, 501 Pa. 15, 459 A.2d 727 (Pa. 1983) (holding that the trial court judge did not abuse his discretion in refusing to recuse himself on the basis that the offenses for which the defendant was convicted occurred when the trial judge was serving as district attorney, where he had taken a statement from a primary witness in the instant case and had prosecuted the defendant on unrelated charges); see also Laird v. Tatum, 409 U.S. 824 (1972) (where then-Justice Rehnquist held that his recusal was not warranted merely because he was an Assistant Attorney General while Laird was being investigated and prosecuted because Rehnquist did not have any advisory role in any matters involving Laird, had never signed a pleading or brief regarding the case, and had never personally participated in the trial or appeal); Donald v. Jones, 445 F.2d 601 (5th Cir. 1971) (holding that the defendant was not deprived of a fair and impartial trial because the judge who presided at his pretrial hearing was first assistant district attorney at the time of the commission of the offense because the judge had never heard of the defendant prior to assuming the bench, had not participated in the investigation of the case, and did not sit at the actual trial); Commw. v. Jones, 541 Pa. 351, 663 A.2d 142 (Pa. 1995) (holding that although the judge's name had appeared on papers in connection with the defendant's conviction, which had occurred while the judge was a district attorney, this did not warrant recusal absent a showing that the judge had any direct personal contact with defendant's case during his prosecution and conviction); Rule 501, SCACR, Code of Jud. Conduct Cannon 3(E)(1)(a) (Commentary).

case and had not discussed it, either with employees of the solicitor's office or with any law enforcement agency. Indeed, Jackson offered no proof to the contrary.[7]

We further note the ultimate outcome of the case, Jackson's conviction, is fully supported by the record.[8] Jackson signed a statement in which he admitted: he was present at the commission of the crimes, he drove the carjacked vehicle, and he owned a green Honda Accord. Jackson also identified one of his co-conspirators in a photo lineup. Eyewitness testimony placed Jackson and at least one of his co-conspirators in a green Accord. A green Accord was seen trailing the carjacked vehicle. Jackson's sister also testified that, on the day of the carjacking, she witnessed Jackson and one of his co-conspirators walking down the dirt road where the carjacked vehicle and the victim's body were eventually found. Given the strength of the evidence offered against Jackson at trial, there is no reason to question the trial judge's impartiality.[9]

CONCLUSION

We find there was no error in the trial judge's denial of Jackson's motion for recusal.[10] There is no reason to challenge the trial judge's

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[7] See Roche, 332 S.C. at 85, 504 S.E.2d at 316 ("If there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal.").

[8] A judge is not required to recuse himself when no evidence is presented other than claimed adverse rulings by the judge. Payne, 283 S.C. at 217, 321 S.E.2d at 183.

[9] See Ellis, 315 S.C. at 285, 433 S.E.2d at 857.

[10] For a general discussion of this particular issue, see Jay M. Zitter, Prior Representation or Activity as Prosecuting Attorney As Disqualifying Judge from Sitting or Acting in Criminal Case, 85 A.L.R. 5th 471 § 3 (2001).

impartiality in this matter because the outcome of the case is supported by the record.[11] Accordingly, Jackson's convictions and sentences are

AFFIRMED.

HUFF and SHULER, JJ., concur.

[11] See Roche at 85, 504 S.E.2d at 316.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

R.C. McEntire, Jr., and Pamela T. McEntire, Respondents,

v.

Mooregard Exterminating Services, Inc., Appellant.

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

Opinion No. 3613
Submitted January 10, 2003 - Filed March 17, 2003

AFFIRMED

Thomas Bailey Smith, of Myrtle Beach, for Appellant.

William S. Duncan, of Georgetown, for Respondents.

GOOLSBY, J.: R.C. McEntire, Jr. and Pamela T. McEntire brought this action against Mooregard Exterminating Services, Inc., alleging, among other things, the breach of a termite contact. The jury found for Mooregard Exterminating. The McEntires filed a post-trial motion, seeking a new trial

pursuant to the thirteenth juror doctrine. They also sought a judgment notwithstanding the verdict and, alternatively, a new trial. At no time during the trial itself did the McEntires move for a directed verdict. The trial court granted the McEntires "a new trial upon the facts," as a ruling pursuant to the thirteenth juror doctrine is also called.[1] Mooregard Exterminating appeals, contending a party must make a directed verdict or similar motion before a trial court can grant a new trial based on the facts. We disagree and therefore affirm.[2]

In Folkens, the supreme court held a trial judge's order granting or denying a new trial based on the thirteenth juror doctrine will not be disturbed unless the trial judge's "decision is wholly unsupported by the evidence or the conclusion reached was controlled by an error of law."[3] Here, the issue raised by Mooregard Exterminating does not question the sufficiency of the evidence to support the trial judge's ruling; rather, it argues his decision was controlled by an error of law.

Although, as Mooregard Exterminating contends, a directed verdict motion is a prerequisite to a motion for judgment notwithstanding the verdict[4] or for a motion for a new trial on the ground that the evidence does not support the verdict,[5] we know of no case—and Mooregard Exterminating cites none to us—in which either the supreme court or the court of appeals, at

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[1] Folkens v. Hunt, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990).

[2] 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.

[3] 300 S.C. at 254-55, 387 S.E.2d at 267.

[4] Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 420, 453 S.E.2d 908, 911 (Ct. App. 1995).

[5] Peay v. Ross, 292 S.C. 535, 537, 357 S.E.2d 482, 483 (Ct. App. 1987).

least since the adoption of the South Carolina Rules of Civil Procedure, has held a trial judge lacks the power to grant a new trial upon the facts if the moving party earlier failed to make a directed verdict or an equivalent motion.[6]

The granting of a new trial upon the facts is not the equivalent of granting a directed verdict.[7] A directed verdict is warranted when "the case presents only questions of law"[8] and "should be allowed only if the evidence would not be legally sufficient to sustain a verdict for the opposite party."[9] The question of whether the evidence adduced by a party can support a verdict in the party's favor is a question of law.[10]

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[6] We are aware of Scott v. Seymour, 105 S.C. 42, 89 S.E. 398 (1916), a South Carolina case which can be read as holding that a motion for a new trial on the ground the verdict was contrary to the evidence could not be sustained because the appellant failed to make a motion for a nonsuit or for a directed verdict as required by what was then Rule 77 of the Circuit Court Rules. See 66 C.J.S. New Trial § 69c, at 205 (1950) (citing Scott and stating: "Generally a new trial on the ground that a verdict is against the evidence . . . will not be refused because the movant failed to ask that the case be taken from the jury, but some decisions apparently follow a contrary rule . . . .") (footnotes omitted). Rule 77 (which later became Rule 76), however, no longer exists. See Rule 86, SCRCP (making July 1, 1985, the effective date of the South Carolina Rules of Civil Procedure).

[7] See 58 Am. Jur. 2d New Trial § 3, at 86-87 (2002) ("A motion for a new trial is governed by a different standard than a motion for a directed verdict.").

[8] Rule 50(a), SCRCP.

[9] 58 Am. Jur. 2d New Trial § 3, at 87.

[10] Id. § 4, at 87.

On the other hand, a trial judge may grant a new trial upon the facts if the judge determines the verdict "is contrary to the fair preponderance of the evidence."[11] Unlike a motion for directed verdict, the trial judge weighs the evidence under the thirteenth juror doctrine[12] and need not view it in the light most favorable to the opposing party.[13] Moreover, the question of whether to grant a new trial upon the facts is one addressed to the discretion of the trial judge.[14]

Because the question of whether the evidence is legally sufficient to support a verdict—a question of law—is totally different from the question of whether the fair preponderance of the evidence supports a verdict—a question involving the exercise of discretion—there is no inconsistency in a party's failure to move for a directed verdict and a party's moving to have the verdict set aside as being against the fair preponderance of the evidence.[15] Stated differently, "[i]t may well be that a party's evidence makes a case for the jury while it is so outweighed by the countervailing evidence that, in the exercise of its discretion, the trial court should not hesitate to set aside the verdict in his favor."[16]

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[11] Dent v. Redd, 270 S.C. 585, 586, 243 S.E.2d 460, 460 (1978).

[12] Ridings v. Norfolk S. Ry. Co., 894 S.W.2d 281, 288 (Tenn. Ct. App. 1994).

[13] See Parker v. Evening Post Publ'g Co., 317 S.C. 236, 247, 452 S.E.2d 640, 646 (Ct. App. 1994) (stating the trial court may take its own view of the evidence).

[14] South Carolina State Highway Dep't v. Clarkson, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976).

[15] Russell v. Pilger, 37 A.2d 403, 414 (Vt. 1944).

[16] Id.

A motion for a directed verdict or similar motion, therefore, was not a prerequisite to a motion to set aside the verdict on the ground the verdict was contrary to the fair preponderance of the evidence.

AFFIRMED.

HEARN, C.J., and SHULER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jack Hurd, **Respondent,**

v.

Williamsburg County and Williamsburg County Transit Authority, **Appellants.**

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

Opinion No. 3614
Heard January 15, 2003 - Filed March 17, 2003

AFFIRMED

Charles E. Carpenter, Jr. and S. Elizabeth Brosnan, of Columbia; Robin B. Lilley and Stephen Paul Bucher, of Charleston; for Appellants.

Ladson Fishburne Howell, Jr., and Richard G. Wern, of N. Charleston; Ronnie Alan Sabb, of Kingstree; for Respondent.

ANDERSON, J.: Jack Hurd brought this tort action against Williamsburg County and Williamsburg County Transit Authority (collectively referred to as the "County"), alleging damages resulting from an automobile-pedestrian collision that occurred when he was struck by an automobile after exiting a bus. A jury trial was held and Hurd was awarded $675,000 in damages. The verdict was reduced under the mandate of the South Carolina Tort Claims Act. The County appeals. We affirm.

FACTS/PROCEDURAL BACKGROUND

Hurd boarded the County's bus around 6 a.m. on February 1, 1996 to go to work in Myrtle Beach. The bus driver usually drove another route, but was substituting for the regular driver that day. The bus route starts in the Sand Ridge Community, travels through Highway 261 to Highway 24, comes down to Highway 41/51 at Mingo's crossing, then goes through Georgetown and Highway 17 to Myrtle Beach.

On the morning of the accident, the bus driver pulled off onto the shoulder of Highway 41, a two-lane road, after several passengers requested he stop there so that they could get breakfast across the road at Mingo's Store. The normal procedure was for the bus driver to stop further down at the "Park and Ride," which is located on the same side of the road as Mingo's Store. The "Park and Ride" was erected by the County to serve as a transfer station for riders because of the congestion in the Highway 41 area.

After several passengers alighted onto the shoulder, Hurd, who had been sleeping, awoke and asked the bus driver to let him off so that he could also go to Mingo's store. According to the bus driver, he informed Hurd he was going to the "Park and Ride" and that Hurd could disembark there and go to Mingo's. Hurd, however, requested to go with the other passengers.

Hurd exited and walked to the rear of the bus. At trial, he claimed he looked to the left and right and did not see any vehicles on the highway. He stated he began to cross the highway when the bus started to pull away and was at an angle so he could not see to his right. Hurd continued across the

highway and was struck by a car coming from the opposite direction. Hurd asserted: "I tried to look around the day that I got hit and my view was blocked, that's why I go [sic] hit." Hurd sustained substantial injuries as a result of being hit.

Booker Pressley, a former director of the County's transit authority, testified that the "Park and Ride" on Highway 41 was built because of the traffic congestion in the area and concern about rider safety. Pressley contended that the transit authority had a policy that the drivers were to let the passengers off at the "Park and Ride." Pressley maintained he issued a written warning to the bus driver following the accident for failing to discharge the passengers at the "Park and Ride." At his deposition, published to the jury, he declared:

> Q. After the establishment of the Park & Ride were the drivers advised that they weren't to use the shoulder of the road to discharge passengers anymore, that they were to use the Park & Ride?
>
> A. We had meetings and the meetings were that every driver would meet down at Mingo's and get down there between the time of a quarter to seven and twenty minutes to seven so they could make their change of the bus. We also talked about you know, it was [sic] thing where we talk about everybody pulling up over there. When we went in there that was a woods area. We were able to get a whole side cleaned up to the store so the passengers wouldn't have to cross the road.
>
> Q. Were the drivers told not to discharge the passengers on the side of the road after the Park & Ride was created?
>
> A. I think every driver was told, and somehow I think they—now, if they was [sic] doing it I didn't know anything about it. Because I used to go down there quite a few times and monitor that because we have some sites in Williamsburg County that's creeping fast. What I mean is there's a lot of traffic and it comes in until you kind of, you know it shoots right up on you.

Q. You were monitoring this area to make sure the drivers weren't discharging passengers on the side of 41?
A. I monitored all areas, Myrtle Beach and all the areas.

. . . .

Q. Is safety a consideration when letting a passenger off the bus?
A. Yes.
Q. In what way?
A. Well, again, just like I said Mingo's is one of those little areas that was congested and that's why we started. What we did was we started a Park & Ride site in the congested area first.
Q. Do you agree that the different discharge areas involve different risks?
A. Yes.
Q. And would you agree that some areas are safer than others?
A. Yes.
Q. Would you agree that the Park & Ride area established behind Mingo's store is a safer area to discharge passengers than on the side of the highway?
A. Yes.

. . . .

Q. Do you have any knowledge about accident or fatalities occurring at that intersection?
A. Well, Mingo's when I first started the transit, they had a stop sign there. Since then I think they had a coupe [sic] of deaths from, not people with transit, but other just drivers. Now they have a blinking red light there. I don't know what has happened but that has always been one of those areas and by me living there I know it because it's an area that serves a lot of log trucks and trucks and if you're a driver a lot of times you see truck and you see one you

don't know how many, or you don't how—you don't—strike that—you don't know what's behind it so that was one of the areas that I always had a lot of concern about and one of the reasons I said that I thought he was blessed so much. When we first went out there we started to—we used to let people off on the side and we was [sic] able to get that property to get over there.

Q. Was that a factor in getting the property, were you looking for a safer place to discharge people?

A. That was the right place. That was the place. That was the ideal place. People wanted to use the store and we wanted to have a place where we had a bus coming in from Hemmingway and we had a bus coming in from Morrisville and one coming in from Neesmith all coming in to the same port.

. . . .

Q. My question was, did he violate a policy of the transit authority by discharging passengers on the side of Highway 41 rather than using the Park & Ride?

A. Well, I guess, like I said when we put up the site there was no question about it that the site was there for the use of getting us off the road. Because we didn't just put up a site we created a piece of land and went in there and cleaned up that woods between the store and the Park and Ride site, it's clean to that store. We brought it over there because we didn't want people crossing the road.

Dr. Robert Roberts, an expert in the field of traffic and pedestrian safety design, professed at trial that it was unreasonable for the bus driver to debus the passengers on the shoulder of the highway. Roberts opined that the "Park and Ride" was a safer place for the passengers to be let off the bus. The following exchange occurred:

Q. Go ahead and give [your opinion on whether or not the Park & Ride is a safety device] to me, please sir.

A. Yes, among other things. Park & Rides serve a multitude of functions. In other words where that's precisely what you do, you go park and get on the bus and ride, you have interchanges between busses; and they're located in such a way that you can make these transfers safely. Yes, that's a primary concern. When you say a safety device, the answer to that is yes, but it is also more than that.

Q. Based upon your review of the depositions and the other materials and our personal viewing of the scene, do you have an opinion as to why this traffic safety device of the Park & Ride was established?

A. Well it was established—this particular one?

Q. Yes, sir, this particular one.

A. Based on what I've seen it was for their safety. It is a place where you can get on and off the bus, transfer from bus to another, transfer from an automobile to a bus, or a bus to the automobile and do it safely and have a place to leave your vehicle and ride in the convenience of the bus to some particular bus you want to go. It's done safely, efficiently for everyone concerned.

. . . .

Q. Is it your opinion that it would be unreasonable for the transit authority to drop off a passenger on the side of the road where there is no Park & Ride in place?

A. It is done, it could be done reasonable. But under the circumstances here I don't consider it reasonable, there is a much better alternative.

Q. What is the alternative?

A. The alternative is the Park & Ride which is just a few hundred feet away. You could stop, allow your passengers to get off the bus in perfect safety, no problems.

. . . .

Q. Dr Roberts, explain to the jury under what circumstances it would be reasonable to drop a passenger off on the side of the road and under what circumstances it would be unreasonable to drop a passenger off on the side of the road.

A. Well you have to keep in mind that this is a rural area where your passengers are going to be getting on and off in rural circumstances. So basically what you want is a location where you can let the passengers off where hopefully you can get the bus completely off the traveled way and still have room for the passengers to get off without ending up in a ditch or something of this type. Then the bus can move off, allow the passengers, if they need to cross the roadway, a clear unobstructed view in either direction so they can cross the road in a location which is reasonably convenient for the passengers. And as I say you have to keep in mind that this is a rural location. It's not like an urban area where you're dropping people off on a curb or a sidewalk. In this particular case I think what makes it unreasonable in my thinking is that you have a facility within a few hundred feet where you can take your bus completely off the roadway, have it in a protected area, where you can have other busses or other vehicles there and passengers can get on and off and transact their business safely and conveniently. So with the Park & Ride there dropping them off on this curbside, not even a curbside so to speak, roadside to me does not make any sense whatsoever.

. . . .

Q. . . . Is the side of the road, the side of highway 41, safer or less safe than the Park & Ride [?]

Mr. Bucher: Same objection, your honor.

A. It's less safe.

The jury returned a verdict in favor of Hurd, finding that Hurd was 42% at fault in causing his injuries and that the County was 58% at fault. The jury awarded Hurd $675,000 in damages. Following the County's post trial motions, the trial court reduced the award of damages to $250,000, pursuant to the South Carolina Tort Claims Act liability cap.

The County appeals, arguing the trial court erred in failing to direct a verdict because Hurd did not establish that the County breached any duty, that the County's actions were the proximate cause of his injuries, or that the County was more negligent than Hurd.

STANDARD OF REVIEW

When reviewing a ruling on a motion for directed verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. See F & D Elec. Contractors, Inc. v. Powder Coaters, Inc., 350 S.C. 454, 567 S.E.2d 842 (2002); Wintersteen v. Food Lion, Inc., 344 S.C. 32, 542 S.E.2d 728 (2001); see also Harvey v. Strickland, 350 S.C. 303, 566 S.E.2d 529 (2002) (in ruling on a motion for directed verdict, trial court is required to view evidence and inferences which reasonably can be drawn therefrom in light most favorable to party opposing motion and to deny motion where either evidence yields more than one inference or its inference is in doubt). In essence, we must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor. Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997); Bultman v. Barber, 277 S.C. 5, 281 S.E.2d 791 (1981).

When the evidence yields only one inference, a directed verdict in favor of the moving party is proper. Sims v. Giles, 343 S.C. 708, 541 S.E.2d 857 (Ct. App. 2001); R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 540 S.E.2d 113 (Ct. App. 2000). However, if the evidence as a whole is susceptible of more than one reasonable inference, the case must be

submitted to the jury. Quesinberry v. Rouppasong, 331 S.C. 589, 503 S.E.2d 717 (1998); Getsinger v. Midlands Orthopaedic Profit Sharing Plan, 327 S.C. 424, 489 S.E.2d 223 (Ct. App. 1997); see also Heyward v. Christmas, ___S.C.___, 573 S.E.2d 845 (Ct. App. 2002) (if the evidence is susceptible of more than one reasonable inference, a jury issue is created and the court may not grant a directed verdict).

When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Harvey, 350 S.C. at 308, 566 S.E.2d at 532; Creech v. South Carolina Wildlife & Marine Res. Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997); Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998). The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror. Hanahan, 326 S.C. at 149, 485 S.E.2d at 908. Yet, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury. Small v. Pioneer Mach., Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997). Our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. Id. A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture, or speculation. Id.

In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence. Long v. Norris & Assocs., Ltd, 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000); Jones v. Gen. Elec. Co., 331 S.C. 351, 503 S.E.2d 173 (Ct. App. 1998). This Court can only reverse the trial court when there is no evidence to support the ruling below. Steinke v. South Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999); Sims, 343 S.C. at 714, 541 S.E.2d at 861; Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). We must affirm a trial judge's denial of a directed verdict motion when there is evidence to support the court's ruling. See Strange v. South Carolina Dep't of Hwys. & Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994). Accordingly, we must review the evidence to determine whether the trial court properly submitted the case to the jury.

LAW/ANALYSIS

I. Breach of Duty

The County contends Hurd failed to present evidence establishing that the County breached any duty of safety it owed to Hurd. Particularly, the County alleges that Hurd was unloaded in a reasonably safe location.

A common carrier has a duty to exercise the highest degree of care towards its passengers. Singletary v. Atl. Coast Line R.R. Co., 217 S.C. 212, 218, 60 S.E.2d 305, 307 (1950); Thomas v. Atl. Greyhound Corp., 204 S.C. 247, 252, 29 S.E.2d 196, 198 (1944); Poliakoff v. Shelton, 193 S.C. 398, 408, 8 S.E.2d 494, 498 (1940). "The relation of passenger and carrier ordinarily ends when the passenger steps from a bus into a reasonably safe place on a public highway." Flynn v. Carolina Scenic Stages, 237 S.C. 340, 345, 117 S.E.2d 364, 366 (1960); see 14 Am.Jur.2d Carriers § 752 (2000). However, "it does not follow that the carrier is then wholly discharged of any duty whatsoever to such passenger. It still owes him the duty of exercising ordinary care to see that after alighting safely he is not in a position or situation as to be imperiled by the starting up of the bus." Flynn, 237 S.C. at 345, 117 S.E.2d at 366-67. Therefore, the question before this Court is whether or not Hurd presented any evidence establishing that he was let off the bus in an unreasonably dangerous location.

At trial, Hurd presented testimony from Dr. Roberts establishing that it was unwise for the bus driver to allow the passengers to debark the bus on the shoulder of the highway. Additionally, the former director of the County's transit authority stated that it was the transit authority's policy to only let passengers off at the "Park and Ride" on Highway 41 and that Highway 41 was a congested area. Furthermore, the jury could infer from the mere presence of the "Park and Ride" in the area that it was not safe to allow passengers to exit the bus from the shoulder of the highway. Under our standard of review, we find there was evidence presented to the jury that the County breached its duty of care to Hurd by allowing him to exit from the bus on the shoulder of the highway.

II. Proximate Cause

The County argues Hurd failed to present any evidence that an act of the County was a proximate cause of his injury.

In a negligence action, the plaintiff must prove proximate cause. Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998); Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). Negligence is not actionable unless it proximately causes the plaintiff's injury. Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998); Bergstrom v. Palmetto Health Alliance, ___S.C.___, 573 S.E.2d 805 (Ct. App. 2002). It is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant's negligence. Parks v. Characters Night Club, 345 S.C. 484, 548 S.E.2d 605 (Ct. App. 2001). If one neglects a duty which proximately causes injury to another, recovery is warranted. Hodge v. Crafts-Farrow State Hosp., 286 S.C. 437, 334 S.E.2d 818 (1985); Vinson, 324 S.C. at 400, 477 S.E.2d at 720.

Proximate cause requires proof of both causation in fact and legal cause. Oliver v. South Carolina Dep't of Hwys. & Pub. Transp., 309 S.C. 313, 422 S.E.2d 128 (1992); Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001); Parks, 345 S.C. at 491, 548 S.E.2d at 609. Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's negligence. Oliver, 309 S.C. at 316, 422 S.E.2d at 130; Trivelas, 348 S.C. at 135-36, 558 S.E.2d at 276; Vinson, 324 S.C. at 400, 477 S.E.2d at 721.

Legal cause, in contrast to the "but for" nature of causation in fact, is proved by establishing foreseeability. Oliver, 309 S.C. at 316, 422 S.E.2d at 131; Small v. Pioneer Mach., Inc., 329 S.C. at 463, 494 S.E.2d at 842; see also Trivelas, 348 S.C. at 136, 558 S.E.2d at 276 (legal cause turns on the issue of foreseeability). The standard by which foreseeability is determined is that of looking to the natural and probable consequences of the complained of act. Oliver, 309 S.C. at 316, 422 S.E.2d at 131; Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978).

The touchstone of proximate cause in South Carolina is foreseeability. Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 443 S.E.2d 392 (1994); Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997). An injury is foreseeable if it is the natural and probable consequence of a breach of duty. Bergstrom, ___S.C. at ___, 573 S.E.2d at 809-10; Trivelas, 348 S.C. at 136, 558 S.E.2d at 276; see also Vinson, 324 S.C. at 400, 477 S.E.2d at 721 (foreseeability is determined by looking to the natural and probable consequences of the act complained of). A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence. Newton v. South Carolina Pub. Rys. Comm'n, 319 S.C. 430, 462 S.E.2d 266 (1995); McNair, 330 S.C. at 349, 499 S.E.2d at 497; Goode, 329 S.C. at 447, 494 S.E.2d at 834.

A negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred. Vinson, 324 S.C. at 401, 477 S.E.2d at 721. In other words, if the accident would have happened as a natural and probable consequence, even in the absence of the alleged breach, then a plaintiff has failed to demonstrate proximate cause. Where the injury complained of is not reasonably foreseeable, there is no liability. Crolley v. Hutchins, 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989). In order for conduct to amount to negligence for which compensation can be collected, the defendant must have foreseen, or by the exercise of ordinary care should have foreseen, the probability that his conduct would likely cause injury to another. Vinson, 324 S.C. at 401, 477 S.E.2d at 721. One is not charged with foreseeing that which is unpredictable or which would not be expected to happen as a natural and probable consequence of the defendant's negligent act. Id.

Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach. Parks, 345 S.C. at 491, 548 S.E.2d at 609; Vinson, 324 S.C. at 401, 477 S.E.2d at 721; see also Shepard v. South Carolina Dep't of Corrections, 299 S.C. 370, 385 S.E.2d 35 (Ct. App. 1989) (foreseeability is to be judged from perspective of defendant

at time of negligent act, not after injury has occurred). It is not necessary for a plaintiff to demonstrate the defendant should have foreseen the particular event which occurred but merely that the defendant should have foreseen his or her negligence would probably cause injury to someone. Greenville Mem'l Auditorium v. Martin, 301 S.C. 242, 391 S.E.2d 546 (1990); see also Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 393 S.E.2d 914 (1990) (although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, plaintiff need not prove that defendant should have contemplated particular event which occurred; defendant may be held liable for anything which appears to have been a natural and probable consequence of his negligence); Vinson, 324 S.C. at 400-01, 477 S.E.2d at 721 (foreseeability does not mean that defendant contemplated the event that occurred; it is sufficient that he should have foreseen his negligence would probably cause injury to someone).

Proximate cause is the efficient or direct cause of an injury. Small, 329 S.C. at 464, 494 S.E.2d at 843; Vinson, 324 S.C. at 401, 477 S.E.2d at 721. Proximate cause does not mean the sole cause. Small, 329 S.C. at 464, 494 S.E.2d at 843. The defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury. Id. The issue of proximate cause may be resolved by direct or circumstantial evidence. Mahaffey v. Ahl, 264 S.C. 241, 214 S.E.2d 119 (1975); Small, 329 S.C. at 464, 494 S.E.2d at 843.

"Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." McNair, 330 S.C. at 349, 499 S.E.2d at 497. Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law. Trivelas, 348 S.C. at 137, 558 S.E.2d at 277; Ballou v. Sigma Nu Gen. Fraternity, 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986); see also Oliver, 309 S.C. at 317, 422 S.E.2d at 131 (legal cause is ordinarily a question of fact for the jury; only when the evidence is susceptible to only one inference does it become a matter of law for the court). If there is a fair difference of opinion regarding whose act proximately caused the injury, then the question of proximate cause must be submitted to the jury. Ballou, 291

S.C. at 147-48, 352 S.E.2d at 493. The particular facts and circumstances of each case determine whether the question of proximate cause should be decided by the court or by the jury. Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 504 S.E.2d 347 (Ct. App 1998); Small, 329 S.C. at 464, 494 S.E.2d at 843.

Hurd presented evidence, through Pressley and Roberts, that the County's letting Hurd off on the shoulder of Highway 41 was a proximate cause of his injury. Specifically, Hurd established causation in fact and legal cause, the two elements of proximate cause. Hurd demonstrated that the injury would not have happened "but for" the County's discharging him on the shoulder of the road instead of at the "Park and Ride." Pressley attested that the "Park and Ride" was created so passengers would not have to cross the road to go to Mingo's Store, the drivers were told not to unload the passengers on the side of the road after the "Park and Ride" was created, he monitored the area to make sure the drivers were not alighting passengers on the side of the road, and the "Park and Ride" was created because it was a safer place to discharge passengers than the shoulder of the road. Roberts professed that under the circumstances of a "Park and Ride" being in place nearby, it was unreasonable for the County to drop off passengers on the side of the road. Hurd established the requisite foreseeability for legal cause by Pressley's testimony that the County created the "Park & Ride" as a safety measure in the congested area. Hurd has, therefore, presented evidence that allows one to infer that the County's action was a proximate cause of the accident.

III. Comparative Negligence

The County argues that Hurd did not present any evidence that the County's negligence exceeded Hurd's negligence.

Comparative negligence is the law in South Carolina. Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E.2d 783 (1991). The jury must apportion fault between the plaintiff and defendant in a negligence action. Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000). Under the comparative negligence doctrine, the plaintiff's negligence does not

automatically bar recovery by the plaintiff as long as the plaintiff's negligence is not greater than that of the defendant. Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001); see also Thomasko v. Poole, 349 S.C. 7, 561 S.E.2d 597 (2002) (under comparative negligence, plaintiff's contributory negligence does not bar recovery unless that negligence exceeds defendant's). Stated differently, a plaintiff may only recover damages if his own negligence is not greater than that of the defendant. Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000). The plaintiff's damages are reduced in proportion to the amount of his or her negligence. Clark, 339 S.C. at 378, 529 S.E.2d at 533. The burden of proof is on the plaintiff to establish the negligence of the defendant. Ross v. Paddy, 340 S.C. 428, 532 S.E.2d 612 (Ct. App. 2000).

Generally, "under a 'less than or equal to' comparative negligence rule, determination of respective degrees of negligence attributable to the plaintiff and the defendant presents a question of fact for the jury, at least where conflicting inferences may be drawn." Brown v. Smalls, 325 S.C. 547, 559, 481 S.E.2d 444, 451 (Ct. App. 1997); see also Creech v. South Carolina Wildlife and Marine Res. Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997) (comparison of a plaintiff's negligence with that of the defendant is a question of fact for the jury to decide). "Accordingly, apportionment of negligence, which determines both whether a plaintiff is barred from recovery or can recover some of his damages and the proportion of damages to which he is entitled, is usually a function of the jury." Brown, 325 S.C. at 559, 481 S.E.2d at 451. "In a comparative negligence case, the trial court should only determine judgment as a matter of law if the sole reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent." Bloom, 339 S.C. at 422, 529 S.E.2d at 713; see also Thomasko, 349 S.C. at 11, 561 S.E.2d at 599 (in comparative negligence case, trial court should grant motion for directed verdict if sole reasonable inference from evidence is that non-moving party's negligence exceeded fifty percent).

The testimony of Pressley is overwhelming that the County violated its own safety policy by alighting passengers on the shoulder of the road instead of at the "Park and Ride." Rather than discharge the passengers at the "Park

and Ride," which was constructed to insure passenger safety, the driver decided to violate the County's policies and debus the passengers on the shoulder of the road. In addition, Roberts concluded that it was unreasonable and did "not make any sense whatsoever" to discharge passengers on the roadside rather than at the "Park and Ride." Under the facts of this case, we find Hurd presented evidence that allows a jury to draw a reasonable inference that the County's negligence was greater than Hurd's negligence.

CONCLUSION

Accordingly, the trial court did not err in failing to direct a verdict in favor of the County. The decision of the trial court is

AFFIRMED.

HEARN, C.J., concurs.

CURETON, J., dissents in a separate opinion.

C**URETON, J., dissenting:** I respectfully dissent.

I.

The majority contends that Hurd produced sufficient evidence to establish that he was let off the bus in an unreasonably dangerous location. I disagree.

At trial, Hurd offered the deposition of Booker Pressley, the former director of Williamsburg County's transit authority. Pressley stated that the area in which the "Park and Ride" was created was congested. Pressley attested that the "Park and Ride" was created so that the passengers would not have to cross the road to go to Mingo's store, and it was also established to provide the County with a safer place to discharge its passengers than on the side of the highway.

Hurd also presented testimony from Dr. Roberts, an expert in the field of traffic and pedestrian safety design, that it was unwise for the bus driver to have allowed passengers to disembark from the bus on the shoulder of the highway when there was a "Park and Ride" available. However, Roberts further opined that it would be reasonable to drop passengers off on the side of the road under the following circumstances:

> [K]eep in mind that this is a rural area where your passengers are going to be getting on and off in rural circumstances. So … what you want is a location where you can let the passengers off where hopefully you can get the bus completely off the traveled way and still have room for the passengers to get off without ending up in the ditch or something of this type. Then the bus can move off, allow the passengers, if they need to cross the roadway, a clear unobstructed view in either direction so they can cross the road in a location which is reasonably convenient for the passengers.

At trial Appellant presented evidence which clearly showed that the shoulder of the road was adequate in size to allow the bus space to pull completely off the roadway while still having adequate room for passengers to disembark without stepping into a ditch, etc. The shoulder was also sufficient to enable the bus to reenter the roadway, while at the same time allowing the passenger to safely stand in the shoulder and view both lanes of traffic so that the passenger could then cross the roadway in a reasonably convenient location. The majority points to the fact that when the bus moved to reenter the highway, the bus was at an angle and Hurd testified he was unable to see to his right. However, there is no evidence to show that the bus pulled onto the highway into the oncoming lane of traffic traveling from the right and blocked Hurd's view in that manner.

A common carrier has a duty to exercise the highest degree of care towards its passengers. Singletary v. Atl. Coast Line R.R. Co., 217 S.C. 212, 218, 60 S.E.2d 305, 307 (1950). However, "the relation of passenger and carrier ordinarily ends when the passenger steps from a bus into a reasonable

safe place on a public highway." Flynn v. Carolina Scenic Stages, 237 S.C. 340, 345, 117 S.E.2d 364, 366 (1960). Accord Harris v. Atl. Greyhound Corp., 90 S.E.2d 710, 713 (N.C. 1956) (finding bus company owes a passenger duty to provide a safe landing, but once passenger has alighted safely to a place of safety, relationship of carrier and passenger ends).

The extent of Pressley and Roberts's testimony was not that this particular shoulder was unsafe in and of itself, but that this shoulder was unreasonably dangerous in light of the fact that there was a safer location, a "Park and Ride," a few hundred feet away. However, the threshold that must be met was that the carrier breached a duty to Hurd because the carrier let him off the bus in an unreasonably dangerous location. The evidence presented by Hurd does not meet this standard.

II.

The majority found that Hurd presented evidence that allowed an inference that the County's actions were the proximate cause of the accident and that the county's negligence was greater than Hurd's negligence. I disagree.

Although comparison of a plaintiff's negligence with that of a defendant is ordinarily a question for the jury, the trial court should determine this question as a matter of law if the "sole reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent." Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000). "Where evidence of the plaintiff's *greater* negligence is overwhelming, evidence of slight negligence on the part of the defendant is simply not enough for a case to go to the jury." Id. at 424, 529 S.E.2d at 714.

Hurd testified that he did not have a clear view of the highway when he began to cross the street to reach Mingo's store. He stated that he continued to cross the highway even though the bus was blocking his ability to see oncoming traffic. Rather than wait a brief moment on the shoulder for the bus to pull away, Hurd chose to cross the highway despite his obstructed

view. Furthermore, Hurd requested to be let out on the shoulder even though the driver informed him that he was driving to the "Park and Ride" where Hurd could have safely exited the bus and walked to Mingo's store. Hurd's own testimony established that he attempted to cross the highway in an unreasonable and unsafe manner.

> A common carrier of passengers is due such passengers the highest degree of care, but is not an insurer of the safety of passengers under all circumstances. … In an action in tort based on negligence, the negligence of the defendant must be the proximate cause of the injury to the plaintiff. Even though there may be some testimony from which it could be inferred that a defendant was negligent, a plaintiff cannot unnecessarily and consciously take a risk which may or may not result in injury, and when it does result in injury, then recover damages therefor against a defendant. In other words, the law requires that a passenger . . . should use every reasonable care to avoid injury to himself, and if he fails to use such care as a man of ordinary prudence and caution would have used under the surrounding circumstances, and is injured as a result thereof, he cannot recover.

Singletary, 217 S.C. at 218-19, 60 S.E.2d at 307-308 (1950). Under the facts of this case, I find that Hurd failed to present evidence that the carrier's negligence was the proximate cause of his injuries or that the County's negligence was greater than his own. Accordingly, the trial court erred in failing to direct a verdict in favor of the County.

I would **REVERSE** and enter judgment for Appellant.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Darnell Hudson East, Appellant.

Appeal From Anderson County
John W. Kittredge, Circuit Court Judge

Opinion No. 3615
Submitted January 10, 2003 – Filed March 17, 2003

AFFIRMED

Senior Assistant Appellate Defender Wanda H. Haile, of Columbia; for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, all of Columbia; and Solicitor Druanne Dykes White, of Anderson; for Respondent.

HEARN, C.J.: Darnell East was indicted for armed robbery and seven counts of kidnapping. The trial judge denied his motions for a directed verdict on the charges of kidnapping. East was convicted on all counts and sentenced to life without parole. East appeals, asserting the trial judge erred in denying his motion for a directed verdict on the kidnapping charges because the alleged kidnapping was not a separate and distinct offense from the armed robbery. He also contends the trial judge erred in denying his motion for a directed verdict on the kidnapping charge as to Richard Ausburn because Ausburn did not testify at trial. We affirm.[1]

I. FACTS/PROCEDURAL HISTORY

Two men entered a fast-food restaurant in Powdersville shortly before it opened on a Sunday morning. One of the men had a knife and said: "This is a robbery." When the employee advised him that he did not have the key to open the cash drawer, the robber with the knife and the employee walked to the manager's office. The manager came to the door of the office, and the robber grabbed the phone from the manager and cut the cord with the knife. Shortly thereafter, the other robber, East, came back to the manager's office carrying a gun. East grabbed the manager and took him into the office. When East came out of the office with the manager, the two robbers told seven of the employees to "lay (sic) on the ground." The employees lay there for several minutes until the robbers left the store. Approximately twenty-three hundred dollars was stolen from the store.

At trial, the defense moved for a directed verdict on the ground that the brief confinement of the victims during the course of the armed robbery was not a separate and distinct offense. A directed verdict was also sought on the kidnapping charge as to one of the employees, Richard Ausburn, because Ausburn "did not appear and has not testified." Relying primarily on the case of State v. Hall, 280 S.C. 74, 310 S.E.2d 429 (1983), the trial judge denied the motion for a directed verdict. He also found the testimony of other employees concerning Ausburn's presence during the

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

robbery to be sufficient to warrant a denial of the motion for a directed verdict as to that count of kidnapping. The jury convicted East of all charges.

II. ISSUE

East argues he was entitled to a directed verdict on the kidnapping charges because the brief confinement of the employees during the course of the armed robbery was not sufficient to constitute the separate crime of kidnapping. East also argues he was entitled to a directed verdict on the kidnapping count with respect to Richard Ausburn because Ausburn did not appear at trial and did not testify.

III. DISCUSSION

S.C. Code §16-3-910 (Supp. 2001) defines the offense of kidnapping as follows: "Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony . . . ." Kidnapping is a continuous offense which "commences when one is wrongfully deprived of freedom and continues until freedom is restored." State v. Tucker, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999). South Carolina's kidnapping statute requires proof of an unlawful act taking one of several alternative forms, including seizure, confinement, inveiglement, decoy, kidnapping,[2] abduction, or carrying away. See State v. Owens, 291 S.C. 116, 352 S.E.2d 474 (1987).

The issue of whether the act of confinement can constitute the separate offense of kidnapping when it is incidental to the commission of another crime was raised in State v. Hall, 280 S.C. 74, 310 S.E.2d 429 (1983). In Hall, the victim was abducted by knifepoint as she placed a call from a phone booth near a clubhouse of an apartment complex. The perpetrator forced the victim to walk to an adjacent pool area where he

[2] "As used in § 16-3-910, the term 'kidnap' apparently refers to the common law crime of kidnapping." State v. Berntsen, 295 S.C. 52, 54 n.1, 367 S.E.2d 152, 153 n.1 (1988).

sexually assaulted her and forced her to walk to different locations around the pool. At each location, the victim was assaulted. On appeal from his convictions for assault and battery of a high and aggravated nature, first degree criminal sexual conduct, and kidnapping, Hall argued the trial judge erred in failing to charge the jury that in order to establish kidnapping, the State must prove the confining and carrying away of the victim was more than incident to the commission of another crime. The South Carolina Supreme Court disagreed, holding that Hall's restraint of the victim constituted kidnapping within the meaning of S.C. Code Ann. § 16-3-910 (1976) "regardless of the fact that the purpose of this seizure was to facilitate the commission of a sexual battery." 280 S.C. at 78, 310 S.E.2d at 431.

It appears that South Carolina may be in the minority of jurisdictions which have considered this issue. See State v. Anthony, 817 S.W.2d 299, 305 (Tenn. 1991) (citing to at least fifteen states' appellate court decisions on this issue and stating that "[b]y an overwhelming margin, the majority view in other jurisdictions is that kidnapping statutes do not apply to unlawful confinements or movements incidental to the commission of other crimes."); see also Model Penal Code § 212.1 (2001) (requiring movement over a substantial distance or confinement for a substantial period of time). Nevertheless, we agree with the trial judge here that the decision of our supreme court in State v. Hall controls.

Moreover, we note that the trial judge charged the jury that in order for it to convict East of both offenses, it must find that he had the requisite intent to commit two separate offenses. Although the jury charge is not part of the record on appeal, the trial judge advised counsel when he placed the results of the charge conference on the record and stated:

> I am going to follow the lead of [defense counsel] in her request from that Hall case that cites with approval the North Carolina decision that in order to convict on the second series of offenses, the alleged kidnappings, I'm going to quote from that case and make that charge. And for the record, it will be as follows: "Under the law, two or more criminal

> offenses may grow out of the same course of action as where one offense is committed with the intent thereafter to commit the other and is actually followed by the commission of the other."

Thus, the jury was clearly instructed that in order to convict East of both armed robbery and kidnapping, it would have to find that he possessed the requisite intent to commit the second offense, in this case, the kidnapping.

Regarding East's argument concerning the failure of the State to call one of the victims as a witness, there was testimony in the record from the other KFC employees that Ausburn was present when they were confined in the hallway. Accordingly, the trial judge properly denied the motion for a directed verdict on this ground. See State v. Charping, 333 S.C. 124, 129, 508 s.E.2d 851, 854 (1998) ("[A]n adverse inference from the unexplained failure of a party to call an available witness is generally held not warranted when the material facts assumed to be within the knowledge of the absent witness have been testified to by other qualified witnesses."); State v. Creech, 314 S.C. 76, 82-83, 441 S.E.2d 635, 638 (Ct. App. 1994) ("In reviewing the refusal to grant a directed verdict, the evidence is viewed in the light most favorable to the State to determine whether there is any evidence, either direct or circumstantial, which reasonably tends to prove the guilt of the accused, or from which guilt may be fairly and logically deduced.")

Accordingly, East's convictions are

AFFIRMED.

GOOLSBY and SHULER, JJ. concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Edgar Scott, as Parent and Natural Guardian of Zacharias Scott, a Minor Under the Age of Fourteen Years, **Appellant,**

v.

Greenville Housing Authority, as Owner and Operator of Pierce Homes, **Respondent.**

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge
Wyatt T. Saunders, Jr., Circuit Court Judge

Opinion No. 3616
Heard February 11, 2003 – Filed March 17, 2003

REVERSED and REMANDED

John Robert Peace, of Greenville, for Appellant.

Merl F. Code and E. Delane Rosemond, of Greenville, for Respondent.

ANDERSON, J.: Edgar Scott (Scott), a parent of a three-year-old boy who was severely burned by a hot water heater at a Greenville Housing Authority (GHA) property, appeals the jury verdict in GHA's favor. Scott argues the trial judge erred by refusing to hold GHA admitted liability pursuant to Rule 36, SCRCP. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

On February 7, 1998, Scott left his son, three-year-old Zacharias Scott, with a babysitter in unit 62-A of Pierce Homes. Pierce Homes is a property owned and operated by GHA. After going to the bathroom, Zacharias attempted to wash his hands. The water was so hot that it caused severe burns to his hands. Zacharias spent ten days in the hospital for his painful burns, which required him to be placed under anesthesia prior to changing his bandages. Over the next two years, Zacharias underwent several surgeries to improve the appearance and range of motion in his hands. Despite the surgeries, Zacharias' hands were severely scarred and he incurred more than $23,000 in medical bills.

On January 4, 2000, Scott, on behalf of Zacharias, sued GHA, alleging GHA was aware the hot water heater was improperly set and that GHA's grossly negligent and reckless acts proximately caused Zacharias' injuries. Scott sought actual and punitive damages. GHA denied liability and asserted that Scott was responsible for the injuries for failing to properly supervise Zacharias and Zacharias assumed the risk of burns by using only hot water to wash his hands.

The parties proceeded with discovery. On November 15, 2000, Scott served GHA with Supplemental Interrogatories and Requests for Production, requesting, among other things, inspection records for the hot water heaters. Thereafter, on November 21, 2000, Scott served GHA with a First Set of Requests for Admission and Supplemental Interrogatories. Request to Admit numbers 3 and 4 asked GHA to admit that it was responsible and liable for all of Zacharias' damages, and that its conduct was the sole proximate cause of

any and all damages he suffered. The remaining requests asked GHA to admit that it had a duty to inspect the hot water heater to unit 62-A and whether GHA had performed such an inspection in the year prior to the incident. GHA did not respond to either discovery request within thirty days. Further, GHA only responded to the Supplemental Interrogatories and Request to Produce on February 5, 2001, two days before the matter was scheduled for trial. GHA did not produce the inspection records for the hot water heaters and never responded to the Requests for Admission.

The matter was initially scheduled for trial on February 7, 2001. During the pretrial hearing, Scott moved to have GHA's lack of response to the Requests for Admission deemed an admission of liability and proximate cause of Zacharias' injuries pursuant to Rule 36, SCRCP, so that the trial could continue only as to damages. GHA moved to withdraw the admissions for lack of response, averring Scott was on notice that GHA denied liability in the matter because it moved for summary judgment, it denied liability in its answer, and it pled contributory negligence and assumption of the risk as affirmative defenses. GHA alleged that, because the deemed admission of liability was at the crux of the case, not regarding a tangential fact, the presentation of the merits would be subserved by allowing the admissions to be withdrawn and Scott would suffer no prejudice in having to prove liability.

Scott claimed that, because GHA refused to comply with any of his discovery requests, he did not have the inspection records necessary to prepare his case. Thus, he would be prejudiced and presentation of the merits would not be subserved thereby if GHA were allowed to withdraw their admission of liability. Scott admitted he did not file a motion to compel after GHA failed to respond to the requests for admissions because the issue of liability was deemed admitted under the rule. GHA argued that it had given Scott all the information and records that were available.

The trial court struck GHA's admissions numbers 3 and 4 regarding liability and negligence. The court found Scott made similar allegations in his complaint and that GHA had denied liability and negligence in its answer. The court was concerned that "in every case, then, after issues are joined by pleadings that one or both of the parties will again plead the case by asking for admissions, and we will have a never-ending pleading circumstance by

requests for admissions going back and forth between the parties." The court noted that the Tort Claims Act requires gross negligence and an admission of liability does not admit gross negligence. In the written order, the court stated **"the requests to admit are superfluous to the issues joined in the pleadings and specifically pled in the Plaintiff's complaint and specifically denied by affirmative defenses in Defendant's answer."** The trial court continued the trial to allow Scott to file motions to compel and for GHA to provide Scott with discovery.

Scott filed a motion for reconsideration of the matter. The court denied the motion, holding that **"when issues of fact are joined by answer to the complaint denying assertions in the complaint, then no subsequent failure to respond to discovery as permitted by the Rules of this Court may supercede [sic] and negate those ultimate issues of fact in controversy which are presented by the fundamental pleadings of the parties in the cause before the Court."**

Scott moved to compel production of GHA's records concerning the hot water heater. On March 20, 2001, the trial court ordered the production of records and affidavits regarding the search for records within fourteen days. GHA failed to produce any documents within the prescribed time period. Scott moved for sanctions for failure to produce the records on April 3, 2001.

On April 9, 2001, GHA filed the affidavit of U.S. Sweeney, Public Housing Coordinator, in which Sweeney declared he gave his attorney all of the documents concerning the hot water heaters. Thereafter, GHA provided copies of inspection records for the last two inspections of the hot water heaters on April 1, 1997, and May 12, 1998. GHA failed to provide requested information regarding other inspections or the purchase, manufacture, maintenance, warranty, or any other requested information regarding the hot water heater.

The matter was rescheduled for trial on April 23, 2001. During the trial, Sweeney testified that more records regarding the hot water heaters were available. During the lunch break, Sweeney obtained two file folders

containing numerous inspection documents. The trial court granted Scott's motion for a mistrial.

Scott filed a second motion for sanctions for contempt of court and failure to participate in discovery. Because GHA had repeatedly denied the existence of the hot water heater records which were readily available, Scott requested that the portion of GHA's answer in which they denied knowledge of the faulty hot water heaters be struck and that GHA pay Scott's trial preparation costs and attorney's fees. The trial court granted Scott's motion for sanctions as to the trial preparation costs and attorney's fees, but the court denied Scott's request to strike GHA's denial of knowledge regarding the hot water heaters.

The case finally went to trial on May 24, 2001. The jury found for GHA.

STANDARD OF REVIEW

In an action at law, on appeal of a case tried by a jury, the appellate court's standard of review extends merely to the correction of errors of law. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976); R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 540 S.E.2d 113 (Ct. App. 2000). We will not disturb the jury's factual findings unless a review of the record discloses there is no evidence which reasonably supports the jury's findings. Townes, 266 S.C. at 85, 221 S.E.2d at 775; Brown v. Smalls, 325 S.C. 547, 481 S.E.2d 444 (Ct. App. 1997); see also York v. Conway Ford, Inc., 326 S.C. 170, 480 S.E.2d 726 (1997) (Court has no power to review matters of fact in action at law except to determine if verdict is wholly unsupported by evidence); Cohens v. Atkins, 333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998) (in action at law on appeal of case tried by jury, jurisdiction of Court of Appeals extends merely to correction of errors of law, and factual finding of jury will not be disturbed unless review of record discloses there is no evidence which reasonably supports jury's findings).

LAW/ANALYSIS

Scott contends the trial court abused its discretion in allowing GHA to withdraw its deemed admission because: (1) the court erred in ruling that a defendant cannot make an admission that is contrary to denials contained in the answer; (2) the court ignored the requirements for admissions and denials as set forth in Rule 36(a), SCRCP; (3) the court failed to follow the requirements of Rule 36(b), SCRCP, in evaluating GHA's motion to withdraw the admissions; and (4) the court's ruling is inconsistent with the "form and substance" of Rule 36. We agree.

I. ADMISSIONS PURSUANT TO RULE 36(a), SCRCP

The trial court in the underlying case based its ruling, in part, on the fact that any admission pursuant to Rule 36(a) would be in direct conflict with GHA's answers in its pleadings and went to the ultimate question of liability.

Whether as previously embodied in prior South Carolina Circuit Court Rule 89 or as currently verbalized in Rule 36, SCRCP, South Carolina has long had the discovery rule that failure to respond to requests for admissions renders any matter listed in the request conclusively admitted for trial. Rule 36(a)[1] provides that matters for which admissions are requested will be deemed admitted "unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow[,] . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . . ."

In reviewing the tenets of Rule 36(a), our courts have repeatedly found that failure to respond to requests for admissions deems matters contained therein admitted for trial, regardless of whether the admission concerns a

[1] The second paragraph of Rule 36(a) was amended effective September 1, 2001, to reflect the change in Rule 29 allowing parties, under certain circumstances, to stipulate to extensions. Because this amendment occurred after the underlying events in the present case, it has no effect on our analysis.

matter responded to in a party's pleadings. In Hatchell v. Jackson, 290 S.C. 256, 349 S.E.2d 407 (Ct. App. 1986), Hatchell sued Jackson for fraud and deceit in connection with the sale of a restaurant. Jackson counterclaimed for breach of contract. In his reply to Jackson's counterclaim, Hatchell denied he committed a breach of contract, but he failed to respond to Jackson's request for admissions. The Circuit Court granted summary judgment in favor of Jackson. The Court of Appeals articulated:

> Hatchell never responded to Jackson's request for admissions; therefore, under South Carolina Circuit Court Rule 89(a), which was then in effect and is now embodied in Rule 36(a) of the new South Carolina Rules of Civil Procedure, each matter of which Jackson sought an admission was deemed admitted.
>
> Based upon the admissions on file, Jackson moved for summary judgment. She maintained the pleadings and admissions on file showed that there was no genuine issue as to any material fact and that she was entitled to judgment as a matter of law on both Hatchell's claim and her own.

Hatchell, 290 S.C. at 258, 349 S.E.2d at 408. Because genuine issues of material fact still existed even after matters were deemed admitted due to Hatchell's failure to respond to the request, this Court held the Circuit Court erred in granting summary judgment and reversed. Id. at 259, 349 S.E.2d at 408.

A majority of the Supreme Court, in Hinson-Barr, Inc. v. Pinckard, 292 S.C. 267, 356 S.E.2d 115 (1987), concluded that a seller of restaurant equipment was not entitled to summary judgment in its action for breach of contract against a buyer. The dissent, however, pointed out that the buyer failed to respond to the requests for admission:

> Under Rule 36(a), SCRCP, all matters contained in a Request for Admission are admitted unless the party serves answers or objects within a certain time. It is undisputed that [B]uyer never responded to Seller's second Request for

> Admissions served on February 28, 1985. By its failure to act, Buyer admitted: (1) that it "accepted the equipment and goods supplied by [Seller] as reflected in the invoices . . ."; (2) the genuineness of and its acceptance of the invoices and ledger sheets; and (3) that it resold these goods to a third party. These facts are conclusively admitted for the purposes of this litigation since Buyer made no motion to withdraw or amend them. Rule 36(b), SCRCP.

Hinson-Barr, 292 S.C. at 269-70, 356 S.E.2d at 116-17 (Ness, C.J., dissenting) (footnote omitted); see also Bakala v. Bakala, Op. No. 25586 (S.C. Sup. Ct. filed Jan. 27, 2003) (Shearouse Adv. Sh. No. 4 at 12) ("Husband did not respond to Wife's request to admit that his interest in Hartig had a value of $300,000 and this fact is therefore deemed admitted under Rule 36(a), SCRCP.").

More recently, the Court of Appeals addressed the binding effect of admissions due to a failure to respond to the requests to admit. In Commerce Center of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc., 347 S.C. 545, 556 S.E.2d 718 (Ct. App. 2001), a building owner brought an action against an architect and a contractor for damages due to leaky windows. The building owner responded to the requests for admissions, but the owner specifically reserved the right to supplement the response. In reviewing the Circuit Court's refusal to allow the contractor to present copies of the admissions to the jury while granting the owner's request to amend the admissions, this Court determined that admissions obtained via a failure to respond to a request to admit were just as binding on a party as answers in pleadings or stipulations, absent the grant of an amendment to the admissions:

> A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the general rules of discovery that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Rule 36(a), SCRCP. The efficacy of these admissions is akin to the doctrine of judicial estoppel: an

> admission precludes the admitting party from arguing facts at trial contrary to its responses to a request to admit, absent an amendment to or revocation of the admission as allowed under the rules. See Rule 36(b), SCRCP ("Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."); cf. Adams v. Orr, 260 S.C. 92, 194 S.E.2d 232 (1973) (affirming trial judge's refusal to hold that plaintiff's lack of responses to several of defendant's requests to admit were admitted as binding fact because the requests to admit, as worded, were ambiguous and subject to more than one reasonable interpretation).
>
> Admissions under Rule 36 are treated as admissions in pleadings. Muller v. Myrtle Beach Golf & Yacht Club, 303 S.C. 137, 399 S.E.2d 430 (Ct. App. 1990), overruled on other grounds by Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000); see also James F. Flanagan, South Carolina Civil Procedure 304 (1996) ("Admissions are similar to pleadings."); Pulte Home Corp. v. Woodland Nursery & Landscapes, Inc., 230 Ga. App. 455, 496 S.E.2d 546, 548 (1998) ("In form and substance [a response to a request to admit] is comparable to an admission in pleadings or stipulation of facts and as such is generally regarded as a judicial admission rather than evidentiary admission of a party.").

Commerce Ctr., 347 S.C. at 554-55, 556 S.E.2d at 723 (footnote omitted). Although the Court found the Requests for Admissions were just as binding as pleadings on the parties, it further ruled the Circuit Court was correct in refusing to submit the admissions to the jury because, pursuant to Rule 43, SCRCP, "'pleadings shall not be submitted to the jury for its deliberations.'" Id. at 555, 556 S.E.2d at 723 (quoting Rule 43(g), SCRCP). Thus, in our state, requests to admit are not submitted to the jury; rather, the proper course of action is to publish the admissions to the jury. Id.

The federal rule on requests for admissions is substantively similar to our rule. According to Rule 36(a) of the Federal Rules of Civil Procedure, matters for which an admission is sought shall be deemed admitted unless

"the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . . ." Rule 36(a), FRCP. The purpose of the rule is to save time and to limit the issues in the case:

> [The rule's] function is to define and limit the matters in controversy between the parties.
>
> > Through such definition and limitation, admissions promote both efficiency and economy in resolving disputes. If a point is conceded, litigants need not expend effort in investigations concerning it nor incur expense in presenting evidence to prove it. Judicial administration is also aided. Admissions reduce the time required to try a case. Indeed, they often make summary judgment possible. Finally, admissions encourage litigants to evaluate realistically the hazards of trial, and thus tend to promote settlements.
>
> The rule is intended to expedite the trial and to relieve the parties of the cost of proving facts that will not be disputed at trial, the truth of which is known to the parties or can be ascertained by reasonable inquiry.

8A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2252 (2d ed. 1994) (footnotes omitted); see also Langer v. Monarch Life Ins. Co., 966 F.2d 786, 803 (3d Cir. 1992) ("Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be.").

Some federal courts have held that requests for admissions are not objectionable merely because they go to ultimate facts or other issues that must be proven by the plaintiff. See, e.g., Cereghino v. Boeing Co., 873 F. Supp. 398, 403 (D. Or. 1994) (holding "a request for admission under Rule

36, and a resultant admission, are not improper merely because they . . . relate to an 'ultimate fact,' or prove dispositive of the entire case.").

The trial judge in the present case erred as a matter of law in finding the admissions made as a result of GHA's failure to respond to Scott's requests for admissions were not binding because the admissions would conflict with GHA's answers in its pleadings. The purpose of Rule 36 is to allow parties to narrow the issues and determine which facts do not need to be proven because they are admitted. Rule 36(a) does not condition the binding effect of requests for admissions upon whether the requests address issues asserted or denied in the pleadings. Whether a request to admit alters the pleadings depends on the language of the particular request to admit. However, if the language of the request for admission specifically goes to an issue in the pleadings, the admission resulting from a party's failure to respond to the request may override the pleadings. Despite GHA's denial of liability and negligence in its pleadings, its failure to respond to Scott's requests for admissions concerning these issues was binding upon it.

This record exemplifies a paradigm of contumacy and intransigence in the discovery arena. A review of the record does <u>not</u> reveal a paucity or a modicum of response. The activity by GHA demonstrates a nihility in the discovery activity.

Concomitantly, we reverse the trial court's finding that the ultimate issue could not be determined by the admission because it was "superfluous" to the pleadings.

II. AMENDMENT OF ADMISSIONS -- RULE 36(b), SCRCP

We now turn to whether the trial court abused its discretion in allowing GHA to withdraw its admissions.

Rule 36(b) delineates the effect of any admission:

> Any matter admitted under this rule is **<u>conclusively established</u>** unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule

> governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admissions fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose.

Rule 36(b), SCRCP (emphasis added). Therefore, a trial court "may allow a party to amend or withdraw its answers to a request to admit when: (1) the presentation of the merits is furthered by the amendment; and (2) the party who obtained the admission cannot demonstrate prejudice because of the amendment." Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc., 347 S.C. 545, 557, 556 S.E.2d 718, 724 (Ct. App. 2001); see also Tuomey Reg'l Med. Ctr., Inc. v. McIntosh, 315 S.C. 189, 191, 432 S.E.2d 485, 487 (1985) ("Rule 36, SCRCP allows amendment of an admission in the discretion of the court when 'the merits of the action will be subserved thereby and the party who obtained the admissions fails to satisfy the court that withdrawal or amendment will prejudice him . . . .'"). Federal Rule 36(b), FRCP, similarly provides that "the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits."

In the instant case, GHA argued that it should be allowed to withdraw the admission resulting from its lack of response because it "affirmatively denied those specific admissions . . . in the answer . . . and [it] moved for summary judgment . . . ." GHA asserted Scott would not suffer any prejudice because "at any time during this case [Scott] would never have relied upon the fact that we would admit liability" due to GHA's denial in the pleadings. Scott alleged that the merits would not be subserved by letting GHA out of its admissions. Because of GHA's refusal to cooperate with discovery requests, Scott claimed he would be severely prejudiced. In ruling on the matter, the trial court never addressed whether Scott would be prejudiced by the withdrawal of the admissions. The court merely focused on the problems that

might occur if requests for admissions were allowed to negate denials in pleadings.

The gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party. See State Hwy. Dep't v. Booker, 260 S.C. 245, 195 S.E.2d 615 (1973); Hodge v. Myers, 255 S.C. 542, 180 S.E.2d 203 (1971). Essentially, the rights of discovery articulated by the rules give the attorney the means to prepare for trial.

Discovery is the quintessence of preparation for trial and, when discovery rights are trampled, prejudice must be presumed. See Downey v. Dixon, 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987). Unless the party who has failed to submit to discovery can show lack of prejudice, reversal is mandated. Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997).

The judge erred in failing to address the prejudice that would be suffered by Scott. Further, it is evident from the record that Scott was prejudiced by the withdrawal of the admission. GHA either denied the existence of or did not provide Scott with discovery records it clearly had access to prior to the first date the trial was scheduled. Scott needed the discovery, which was solely within the control of GHA, in order to prove his case. After the trial court allowed GHA to withdraw its admissions, GHA continued to frustrate Scott's ability to present his case by first denying the existence of the hot water heater records and then surprising Scott with the records during the middle of trial. The trial court erred in failing to find that Scott was prejudiced. We conclude the trial court committed an abuse of discretion in allowing the withdrawal of the admissions in this case.

Furthermore, we note the trial court had the option to completely strike GHA's pleadings in the matter as a sanction for its failure to cooperate in discovery. See Rule 37(b)(2)(C), SCRCP; see also In re Solomon, 307 S.C. 1, 3, 413 S.E.2d 808, 809 (1992) (holding that "[b]ecause [attorney] did not respond [to the requests for admission], however, the allegations were deemed admitted by the trial judge pursuant to Rule 37, SCRCP, and judgment was entered against [client].").

CONCLUSION

The trial court's decision to allow GHA to withdraw the admissions was based on the judge's erroneous belief that requests for admissions could not displace answers in pleadings. The court failed to consider the prejudice that would and did result to Scott due to the withdrawal of the admissions. Accordingly, we **REVERSE** the trial court's decision to allow withdrawal of the admissions, **REVERSE** the jury's verdict in the trial, and **REMAND** the matter for further proceedings consistent with this opinion.

REVERSED and REMANDED.

CONNOR and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Bobby Watson, Appellant.

Appeal From Chesterfield County
Paul M. Burch, Circuit Court Judge

Opinion No. 3617
Heard February 25, 2003 – Filed March 17, 2003

AFFIRMED

Assistant Appellate Defender Eleanor Duffy Cleary, of the South Carolina Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and

Solicitor Jay E. Hodge, Jr., of Cheraw; for Respondent.

GOOLSBY, J.: Bobby Watson appeals his convictions for first-degree criminal sexual conduct (CSC) with a minor and committing a lewd act upon a child under the age of sixteen years, arguing the trial court erred in not allowing him to present surrebuttal testimony in response to the State's reply evidence. We affirm.

FACTS

This action arises out of allegations that Watson abused his girlfriend's daughter (the victim).[1] In July 1999, the victim, then nine years old, told her grandmother that Watson had sexually abused her for two years. At trial, the victim testified that Watson had made her "suck his private parts" and had "grabbed [her] hand and put it on his front private part and rubbed up and down." The victim also testified Watson made her sit on his penis and that he had touched her "inside." The victim stated the incidents occurred when she stayed with her mother, her brother, and Watson in a two-bedroom trailer and also at her grandmother's house.

Watson denied the allegations and maintained they resulted from the fact that his girlfriend was mad at him for cheating on her, as was her family; he contended the victim "very seldom was in our house." Watson testified that he and his girlfriend lived in a trailer with their son, and that the victim did not live with them during the time the acts allegedly occurred, when the victim was seven to nine. Rather, the victim stayed with her grandmother "practically all the time" and "was a visitor in [his] home [the trailer]." Watson asserted that he was never left alone with the victim. He also presented a defense theory that the allegations could have been the product of suggested memories based on the victim having seen pornographic movies and a sex channel on television that the victim's grandmother allegedly

[1] Although the victim was not his child, Watson and his girlfriend did have one child together, a son.

subscribed to.[2] He alternatively asserted that if there was any sexual abuse, it was committed by someone else.

In reply, the State presented the testimony of a neighbor, who stated that she often saw Watson, his girlfriend, their son, and the victim at the trailer from 1997 to 1999, although the victim would sometimes stay at her grandparents' house. The neighbor also testified that she went to the trailer to borrow something one day and Watson was home with just his son and the victim. During cross-examination, the witness admitted having a criminal record involving fraudulent checks and shoplifting.

A jury convicted Watson of first-degree CSC with a minor and committing a lewd act upon a child under the age of sixteen years. The trial court sentenced him to thirty years in prison for the CSC charge and a concurrent fifteen years for the charge of committing a lewd act.

LAW/ANALYSIS

Watson contends he is entitled to a new trial based on the trial court's failure to allow him to present surrebuttal testimony.

After the State presented reply testimony from Watson's neighbor, the following exchange occurred:

> MRS. RIVERS [Defense counsel]: Your Honor, I would ask to put the defendant on the stand for rebuttal.
> MS. MAYES [State]: I know of absolutely no provision under the law of the Rules of Evidence that allows that, Your Honor.
> THE COURT: I don't either.
> Any matters of law at this time?

[2] During an interview with a psychologist, the victim reported having briefly seen, on two occasions, portions of sexually explicit videotapes that were mistakenly put in the VCR. Her grandmother (or another adult), however, had realized the mistake and retrieved them.

The parties then proceeded to discuss jury charges. Thereafter, Watson himself addressed the court and stated, "Your Honor, I want to ask you can I comment on what this testimony was because this lady right here that just stated this testimony was evicted. Katrina, the mother of the victim, lived with this woman." Watson told the court that his father would also be willing to testify. The court stated: "I'm sorry. I am not allowed under procedure to let that happen. That was reply from the State after you put up your defense, Mr. Watson."

On appeal, Watson's appellate counsel argues the trial court erred in failing to exercise its discretion or, alternatively, abused its discretion, when it did not allow the defense to present surrebuttal testimony to address allegedly new matter brought out in the State's reply evidence. Counsel contends that, contrary to the trial court's ruling, surrebuttal testimony is allowed under South Carolina law, citing Camlin v. Bi-Lo, Inc.[3] and State v. Summer[4] as supporting authority.

Initially, we find it questionable whether this issue was preserved for consideration on direct appeal as this argument appears to be raised for the first time on appeal. When the trial court denied the request to present the additional testimony, it did so based on its apparent belief that additional testimony was not allowed after the State's reply. No argument was raised by the defense that such surrebuttal testimony is, in fact, allowed in the court's discretion.[5]

On the merits, contrary to the trial court's statement that it was "not allowed under procedure to let that happen," some authorities note that there are occasions when the trial court may allow surrebuttal testimony in its discretion:

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[3] 311 S.C. 197, 428 S.E.2d 6 (Ct. App. 1993).

[4] 55 S.C. 32, 32 S.E. 771 (1899).

[5] See State v. Huggins, 336 S.C. 200, 205, 519 S.E.2d 574, 577 (1999) ("It is well-settled that issues may not be raised for the first time on appeal.").

> Surrebuttal is appropriate when, in the judge's discretion, new matter or new facts are injected for the first time in rebuttal[,] especially where the evidence offered in surrebuttal is for the first time made competent by the evidence introduced by plaintiff in rebuttal.
>
> On the other hand, if the evidence sought to be introduced in surrebuttal could or should have been introduced at an earlier stage, its admission or rejection is a matter for the discretion of the trial court, as where the evidence is cumulative, or where there is no sufficient excuse for not introducing the evidence in chief at the proper time.[6]

South Carolina courts have approved the use of surrebuttal testimony in the discretion of the trial court. In Goethe v. Browning,[7] our supreme court stated: "Admission of evidence in surrebuttal is very much in the discretion of the trial judge."[8] In State v. Summer, the court observed: "[I]f the plaintiff [or the prosecution in a criminal case] in reply puts new matter in evidence, or makes a new case different from that at first made out, it becomes the right of the defendant to call witnesses in surrebuttal."[9] Further, in Camlin v. Bi-Lo, Inc., we stated: "A defendant has a right to respond to new evidence given in reply."[10]

Thus, the trial court erred when it stated it was not allowed to permit additional testimony; however, we conclude Watson has suffered no prejudice warranting reversal, in any event, as the State's reply witness did

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[6] 88 C.J.S. Trial § 197 (2001) (footnote omitted).

[7] 146 S.C. 7, 143 S.E. 362 (1928).

[8] Id. at 18, 143 S.E. at 366.

[9] 55 S.C. at 40, 32 S.E. at 774 (citation omitted).

[10] 311 S.C. at 200, 428 S.E.2d at 8 (citing Strait v. City of Rock Hill, 104 S.C. 116, 88 S.E. 469 (1916)).

not raise any new evidence. The reply witness's testimony that she saw the victim, her younger brother, her mother, and Watson living together in the trailer and that she saw Watson home alone with the victim and her younger brother was cumulative to the testimony of the victim and her grandmother, who both testified during the State's case-in-chief that Watson had been alone with the victim and her younger brother on nights when his girlfriend was working, and that the victim stayed at the trailer with him. Additionally, we note the victim testified the abuse occurred not only when her mother was gone, but also while her mother was home asleep. Finally, the evidence Watson would have offered, i.e., that the neighbor had been evicted and had lived with his ex-girlfriend, were matters going to credibility that could have been brought out during cross-examination. Defense counsel did elicit on cross-examination the fact that the neighbor had prior convictions so as to attack her credibility. Accordingly, Watson's conviction and sentence are

AFFIRMED.

HEARN, C.J., and SHULER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Diane Shannon, Respondent,

v.

George Shannon, Appellant.

George L. Shannon, Appellant,

v.

Teresa Diane Shannon, Respondent.

Appeal From Kershaw County
Gerald C. Smoak, Jr., Family Court Judge

Opinion No. 3618
Heard February 13, 2003 – Filed March 17, 2003

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

James W. Corley, of Columbia; for Appellant.

Carlos W. Gibbons, Jr., of Columbia; for Respondent.

STILWELL, J.: In this post-divorce domestic action, George Shannon (Husband) appeals an order of the family court holding him in contempt and denying his plea for termination or modification of his alimony obligation to Diane Shannon (Wife). We affirm in part, reverse in part, and remand.

BACKGROUND

The parties were divorced by order of the family court in 1997. The divorce decree provides, inter alia, that Husband is to pay Wife $400 per month in periodic alimony with all payments to be made through the court.

On February 16, 1999, Wife was reported as a missing person. Her whereabouts have not been known since that date. After her disappearance, a conservatorship was established on Wife's behalf.

Husband instituted this action in April of 2001 seeking termination of his alimony obligation to Wife. Alternatively, Husband sought modification of his alimony obligation, retroactive to the date Wife was reported missing. First Union Bank, in its capacity as Wife's court-appointed conservator, arranged for Wife to have legal representation. Wife's answer to the complaint denied Husband's entitlement to the relief sought, and contained a counterclaim seeking an award of attorney fees and costs. Additionally, because Husband was in arrears on his alimony payments, the family court issued a rule to show cause why Husband should not be held in contempt for failure to pay alimony.[1]

After a hearing on both actions, the court denied Husband's plea for relief from his alimony support obligation and held him in contempt for failure to pay alimony. The court determined his arrearage was $7,763 as of the date of the order. This appeal followed.

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[1] The Rule to Show Cause refers to Husband's failure to pay child support rather than alimony. We determine that to be merely a clerical oversight.

STANDARD OF REVIEW

In appeals from the family court, this court may find facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992); Owens v. Owens, 320 S.C. 543, 546, 466 S.E.2d 373, 375 (Ct. App. 1996).

DISCUSSION

Husband asserts the family court erred in failing to grant him relief from his alimony obligation in light of Wife's continued status as a missing person. We agree.

In denying Husband any relief from his alimony obligation, the family court reasoned that Wife's status as a missing person is not, standing alone, a sufficient basis to terminate or suspend Husband's support obligation. The court further reasoned that in the event Wife reappears, she would be left without a remedy to collect any support obligation owed. We agree with Husband that the family court's reasoning as to this issue is flawed.

An award of periodic alimony may be modified pursuant to South Carolina Code Annotated section 20-3-170 (1985). That statute provides:

> Whenever [a spouse] . . . has been required to make [to] his or her spouse any periodic payments of alimony and the circumstances of the parties or the financial ability of the spouse making the periodic payments shall have changed since the rendition of such judgment, either party may apply to the court which rendered the judgment for an order and judgment decreasing or increasing the amount of such alimony payments or terminating such payments.

In order to justify modification or termination of an alimony award, the changes in circumstances must be substantial or material. Eubank v. Eubank, 347 S.C. 367, 372, 555 S.E.2d 413, 416 (Ct. App. 2001).

As alleged in the complaint and admitted in the answer, Wife's whereabouts have not been known since on or before February 16, 1999. Additionally, the record contains no evidence Wife is actually receiving or in any way personally benefiting from Husband's alimony payments. The basic purpose of alimony is to substitute for the support which is "normally incident to the marital relationship." McNaughton v. McNaughton, 258 S.C. 554, 558, 189 S.E.2d 820, 822 (1972). If these parties were not divorced, Husband would have no obligation to provide financial support for a wife who chose to disappear.

In our view, Wife's sustained disappearance constitutes a substantial change in the parties' circumstances warranting a modification of Husband's alimony obligation. Under the extraordinary circumstances of this case, we are simply unable to conclude that the ends of justice and equity will be served by requiring Husband to continue making alimony payments until such time as Wife either reappears or is declared dead.

We hold the peculiar circumstances of this case warrant a modification amounting to suspension of Husband's alimony obligation retroactive to the date this litigation was commenced. We therefore reverse the family court's order and remand the case for recalculation of Husband's arrearage consistent with this holding.

Additional considerations convince us this result is equitable. Although Husband did not seek modification, termination, or suspension of his alimony obligation on any ground other than Wife's continued status as a missing person, his financial circumstances have changed since the court originally ordered alimony. He lost his job and now earns significantly less than at the time of the divorce. Additionally, although the court awarded custody of the couple's children to Wife, they were placed in Husband's care before Wife's disappearance, and he has received no child support from Wife or her conservator.

Regarding the family court's concern that Wife, should she reappear, will be without legal means to recover the amount of support that would have been due her if Husband's obligation had not been suspended, we note

nothing prevents Wife from petitioning the family court to lift the suspension ordered herein and to revisit the issue of alimony pursuant to the provisions of section 20-3-170. Our holding is not intended to prevent Wife from pursuing such legal recourse should she reappear.

Further, our decision is not intended to disturb the family court's findings as to contempt or any arrearage Husband accumulated prior to the commencement of this action. We are aware of no authority, and Husband cites none, entitling a spouse to cease making court-ordered alimony payments in the absence of a judicial order authorizing such relief.

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

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

CURETON and HOWARD, JJ., concur.