The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

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

# N O T I C E

IN THE MATTER OF JOHN EARL DUNCAN, PETITIONER

On June 12, 2000, Petitioner was indefinitely from the practice of law, retroactive to July 30, 1999. In the Matter of Duncan, 340 S.C. 622, 533 S.E.2d 894 (2000). He has now filed a petition to be reinstated.

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

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

These comments should be received no later than July 22, 2002.

Columbia, South Carolina

May 22, 2002

# The Supreme Court of South Carolina

In the Matter of
Richard S. Vaughan, Deceased.

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ORDER

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Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Vaughan and the interests of Mr. Vaughan's clients.

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

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Richard S. Vaughan, Esquire, shall serve as notice to the bank or other financial institution that Steven M. Krause, 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 Steven M. Krause, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Vaughan's mail and the authority to direct that Mr. Vaughan's mail be delivered to Mr. Krause's office.

Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

May 22, 2002

# The Supreme Court of South Carolina

In the Matter of Yvonne
Prince Waldrop, Respondent.

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ORDER

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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 this Court.

IT IS FURTHER ORDERED that Albert D. McAlister, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other accounts into which respondent may have deposited client or trust monies. Mr. McAlister shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. McAlister has the authority

to make disbursements from respondent's trust, escrow, and/or operating account(s) as is reasonably necessary and may apply to the Chair of the Commission on Lawyer Conduct for authority to make any disbursements that appear to be unusual or out of the ordinary.

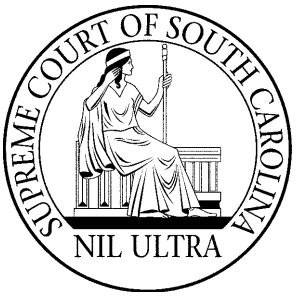
IT IS FURTHER ORDERED that this Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as notice to the bank or other financial institution that Albert D. McAlister, Esquire, has been duly appointed by this Court.

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

Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

May 22, 2002

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## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**May 27, 2002**

**ADVANCE SHEET NO. 17**

**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**

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The State, Petitioner,

v.

James Anthony Primus, Respondent.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal From Dorchester County
Luke N. Brown, Jr., Circuit Court Judge

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Opinion No. 25471
Heard April 4, 2002 - Filed May 20, 2002

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**AFFIRMED IN PART; REVERSED IN PART.**

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Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Assistant Attorney General Melody J. Brown, all of Columbia; and Solicitor Walter M. Bailey, of Summerville, for petitioner.

Chief Attorney Daniel T. Stacey, of South Carolina Office of Appellate Defense; and Katherine Carruth Link, both of Columbia, for respondent.

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**JUSTICE BURNETT:** Respondent James Anthony Primus (Primus) was indicted on charges of first degree criminal sexual conduct (CSC) and kidnapping. He was convicted of kidnapping and assault and battery of a high and aggravated nature (ABHAN) and sentenced to consecutive terms of thirty years and ten years, respectively. The Court of Appeals reversed. State v. Primus, 341 S.C. 592, 535 S.E.2d 152 (Ct. App. 2000). The Court granted a writ of certiorari to review the Court of Appeals' decision. We affirm in part and reverse in part.

## ISSUES

I. Did the trial court have subject matter jurisdiction to convict Primus of ABHAN under an indictment for first degree CSC?[1]

II. Did the Court of Appeals err by concluding the assistant solicitor's comment during closing argument about Primus' failure to call his uncle as a witness was prejudicial error?

## DISCUSSION

### I.

Did the trial court have subject matter jurisdiction to convict Primus of ABHAN under an indictment for first degree CSC?

The circuit court does not have subject matter jurisdiction to

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[1]In its order granting certiorari, the Court ordered the parties to brief this issue.

convict a defendant of an offense unless there is an indictment which sufficiently states the offense, the defendant waives presentment, or the offense is a lesser included offense of the crime charged in the indictment. State v. Owens, 345 S.C. 637, 552 S.E.2d 745 (2001). The test for determining when an offense is a lesser included offense of another is whether the greater of the two offenses includes all the elements of the lesser offense. State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000). If the lesser offense includes an element which is not included in the greater offense, then the lesser offense is not included in the greater offense. Hope v. State, 328 S.C. 78, 492 S.E.2d 76 (1997). While the Court recognizes the existence of a few anomalies, it generally adheres to use of the traditional elements test. State v. Elliott, 346 S.C. 603, 552 S.E.2d 727 (2001).

Under South Carolina Code Ann. § 16-3-652(1)(a)(b) (Supp. 2001), first degree CSC requires a (1) a sexual battery and (2) aggravated force to accomplish the sexual battery[2] *or* forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar offense or act.[3] A sexual battery is "statutorily defined to include only certain specific acts, which can be loosely described as involving penetration of some sort." State v. Elliott, supra 346 S.C. at 606, 552 S.E.2d at 729; S.C. Code Ann. § 16-3-651(h) (1985).

ABHAN is an unlawful act of violent injury accompanied by

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[2]"Aggravated force" is defined as the use of "physical force or physical violence of a high and aggravated nature to overcome the victim." S.C. Code Ann. § 16-3-651(c) (1985). Aggravated force also includes the threat of the use of a deadly weapon. Id

[3]In 1998, the General Assembly added a third aggravator to first degree CSC. This aggravator provides that the actor engage in a sexual battery while causing the victim to become mentally incapacitated or physically helpless through use of a controlled or intoxicating substance. 1998 S.C. Acts 372, § 4. This provision took effect after the date of the crimes in this case and, therefore, is inapplicable. See S.C. Code Ann. § 16-3-652(1)(c).

circumstances of aggravation. State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000). "Circumstances of aggravation" is an element of ABHAN. Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000). Circumstances of aggravation include the use of a deadly weapon, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority. State v. Fennell, supra.

"Circumstances of aggravation" is an element of ABHAN not included in first degree CSC.[4] See Knox v. State, supra ("circumstances of aggravation" is an element of ABHAN not included in second degree lynching, therefore, ABHAN is not a lesser included offense). Furthermore, even though a circumstance of aggravation may constitute an element in first degree CSC under the facts of a particular case (i.e., use of a deadly weapon), because all of the circumstances of aggravation are not elements of first degree CSC, ABHAN is not a lesser included offense. See id. (even though second degree lynching includes two circumstances of aggravation that may establish ABHAN, ABHAN is not lesser included offense because there are other circumstances of aggravation that are not included in second degree lynching); State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997) (because each circumstance of aggravation for ABHAN is not always a necessary element of felony DUI, ABHAN is not a lesser included offense of felony driving under the influence). Accordingly, employing the traditional elements test, ABHAN is not a lesser included offense of first degree CSC.

Nevertheless, the Court most recently determined that because it had consistently held ABHAN is a lesser included offense of assault with

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[4]Many of the circumstances of aggravation for ABHAN have nothing to do with the degree of force necessary to establish the element of "aggravated force" in first degree CSC. See Footnote 2. ABHAN may occur even though no real force is employed against the victim. State v. Green, 327 S.C. 581, 491 S.E.2d 263 (Ct. App. 1997).

intent to commit CSC, it would continue this ruling even though the two offenses failed the traditional elements test. State v. Elliott, supra. Similarly, the Court has repeatedly held ABHAN is a lesser included offense of first degree CSC. State v. Frazier, 302 S.C. 500, 397 S.E.2d 93 (1990); State v. Pressley, 292 S.C. 9, 354 S.E.2d 777 (1987); State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986); State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986); State v. Lambright, 279 S.C. 535, 309 S.E.2d 7 (1983). In order to have a uniform approach to CSC and ABHAN offenses, we likewise hold ABHAN is a lesser included offense of first degree CSC.

## II.

Did the Court of Appeals err by concluding the assistant solicitor's comment during closing argument about Primus' failure to call his uncle as a witness was prejudicial error?

At trial, the State presented evidence that Primus forced the victim into an abandoned home and raped her. Through the testimony of a police detective, the State introduced Primus' statement to the police; Primus cross-examined the detective. According to the detective, Primus stated he had breakfast at Shoney's and then visited his uncle, Joe Hodges, at the time the assault occurred. Primus rested his case without testifying or offering any witnesses in his defense.

During closing argument the following transpired:

> Assistant Solicitor: And the crucial period when Detective Bills told you he was most interested in was this Shoney's and Uncle Joe Hodges' house. Of course, you can't hold the fact that Mr. Primus didn't present any evidence against him, but don't you think that would have made his alibi a lot stronger if Joe Hodges, his own uncle, had come to court and said, oh, he couldn't have been on Gum Branch Road raping this woman because he was at my house in Corey Woods?

> Defense Counsel: I have an objection, your Honor. We don't have to bring those people to court, Judge.
>
> The Court: I'll be telling you later on, I give each attorney a lot of leeway in making their summation to you and I'll be telling you the defendant doesn't have to do anything, doesn't have to prove anything, but I'll be explaining more to you later. Go ahead, Solicitor.

(Emphasis added).

In his final jury instructions, the trial judge charged the jury Primus had the constitutional right not to testify or offer evidence. In addition, he instructed the jury the State had the burden to prove Primus' guilt beyond a reasonable doubt.

The Court of Appeals reversed Primus' convictions. It concluded that by referring to Primus' failure to call his uncle as a witness, the assistant solicitor improperly commented on Primus' right to rely on his constitutional presumption of innocence and on the State's burden to establish his guilt beyond a reasonable doubt. State v. Primus, supra. The Court of Appeals further found the above-referenced jury charge did not cure the assistant solicitor's error. Id. Finally, the Court of Appeals concluded the comment was not harmless in light of the lack of overwhelming evidence against Primus. Id.

## A.

> Did the Court of Appeals err by holding that, because Primus did not present evidence in his defense, the assistant solicitor improperly commented in closing argument upon his failure to call his uncle to corroborate his alibi defense?

The State contends the Court of Appeals erred by holding that, because Primus did not present evidence in his defense, the assistant solicitor

improperly commented in closing argument upon his failure to call his uncle to corroborate his alibi defense. The State claims Primus "chose to actively pursue an alibi defense" by giving a statement to police detailing an alibi, cross-examining the witnesses about his alibi, requesting an alibi charge, and arguing alibi in his closing argument and, therefore, the assistant solicitor was not prohibited from commenting on Primus' failure to call his uncle in support of his alibi. We disagree.

The State did not raise this issue in its brief to the Court of Appeals. Instead, it argued the comment was cured by the trial judge's charge and was, at most, harmless error in light of the evidence against Primus. The State offered its present argument for the first time in its petition for rehearing. Because the State failed to raise its current argument in its brief to the Court of Appeals, the issue is not properly preserved for this Court's consideration on writ of certiorari. Rule 226(d)(2), SCACR (only questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for a writ of certiorari); see Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue, 342 S.C. 34, 535 S.E.2d 642 (2000) (issue not argued in brief is deemed abandoned and precludes consideration on appeal).

In any event, when the accused neither testifies nor offers any witnesses, it is error for the solicitor to comment upon the defendant's failure to call witnesses on his behalf. State v. Posey, 269 S.C. 500, 238 S.E.2d 176 (1977) (where defendant did not present evidence, it was error for solicitor to comment on defendant's failure to call his wife who was eyewitness to crime). This rule stems from the constitutional presumption of innocence and the State's burden of proving the accused guilty. Id.

> It is elementary that an accused is presumed innocent until proven guilty and that the burden is upon the State to prove the accused committed the crime charged. An accused has the right to rely entirely upon this presumption of innocence and the weakness in the State's case against him. He would clearly be deprived of that right if an adverse inference is permitted to be

indulged against him because of its exercise.

Id. 269 S.C. at 503, 238 S.E.2d at 177; see State v. Browning, 154 S.C. 97, 102, 151 S.E. 233, 235 (1930) (". . . the defendant did not take the stand to deny or explain the evidence adduced against him, and that he did not offer any evidence in his behalf. . . . The defendant had the constitutional right to adopt these courses if he chose to do so, and neither the lower court nor this court have the right to punish him for the exercise of either of those rights.").

Although we agree with the State that Primus "actively pursued" an alibi defense, Primus neither testified nor called witnesses on his own behalf. Primus' alibi defense was introduced by the assistant solicitor through direct-examination of a State's witness. Neither defense counsel's closing argument nor the trial judge's charge on alibi constitute evidence of alibi. Accordingly, the Court of Appeals correctly held the assistant solicitor's comment concerning Primus' failure to produce Uncle Joe Hodges was improper.

**B.**

Did the Court of Appeals err by holding the trial judge's several jury charges did not cure the assistant solicitor's alibi comment?

Relying on State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996), the Court of Appeals held the trial judge's final jury instruction on Primus' right not to testify or put up evidence did not cure the assistant solicitor's comment during closing argument. The State argues the Court of Appeals erred by failing to consider the judge's remarks to the jury throughout the trial, particularly the judge's remarks after the jury was sworn, after Primus rested his case, and after Primus objected to the assistant solicitor's comment. We disagree.

The trial judge's remarks after the jury was sworn and after Primus rested his case were not included in the Record on Appeal. Accordingly, the Court of Appeals could not have considered the remarks.

Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.").[5]

Moreover, in its brief to the Court of Appeals, the State did not assert the trial judge's response to Primus' objection constituted an effective curative instruction. Accordingly, the State failed to preserve this argument for consideration by the Court on certiorari. Rule 229(d)(2), SCACR (only questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for certiorari).

**C.**

Did the Court of Appeals err by concluding the assistant solicitor's alibi comment was not harmless error?

The State argues the Court of Appeals erred by holding the assistant solicitor's comment was not harmless error. We agree.

The victim testified she had known Primus for seven years and had been on one date with him years before. She explained that on the evening of July 12, 1997, Primus gave her a ride from St. George to a club in Bowman. Her boyfriend drove her home from the club around 2:00 a.m.

At 7:00 a.m. on July 13th, Primus arrived at the victim's home and asked if she would like to drive with him to visit her uncle. She agreed. Not long after, Primus stopped his car at an abandoned home and told her to get out of the car. According to the victim, when she refused, he came around the side of the car with a rusty, pointed object, pulled her out of the vehicle, and pushed her into the house. He made her take her clothes off and lie on the bed; he placed his penis inside her for "a couple of seconds" before

[5]We find no error in the Court of Appeals' denial of the State's motion to supplement the record.

she kneed him. The victim then jumped through a glass window, cutting her finger. Primus followed her outside, wrestling her to the ground. The victim found a stick and jabbed Primus in the eye and chest. She was able to escape and run to a neighboring home.

Hubert Shieder testified that early on the morning of July 13, 1997, someone rang his doorbell. The victim was standing at the front door. She was naked, had scratches and blood around her mouth, and was shaking and nervous. She stated she had been raped.

Toni Shieder testified the victim rang her doorbell 7:30 a.m. But for a pair of socks and one shoe, the victim was naked. Mrs. Shieder described the victim as "afraid, scared, just petrified." Mrs. Shieder called the police. She testified the abandoned home is located one-quarter of a mile from her own home.

The patrol officer who first arrived at the Shieders' home testified the victim had a cut on her hand, blood around her mouth, and was in emotional distress. He located a wooden stick on the front porch steps. The victim identified Primus as her attacker.

Through the crime scene technician/fingerprint examiner the State admitted photographs of the abandoned home. The photographs show a broken glass window, a trail of blood leading in the direction of the Shieders' home, a purple t-shirt in the bedroom, and one tennis shoe in the bedroom.[6] The witness testified Primus' fingerprint was on the doorknob of the abandoned home.

The SLED serologist testified a laboratory analyzed three areas of blood located on the wooden stick found on the Shieders' front porch. Blood on one end and the middle of the stick was consistent with the victim's DNA profile. The victim could not have been the donor of blood located on

[6]The victim testified the t-shirt and tennis shoe belonged to her.

the other end of the stick; Primus could have been the donor of this blood. According to the serologist, testing the population at random, 1 of 174 people would match the two-point DNA profile on the blood found on this end of the wooden stick.

Detective Bills testified Primus gave a statement to the police. According to Bills, Primus stated he drove the victim and others to a club in Bowman around 10:00 p.m. on July 12, 1997. Between 3:00 and 4:00 a.m., he left the club and went to Club Venezula in North Charleston. At 7:00, he had breakfast at Shoney's then went to his Uncle Joe Hodge's home where he stayed for two or three hours. Thereafter, he went to Carter's convenience store; he had car trouble and left his car by the side of the road. A stranger gave Primus a lift and dropped him off in Springtown where Primus played basketball with someone named "David." This was the first time he had played basketball with David and he did not know his last name. Primus stated he received scratches from playing basketball.

According to the detective, he arrested and interviewed Primus on July 15, two days after the assault. At that time, Primus had scratches on his face, neck, back and chest. The detective stated these injuries were consistent with the victim's report.

The detective testified he made numerous attempts to contact Joe Hodges, but Hodges did not respond. He also testified he spoke with Primus on another occasion and asked him some specifics about Club Venezula. At that time, Primus became upset and angry and stated he had not gone inside the club.

It is undisputed the victim was attacked and beaten. The question was the identity of the perpetrator. Relying solely on the "de minimus" DNA evidence, the Court of Appeals determined there was not overwhelming evidence that Primus was the assailant.

We conclude there was overwhelming evidence of Primus' guilt. His fingerprint was found on the doorknob of the abandoned home. Two days

after the assault, he had scratches on his face and chest which were consistent with the victim's assertion she had scratched Primus on the face and chest with a stick. Finally, the victim's blood was positively identified as being on the wooden stick she used to fend off her attacker; DNA tests determined Primus could have left the blood on the other end of the same wooden stick. According to the serologist, examining the population at random, only 1 of 174 people would match the DNA profile of the blood located on the stick. While this probability is not nearly as definitive as that which has been offered in other trials, it is nonetheless highly persuasive, especially when combined with other evidence of Primus' guilt. Accordingly, the assistant solicitor's comment, while improper, was harmless beyond a reasonable doubt. State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997), citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974) (new trial will not be granted unless prosecutor's comments so infected trial with unfairness as to make the resulting conviction a denial of due process).

In conclusion, we **AFFIRM IN PART** and **REVERSE IN PART**.

**TOAL, C.J., MOORE, J., and Acting Justice George T. Gregory, Jr., concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.**

**JUSTICE PLEICONES**: I concur in part and dissent in part. I would hold that assault and battery of a high and aggravated nature (ABHAN) is not a lesser-included offense of first degree criminal sexual conduct and would vacate Primus's ABHAN conviction. See State v. Elliott, 346 S.C. 603, 552 S.E.2d 727 (2001)(Pleicones, J., dissenting). I agree with the majority's conclusion that the assistant solicitor's improper statement in closing argument does not warrant a new trial.

# The South Carolina Court of Appeals

Thomas Sand Company,

Appellant,

v.

Colonial Pipeline Company,

Respondent.

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ORDER DENYING PETITION
FOR REHEARING

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**PER CURIAM:** After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and, hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied. However, Opinion No. 3454 filed on February 25, 2002, is hereby withdrawn and the attached opinion is substituted therefor.

s/ C. Tolbert Goolsby, Jr., J.

s/Thomas E. Huff, J.

s/H. Samuel Stilwell, J.

Columbia, South Carolina

May 21, 2002.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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Thomas Sand Company,

Appellant,

v.

Colonial Pipeline Company,

Respondent.

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

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Opinion No. 3454
Heard October 3, 2001 - Filed February 25, 2002
Withdrawn and Substituted May 21, 2002

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**REVERSED**

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W. Grady Jordan, of Olson, Smith, Jordan & Cox, of Easley; and J. Kendall Few, of Few & Few, of Greenville, for appellant.

Edward Cole, of The Ward Law Firm, of Spartanburg, for respondent.

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**STILWELL, J**: Thomas Sand sued Colonial for damages, alleging a spill from its pipeline rupture contaminated a sand deposit Thomas Sand had leased

on the Reedy River. The trial court held the failure to exhaust administrative avenues to obtain a permit was the proximate cause of its inability to mine the sand and granted Colonial summary judgment. We reverse.

## FACTS

Colonial owns and operates a 36-inch pipeline extending from Houston to New York which transports petroleum products. In late June 1996, Colonial's pipeline ruptured at its junction with the Reedy River in Greenville County, spilling approximately one million gallons of diesel fuel into the river. The investigation by state and federal agencies, the extensive sampling and assessment, and the numerous lawsuits surrounding the spill were not resolved until late 1998 or early 1999.

In May 1996, Thomas Sand had applied to the South Carolina Department of Health and Environmental Control (DHEC) for the necessary permit to mine the sand deposit. Because mining could impact U.S. navigable waters, the project was also subject to the U.S. Army Corps of Engineers (Corps) permitting requirements. Other interested state and federal agencies reviewed the application and expressed a range of concerns both related and unrelated to the spill, including adverse impact on fisheries and other natural resources, smothering of warm water fish eggs by silt-laden sediments, and stream bed and bank instability. The agencies specifically requested the permit not be issued until these concerns were addressed.

Similarly, the United States Department of the Interior (USDOI) Fish and Wildlife Service expressed concerns with the possibility of stirring up preexisting contaminants amplified by the oil pipeline rupture. It recommended that no permit be issued until the extent of the sediment contamination could be further studied. The USDOI recommended to the Corps that the permit be denied, due solely to the oil contamination. Based on available information, the Corps in turn advised Thomas Sand that, "due to the breaching of the Conestee Lake dam and the recent oil pipeline rupture, this office has reason to believe that there is a presence of contaminants that could cause or contribute to significant degradation of the waters of the United States." The Corps requested

more specific information from USDOI and Thomas Sand before determining what testing would be required.

Shortly thereafter, Thomas Sand withdrew the application "rather than have the permit denied with consequent prejudice." It requested that DHEC hold the application in abeyance until evaluation of the damage caused by the oil spill was completed. DHEC agreed to do so for six months to allow Thomas Sand to complete "sufficient work" to enable DHEC to determine whether mining could be environmentally safe. Thomas Sand elected not to perform testing but rather submitted a revised application vastly reducing the size of the proposed operation. In response, concerned agencies renewed their objections based on potential damage to wetlands, wildlife, and riverbed and bank stability, as well as possible diesel contamination and the lack of requested sediment testing. USDOI specifically noted the prior application was "eventually retired at least partially due to a major oil pipeline spill. . . ." Thus, USDOI recommended the permit not be issued until "adequate sediment testing is done to be able to conclude that contaminants including heavy metals, PAH's and/or other petroleum related compounds would not be released by mining this site. . . ." While noting elevated levels of contaminants from upstream industries, DHEC specifically stated the central concern in the previous application was contamination from the Colonial pipeline spill and requested a detailed drawing comparison with the prior application and a sediment sampling plan to test for contamination. Thereafter, DHEC denied the revised application but provided it could be resubmitted and would require a sediment sampling plan for potential contaminants.

Thomas Sand did not appeal DHEC's decision but filed this action against Colonial seeking damages for economic loss due to inability to exercise its mining rights under its lease. Colonial admitted the oil spill from a rupture in its pipeline but denied any contamination of the sand deposit. Colonial moved for summary judgment on the grounds that (1) Thomas Sand failed to exhaust its administrative remedies; and (2) Thomas Sand adduced no evidence of contamination in the proposed sand mining site resulting from the Colonial spill, nor that such contamination, if present, would preclude the mining permit being issued. The trial court granted the motion, finding that Thomas Sand failed to

establish the spill proximately caused its damages.

## STANDARD OF REVIEW

In an action granting summary judgment, an appellate court reviews the record under the same standard applied by the trial court under Rule 56, SCRCP. Jones v. Equicredit Corp., 347 S.C. 535, ___, 556 S.E.2d 713, 715 (Ct. App. 2001); see also Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). "Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Doe ex rel. Doe v. Batson, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001) (citing Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)).

> Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. If triable issues exist, those issues must go to the jury.

Worsley Cos. v. Town of Mount Pleasant, 339 S.C. 51, 55, 528 S.E.2d 657, 659-660 (2000) (citations omitted). Even if there is no dispute as to evidentiary facts, summary judgment is not appropriate where there is a dispute as to a conclusion to be drawn from those facts and to clarify the application of the law. Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

> It is the duty of the court, on a motion for summary judgment, not to try issues of fact, but only determine whether there are genuine issues of fact to be tried; and, once having found that triable issues exist, must leave those issues for determination at a trial. The problem besetting courts lies in deciding what is or what is not a 'genuine issue as to any material fact.'

Spencer v. Miller, 259 S.C. 453, 456, 192 S.E.2d 863, 864 (1972).

## DISCUSSION

Thomas Sand asserts the trial court erred in finding it failed to establish Colonial's oil spill proximately caused its damages. We find the evidence raises a genuine issue of material fact on that issue.

### I. Proximate Cause

The elements "of negligence are: (1) a duty owed to the plaintiff by the defendant, (2) a breach of that duty by the defendant, and (3) damages proximately resulting from the breach of duty." Hubbard v. Taylor, 339 S.C. 582, 588, 529 S.E.2d 549, 552 (Ct. App. 2000); Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 88, 502 S.E.2d 78, 82 (1998). The existence of a duty is not questioned and Colonial has admitted in prior judicial proceedings that the discharge was due to its negligence. Thus, the sole issue before us is whether there is a question of fact on the issue of proximate cause.

Proximate cause requires proof of both causation in fact and legal cause. Rush v. Blanchard, 310 S.C. 375, 379, 426 S.E.2d 802, 804 (1993). "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." Id. at 379, 426 S.E.2d at 804. "Legal cause, in contrast to the 'but for' nature of causation in fact, turns on the issue of foreseeability." Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 210, 544 S.E.2d 38, 46 (Ct. App. 2001), cert. granted (Oct. 10, 2001). "[I]t is not necessary that the actor must have contemplated or could have anticipated the particular event which occurred. . . ." Young v. Tide Craft, Inc., 270 S.C. 453, 463, 242 S.E.2d 671, 675 (1978).

> He may be held liable for anything which appears to have been a natural and probable consequence of his negligence. If the actor's conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred does not negative his liability.

Childers v. Gas Lines, Inc., 248 S.C. 316, 325, 149 S.E.2d 761, 765 (1966). "A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's act." Small v. Pioneer Mach., Inc., 329 S.C. 448, 463, 494 S.E.2d 835, 843 (Ct. App. 1997). "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." Id. at 464, 494 S.E.2d at 843. "Only when the evidence is susceptible to only one inference does it become a matter of law for the court." Oliver v. S.C. Dep't of Highways & Pub. Transp., 309 S.C. 313, 317, 422 S.E.2d 128, 131 (1992).

"Proximate cause does not mean the sole cause. The defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury." Small, at 464, 494 S.E.2d at 843. The Thomas brothers have been in the sand business for forty years. Kenneth Thomas testified that the fish and sediment concerns predating the spill had been raised in other permits that were ultimately issued. Based on his observations of the spill site and his experience dealing with DHEC, he testified that he determined the permit would be difficult "to ever get it cleared up with DHEC" and would cost more than it was worth even if ultimately granted. Jack Thomas, another brother, testified similarly. In its order, the trial court clearly found that the Thomas brothers' testimony about observations of diesel fuel contamination were sufficient to withstand summary judgment on the issue of contamination alone.

In addition, Thomas Sand offered the testimony of Dr. David Hargett, a principal in Pinnacle Consulting Group, which consults on environmental and natural resource management, regulatory compliance, hazardous site reclamation, and permitting assistance, as well as being subcontracted by DHEC to study the riparian conditions of the entire Reedy River basin. Dr. Hargett is a recognized expert on the Reedy River and serves on the Reedy River Task Force citizen-based planning group, as well as other committees that regularly meet with state agencies about the Reedy River. He personally viewed the spill by helicopter immediately following the event, and was extensively involved in monitoring and assisting in reclamation efforts.

The trial court questioned whether an expert other than the agency could give an opinion on whether the permit would have been denied, thereby discounting Dr. Hargett's testimony in ruling on the motion. As Dr. Hargett's expert testimony was one of the primary bases for establishing proximate cause between the diesel spill and denial or delay of the permit, Thomas Sand clearly suffered prejudice. "To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997). "Qualification depends on the particular witness' reference to the subject. '[A]n expert is not limited to any class of persons acting professionally.'" Id. at 253, 487 S.E.2d 598 (citing Lee v. Suess, 318 S.C. 283, 285, 457 S.E.2d 344, 346 (1995) and quoting Botehlo v. Bycura, 282 S.C. 578, 586, 320 S.E.2d 59, 64 (Ct. App. 1984)). "The test for qualification is a relative one that is dependent on the particular witness's reference to the subject." Knoke v. S.C. Dep't of Parks, Recreation & Tourism, 324 S.C. 136, 142, 478 S.E.2d 256, 259 (1996).

> The term 'expert' has many lights and shadows. It can denote a man who is a recognized authority and, perhaps as accurately, a fellow who once went to the city. At what point between those two extremes he will be allowed to express an opinion on the witness stand will be for the trial judge to decide in the first instance. But whatever his status in life may be, his qualifications can not be assumed; they must be established by evidence. The quality or quantity of that evidence occasionally may require some adjustment, depending upon the exigencies of the moment, and in such circumstances, the trial judge will need to exercise the full measure of his judgment, skill, and discretion.

Hewitt v. Md. State Bd. of Censors, 221 A.2d 894, 900 (Md. Ct. App. 1966). "The party offering the expert has the burden of showing his witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony." State v. Schumpert, 312 S.C. 502, 505, 435 S.E.2d 859,

861 (1993). "Defects in an expert witness' education and experience go to the weight, rather than the admissibility, of the expert's testimony." Gooding at 253, 487 S.E.2d at 598.

While it is true that the qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion, we think Dr. Hargett's qualifications to testify as an expert speak for themselves and any gap in his experience would go to the weight and credibility of his testimony, rather than to its admissibility. "Where the expert's testimony is based upon facts sufficient to form the basis for an opinion, the trier of fact determines its probative value." Berkeley Elec. Coop., Inc. v. S.C. Pub. Serv. Comm'n, 304 S.C. 15, 20, 402 S.E.2d 674, 677 (1991); see also Carter v. R.L. Jordan Oil Co., 294 S.C. 435, 441, 365 S.E.2d 324, 328 (Ct. App. 1988), rev'd on other grounds, 299 S.C. 439, 385 S.E.2d 820 (1989) ("An expert is given wide latitude in determining the basis of his testimony."); Duke Power Co. v. Opperman, 266 S.C. 99, 102, 221 S.E.2d 782, 783 (1976) ("He was definitely qualified to testify, and if he could give no rational basis for his testimony, as contended by the appellant, it was a matter for the jury to consider.").

Dr. Hargett opined the site in question was "extraordinarily well-suited for sand mining and . . . no other stretch of the river would be appropriate," based on the absence of bedrock, deeper deposits of sediments, unusual accessibility due to the broad flood plain and gentle slope, and low water velocities in the backwater area. According to Dr. Hargett, had there been no spill and had Thomas Sand pursued the application, he believed the permit would have been issued, and the site would continue to produce for at least ten years. However, he testified it would have been ill-advised to pursue the permit or attempt mining after the spill until federal and state agencies had resolved contamination concerns, which included extensive sampling, testing, and assessment close to the site. Specifically, the degree of contamination was less relevant than the ongoing agency investigations. Had Thomas Sand pursued the permit, he stated other parties likely would have taken action to stop their operation because it could confuse the ongoing studies. Dr. Hargett opined the environmental impacts were uncertain and subject to ongoing investigations until the agency reports came out two to three years later.

Colonial argues Dr. Hargett is not qualified to render an expert opinion because he did not know the specific DHEC permitting standards and project parameters and had never been personally involved in obtaining a sand mining permit. Dr. Hargett clarified that any lack of specifics in his testimony did not demonstrate a lack of expertise but resulted from the limited amount of time he had spent with this specific case. Our review of his deposition indicates that Dr. Hargett, while not intimately familiar with the specifics of DHEC mining permit processes, was sufficiently familiar with them that it did not detract from his demonstrated expertise on environmental issues generally and as they relate to the Reedy River specifically. Dr. Hargett's testimony, combined with the other evidence in the record, is sufficient to survive a motion for summary judgment.

## II. Exhaustion of Administrative Remedies

Colonial argues Thomas Sand's failure to exhaust its administrative remedies precludes tort action against a third party. If this were an appeal from the denial of the permit through the administrative process in which DHEC was the appropriate fact finder, Thomas Sand would clearly be required to exhaust its administrative remedies prior to bringing suit. See Stanton v. Town of Pawleys Island, 309 S.C. 126, 420 S.E.2d 502 (1992) (plaintiff is generally required to exhaust administrative remedies before seeking relief from the courts, and dismissal for failure to do so is in the sound discretion of the trial judge); Moore v. Sumter County Council, 300 S.C. 270, 387 S.E.2d 455 (1990) (court could not adjudicate takings issue until plaintiff had exhausted administrative remedies; potential agency delay and expense did not excuse exhaustion requirement). However, in a tort action against a third party, no such exhaustion requirement exists. The question is not whether the permit would have been granted but whether Thomas Sand was damaged, either by added delay or expense in the permit process or by the eventual denial of the permit, based on Colonial's negligence. DHEC is not the appropriate fact finder to answer this question. The jury is.

The basic purpose of the exhaustion requirement, to allow the agency to render a final decision and set forth its reasons for the permit denial, would not assist the court in this instance. The alleged wrong is not one which the

administrative process was designed to redress. "The doctrine of exhaustion of administrative remedies only comes into play when a litigant attempts to invoke the original jurisdiction of a circuit court to adjudicate a claim based on a statutory violation for which the legislature has provided an administrative remedy." Med. Mut. Liab. Ins. Soc. of Md. v. B. Dixon Evander & Assocs., 609 A.2d 353 (Md. App. 1992). A litigant need not exhaust administrative remedies where "there are no administrative remedies for the wrongs it assertedly suffered." Id. at 360. The question is simply whether the diesel spill from Colonial's pipeline was a substantial contributing factor to the denial of the permit or to rendering the permitting process more time consuming or more expensive than was practicable from a rational business standpoint.

## CONCLUSION

Viewing the evidence in the light most favorable to Thomas Sand, as we are required to do, there is a genuine issue of material fact on the question of the proximate cause of Thomas Sand's injuries, if any. Thus, summary judgment in favor of Colonial is

**REVERSED.**

**GOOLSBY and HUFF, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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Paresh Shah, M.D. and Robert L. Waldron, II, M.D.,
Plaintiffs,

of whom, Robert L. Waldron, II, M.D. is the

Appellant,

v.

Richland Memorial Hospital, W. John Bayard, M.D.,
W. John Bayard, M.D., P.A., and Kester Freeman, Jr.,
in his individual and official capacities,

Respondents.

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Appeal From Richland County
James Carlyle Williams, Jr., Circuit Court Judge

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Opinion No. 3497
Heard April 11, 2002 - Filed May 20, 2002

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**AFFIRMED IN PART, REVERSED IN PART and REMANDED**

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Eric S. Bland, of Bland & Rickard; J. Preston Strom, Jr., and Robert D. Dodson, of Strom Law Firm; all of Columbia, for appellant.

Carl B. Epps, III, of Nelson, Mullins, Riley & Scarborough; Charles T. Speth, II and M. Brian Magargle, of Haynsworth, Baldwin, Johnson & Greaves; and Charles E. Carpenter, Jr., Frederick A. Crawford, Georgia Anna Mitchell, Elbert S. Dorn, of Turner, Padget, Graham & Laney and S. Elizabeth Brosnan, of Richardson, Plowden, Carpenter & Robinson, all of Columbia, for respondents.

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**CURETON, J.:** Dr. Robert L. Waldron, II, (Waldron) a radiologist, brought this action against Richland Memorial Hospital (RMH) and the other named respondents asserting RMH was obligated by the terms of its hospital bylaws and regulations to equitably allocate all "undesignated" radiological work among the radiologists on staff. Waldron contends that RMH violated its hospital bylaws and regulations when it entered into an exclusive contract which prevented his participation in the allocation of radiological work. Waldron appeals the order of the circuit court dismissing his complaint with prejudice. We affirm in part, reverse in part, and remand.

## FACTS

As noted by the trial court, "[t]he facts and procedural history of this case are somewhat complex."[1] Waldron is a physician licensed to practice medicine in South Carolina. He is board certified in radiology with a certificate of added qualifications (CAQ) in neuroradiology. He has been an active member of the medical staff at RMH for over sixteen years with full admitting privileges within the Department of Radiology. From 1981 to 1989, Waldron served as the department's Professional Director. The Professional Director is an independent

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[1] The court noted this action is one of four pending lawsuits that involved the various parties.

contractor with RMH who, for a fixed fee, performs certain contractually-defined services relating to the oversight of the Department of Radiology.

The practice of radiology is recognized as a hospital-based practice. In accordance with the hospital's Medical/Dental Staff Bylaws, Rules and Regulations dated May 1994 (Bylaws) and the Department of Radiology's Rules and Regulations (as implemented by the Medical Executive Committee (MEC)), Waldron was required to devote at least 120 hours per month to the Department of Radiology and was not entitled to practice at any hospital other than RMH.

All of the physician parties to this litigation were radiologists and former partners in Richland Radiological Associates (RRA).[2] RRA was organized, in part, to provide radiological services to RMH. RRA consisted of Waldron, Dr. Paresh Shah, Dr. Edward R. Sun, Dr. W. John Bayard, and several other radiologists.

After a considerable period of disagreement over the way radiological services were being provided, RRA was dissolved on February 24, 1995. Bayard, along with all of the former members of RRA except Waldron, Shah, and Sun, thereafter formed a new group, Richland Radiological Consultants (RRC). Waldron, Shah, and Sun were not asked to join RRC. Waldron has since practiced as an independent radiologist at RMH.

In December 1995, Bayard signed a three-year contract with RMH to be its Professional Director of the Department of Radiology. The contract was for the period of January 1, 1996 to December 31, 1998. The contract allowed Bayard to assign all "undesignated" radiological work at RMH to his group,

[2] Kester Freeman is the CEO of Palmetto Health Alliance and the former president and CEO of RMH.

RRC.[3] "Undesignated" radiological procedures are those where the treating physician does not specify a particular radiologist to perform the work.

On January 12, 1996, Bayard sent letters to Waldron, Shah, and Sun advising them that, effective March 1, 1996, he would exercise his authority under the Professional Director's contract and award all undesignated work to his group, RRC. Bayard's letters advised Waldron, Shah, and Sun that they would be permitted to continue practicing at the hospital, but their practice would be limited to cases specifically designated for them. According to Waldron, during his sixteen-plus years at RMH, all radiologists in the department had shared equitably in the undesignated cases on a rotating basis. The undesignated work comprised nearly all of the radiological work performed at RMH.

Waldron, Shah, and Sun filed this action on February 20, 1996, before the proposed change in the rotation schedule on March 1st, seeking a declaratory judgment that the proposed duty schedule violated the Bylaws and regulations of the hospital and the State Ethics Act. They also sought a permanent injunction barring the respondents from instituting the exclusive contractual arrangement, which granted RRC the exclusive right to treat undesignated patients, and the proposed duty rotation schedule, which excluded the appellants from treating undesignated patients as of March 1, 1996. In its final form, the complaint sought a declaratory judgment and permanent injunction and asserted claims for breach of contract, unfair trade practices, violation of 42 U.S.C. § 1983, and tortious interference with existing and prospective contractual relations. The appellants essentially asserted RMH had violated the Bylaws by giving Bayard an exclusive Professional Director's contract, which allowed him

[3] Bayard was first appointed the Professional Director of the Department of Radiology in 1989, and has served in this position under successive contracts.

to assign all of the undesignated work in the hospital to his own group, RRC, to the exclusion of the appellants.[4]

The circuit court issued a temporary restraining order on February 29, 1996, and a preliminary injunction on August 14, 1996, requiring RMH to preserve the "status quo" during the pendency of this litigation.

In July 1996, RMH and Baptist Healthcare System of South Carolina, Inc. entered into a Pre-Incorporation and Joint Operating Agreement. Pursuant thereto, on February 9, 1998, RMH formally transferred all operational control of the hospital to the Palmetto Health Alliance (Alliance), a private, nonprofit entity organized as a 501(c)(3) corporation. On December 31, 1998, the disputed radiology contract with Bayard expired by its own terms.

In 1999, Bayard moved for a nonjury trial. Waldron opposed the motion. On March 23, 1999, the trial court entered an order granting Bayard's motion stating "all claims in equity and issues of law will be heard and decided by the Court."

The case proceeded to a bench trial on May 4 and 5, 1999, on the claims for breach of contract, declaratory judgment, and an injunction. At the commencement of trial, Respondents moved to dismiss those claims on the ground of mootness. On May 6, 1999, the parties met in chambers. Thereafter, several hearings were held on various motions submitted by the parties. Waldron moved (1) to amend the pleadings to add or substitute the Alliance and Palmetto Richland Memorial Hospital as parties, (2) for Leave to Supplement the Record, and (3) to preserve his jury trial rights on the remaining causes of action. No additional testimony was taken at these hearings.

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[4] Shah and Sun were also originally parties to this action. Sun settled all claims prior to the filing of RMH's motion to dismiss, and Shah settled during the pendency of this appeal.

On November 17, 1999, the trial court entered an order denying the motion to amend the complaint to substitute or join as defendants the Alliance and Palmetto Richland Memorial Hospital.

On December 27, 1999, the trial court entered an Order of Dismissal granting Respondent's motion to dismiss the three causes of action for breach of contract, declaratory judgment, and a permanent injunction. The court dismissed the causes of action on the ground of mootness, noting a jury trial date would be set for the remaining causes of action. Waldron moved to alter or amend the order on January 5, 2000. He also filed a motion for a stay of the jury trial on the remaining causes of action.

On March 15, 2000, the court entered three additional orders: (1) granting the appellants' motion for leave to supplement the record, (2) denying appellants' motion to stay the jury trial of the remaining causes of action, and (3) amending the 12/17/99 Order of Dismissal on the ground of mootness. This appeal followed.

## LAW/ANALYSIS

### I. Amendment of Complaint

Waldron first contends the trial court misapprehended the law of successor liability and erred in denying the motion to amend the complaint to substitute or join the Alliance as a party defendant. We agree.

In August 1999, the appellants moved to amend the Third Amended Complaint to substitute or join as party defendants the Alliance and Palmetto Richland Memorial Hospital pursuant to Rules 15(a) and 25(c) of the South Carolina Rules of Civil Procedure. The motion was made on the grounds that the Alliance had contractually assumed the liabilities of its predecessor, RMH, and RMH now does "business under the trade name Palmetto Richland Memorial Hospital."

After a hearing, the trial court denied the motion on the grounds that (1) the appellants waited more than 1½ years after the creation of the Alliance before making the motion, (2) the formation of the Alliance was not the result of a mere name change, (3) the Alliance would be prejudiced by joinder because it did not participate in the extensive discovery conducted by the existing parties, and (4) the trial had already begun without the Alliance, thus adding the Alliance would require a mistrial and an additional delay. The court expressly "acknowledge[d] that the Rules require that amendments be 'freely' allowed when justice requires and there is no prejudice." However, the court found "that justice does not require either the proposed amendments or the substitution of parties sought by Plaintiffs . . . [and] that the Defendants, and the Alliance, would suffer substantial prejudice were Plaintiffs' Motions to be granted."

Rule 19(a)(1), SCRCP, provides in pertinent part that a person subject to process shall be joined as a party in the action if "in his absence complete relief cannot be accorded among those already parties." The notes to Rule 19 indicate that this rule is the same as the federal rule, and that the principle behind the rule is "that whenever possible persons materially interested in the action shall be joined so that they may be heard and a complete determination made." Rule 25(c), SCRCP, provides: "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party."

The trial court had the authority under Rule 19, SCRCP, to join the Alliance and Palmetto as parties if the same was necessary to afford complete relief to appellants. Moreover, under Rule 25, SCRCP, the trial court could have substituted the Alliance and Palmetto as parties instead of RMH. "The test of whether an amendment should be allowed is whether the amendment will prejudice or work an injustice to the adverse party." Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 509, 369 S.E.2d 156, 159 (Ct. App. 1988). "Delay in seeking leave to amend pleadings, regardless of the length of the delay, will not ordinarily be held to bar an amendment in the absence of a finding of prejudice." Id. at 508, 369 S.E.2d at 159 (emphasis added). The burden of establishing prejudice is on the party opposing the motion. Pruitt v. Bowers,

330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct. App. 1998). "In the absence of a proper reason, such as bad faith, undue delay, or prejudice, a denial of leave to amend is an abuse of discretion." Forrester, 295 S.C. at 507, 369 S.E.2d at 158.

The trial court in effect concluded it was not feasible to join the Alliance as a party because the case had progressed to the point that adding the Alliance as a party would prejudice the Alliance. However, the evidence before the trial court also established that the Alliance had a material interest in the litigation. We note that the 1998 Assignment and Assumption Agreement forming the Alliance specifically provides that the Alliance assumed the liabilities and obligations of RMH. Moreover, at the September 30, 1999 hearing in this matter, the Alliance's attorney acknowledged that the Alliance would be liable for any judgments incurred by its predecessor, RMH. As a result, the addition of the Alliance as a party was necessary so that the party who would be ultimately responsible for the judgment would have an opportunity to be heard, thus providing a complete determination of the liability flowing from Respondent's conduct. Rule 19(a)(1) SCRCP, appears to mandate that under the circumstances of this case, the Alliance should be made a party in order to preclude Waldron from having to pursue future lawsuits against the Alliance to enforce judgments he may obtain against Respondents. 7 Charles A. Wright et al., Federal Practice and Procedure: Civil 3d §1603 (2001).

We find the Alliance would not be unduly prejudiced by being made a party to the litigation. Its addition would not only avoid multiplicity of actions, but would afford the Alliance the opportunity to participate in the making or avoidance of a judgment it could be called upon to satisfy. The trial court, therefore, erred in failing to grant Waldron leave to amend his pleadings to add the Alliance as a party.

## II. Mootness

Waldron next contends the trial court erred in concluding his causes of action for breach of contract, declaratory judgment, and injunctive relief should be dismissed on the ground of mootness. Waldron argues the trial court misapprehended and misapplied the law with regard to the mootness doctrine

and the exceptions to the doctrine. Waldron also avers the trial court misapprehended and misapplied the law with regard to the law of declaratory judgments, injunctive relief and the creation of contractual rights. We agree in part.

Respondents moved to dismiss the complaint essentially alleging the complaint was moot because (1) the disputed radiology contract between RMH and Bayard expired by its own terms on December 31, 1998, (2) the injunctions issued in this case preserved the status quo and enjoined the respondents from implementing the proposed change in the duty schedule, and (3) the governmental entity, RMH, no longer operates the radiology department following the consummation of the Joint Operating Agreement (between the hospital and Baptist Healthcare System, dated July 10, 1996) and the resulting assignment of the radiology contract to the Alliance on February 9, 1998.

The trial court dismissed the breach of contract cause of action finding that the action was moot. The trial court held that the formation of the Alliance and its assumption of operational control of the hospital prevented the court from granting effective relief because RMH had ceased to exist and there was no party that could be bound by its ruling. Additionally, the trial court determined that it was not necessary to address the issue of whether the Bylaws, rules and regulations and course of dealing between the parties created a contract providing Waldron with certain rights to the equitable distribution of the undesignated radiological procedures. The trial court held the temporary injunction granted by the court prevented the implementation of the proposed rotational schedule and, because the contract is now expired, Waldron could prove no damages.

Waldron contends the trial court erred in holding that, even assuming the Bylaws formed a contract and the contract was breached by the proposed scheduling of the undesignated procedures, he was unable to establish damages flowing from a breach because the temporary injunction prevented the implementation of the proposed duty rotation schedule. Waldron asserts that it was an error for the trial court not to permit evidence on the issue of damages,

arguing he suffered collateral damages from the proposed duty rotation schedule despite the issuance of the preliminary injunction by the court. We agree.

Initially we find that the trial court erred in holding that there is no entity against which a judgment may be enforced, finding that there was nothing in the Assignment and Assumption Agreement that indicated a judgment could be enforced against the Alliance. Our review of the record, however, shows that the attorney for the Alliance conceded at a motion hearing that the language in the Assignment and Assumption Agreement means that if there is any judgment in this case the Alliance has responsibility for satisfying the judgment.

Because Waldron does not limit his allegation of damages to the institution of the proposed duty rotation schedule, we further find the trial court erred in finding as a matter of law that Waldron could not prove any damages flowed from the alleged breach of the Bylaws contract as there was no evidence presented to the court regarding what the damages may have been. We find that whether or not Waldron is able to prove damages goes to whether there is evidence to support his cause of action. Therefore, the fact the schedule was not instituted is not determinative of whether this cause of action is moot and is not appropriately addressed in a motion to dismiss on the ground of mootness. Accordingly, the trial court erred in finding Waldron's first cause of action for breach of contract was moot.

Additionally, Waldron argues the trial court erred in finding that the requests for a declaratory judgment and a permanent injunction were likewise moot. We disagree.

An appellate court "will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 714 (1973). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [an] existing controversy. This is true when some event occurs making it impossible for [a] reviewing [c]ourt to grant effectual relief." Id. at 346, 195 S.E.2d at 715. "Moot appeals differ from unripe appeals in that moot

appeals result when intervening events render a case nonjusticiable." Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001).

In the civil context, there are three general exceptions to the mootness doctrine. Curtis, 345 S.C. at 568, 549 S.E.2d at 596.

> First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.

Id. (citations omitted).

In his complaint, Waldron sought a declaration that Bayard and Freeman, as public employees or public officials, were obligated to avoid conflicts of interest, and that the exclusive contractual arrangement and the proposed duty rotation schedule violated the State Ethics Act.[5] Waldron also sought permanent injunctive relief restraining RMH from instituting the exclusive contractual arrangement which grants RRC the exclusive right to perform the undesignated

[5] See S.C. Code Ann. § 8-13-700(A) (Supp. 2001) ("No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself . . . or a business with which he is associated."); S.C. Code Ann. § 8-13-775 (Supp. 2001) ("A public official, public member, or public employee may not have an economic interest in a contract with the State or its political subdivisions if the public official, public member, or public employee is authorized to perform an official function relating to the contract.").

procedures, effectively preventing Waldron from participating in the treatment of undesignated patients.

The trial court noted the State Ethics Act applies only to public officials, members, and employees and found "RMH, as a governmental health care provider, was subject to the State Ethics Act, [but] the Act does not apply to a private 501(c)(3) corporation like the Alliance." The court concluded it need not reach the issue of whether the challenged conduct violated the State Ethics Act as "any declaratory judgment would constitute an impermissible 'advisory opinion.'" The court further stated the "Plaintiffs have failed to satisfy this Court that relief by way of a permanent injunction is needed." The court based this conclusion on the fact that "[n]othing remains to be enjoined. No contract remains to be construed. The disputed Radiology Contract has expired."

We agree with the trial court that any issue regarding the violation of the State Ethics Act is now moot because the Alliance is no longer a governmental entity, and therefore any declaration that the actions taken by RMH violated the State Ethics Act would be advisory in nature. We also find no exception to the mootness doctrine that would apply to this set of facts, as the Alliance is a private entity and not subject to the State Ethics Act.

Likewise, we find that the request for a permanent injunction is no longer viable as the disputed contract has now expired, and thus there is nothing for the court to enjoin. Additionally, we find that there is no exception to the mootness doctrine that would be applicable because the language in the complaint seeking the permanent injunction specifically sought to enjoin the institution of the Radiology contract and proposed duty rotation schedule then in existence.

## III. Dismissal of Waldron's causes of action

Waldron finally contends the trial court caused prejudice, in the form of collateral estoppel, by denying him a jury trial, proceeding to make findings of fact and conclusions of law without giving him the opportunity to make his record, denying his motion for a stay, and dismissing the action with prejudice.

To the extent Waldron is arguing he should have been awarded a jury trial, we find this issue is not properly before us. Our supreme court has held that orders concerning the mode of trial affect substantial rights as provided under S.C. Code Ann. § 14-3-330(2) (1976) and must be appealed immediately. Lester v. Dawson, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997). Thus, where a party fails to immediately appeal an order designating the case as a non-jury matter, it acts as a waiver of the right to appeal that issue and a subsequent appeal is barred. Id.; see also Foggie v. CSX Transp., 313 S.C. 98, 103, 431 S.E.2d 587, 590 (1993) ("Issues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial court is immediately appealable.").

Waldron also argues he was prejudiced because he was not able to fully present his case before the trial court dismissed the three claims with prejudice. Based on our holding above, we need not further address the trial court's dismissal of Waldron's first three claims. We agree with Waldron that the cause of action for breach of contract should be heard on its merits. As to the remaining causes of action, there is no evidence in the record as to the current status of these claims, but we find the court's dismissal could have no direct effect on the remaining claims, especially in light of our partial reversal and remand.

## CONCLUSION

We affirm the trial court's dismissal of Waldron's requests for a declaratory judgment regarding the State Ethics Act and a permanent injunction. However, we reverse the trial court's denial of the motion to amend to add the Alliance as a party and the dismissal of the claim for breach of contract, and remand for further proceedings.

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

**GOOLSBY and HOWARD, JJ., concur.**

**In The Court of Appeals**

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Mary Tatnall f/k/a Mary Dunn,

Plaintiff,

v.

Betty Jo Gardner and Joy Logan, Treasurer of Beaufort County,

Defendants,

OF WHOM
Mary Tatnall f/k/a Mary Dunn and Betty Jo Gardner are

Respondents,

and

Joy Logan, Treasurer of Beaufort County is the

Appellant.

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Appeal From Beaufort County
Thomas Kemmerlin, Jr., Special Circuit Court Judge

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Opinion No. 3498
Submitted April 8, 2002 - Filed May 20, 2002

## APPEAL DISMISSED

Patrick M. Higgins and Stephen P. Hughes, of Howell, Gibson & Hughes, of Beaufort, for appellant.

R. Nicholas Felix, of Bethea, Jordan & Griffin; and J. Ray Westmoreland, both of Hilton Head, for respondents.

**HOWARD, J.**: This is an appeal from an order denying Joy Logan's motions to reconsider and amend her pleadings to assert third party claims against Betty Jo Gardner. Because all third party claims are permissive, the trial court's order denying Logan's motions to reconsider and amend neither determines a substantial matter "forming the whole or part of some cause of action," nor prevents "a judgment from being rendered in the action" from which Logan could appeal. Therefore, this Court lacks subject matter jurisdiction to hear the appeal and it is dismissed without prejudice.

"The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental." Anderson v. Anderson, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989). Subject matter jurisdiction may not be waived even with consent of the parties. Hunter v. Boyd, 203 S.C. 518, 525, 28 S.E.2d 412, 416 (1943). The issue of subject matter jurisdiction may be raised at any time including when raised for the first time on appeal to this Court. Brown v. State, 343 S.C. 342, 346, 540 S.E.2d 846, 848-49 (2001). Furthermore, this Court must, on its own motion, raise the issue of subject matter jurisdiction to ensure the "orderly administration of justice." State v. Castleman, 219 S.C. 136, 139, 64 S.E.2d 250, 252 (1951).

> [This Court] shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas . . .
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action . . .

S.C. Code Ann. § 14-3-300(1)-(2) (1977). Absent some "specialized statute," this Court is not permitted to hear a case on appeal not comporting with the requirements of this section. Woodard v. Westvaco Corp., 319 S.C. 240, 242-43, 460 S.E.2d 392, 393-94 (1995); see also Rule 201, SCACR (stating an appeal may only "be taken . . . from any final judgment or appealable order"); Rule 72, SCRCP (stating an appeal may only "be taken . . . from any final judgment or appealable order").

"To involve the merits," pursuant to section 14-3-330(1), "the order must 'finally determine some substantial matter forming the whole or part of some cause of action or defense.'" Peterkin v. Bringman, 319 S.C. 367, 368, 461 S.E.2d 809, 810 (1995) (quoting Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993) (citations omitted)); see Shields v. Martin Marietta Corp., 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991); cf. Collins v. Sigmon, 299 S.C. 464, 466, 385 S.E.2d 835, 836 (1989) (holding an order allowing the amendment of pleadings is generally not immediately appealable).

Pursuant to section 14-3-330(2), this Court may not review an order that "does not prevent a judgment from being rendered in the action, and [from which the] appellant can seek review . . . in any appeal from [the] final judgment." Peterkin, 319 S.C. at 368, 461 S.E.2d at 810; see Mid-State Distribs., 310 S.C. at 334 n.4, 426 S.E.2d at 780 n.4; see also Robertson v. Bingley, 6 S.C. Eq. (1 McCord Eq.) 333, 351 (Ct. App. 1826) ("[A]n order which does not put a final end to the case, nor establish any principle which will

finally affect the merits of the case, nor deprive the party of any benefit which he may have at a final hearing, ought to be considered an interlocutory order, from which no appeal ought to be allowed."); Marshall v. Winter, 250 S.C. 308, 312, 157 S.E.2d 595, 596-97 (1967) (indicating an order denying a motion is not appealable before final judgment in any respect in which it does not deprive the movant of a substantial right).

In the present case, the trial court's order denying Logan's motion to amend her answer to assert third party claims against Gardner neither determines a substantial matter "forming the whole or part of some cause of action," nor prevents "a judgment from being rendered in the action" from which Logan could then seek review. See Peterkin, 319 S.C. at 368, 461 S.E.2d at 810; Mid-State Distribs., 310 S.C. at 334 n.4, 426 S.E.2d at 780 n.4. At the conclusion of the present action, Logan may either appeal the trial court's order denying her motion to amend or file a separate, first-party suit against Gardner. See N.C. Fed. Sav. & Loan Assoc. v. Dav. Corp., 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989) (holding third party claims are permissive in nature and may be brought in subsequent actions).

Accordingly, Logan's appeal is dismissed without prejudice.

**APPEAL DISMISSED.**[1]

**HEARN, C.J., and GOOLSBY, J., concurring.**

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

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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**The State,**

**Respondent,**

**v.**

**Walter Laranzo Lee,**

**Appellant.**

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**Appeal From Anderson County**
**H. Dean Hall, Circuit Court Judge**

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**Opinion No. 3499**
**Heard April 9, 2002 - Filed May 20, 2002**

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**AFFIRMED**

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**Charles L. Anderson, of Kenyon, Lusk & Anderson, of Anderson, for appellant.**

**Deputy Director for Legal Services Teresa A. Knox, Legal Counsel Tommy Evans, Jr., and Legal Counsel J. Benjamin Aplin, all of South Carolina Department of Probation, Parole and Pardon Services, of Columbia, for respondent.**

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**ANDERSON, J.**: Walter Laranzo Lee appeals from an order of the trial court revoking his probation. He initially pled guilty to resisting arrest–assault on officer and was sentenced to five years in prison. In addition, Lee pled guilty to assault and battery with intent to kill ("ABIK"). He was sentenced to ten years, suspended upon the service of five years probation. The judge ordered the probation to begin **"upon [Lee's] release from sentence now serving [for resisting arrest], to include any early release program/supervision."** Lee was paroled. Soon after, Lee violated his probation and the judge revoked three years of the original ten year suspended sentence, converted the restitution owed to a civil judgment, and terminated probation. Lee appeals. We affirm.

## FACTS/PROCEDURAL BACKGROUND

In October 1996, Lee was indicted with resisting arrest–assault on officer. In June 1997, Lee was indicted for ABIK and possession of a weapon during the commission of a violent crime. On December 3, 1997, Lee pled guilty to the resisting arrest charge and was sentenced to five years in prison. The next day, Lee pled guilty to the ABIK charge and was sentenced to ten years, suspended upon the service of five years probation. The possession charge was nol prossed. In its Probation Order, the court ruled Lee's probation "[b]egins upon release from sentence now serving, to include any early release program/supervision." Lee did not appeal his convictions or sentences.

On March 29, 2000, Lee was paroled on his resisting arrest conviction. Pursuant to the December 4, 1997 probation order, Lee's probation on his ABIK conviction started on March 29, 2000. Lee was on parole and probation at the same time, each with the standard conditions, such as maintaining suitable employment, and the special conditions of intensive supervision with electronic monitoring, participation in a substance abuse program, random drug screening, and attendance at a mental health program. Further, Lee was required to pay restitution, fines, supervision fees, and the electronic monitoring fee.

On May 4, 2000, Lee was charged with violating: (1) various conditions of his parole; and (2) various conditions of his probation. Five days later, Lee was served with both warrants. In August 2000, he appeared at a parole violation hearing before the South Carolina Board of Probation, Parole and Pardon Services ("the Board"). The Board found Lee had violated six conditions of his parole and continued Lee on parole with additional conditions of supervision. Almost one month after his parole violation hearing, Lee appeared at a probation violation hearing. The circuit judge concluded Lee had willfully violated the conditions of his probation. He revoked three years of the original ten year suspended sentence, converted the restitution owed to a civil judgment, and terminated probation.

## ISSUES

I. Did the Circuit Court abuse its discretion in revoking Lee's probation?

II. Did the Circuit Court have subject matter jurisdiction to revoke Lee's probation?

## STANDARD OF REVIEW

This Court will not disturb the Circuit Court's decision to revoke probation unless the decision was influenced by an error of law, was without evidentiary support, or constituted an abuse of discretion. State v. Archie, 322 S.C. 135, 470 S.E.2d 380 (Ct. App. 1996); see also State v. White, 218 S.C. 130, 135, 61 S.E.2d 754 (1950) (stating that upon review of revocation of probation, question is not one of formal procedure respecting either notice, specifications of charges or trial thereon, but is simply whether trial court abused its discretion; review therefore must be determined in accordance with principles governing exercise of judicial discretion). The decision to revoke probation is addressed to the discretion of the circuit judge. White, 218 S.C. at 134-35, 61 S.E.2d at 756; State v. Proctor, 345 S.C. 299, 546 S.E.2d 673 (Ct. App. 2001); State v. Hamilton, 333 S.C. 642, 511 S.E.2d 94 (Ct. App. 1999). A reviewing court will only reverse this determination when it is based on an error of law or a lack of supporting evidence renders it

arbitrary or capricious. Proctor, 345 S.C. at 301, 546 S.E.2d at 674. The court has much discretionary authority in dealing with guilty persons who are in a probationary status. Shannon v. Young, 272 S.C. 61, 248 S.E.2d 914 (1978).

## LAW/ANALYSIS

### I. Revocation of Probation

This issue may not be preserved for review. At the probation revocation hearing, Lee noted the prior parole revocation hearing and the Board's decision to continue him on parole. However, he did not argue the Board's decision somehow bound the Circuit Court to make a like decision in the probation matter. Rather, Lee conceded several probation violations and offered explanations for his failure to comply with the conditions. An issue must be raised to and ruled upon by the trial judge to be preserved for appellate review. State v. Perez, 334 S.C. 563, 514 S.E.2d 754 (1999); State v. Williams, 303 S.C. 410, 401 S.E.2d 168 (1991).

Lee contends that the "circuit judge abused his discretion and that the decision to revoke his probation was arbitrary and capricious." In his brief, he argues:

> The violations alleged in the violation of probation arrest warrant issued on May 4, 2000 were identical to the violations alleged in the violation of parole arrest warrant issued that same date.…
>
> . . .
>
> We are now faced with a Circuit Court and a Parole Board, whose functions are virtually identical in the area of determining whether a criminal defendant should be allowed to serve his or her sentence outside of the walls of our prison system, each reaching a different decision on the same alleged facts. It is the Appellant's contention that the Circuit Court's decision to revoke his probation, after a thorough review of the facts by the Parole

> [B]oard determined no revocation was warrant[ed], was an abuse of discretion, was arbitrary and capricious, and warrants a reversal by this Court.

We find Lee's argument is meritless. In the absence of capricious or arbitrary exercise, the discretion of the court in revoking probation will not be disturbed on appeal. State v. McCray, 222 S.C. 391, 73 S.E.2d 1 (1952). Revocation of probation, in whole or in part, is the means of enforcement of the conditions of the probation. Id.; see also State v. White, 218 S.C. 130, 61 S.E.2d 754 (1950) (stating that on review of revocation of probation, question is not one of formal procedure respecting either notice, specifications of charges or trial thereon, but is simply whether trial court abused its discretion and must be determined in accordance with principles governing exercise of judicial discretion, which implies conscientious judgment, not arbitrary action, takes account of law and particular circumstances, and is directed by judge's reason and conscience to just result); State v. Archie, 322 S.C. 135, 470 S.E.2d 380 (Ct. App. 1996) (holding this Court will not disturb circuit court's decision to revoke probation unless decision was influenced by error of law, was without evidentiary support, or constituted abuse of discretion). The court has much discretionary authority in dealing with guilty persons who are in a probationary status. Shannon v. Young, 272 S.C. 61, 248 S.E.2d 914 (1978).

"Probation is a matter of grace; revocation is the means to enforce the conditions of probation." State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 97 (Ct. App. 1999) (citing McCray and State v. White). However, the authority of the revoking court should always be predicated upon an evidentiary showing of fact tending to establish a violation of the conditions. Id. (citing White and State v. Miller, 122 S.C. 468, 115 S.E. 742 (1923)). Thus, before revoking probation, the circuit judge must determine if there is sufficient evidence to establish the probationer has violated his probation conditions. Id. at 648-49, 511 S.E.2d at 97. Once the determination is made that a probationer has violated the conditions of his probation, the circuit judge can require the probationer to serve all or a portion of the sentence originally imposed. S.C. Code Ann. § 24-21-460 (1989).

At the probation revocation hearing, Lee admitted violating several conditions of his probation including: (1) failing to pay supervision fees; (2) failing to pay restitution; (3) failing to comply with substance abuse treatment; and (4) failing to comply with electronic monitoring. Defense counsel claimed that, despite these violations, "locking [Lee] back up" was not the solution to Lee's problems. Instead, defense counsel asked the court to restructure Lee's financial obligations and continue him on probation.

The fact that the Board chose to continue Lee on parole as a result of his parole violations has no bearing on the Circuit Court's decision regarding his concomitant probation violations. In any event, the Board and the Circuit Court judge were entirely consistent in finding Lee had violated the conditions of his supervision. Only their actions in response to the violations were different.

Lee admittedly violated numerous conditions of his probation. There was a sufficient factual basis to support the revocation. Thus, the judge did not abuse his discretion in revoking Lee's probation.

## II. Subject Matter Jurisdiction

Lee argues the Circuit Court did not have subject matter jurisdiction in this matter. He asserts "there is … no authority given the Circuit Court to place a defendant on both probation and parole at the same time. The statute clearly envisions the situation where a defendant completes his sentence and then begins his probation. Otherwise you have the situation facing [Lee] whereby he must answer to both the Parole Board and the circuit court for the same conduct." This assertion has no merit.

Subject matter jurisdiction to revoke an individual's probation is conferred on the General Sessions Court by either the issuance of a probation violation warrant or the issuance of a probation violation citation and affidavit in lieu of a warrant. State v. Felder, 313 S.C. 55, 437 S.E.2d 42 (1993); State v. Hutto, 252 S.C. 36, 165 S.E.2d 72 (1968); see also S.C. Code Ann. § 24-21-450 (Supp. 2001) (requiring issuance of probation revocation warrant before probation may be revoked); S.C. Code Ann. § 24-21-300

(Supp. 2001) (permitting use of written citation and affidavit in lieu of warrant; issuance of citation or warrant during period of supervision gives jurisdiction to court and Board at any hearing on violation).

Here, Lee's five year probationary period was ordered to begin "upon release from sentence now serving, to include any early release program/supervision." On March 29, 2000, Lee was granted parole on the sentence he was serving. Therefore, his probationary period began on March 29, 2000. On May 4, 2000, during the five year probationary period, the arrest warrant for violation of probation was issued. On May 9, 2000, Lee was served with the arrest warrant for probation violation. This warrant thus conferred subject matter jurisdiction upon the court.

Lee argues the Circuit Court had no authority to order a sentence such as the one he received for ABIK. However, the statutory authority of the sentencing court to issue the underlying sentence could have been challenged in a motion to reconsider the sentence, on direct appeal, or as a defense to the probation revocation proceedings. Lee made no such challenge. Thus, the sentence is the law of the case, and any lack of authority does not affect the subject matter jurisdiction of the Circuit Court to later proceed with the revocation. See State v. Sampson, 317 S.C. 423, 454 S.E.2d 721 (1994) (holding unappealed ruling is the law of the case).

We distinguish this case from State v. Proctor, 345 S.C. 299, 546 S.E.2d 673 (Ct. App. 2001). Proctor appealed the order finding him in violation of probation. He was originally sentenced to five years under the Youthful Offender Act ("YOA") for a grand larceny conviction, and he received suspended sentences for both burglary and arson. His probation order for the burglary conviction stated, "the conditions of probation begin after YOA case." Id. at 300, 546 S.E.2d at 674. His probation order for the arson conviction stated, "the conditions of probation begin after active YOA." Id. While serving the five year sentence, Proctor was conditionally released from incarceration. At his probation revocation hearing, the trial judge ruled the period of probation began upon Proctor's conditional release from the YOA sentence and ran concurrently with the YOA conditional release. In reversing, this Court found that Proctor was still serving his YOA

sentence while on conditional release. Id. at 303, 546 S.E.2d at 675. Upon his unconditional release by the Division, Proctor will begin to serve his probationary terms as provided in the probation orders. Id. at 303, 546 S.E.2d at 675-76. In the present case, the probation was to begin upon Lee's "release from the sentence now serving, to include any early release program/supervision." Thus, probation would begin when he was released from incarceration. In Proctor, however, the probation began after Proctor's unconditional release from the YOA offense, which did not coincide with his release from incarceration because that was only a conditional release from the YOA sentence.

A sentencing judge has the authority to order a probationary period to begin upon a defendant's release from incarceration on a separate charge, even if that release is the result of the defendant being paroled. Section 24-21-410 provides: "After conviction or plea for any offense, except a crime punishable by death or life imprisonment, the judge of a court of record with criminal jurisdiction at the time of sentence may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation. Probation is a form of clemency." Additionally, "**[t]he period of probation or suspension of sentence** shall not exceed a period of five years and **shall be determined by the judge of the court** and may be continued or extended within the above limit." S.C. Code Ann. § 24-21-440 (Supp. 2001) (emphasis added). Sections 24-21-410 and 24-21-440 vest the sentencing judge with broad authority to determine the beginning date of a term of probation, so long as the term of the probation does not exceed five years. Because the probation did not exceed five years, there was no error by the Circuit Court.

Lee argues there is no authority given to the court to place a defendant on probation and parole at the same time. In the present case, the sentencing court only placed Lee on probation, not on parole. He was paroled by the Board in an appropriate exercise of its discretion. See S.C. Code Ann. §§ 24-21-610 to -710 (1989 & Supp. 2001) (relating to parole and release for good conduct). Parole eligibility is not a matter within the jurisdiction of the trial court, but falls within the province of the Board of Probation, Parole, and Pardon Services. Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991)

(citing S.C. Code Ann. § 24-21-610 (1989)). Thus, the probation revocation was proper, as it was a separate and distinct function from that of the Board.

## CONCLUSION

Accordingly, for the foregoing reasons, the order of the Circuit Court is

**AFFIRMED.**

**CURETON, J., and THOMAS, Acting Judge, concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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**The State,**

**Respondent,**

**v.**

**Reyes Cabrera-Pena,**

**Appellant.**

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**Appeal From Spartanburg County**
**Wyatt T. Saunders, Jr., Circuit Court Judge**

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**Opinion No. 3500**
**Heard April 10, 2002 - Filed May 20, 2002**

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**AFFIRMED**

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**Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, of Columbia, for appellant.**

**Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and**

**Assistant Attorney General Jeffrey A. Jacobs, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for respondent.**

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**ANDERSON, J.**: Reyes Cabrera-Pena ("Cabrera") was convicted of murder, possession of a firearm during the commission of violent crime, and three counts of pointing and presenting a firearm. On appeal, he argues the trial court erred in excluding a portion of a written statement he made to the police and in prohibiting him from recalling his attorney after choosing to proceed pro se. We affirm.

## FACTS/PROCEDURAL BACKGROUND

Alma Mendez was separated from her husband, Cabrera. They had a two-year-old daughter, Melissa. On the evening of June 30, 1999, Alma, Melissa, and friends Raphael Gonzalez, Jr., Vicente Cazeros, Elke Wagner, and Wagner's six-year-old son, Christopher, ate a late dinner at an Applebee's in Spartanburg County. In the middle of their dinner, Cabrera appeared in the restaurant. Cabrera approached Alma's table and spoke to her. The two were soon outside arguing. Alma later came back as Cabrera left. Alma reported to her dinner companions that Cabrera was upset about their separation and wanted her back. Alma reported that she did not want anything more to do with Cabrera.

The party left the restaurant as it began closing around midnight. As she was getting into Gonzalez's extended cab pickup, Alma spotted Cabrera's van in the parking lot of an adjacent business. Cabrera flashed his lights and Alma went over to the van. Within several minutes, she walked back to her group with Cabrera following several strides behind her. Alma motioned to the others that Cabrera had a handgun tucked under his waistband.

Cabrera announced to the group that Alma and Melissa were leaving with him. Alma said she and her daughter were not going anywhere with him. Cabrera called for Melissa, and Melissa got out of the truck and into Cabrera's arms. Gonzalez and Wagner tried to defuse the situation by telling Cabrera that

since they had brought Alma and Melissa to the Applebee's, they would take her home. Cabrera instructed Gonzalez and Wagner to stay out of his family's dispute. Alma grabbed Melissa from Cabrera. Cabrera then took the gun from his waistband and pointed it at Alma. Alma put her hand on his wrist and attempted to push the gun down. Cabrera pulled his hand back, pointed the gun at Alma, and fired. Alma, who was still holding Melissa, sustained a gunshot to her right eye and was killed. As Alma fell with Melissa to the ground, Gonzalez, Wagner, and Cazeros raced to aid the two. Cabrera pointed his gun at all three; however, he did not fire the weapon. Instead, he ran back to his van and drove away.

Spartanburg County Sheriff's Department officers arrested Cabrera within hours. He was taken to the Spartanburg County Detention Center, where investigators with the Spartanburg Department of Public Safety began an interrogation. Cabrera is a foreign-born Hispanic; thus, in an abundance of caution, the police brought in Tony Membreno, a public safety officer fluent in Spanish, to interpret for Cabrera.[1] Cabrera was read his Miranda rights in English by Detective Michael Morrow and Spanish by Officer Membreno. As Officer Membreno attempted to ascertain whether Cabrera understood his rights, Cabrera stated: "I'm guilty. I fully accept everything that had happened and I'm responsible for it." Cabrera then signed a waiver form, orally recounted the details of the crime, and later repeated his confession in a written statement. The oral statement was taped.

Cabrera was indicted for Alma's murder, possession of a firearm during the commission of a violent crime, and three counts of pointing and presenting a firearm. He was convicted by a jury and sentenced to life imprisonment.

## ISSUES

I. Did the trial judge err by refusing to admit self-serving

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[1] Cabrera was also provided a Spanish-speaking interpreter who sat beside him throughout the trial.

portions of Cabrera's written statement into evidence during Cabrera's cross examination of a police officer about oral statements he made to the officer during custodial interrogation?

II. Did the trial judge err by refusing to permit Cabrera's attorney to resume his representation of Cabrera following Cabrera's decision to terminate counsel?

## LAW/ANALYSIS

### I. Admissibility of Cabrera's Self-Serving Written Statement

Cabrera argues the circuit judge erred in preventing him from introducing a self-serving portion of his written statement while cross examining Officer Membreno about oral statements he made to the officer during custodial interrogation. We disagree.

After being read his Miranda rights by Detective Morrow in English and by Officer Membreno in Spanish, Cabrera indicated that he understood. Cabrera gave an oral statement to Officer Membreno concerning the events surrounding the shooting and confessed to killing Alma. His statement was recorded on audiocassette and Cabrera reduced his statement to writing. In the written statement, Cabrera indicated Alma took the gun from him and the gun "went off" when he grabbed it back from her.

During the Jackson v. Denno hearing, the solicitor moved to have the oral statement given to Officer Membreno introduced under Rule 801(d)(2), SCRE as an admission of a party-opponent. Arguing that Cabrera's self-serving written statements were hearsay, the solicitor moved to exclude the self-serving portions of the statement from introduction through the testimony of Officer Membreno. The solicitor did not want to introduce the tape recording of the statement or the written statement. Noting that the written statement contained some self-serving statements, the court ruled that if any of the document was introduced, then the entire document, including the self-serving statements, must be introduced pursuant to the completeness theory. The solicitor informed the

court that she did not plan to introduce the written statement, but she would introduce the oral statements made to the police officer through the officer's testimony.

During direct examination, Officer Membreno recounted Cabrera's oral statement in which Cabrera described the details of the evening of the shooting. On cross examination, Cabrera, proceeding pro se, attempted to ask Officer Membreno about the written statement and wanted him to read it. The court asked the parties to approach the bench. The following discussion occurred out of the hearing of the jury:

Solicitor: And he wants [Officer Membreno] to read parts of it?

Before the officer reads, you know, I think that he is going to have to offer this into evidence. Certainly at that point I would renew my objection to introduction of this officer of any statements. Basically I think –

The Court: The State has objected to any statement that was made by you that tends to be in your favor. You may remain silent or you may tell the jury about this, but you may not ask this witness about this statement, this part of it.

Cabrera: Why can't I?

The Court: You either have to testify or remain silent. If you are permitted to ask him to read this part of the statement, then you are testifying through another witness, which is not permitted. Do you understand?

Cabrera: It's the same thing that I said that I signed. It's

the same thing.

The Court: You may testify or you may remain silent, but you may not ask this witness what you said to defend yourself.

The judge then excused the jury and read the portion of the written statement Cabrera wished to discuss into the record: "I don't know how she took the gun out of my pants pocket. I tried to grab and force her, but the gun went off and fired." The court found the statement was self-serving and not a proper question to ask on cross examination.

The trial continued. During deliberations, the jury requested and received the manslaughter and murder instructions. Three hours later, the jury indicated it had reached a verdict on the firearms offense, but not on the murder or manslaughter offense. The judge gave the jury an Allen charge. An hour later, the jury again requested an instruction on the distinction between murder and manslaughter, and the judge charged the jury on both offenses. Nearly two hours later, the jury returned a verdict of guilty of murder.

Cabrera argues that excluding the portion of his written statement about the gun going off during a struggle with Alma was unfair.

### A. Rule 106, SCRE Analysis

Rule 106, SCRE, provides:

> When a **writing, or recorded statement**, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

(emphasis added).

"In interpreting the language of a court rule, we apply the same rules of

construction used in interpreting statutes. Therefore, the words of [the rule] must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule." State v. Brown, 344 S.C. 302, 306, 543 S.E.2d 568, 570 (Ct. App. 2001) (quoting Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994)).

In construing the parameters of Rule 106, SCRE, our Supreme Court has looked to Rule 106 of the Federal Rules of Evidence. The common-law doctrine of completeness has been partially codified in Rule 106 of the Federal Rules of Evidence. United States v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996) (citing Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171-72, 109 S. Ct. 439, 450-51, 102 L. Ed. 2d 445 (1988)). **The rule applies only to writings or recorded statements, not to conversations.** Id. (citing Fed.R.Evid. 106, advisory committee notes and United States v. Bigelow, 914 F.2d 966 (7th Cir.1990), cert. denied, 498 U.S. 1121, 111 S. Ct. 1077, 112 L. Ed. 2d 1182 (1991) (emphasis added). In State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998), the Court noted Rule 106, Fed.R.Evid. is based on the "rule of completeness" and "seeks to avoid the unfairness inherent in 'the misleading impression created by taking matters out of context.'" Id. at 170, 508 S.E.2d at 875 (citations omitted). Additionally,

> Rule 106 [of the Federal Rules of Evidence] is a procedural device governing the timing of completion evidence; the Rule is 'primarily designed to affect the order of proof.' It means that the adverse party need not wait until cross-examination or rebuttal. As such, the Rule reduces the risk that a writing or recording will be taken out of context and that an initial misleading impression will take hold in the mind of the jury.

Id. (citations omitted).

Although Rule 106 is intended to clarify any misconceptions the admission of a partial statement would give, "[o]nly that portion of the remainder of a statement which explains or clarifies the previously admitted portion should be introduced." Id. at 171, 508 S.E.2d at 876 (citations omitted).

The actual recording of Cabrera's oral statement was not admitted into evidence. Membreno did not mention in his testimony whether Cabrera's oral statement contained the same self-serving statement as the written statement regarding the struggle over the gun. The record before us only indicates that Cabrera made the self-serving statement in the **written** statement. As Rule 106 only applies to writings or recordings, we find no error with the trial court's refusal to admit any self-serving portion of the oral conversation Cabrera had with Membreno under a Rule 106 analysis.

Further, Cabrera only attempted to admit a portion of the **written** statement, not any portion of the **oral** statement. Because the written statement was never introduced, the trial judge did not violate Rule 106 in prohibiting Cabrera from questioning Membreno regarding the self-serving portions of the written statement. Rule 106, by its terms, refers only to **written** or **recorded** statements, not to conversations.

### B. State v. Jackson Analysis

Before the South Carolina Rules of Evidence were adopted, State v. Jackson, 265 S.C. 278, 217 S.E.2d 794 (1975), held that when some of a conversation is placed into evidence, a party is entitled to "prove the remainder of the conversation, so long as it is relevant, particularly when it explains or gives new meaning to the part initially recited." Id. at 284, 217 S.E.2d at 797. Because the oral statement was introduced in totality, the trial court complied with the rule in Jackson.

### C. State v. Terry Analysis

In State v. Terry, 339 S.C. 352, 529 S.E.2d 274, cert. denied, 531 U.S. 882, 121 S. Ct. 197, 148 L. Ed. 2d 137 (2000), the Supreme Court held that a defendant who elected not to testify in accordance with his Fifth Amendment privilege against self-incrimination was not "unavailable" within the meaning of Rule 804(b)(3), SCRE. As a result, the defendant could not introduce his confession, which suggested he was guilty of manslaughter rather than murder, as a statement against penal interest. The Court reasoned that the defendant was

attempting to exculpate himself with his confession and held that a defendant seeking to make exculpatory statements must face cross examination unless corroborating circumstances clearly indicated the trustworthiness of the statements. Id. at 356-57, 529 S.E.2d at 276-77.

In State v. Golson, Op. No. 3465 (S.C.Ct.App. filed March 25, 2002) (Shearouse Adv.Sh. No. 8 at 65), the Court of Appeals analyzed the admissibility of the defendant's exculpatory statement under the Terry analysis. Unlike the scenario in Terry, Golson testified in his own defense. Accordingly, Golson did not render himself unavailable as a witness by virtue of the exercise of his Fifth Amendment privilege against self-incrimination. Moreover, the prosecution was afforded the opportunity to — and did — cross examine Golson. Taking these circumstances into account, this Court found the holding in Terry did not control the evidentiary issue in this case. Id. at 73.

Cabrera did not testify. His reliance upon Golson is misplaced because Golson testified in his own defense and was subjected to cross examination. Cabrera falls squarely into the holding of State v. Terry.

## II. Trial Judge's Refusal to Permit Cabrera to Recall His Attorney to Resume Once Counsel was Dismissed

Cabrera argues the trial judge erred in ruling that he could not change his mind about proceeding pro se once he decided to dismiss his attorney. We disagree.

During pre-trial proceedings, Cabrera passed a letter to the trial judge in which he announced his desire to terminate representation by his attorney, Michael Morin. In the letter, Cabrera complained Morin failed to review evidence in the case with him, failed to pursue plea alternatives, and was not prepared for trial. He requested the appointment of another public defender and a continuance. Cabrera's letter was read into the record. Morin disputed Cabrera's claims regarding his preparation and the pursuit of a plea, but added he likely could not represent Cabrera because an adversarial atmosphere between the two had apparently arisen. Morin stated:

Morin: I feel that I am prepared to try this case. However, I must also say that having had read this into the record, it may appear that an adversarial situation has developed between my client and myself. And I think it's important for me to put that to the court, having – I don't want to go into all the things that I would deny in that record, but there is obviously ethical violations that have been accused of me, as well as any honesty I would have with my client. And while I am prepared to go forward, I think — I hate to say this, but that may create an adversarial position between my client and myself.

The Court: Thank you[,] Mr. Morin. Ms. Stone, any response or remarks?

In her response, the solicitor strenuously argued against a continuance due to a lack of due diligence by Cabrera to inform the court of his concerns and the cost to the State if the trial was delayed. At the time these proceedings occurred, the matter had been pending for **nine months**:

Solicitor: Of course, it's never been brought to our attention before this morning that the defendant wished to fire Mr. Morin. It's my understanding from him that he didn't even realize that when we had the hearing earlier. Mr. Morin represented him at a criminal domestic violence trial a month ago, when I know for certain we discussed this date at that time. He represented him at that trial. He had no problem with him at that point.

He has been in jail for approximately nine months. As he stated, he doesn't have any

money to hire a private attorney. And he hasn't attempted to do that prior to this time.

While he's complaining about us pushing this case. Of course, we have to consider things like defendants in jail. He has been denied bond. And, of course, the seriousness of the charge, including the feelings of the family that would like to put this to rest in their minds and hearts concerning the death of their sister and the assertion of what happens to the children, yes, we have tried to move this case. We have let the defense know that we had it set on a trial. And as far as I know, he's told his client.

The judge denied Cabrera's motion for a continuance. He then informed Cabrera of his options regarding representation and provided him with time to carefully consider his decision:

The Court: With regard to the motion of Mr. Cabrera to discharge the services of his attorney. He has that right. He may do that, but he will be representing himself, which is not advised and which is an unwise … and an unhappy thing to do, because is not learned in the law or the procedures of the court, and lawyers are supposed to speak for their clients.

If you were to discharge Mr. Morin, you would be speaking for yourself, with no knowledge of the law or the procedures involved. So, it's your decision whether you want to have Mr. Morin assist you and try this case, or whether you wish to try the case and represent yourself.

Take your time. Take your time.

Cabrera: Yes, sir.

The Court: Take your time and talk with Mr. Morin about this. There is no — there is no rush. Take your time and make a decision as to whether you want Mr. Morin to represent you or whether you wish to represent yourself.

Following a recess, the court asked Cabrera for his decision:

The Court: Now, Mr. Cabrera, you have a right to remain silent. You do not have to speak at all during the trial.

You have a right to confront the witnesses who may be called to testify against you. If you wish to ask them any questions, you may ask them questions yourself.

The court will instruct the jury that they cannot hold against you the fact that you do not testify in your own behalf. The jurors would be instructed that they couldn't talk about your maintaining your silence, even when they considered your guilt or innocence in the jury room.

The court has denied your motion for continuance.

The case will go forward, as the State has prepared its case and is ready to go forward.

You may have Mr. Morin represent you;

you may represent yourself; you may have Mr. Morin sit with you and assist you; or you may remain silent throughout the trial; or you may, through [the interpreter], ask questions of the State's witnesses on your own and represent yourself.

Do you understand your options?

Cabrera: Yes.

The Court: The court warns you in the strongest possible measure that you should have an attorney to represent you in this matter. However, you are entitled to represent yourself, if you choose to do so. Do you understand?

Cabrera: Yes.

Following the instructions from the court, the trial was recessed to give Cabrera the opportunity to further discuss his representation with his attorney.

The Court: Mr. Morin, have you talked with your client about his desire to have your representation, or otherwise?

Morin: Yes, sir.

The Court: What is his decision?

Morin: I do not know. He will have to —

The Court: The court will speak directly to Mr. Cabrera. Mr. Cabrera, do you wish to have Mr. Morin represent you?

. . . .

Cabrera: If I don't have any other opportunity or possibility, yes.

The Court: Very well. Mr. Morin, you will continue in your representation. You will have access to Mr. Cabrera. And if Mr. Morton is available, to have him assist you further in more detail preparations.

Proceedings for the day were soon adjourned. The next morning, Morin reported to the court that Cabrera had changed his mind regarding Morin's continued representation of him. The court again stressed to Cabrera that representation by an attorney in a criminal matter was critical and that the judge was not in a position to assist him with his defense if he terminated Morin. The judge further emphasized that the trial would go forward regardless of whether Cabrera was represented:

The Court: Mr. Cabrera, you have the right to represent yourself. It is extremely unwise for a person to represent himself or herself in this court. There are dangers and there are pitfalls in your attempting to represent yourself. The court under no circumstance is permitted to assist you in your defense. That is to say, that if you are unaware of the procedural requirements of the presentation of your case, you may not know what to do, and no one will be able to advise you as to what the procedural requirements are. Therefore, the court in the strongest possible terms again advises you against representation of yourself.

However, you do have that right. It is an

absolute right. You may represent yourself, if you please. You may ask questions of the witnesses called by the State.

You may assert your absolute right to silence and not testify in your own defense. If you choose to testify, you may do so. If you choose not to testify, the court will instruct the jury that you will have invoked that right and the jury may, under no circumstances, hold that against you. They could not even discuss your right to silence and the fact that you did not testify in your own behalf while they were considering your guilt or innocence.

The caution of the court goes to your lack of knowledge of the procedural requirements of a trial, particularly your probable lack of knowledge of the law and the procedures of the trial.

So again, the Court advises you strongly and seriously to reconsider your position.

What is your desire?

Cabrera: I can't represent my own person. I don't know the laws and the rights. And I'm not able to permit that [Morin] represent me, because I'm not content with his work.

Your Honor, you know the law and you know whether the case will continue or not - - will go forward or not.

The Court: The case will go forward, whether you represent yourself or whether Mr. Morin represents you.

Cabrera: Neither of the two.

The Court: Mr. Morin will sit with you at the request of the court and answer any questions that you have. You may represent yourself.

This court again will not, may not, and cannot under any circumstances advise you of your rights at any time during these proceedings. Do you understand?

Cabrera: I just — I don't want a trial. I don't want anything.

Notwithstanding Cabrera's decision, the trial judge directed Morin to remain with Cabrera throughout the trial to answer any questions by Cabrera:

The Court: [Cabrera] has elected to relieve you as his lawyer. After the trial commences, he will not be able to change his mind.

One of the basic and most important reasons for an attorney, as was told to you on yesterday … is to speak for you …. It is important that you not speak for yourself, unless you desire to do that. So you may not, after the commencement of the trial, which is about to start, change your mind and have Mr. Morin brought back into the case. This is an extremely important decision for you.

Cabrera continued to refuse Morin as an attorney during the trial, but he

argued that he was "not participating" in his trial and that he did not know how to represent himself.

Cabrera argues the trial judge erred in ruling he could not change his mind and request counsel during the trial.

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527, 45 L. Ed. 2d 562 (1975). This right may be waived. State v. Fuller, 337 S.C. 236, 523 S.E.2d 168 (1999). "While it is beyond question that an accused may waive counsel and represent himself, it is the responsibility of the trial judge to determine whether there has been an intelligent and competent waiver." State v. Bateman, 296 S.C. 367, 369, 373 S.E.2d 470, 471 (1988) (citations omitted). Waiver may be accomplished by making an intentional and voluntary relinquishment of this right. Id. A trial court, however, must determine the waiver is the product of a knowing, voluntary, and intelligent decision. State v. Boykin, 324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996).

Further, the defendant must be informed on the record of the dangers and disadvantages of self-representation or the record must indicate the defendant had sufficient background to understand the disadvantages of self-representation before he waives his right to counsel. Id. "While a specific inquiry by the trial judge expressly addressing the disadvantages of a pro se defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding." Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990). Where the trial judge fails to make a specific inquiry informing the defendant of the perils of proceeding pro se, "this Court will look to the record to determine whether [the defendant] had sufficient background or was apprised of his rights by some other source." Prince v. State, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990).

There is no right to hybrid representation in South Carolina. State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379

S.E.2d 907 (1989); State v. Sanders, 269 S.C. 215, 237 S.E.2d 53 (1977). "Hybrid representation" is representation which is "partially pro se and partially by counsel." State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998). The right to counsel, once waived, is no longer absolute. Id. at 44, 503 S.E.2d at 751. There is a presumption that a defendant's **post-trial** request for the assistance of counsel should not be refused. Id. However, "there are times when the criminal justice system would be poorly served by allowing the defendant to reverse his waiver at the last minute particularly where delay would result." Id.

In Reed, a defendant elected to proceed pro se in his capital murder trial and was found guilty. On the evening before the sentencing phase, the defendant asked that standby counsel be appointed as counsel. The trial judge denied the request. Noting that the defendant's request occurred during a continuing, and not separate, proceeding and that counsel was not prepared, the Supreme Court found the trial judge did not abuse his discretion in denying the defendant's request for re-appointment of counsel. Id. at 44, 503 S.E.2d at 751.

In the instant case, the trial judge — through a skilled interpreter — repeatedly explained to Cabrera: (1) that the trial would go on despite his protestations; (2) that he had the right to represent himself or have Morin continue with his representation; (3) that self-representation was an unwise and disadvantageous route to take; and (4) once Cabrera came to a decision regarding his representation, there would be no chance to have Morin resume his representation later in the proceedings. On each of these occasions, the court asked Cabrera if he understood what the court was saying. Every time when asked, Cabrera responded in the affirmative. Clearly, Cabrera made a knowing and intelligent waiver of counsel.

The timing of Cabrera's letter complaining about Morin's representation is evidence of his desire not to go to trial. The trial judge elected not to indulge Cabrera's attempt to delay the proceedings. This was within the judge's discretion. See State v. Marshall, 260 S.C. 323, 195 S.E.2d 709 (1973) (affirming trial judge's denial of a motion for continuance because the defendant had not exercised due diligence in securing the presence of a witness for trial).

Allowing Cabrera to recall his attorney during the trial, after he had specifically waived his right to counsel, would have impermissibly resulted in hybrid representation. As the right to counsel is not absolute once waived, the trial court was acting within its discretion in prohibiting hybrid representation. Thus, the trial court could not permit Morin to resume his representation of Cabrera later in the trial.

Further, unlike the defendant in Reed, Cabrera did not specifically ask for the re-appointment of counsel. Cabrera's protestations throughout the trial that he was not participating and that he did not know how to represent himself amounted to expressions of dissatisfaction with the legal system, not a request to withdraw his waiver of counsel. See State v. Hyatt, 513 S.E.2d 90, 94 (N.C. Ct. App. 1999) ("[T]o obtain relief from a waiver of his right to counsel, a criminal defendant must move the court for withdrawal of the waiver"). The trial court committed no error in its ruling that Cabrera could not "change his mind" regarding Morin's representation after electing to terminate counsel.

## CONCLUSION

We rule that Rule 106, by its terms, refers only to **written** or **recorded** statements, not to **conversations**. Further, the efficacy of Rule 106 is to prevent a party from misleading the jury by allowing into evidence relevant portions of the excluded statement which clarify or explain the portion already received. Here, Cabrera **only** attempted to admit part of the **written** statement, not any portions of the **oral** statement.

The Sixth and Fourteenth Amendments of our Constitution guarantee that a defendant in any state or federal court must be afforded the right to assistance of counsel before the defendant can be validly convicted and punished. Indubitably, this right may be waived; however, the trial judge has the duty to determine whether there has been an intelligent and competent waiver. Waiver is the intentional and voluntary relinquishment of this right. The waiver must be the product of a knowing, voluntary, and intelligent decision. A defendant must be informed on the record of the dangers and disadvantages of self-

representation or the record must indicate the defendant had sufficient background to understand the disadvantages of self-representation before the defendant waives the right to counsel.

This record is a paradigm of trial court inquiry as to all facets of constitutional rights and waiver. Based on the foregoing, Cabrera's conviction is

**AFFIRMED**.

**CURETON, J., and THOMAS, Acting Judge, concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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The State,

Respondent,

v.

Demarco Johnson,

Appellant.

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

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Opinion No. 3501
Submitted March 25, 2002 - Filed May 28, 2002

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**AFFIRMED**

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Assistant Appellate Defender Katherine Carruth Link, of S.C. Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General W. Rutledge Martin; and Solicitor

Warren B. Giese, all of Columbia, for respondent.

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**GOOLSBY, J.:** A jury convicted Demarco Johnson of first-degree burglary, armed robbery, and two counts of kidnapping. The trial judge sentenced Johnson on each offense pursuant to section 17-25-45(A) of the South Carolina Code,[1] known as the "Two-Strikes" law,[2] to life imprisonment without the possibility of parole. Johnson had a prior conviction for assault and battery with intent to kill and two prior convictions for attempted armed robbery. On appeal, Johnson challenges the validity of section 17-25-45(A), claiming the

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[1] S.C. Code Ann. § 17-25-45(A) (Supp. 2001). This section currently provides in pertinent part:

> (A) . . . [U]pon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has one or more prior convictions for: (1) a most serious offense . . . .

Id. Section 17-25-45 further provides:

> (C) As used in this section:
> (1) "Most serious offense" means:
> . . .
> 16-3-620 Assault and battery with intent to kill
> . . .
> 16-3-910 Kidnapping
> . . .
> 16-11-311 Burglary, First degree
> 16-11-330 (A) Armed robbery
> 16-11-330(B) Attempted armed robbery . . . .

Id. § 17-25-45(C)(1).

[2] State v. Jones, 344 S.C. 48, 55, 543 S.E.2d 541, 544 (2001).

statute violates the doctrine of separation of powers and the prohibition against cruel and unusual punishment. He also contends the State failed to satisfy its burden of proving that he had been convicted of the prior offenses. We affirm.[3]

1. We find no merit to Johnson's contention that his sentence under section 17-25-45(A) violates the separation of powers doctrine because it deprives the judiciary of "all judicial discretion" in the exercise of its sentencing function. The supreme court basically settled this issue in State v. De La Cruz,[4] a case that dealt with a challenge on the same ground to another mandatory sentencing statute, S.C. Code Ann. § 44-53-370(e)(2)(c) (Supp. 1989).[5] In that case, the supreme court recognized judicial discretion in sentencing is subject to statutory restriction without any violation of the separation of powers doctrine.[6]

2. We likewise find no merit to Johnson's contention that the application to him of the mandatory sentencing statute at issue here amounts to

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[3] 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.

[4] 302 S.C. 13, 393 S.E.2d 184 (1990).

[5] In his attack on the mandatory sentencing statute contained in S.C. Code Ann. § 44-53-370(e)(2)(c) (Supp. 1989), De La Cruz argued "that the mandatory sentence set forth by the legislature impermissibly intrudes into inherent judicial powers in that all judicial discretion in sentencing is removed." Id. at 15, 393 S.E.2d at 185-86 (emphasis added).

[6] See id. at 15, 393 S.E.2d at 186; see also Jones, 344 S.C. at 56, 543 S.E.2d at 545 (holding the mandatory nature of section 17-25-45 does not violate the separation of powers doctrine in light of a prosecutor's discretion to pursue triggering offenses or plea down the charges) (citing State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999)).

cruel and unusual punishment[7] because the facts and circumstances in this case "simply [are] not the kind that warrant[ ] imposition of a life sentence without eligibility for parole."

In State v. Jones,[8] our supreme court determined the life without parole sentence under the Two-Strikes law of a defendant who was convicted of three counts of armed robbery and possession of a firearm was not grossly out of proportion to the severity of the crime for which he was convicted.[9] The Jones court considered the following three factors mentioned in Solem v. Helm[10] in reaching its conclusion: (1) the gravity of the offense compared to the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences for the same crime in other jurisdictions.[11]

Here, few would argue that first-degree burglary, armed robbery, and kidnapping are anything other than grave offenses of the "most serious" nature. Indeed, the Two-Strikes law declares them to be such.[12] When considered along with Johnson's prior offenses, two of which were for attempted armed robbery and one of which was for assault and battery with intent to kill, the penalty of life without parole for each of the offenses for which Johnson was convicted is

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[7] Johnson recognizes this Court upheld the constitutionality of the statute against an attack mounted on cruel and unusual punishment grounds in State v. Brannon, 341 S.C. 271, 533 S.E.2d 345 (Ct. App. 2000).

[8] 344 S.C. 48, 543 S.E.2d 541 (2001).

[9] Id. at 57, 543 S.E.2d at 545.

[10] 463 U.S. 277 (1983).

[11] Jones, 344 S.C. at 56, 543 S.E.2d at 545.

[12] See supra note 1.

not extreme.[13]

Moreover, the sentence that Johnson received is no different from a sentence that would be levied on any other defendant convicted in South Carolina under similar circumstances. The sentence of life without the possibility of parole that the trial court imposed on Johnson upon his conviction for four "most serious" offenses is the same sentence as would be imposed on any other defendant with a record of convictions for one or more "most serious" offenses[14] and similarly convicted.

Regarding the third factor, a life sentence under recidivist laws for armed robbery, one of four "most serious" offenses for which the jury convicted Johnson, is not, as the court recognized in Jones, "unique to South Carolina."[15]

3. Finally, we disagree with Johnson's contention that the State failed to satisfy its burden of proof that Johnson had been convicted of the prior offenses that triggered the Two-Strikes law. The State proffered certified copies of court records showing that a Demarco Johnson pled guilty in 1997 to two counts of attempted armed robbery and one count of assault and battery with intent to kill. Johnson offered no evidence[16] to suggest he was not that Demarco Johnson.

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[13] See Jones, 344 S.C. at 57, 543 S.E.2d at 545 ("[G]iven the 'most serious' nature of armed robbery, when coupled with a prior most serious offense, the gravity of the offense is not disproportionate to a sentence of life without parole.")

[14] See id. at 57, 543 S.E.2d at 545; S.C. Code Ann. § 17-25-45(A).

[15] Jones, 344 S.C. at 57, 543 S.E.2d at 545.

[16] Rather than offer evidence that he was not the Demarco Johnson in question, Johnson, through counsel, complained about the State's failure to honor his request to furnish him with fingerprints or a mug shot from 1997 showing that he was in fact the same individual who had pled guilty to the two offenses that the State relied upon to trigger the Two-Strikes law. Complaints

Under these circumstances, the evidence was sufficient to show that Johnson and the individual previously convicted were one and the same.[17]

**AFFIRMED.**

**CONNOR and ANDERSON, JJ., concur.**

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of counsel do not constitute evidence. See Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986) ("[I]n determining whether a genuine issue of material fact exists, factual statements of counsel, whether made during oral argument or in written briefs or memoranda, ordinarily may not be [ ] considered.").

[17] See Lewis v. State, 508 S.E.2d 218, 222 (Ga. Ct. App. 1998) (stating where the defendant presented no evidence contradicting that he was the person named in the certified court documents, "[c]oncordance of name alone is some evidence of identity" and was sufficient to show the defendant and the individual previously convicted were the same person) (citation omitted); Murphy v. State, 399 So. 2d 340, 346 (Ala. Crim. App. 1981) (holding certified copy of prior conviction of individual with the same name as the defendant was sufficient as it "raised a prima facie presumption of the sameness of the person" and "[t]here was no attempt to rebut that presumption"); see also Park v. Raley, 506 U.S. 20 (1992) (holding where a defendant challenges a prior conviction and the Commonwealth initially proves the existence of the judgment on which it intends to rely, a presumption of regularity attaches and the burden shifts to the defendant to produce evidence showing his rights were infringed or an irregularity occurred).