OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

January 29, 2001

ADVANCE SHEET NO. 4

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Terry
A. Trexler, Respondent.

Opinion No. 25239
Heard December 6, 2000 - Filed January 29, 2001

DISBARRED

Attorney General Charles M. Condon and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Richard A. Blackmon, of Sumter, for respondent.

PER CURIAM: This is an attorney disciplinary matter involving multiple uncontested charges of misconduct, including criminal conduct.[1]

[1]Respondent was convicted on August 4, 2000 of breach of trust with fraudulent intent, blackmail, and conspiracy.

1. The Geneva Frances Matter

Geneva Frances retained Respondent on August 22, 1996 to represent her regarding an automobile accident. The retainer agreement specified a one-third contingency fee. In addition, Respondent drew up a contract for expenses which provided, among other things, for research and investigation at the rate of $65.00 per hour and secretarial services at the rate of $10.00 per hour. This document was dated August 22, 1996. Respondent forged Ms. Frances's signature on the contract and notarized her forged signature.

Respondent settled Ms. Frances's case in March of 1997 for $30,000 and received a partial disbursement of settlement funds. Respondent immediately wrote himself a check for $15,000, claiming the extra $5,000 was for investigative services. An undated Disbursement Sheet showed funds for investigative services in the amount of $5,427.50. However, at the time of disbursement, no detailed itemization of the investigative work was presented to Ms. Frances. The undated Disbursement Sheet showed only "legal assistant expense, 83.5 hours – $65.00 per hour." The Disbursement Sheet also included a charge of $536.50 for paper, fax, stamps, copies, gasoline and mileage, phone, electricity, *and* the investigator's expense to review the accident scene. These bills were improper because Respondent's fee was based on a contingency agreement. A copy of this document was not given to Ms. Frances at the time of disbursement. Respondent disbursed only $3,195.60 to Ms. Frances, and no disbursement was made to medical providers at that time. When Ms. Frances met with an attorney from the South Carolina Bar's Fee Dispute Resolution Board, she saw for the first time a document bearing her forged signature, stating that she "received and approved" the personal injury disbursement from her case on March 26, 1997.

Toumey Hospital treated Ms. Frances for her injuries related to the automobile accident. Ms. Frances's medical expenses totaled $9,430.54. Respondent did not pay Toumey out of the settlement. A collection agency contacted Ms. Frances concerning her unpaid bill at Toumey. Ms. Frances

contacted Respondent's office, requesting information and a copy of her file. Respondent provided Ms. Frances with a copy of her file, but tried to charge her $91.25 for the copy, including one hour's work at $65.00 per hour, as opposed to the $10.00 per hour fee for secretarial service set forth in the Settlement Costs and Expenses Agreement. Respondent eventually paid Ms. Frances's medical bills on May 15, 1997. During the time of delay, Respondent allowed the balance of his trust account to drop as low as $6,326.60 during two months. Payment of Ms. Frances's medical bills was therefore made with funds owed to other clients.

During the course of representation, Respondent advanced $1,000 and $100 to Ms. Frances. These advances were made from funds owed to other clients. Respondent later claimed these advances were to pay specified medical bills in even amounts of $1,000 and $100, even though no such bills existed.

Respondent claimed to have employed Robert Moore as an investigator regarding the Geneva Frances matter. Mr. Moore had no prior investigative experience and no experience researching medical matters. Mr. Moore stated he made approximately 407 copies of documents at the Medical University of South Carolina regarding hand injuries. Mr. Moore testified he made a hand-written summary of his investigation, but no copy was located and no correspondence from Respondent to Ms. Frances's insurance carrier or physician reflects any such research. Mr. Moore's cellular telephone records, for at least one of the days he claimed to be in Charleston doing research, showed calls attributable to a cell tower that did not serve the Charleston area. Respondent falsely testified before the Commission on Lawyer Conduct that the documents supposedly obtained by Mr. Moore were used to enhance his position when negotiating Ms. Frances's case.

Mr. Moore did not prepare itemized bills for his time and expenses on the Geneva Frances case. Respondent and Mr. Moore both testified at their Notices of Appearance that Respondent paid Mr. Moore over $5,000 in cash for his services. Mr. Moore testified he maintains no checking or savings account and did not deposit the money, but simply used

it over the course of time.

Ms. Frances complained to Respondent about the disbursement of funds, payment owed to medical providers, and investigator's fee. In response, Respondent wrote a letter to Ms. Frances dated June 13, 1997, stating that if she complained to the South Carolina Bar and others, he would sue her for $500,000 for slander *per se* and intentional infliction of emotional distress. In a letter to Ms. Frances dated June 14, 1997, Respondent threatened to have her arrested and have criminal charges brought against her, in addition to the civil actions for slander and intentional infliction of emotional distress, "the next time you do anything in relation to contacting my office or anyone else. . . ."

Respondent swore under oath at his Notice of Appearance that he saw Ms. Frances sign the August 22, 1996 contract and the March 26, 1997 approval of disbursement. Investigators from the Attorney General's office found the Settlement Cost and Expense Agreement authorizing the hiring of an investigator, the undated Disbursement Sheet, the approval of the disbursement, and Ms. Frances's letter of complaint to the Fee Dispute Board in the trunk of Respondent's car. Among these documents was a letter dated July 21, 1997 with a simulation of Ms. Frances's signature on the reverse side. Respondent admitted making that signature at his Appearance. Further examination revealed that there had been a tracing done over "Geneva" in Ms. Frances's signature on a copy of the original fee agreement of August 22, 1996. The Questioned Documents section of the State Law Enforcement Division confirmed that Ms. Frances's signature, taken from a copy of the original fee agreement, was traced or forged on the March 26, 1997 document approving the settlement of Ms. Frances's case and the August 22, 1996 contract approving the hiring of an investigator. Respondent not only committed forgery, he notarized the forgeries, and lied about them under oath at his Appearance.

2. <u>The James Richard Bryant Matter</u>

Respondent conducted a real estate closing for James Richard

Bryant on October 23, 1997. Respondent neglected this matter, not recording the deed or paying the survey fee until February of 1998. During the period between Respondent's receipt of closing funds and payment of the survey fee, Respondent allowed his trust account to reach a negative balance.

3. The Arthur H. Wilder, Jr. Matter

Arthur H. Wilder, Jr., the Solicitor for the Third Judicial Circuit, was prosecuting Dean McElveen for rape, kidnapping, and buggery, in a case where the alleged victim was McElveen's former wife, Robin McElveen. Attorney John Miles represented Dean McElveen. Mr. McElveen had brought contempt charges against Mrs. McElveen in the family court. She was found in contempt and sentenced to pay $500 or serve ninety days in jail. Respondent telephoned Mr. Miles and told Mr. Miles that he was representing Mrs. McElveen. Respondent stated that the criminal charges against Mr. McElveen would be dropped in exchange for Mr. McElveen dropping the family court contempt charges and paying Mrs. McElveen $10,000 in cash. Mr. Miles requested this demand in writing. When he did not receive anything in writing, Mr. Miles eventually went to Respondent's office and asked if he could prepare an affidavit memorializing their telephone conversation. Respondent agreed and he and Mr. Miles both signed the resulting affidavit, which attested to the content of the telephone conversation described above, and notarized each other's signatures. At the subsequent family court hearing, Mrs. McElveen appeared represented by an attorney other than Respondent. She testified at the hearing that Respondent was not her lawyer, she did not want money, and she never authorized Respondent to call Mr. Miles. Respondent failed to respond to the subsequent inquiries and investigation by the Commission on Lawyer Conduct.

4. The Annette Briggs Matter

Annette Briggs hired Respondent in December of 1996 to represent her concerning a probate court matter. Opposing counsel was John

C. Land, III. Mr. Land represented Respondent in a disciplinary matter. Ms. Briggs first learned that Mr. Land was representing Respondent when she read a public reprimand issued to Respondent on September 22, 1997. At no time did Respondent disclose to Ms. Briggs that opposing counsel represented him in another matter. Further, Respondent failed to respond to the subsequent inquiries and investigation into this matter.

5. The Second James Richard Bryant Matter

Respondent made payments out of his escrow account on behalf of one client from funds deposited into that account on behalf of another client or personal funds deposited by himself. On January 6, 1998, Respondent wrote a check from his escrow account to Les Boles, marked "closing," in the amount of $1,121.36. On the same day, Respondent wrote a check from his escrow account to Mark McCoy and Beckie McCoy for settlement of a personal injury case in the amount of $2,331. The balance the day before, January 5, was $2,076.04. The balance on January 7 was $76.04, due to a $2,000 check being written. On January 8, Respondent deposited personal funds, drawn upon a personal account shared by Respondent and his mother, in the amount of $3,700, less $1,539 cash, for a net deposit of $2,161. This brought the balance in the escrow account to $2,237.04 as of January 8, 1998. On January 9, 1998, the checks to Mr. Boles and the McCoys were posted and returned due to insufficient funds. The posting of these two checks, plus return fees of $23.00 each, brought the balance to -$1,261.32 on January 9, 1998. On January 12, 1998, Respondent deposited $6,000, causing the checks to Mr. Boles and the McCoys to clear and restoring a positive balance. The source of the $6,000 was a settlement consisting of six checks arising from a personal injury case payable to Mark McCoy and Becky Hogue. Thus, Respondent used the McCoy/Hogue money to pay both the McCoy/Hogue claims and the Boles closing. In addition or in the alternative, Respondent used his own funds to pay these claims. Respondent failed to respond to subsequent inquiries and investigation into this matter.

6. The Disciplinary Counsel Matter

April Pearson was a foster child living with Sara and Theodis Coulter in Sumter. She is disabled, with a low I.Q. and classified as educable retarded. Lexington County Department of Social Services supervised April Pearson. In 1984, when April was about thirteen years old, she became entitled to $20,882.61 in back payments from the Social Security Administration as a result of a class action lawsuit. Following the directives of her supervisor, Amber McMillan, a social worker with Lexington County DSS, contacted the Coulters for the name of an attorney to establish a trust or similar savings fund in which to deposit this money. The Coulters had used Respondent on two prior occasions, so they recommended him to Ms. McMillan. Ms. McMillan met with Respondent and he prepared a trust document on January 21, 1994, appointing himself Trustee.

The trust document was executed by Ms. McMillan and witnessed by two individuals. In Article II, Respondent was appointed Trustee. In Article IV, the trust principal was identified as the $20,882.61. Article V of the trust relieved the Trustee from the provisions of the "Uniform Trustee's Accounting Act" and other such restrictive legislation which may be in effect. The Uniform Trust Act had not been enacted in South Carolina. The "Uniform Trustee's Accounting Act" did not exist.

Article VI of the trust provided that the Trustee could pay himself from the trust such compensation as was usual and reasonable, and may pay attorney's fees or other expenses incurred. Other than Article VI of the trust, there was no fee agreement between Respondent and the Coulters, Ms. McMillan, Lexington County DSS, or South Carolina DSS.

Lexington County DSS issued a check for $20,882.61 on February 1, 1994 to "Drexler [sic] Law Firm" to establish the April Pearson trust account. Respondent deposited the check into his escrow account and opened a mutual fund on behalf of April Pearson with Washington Mutual Investors Fund in the name of "Terry A. Trexler, Trustee, April Pearson

Trust, DTD 1/31/94." Respondent only deposited $15,000 of the April Pearson money into the trust when he opened it and misappropriated the remaining $5,882.61.

Without notice to or knowledge of the Coulters, Amber McMillan, or Lexington County or South Carolina DSS, Respondent made a telephone redemption of $5,000 from the mutual fund on February 1, 1995 and deposited the money into his escrow account. Respondent then misappropriated this money, loaning it to a private investigator, Robert Lee Moore.

On July 25, 1995, Respondent wrote himself a check for $285 from his escrow account labeled "April Pearson" as a fee. This was done without notice to or knowledge of the Coulters, Amber McMillan, or Lexington County or South Carolina DSS. If it was a fee, Respondent provided no bill, invoice, or statement.

Respondent unilaterally executed a loan agreement, stating that he would borrow $9,510 from the April Pearson Trust on July 7, 1995 and July 20, 1995. The document went on to provide that a lump sum payment of $13,000 would be paid back to the trust "during the year 1998." Respondent then withdrew $6,510 on July 7, 1995 and $3,000 on July 20, 1995 from the trust account, deposited the funds into his escrow account, and subsequently spent the money. Respondent did not: (1) enter into a transaction with his client with terms of interest set forth therein, (2) enter into a transaction with his client with terms that were reasonable and fair to his client, (3) enter into a transaction with his client with terms that were fully disclosed and transmitted in writing to the client in a manner that could be reasonably understood by the client, (4) give the client a reasonable opportunity to seek the advice of independent counsel in the transaction, or (5) require the client to consent in writing to the transaction.

Despite April's mental disability, Respondent did not maintain a normal lawyer-client relationship with her. He did not seek the appointment of a guardian or take other protective action with respect to her regarding the

management of the trust, and specifically the taking of the $9,510 loan and the $5,000 loaned to the private investigator.

Although the trust was intended primarily for April's future, it was understood that the Coulters could withdraw money from the trust for the benefit of April. On November 17, 1994, the Coulters received $1,777.81 from the trust to purchase a computer for April. The Coulters also received from Respondent $580 in July 1995 to purchase bedroom furniture for April and $1,000 in July 1997 for a vacation ($500) and a fee to adopt April ($450). The adoption did not take place. In addition, when Mr. Coulter was out of work due to an on-the-job injury, the family requested, and received from Respondent, $1,500 to apply toward family bills. The checks for $580, $1,000, and $1,500 were not withdrawn from April's trust account, but were taken from Respondent's personal funds or law firm funds.

When the investigation into the April Pearson trust began, in September of 1998, the balance in the trust's mutual fund was only $790.59. After Respondent learned about the investigation, he paid $13,000 back into the trust on October 1, 1998. The $13,000 check was drawn on a personal account maintained by Respondent and his mother. Washington Mutual Investors calculated that if Respondent had simply deposited the initial $15,000 on May 11, 1994 and taken no withdrawals from that sum, the value of the fund on October 1, 1998 would have been $34,471.99. In the alternative, if Respondent had deposited the entire $20,882.61, taken the withdrawals described above, and deposited the $13,000 on October 1, 1998, the value of the fund on October 1, 1998 would have been $22,885.25. As an additional alternative, if Respondent had deposited the full $20,882.61 on May 11, 1994, together with the deposit of $13,000 on October 1, 1998, and deducted the withdrawals of his loan and the sums paid to the Coulters, the balance as of October 1, 1998 would have been $34,057.78. The actual balance on October 1, 1998, after the $13,000 deposit, was $13,105.34.

Respondent did not respond to the subsequent inquiries and investigation into this matter.

7. The Fike Matter

Respondent was retained to represent Fike in a civil action against a residential builder and its owners for a fee of about $3,300. After a length of time with minimal action, Respondent failed to respond to Fike's repeated requests for information regarding the case. Fike gave Respondent specific directions as to strategy and decisions about the action, which Respondent refused to follow. Respondent initially misled Fike about the overall conditions and timing of the action, resulting in personal hardship to Fike. Respondent lacked the requisite legal competence to pursue the action for which Fike hired him. Respondent delayed Fike's legal action through his deliberate refusal to respond to discovery requests. Respondent failed to respond to opposing counsel, even though documents required for the discovery process were provided to Respondent and were in his possession. Respondent failed to provide an accounting to Fike for the use of the fees received and the performance of legal services. Respondent failed to provide Fike any information regarding his practice and availability to continue the action on Fike's behalf. Respondent was placed on interim suspension on October 2, 1998. Thereafter, he failed to comply with this Court's directives and did not adequately protect Fike's interests. Fike filed a letter of complaint with the Commission on Lawyer Conduct and Respondent failed to respond to the subsequent inquiries and investigation.

8. The Brown Matter

Brown retained Respondent to handle a domestic matter and paid Respondent a $750 fee. Respondent failed to act with diligence and did not communicate with his client about the action. Respondent gave erroneous advice to Brown and made misrepresentations about Brown's rights. Brown filed a letter of complaint with the Commission on Lawyer Conduct and Respondent failed to respond to the subsequent inquiries and investigation.

9. The Callen Matter

Callen retained Respondent on a child visitation matter and paid

Respondent a $1,000 fee. Respondent failed to act with diligence and did not perform the contracted legal services for his client. Respondent failed to communicate with his client in a timely fashion about this action. Respondent made misrepresentations about both the services performed and the charges being assessed against Callen's retainer. Callen filed a letter of complaint with the Commission on Lawyer Conduct and Respondent failed to respond to the subsequent inquiries and investigation.

10. The Berry Matter

Berry retained Respondent in a domestic matter. Berry filed a letter of complaint with the Commission on Lawyer Conduct and Respondent failed to respond to the subsequent inquiries and investigation.

11. The Huff Matter

Huff retained Respondent in a domestic matter. Huff filed a letter of complaint with the Commission on Lawyer Conduct and Respondent failed to respond to the subsequent inquiries and investigation.

12. The Ervin Matter

Ervin retained Respondent regarding a divorce. Respondent accepted a $550 fee but performed virtually no legal services for Ervin. Respondent advised Ervin the action could be completed within sixty days, when he had reason to know the statement was false, for reasons including the fact that the opposing party would have to be served by publication. The client file has since been returned to Ervin, but Respondent has made no accounting as to how the fee was earned.

Respondent was suspended from the practice of law on October 2, 1998, and thereafter became inaccessible to his client. Ervin made many unsuccessful attempts to contact Respondent about her options for alternative representation and retrieval of her file. Respondent's mother directed Ervin to another attorney, who had already received Ervin's file, but without

Ervin's permission and without any consultation to seek Ervin's approval prior to the transfer of her file. Ervin filed a letter of complaint with the Commission on Lawyer Conduct and Respondent failed to respond to the subsequent inquiries and investigation.

13. The Yates Matter

Yates retained Respondent in a domestic matter and paid Respondent a fee of approximately $650. Respondent failed to perform adequate legal services, failed to act diligently, and did not communicate with his client. Yates filed a letter of complaint with the Commission on Lawyer Conduct and Respondent failed to respond to the subsequent inquiries and investigation.

14. The Wilson Matter

Wilson retained Respondent to seek Social Security benefits and paid Respondent a fee of approximately $500. Respondent failed to act with diligence, did not respond to Wilson's inquiries, and performed inadequate legal services in relation to the legal fee charged. Wilson filed a letter of complaint with the Commission on Lawyer Conduct and Respondent failed to respond to the subsequent inquiries and investigation.

15. The Collins Matter

Collins retained Respondent for a family court matter and paid Respondent a fee of approximately $1,100. Respondent was placed on interim suspension while the matter was pending, but did not provide notice of his suspension to his client. Collins attempted to contact Respondent about the family court matter, and finally received a reply from Respondent's mother. Respondent either directed or caused the transfer of Collins's file to another attorney, without Collins's knowledge, consultation, or permission. Collins filed a letter of complaint with the Commission on Lawyer Conduct and Respondent failed to respond to the subsequent inquiries and

investigation.

16. The Neubert Matter

Neubert retained Respondent to file suit against a bank, among other matters. Respondent failed to file the suit in a timely manner, causing Neubert's action to be barred by the statute of limitations. Neubert filed a letter of complaint with the Commission on Lawyer Conduct and Respondent failed to respond to the subsequent inquiries and investigation.

17. The Johnson Matter

Johnson retained Respondent to file a child custody action on Johnson's behalf. Johnson filed a letter of complaint with the Commission on Lawyer Conduct and Respondent failed to respond to the subsequent inquiries and investigation.

18. The Harris Matter

Harris retained Respondent in a domestic matter and paid Respondent fees of approximately $1,500. Harris filed a letter of complaint with the Commission on Lawyer Conduct and Respondent failed to respond to the subsequent inquiries and investigation.

19. The Stewart Matter

Stewart retained Respondent in a family court matter and paid Respondent fees of approximately $750 plus costs of $130. Stewart filed a letter of complaint with the Commission on Lawyer Conduct and Respondent failed to respond to the subsequent inquiries and investigation.

20. The Bryant Matter

Rosa Bryant retained Respondent to get a court date for her and her husband in a grandparent visitation matter and paid Respondent a legal

fee. No court date was ever provided. After approximately three months, Respondent summoned the Bryants to his office and told them he had filed a lawsuit on their behalf. Mrs. Bryant told Respondent that was not what they had hired him to do. Mrs. Bryant later learned that Respondent had copied another attorney's work, hired by Mrs. Bryant's son. Respondent never appeared in court at any time on the Bryants' behalf. Respondent never made any refund or accounting to the Bryants as to how he applied their attorney's fees. Bryant filed a letter of complaint with the Commission on Lawyer Conduct and Respondent failed to respond to the subsequent inquiries and investigation.

21. The Solesbee Matter

Solesbee retained Respondent in a domestic matter and paid Respondent fees of approximately $1,000. Approximately three months after being retained, Respondent notified Solesbee that another attorney had been associated on the case. Respondent did not consult with, nor request approval from his client prior to this association, nor did Respondent have Solesbee's permission to engage another attorney.

Respondent was unable to timely obtain a hearing on Solesbee's behalf. Respondent, through his staff, told Solesbee that the reason for delay was difficulty in serving the pleadings on Solesbee's spouse. Respondent attended a hearing on this matter, and at the hearing, improperly prompted Solesbee on the witness stand to agree to certain matters concerning marital debt to which Solesbee had not originally agreed.

As the one-year mark approached for a final hearing, Respondent represented to Solesbee that a hearing had been scheduled. Before the purportedly scheduled hearing, Respondent was arrested for a criminal violation and placed on interim suspension. Prior to his suspension, Respondent had never requested a hearing on Solesbee's behalf. Respondent failed to file the parties' agreement with the court and took no action to have the agreement approved by the family court. Solesbee was forced to obtain other legal counsel to obtain a divorce. Respondent did not respond to

inquiries from Solesbee and provided little representation to his client. Following the interim suspension, Respondent did not properly notify Solesbee. Solesbee filed a letter of complaint with the Commission on Lawyer Conduct and Respondent failed to respond to the subsequent inquiries and investigation.

22. The Smith Matter

Smith retained Respondent to pursue an action for grandparent visitation rights. Respondent explained to Smith that he required payment of approximately $2,000 for fees and an additional $500 to hire a detective. Respondent failed to hire a private detective and failed to respond to Smith's inquiries regarding the private detective's report. Instead, Respondent misappropriated the money to his own personal use.

Respondent failed to provide any substantial legal services to Smith in return for the fees he collected, and failed upon request to provide an itemized bill for legal services rendered.

There was at least one family court hearing scheduled. Respondent did not contact Smith to prepare for this hearing. Respondent failed to respond to Smith's inquiries concerning the matter for which he had been retained. Smith filed a letter of complaint with the Commission on Lawyer Conduct and Respondent failed to respond to the subsequent inquiries and investigation.

23. The Wroble Matter

Wroble, who lived out of state, retained Respondent in a divorce and custody matter and paid Respondent fees of approximately $3,500, plus an additional $500 to hire a private investigator. After a period of months, Wroble asked Respondent for a report on the investigator's findings. Respondent failed to adequately answer his client's inquires, instead providing vague answers, such as that Wroble's "husband was slick . . ." Respondent contacted Wroble to explain that there had been a hearing in the

matter, that Respondent had been present at the hearing and represented Wroble. Respondent did not notify Wroble of the hearing in advance. As a result of Respondent's lack of diligence, Wroble did not receive the family court's order directing her to pay child support until she was already in violation of the order.

During the course of representation, Respondent failed to obtain available evidence of prior criminal domestic violence by Wroble's spouse or of Wroble's spouse's adulterous relationship, committed in the presence of Wroble's children. Respondent failed to prepare adequately for trial and used coercive tactics to have Wroble sign an agreement for joint custody of the children. Respondent failed to adequately protect his client's interests in this agreement.

Respondent failed to respond to Wroble's request for an itemized bill. Wroble filed a letter of complaint with the Commission on Lawyer Conduct and Respondent failed to respond to the subsequent inquiries and investigation.

24. <u>The Shirah Matter</u>

Shirah retained Respondent to represent her in a divorce case and paid Respondent fees of approximately $1,300 and costs of approximately $125. Respondent first notified Shirah about a hearing only a few days prior to its scheduled date. Respondent met with Shirah the morning of the hearing, but then had the hearing continued. Shirah's spouse requested a second hearing, and Respondent did not notify his client. Respondent explained to his client that there had been no hearing on that date, and the hearing was in fact scheduled for later in the month. Prior to the hearing date, Respondent was arrested and placed on interim suspension. Shirah learned of Respondent's arrest through newspaper accounts and attempted without success to find out about her case by multiple telephone calls to Respondent's family and to the family court. Shirah learned from the family court that Respondent had never scheduled a hearing, as he had previously

represented to her. Shirah learned from her spouse that Respondent had attended a hearing without notifying her. Respondent failed to provide a copy of the order arising from that hearing to his client. Respondent failed to notify Shirah that the family court had directed her to pay child support; instead, Shirah learned this from her husband. Respondent failed to notify Shirah that he was placed on interim suspension. Respondent's mother tried to refer Shirah to another attorney, even setting up an appointment with that attorney, without knowledge or permission from Shirah. Shirah's file was provided to that other attorney without Shirah's permission. Shirah filed a letter of complaint with the Commission on Lawyer Conduct and Respondent failed to respond to the subsequent inquiries and investigation.

The Panel's Findings[2]

Regarding all matters, the panel found violations of Rules 7(a) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: (1) violating a Rule of Professional Conduct; (3) willful failure to appear personally for a Notice to Appear as directed under Rule 19(c)(4), willful failure to comply with the subpoena issued under Rule 413, and failure to respond to a lawful demand from a disciplinary authority; (5) engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law; and (6) violating the oath of office taken upon admission to practice law in this state.

From the Rules of Professional Conduct, Rule 407, SCACR, the panel found with regard to all matters violations of Rule 8.4, misconduct, subsections (a), (b), (c), (d), and (e). For all matters, the panel found a failure to act competently (Rule 1.1), failure to act with reasonable diligence and promptness in representing a client (Rule 1.3), failure to keep a client reasonably informed about the status of the matter and comply promptly with reasonable requests for information (Rule 1.4), and charging an unreasonable

[2]The full panel adopted the report of the subpanel.

fee or a fee inconsistent with a previous agreement for the fee (Rule 1.5(a) and (b)).

Specifically regarding the Geneva Frances matter, the panel found Respondent misappropriated his client's funds to his own use, failed to deliver to his client funds she was entitled to receive, and failed to promptly render a full accounting regarding property (Rule 1.15). Moreover, Respondent was untruthful in statements to others (Rule 4.1), threatened criminal prosecution (Rule 4.5), did not act with candor toward a tribunal, the Commission on Lawyer Conduct (Rule 3.4), and failed to respond to a lawful demand for information from a disciplinary authority, as well as misleading a disciplinary authority (Rule 8.1(b)). Further, by his forgeries, Respondent committed felonies in violation of the criminal laws of South Carolina, a violation of Rule 8.4.

The panel found violations of Rule 1.1, 1.3, 1.5, 1.15, and 8.4 with regard to the James Richard Bryant matter, the Arthur H. Wilder, Jr. matter, the Annette Briggs matter, the second James Richard Bryant matter, the Disciplinary Counsel matter, the Fike matter, the Brown matter, the Callen matter, the Berry matter, the Huff matter, the Ervin matter, the Yates matter, the Wilson matter, the Collins matter, the Neubert matter, the Johnson matter, the Stewart matter, the Bryant matter, the Solesbee matter, the Smith matter, the Wroble matter, and the Shirah matter. In addition, the panel found Respondent at the very least attempted to obstruct justice, in violation of the criminal law of this state, and in violation of Rule 8.4 in the Arthur H. Wilder, Jr. matter, a violation of Rule 1.15 with regard to the misappropriation of funds due April Pearson in the Disciplinary Counsel matter, and a violation of Rule 4.1, truthfulness in statements to others, in the Shirah matter. The panel also found repeated failure to respond to demands from disciplinary authority in violation of Rule 8.1(b).

We concur with the panel's findings. We have deemed disbarment the appropriate sanction in similar cases involving multiple acts of misconduct, including criminal violations. See, e.g., In re Courtney, Op. No. 25200 (S.C. Sup. Ct. filed Oct. 9, 2000) (Shearouse Adv. Sh. No. 38 at

1); In re Gibbes, 323 S.C. 80, 450 S.E.2d 588 (1994).

Respondent is disbarred, effective as of the date of this Opinion. We also order Respondent to make restitution to all injured parties, including clients, organizations, and the Lawyers' Fund for Client Protection and to pay the costs of all these proceedings. The Office of Disciplinary Counsel shall determine the amount of restitution, with due consideration to the Circuit Court's findings at Respondent's restitution hearing, and implement a plan for restitution. Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DISBARRED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Harry Wesley Lollis, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25240
Heard December 5, 2000 - Filed January 29, 2001

REVERSED

Michael W. Barcroft, of Greenville, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for respondent.

CHIEF JUSTICE TOAL: On May 10, 2000, this Court granted Harry Wesley Lollis' ("Lollis") petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Lollis*, Op. No. 99-UP-488 (S.C. Ct. App. filed September 29, 1999). We reverse.

FACTS/PROCEDURAL BACKGROUND

On February 19, 1998, at 9:05 a.m.,the Liberty Fire Department responded to a fire at Lollis' mobile home. Later that day, the South Carolina Law Enforcement Division ("SLED") Arson Hotline received an anonymous tip concerning the fire. David Tafaoa ("Agent Tafaoa"), a SLED arson investigator, investigated the tip and opined the fire was intentionally set.

Agent Tafaoa's investigation revealed there were two areas of fire origination, the kitchen stove and another unconnected fire in the hallway. At the kitchen stove origination site, some type of paper product was rolled and placed between the skillet and the electric coil of the stove, and the eye of the skillet was turned to "high." Agent Tafaoa was further convinced the fire was intentionally set because many personal items were missing from the mobile home. For example, there were nails and screws in the walls, but there was nothing hanging on them or located on the floor beneath them. Also, a gun rack and a soft gun case were found in the master bedroom, but neither contained a gun. Furthermore, there was nothing in the night stand drawers, there was only one pair of shoes in the closet, and there was no VCR, even though a VCR cable and a few tapes were found in the mobile home.

On the day of the fire, Lollis' common law wife, Tammy Burgess ("Burgess"), confessed in a statement to Agent Tafaoa that she was depressed about her husband's financial condition and intentionally started the fire by leaving a pan of grease on a hot eye of the stove. Burgess admitted Lollis was unaware of her plans to burn their home. She further confessed she took most of their valuables and placed them in a storage room they rented five days prior to the fire. According to Agent Tafaoa, Burgess burned the mobile home so the insurance company would pay the mortgage, their largest debt.

Lollis denies he had any involvement with the fire. He claims he never asked, encouraged, or aided Burgess in the burning of their home. According to Lollis, he had no reason to burn his home because it was being extensively remodeled when the fire occurred. Lollis claims he placed his personal items in

the storage room on the day of the fire because he did not want his valuables ruined by drywall dust while he remodeled his home.

The State offered no evidence of Lollis' alleged financial trouble. On cross examination, the State's witness from the finance company testified Lollis was current on his mortgage payment at the time of the fire. Lollis also testified he was current on his accounts to Commercial Credit, Friendly Loans, State Farm Insurance, and Macy's Credit.

Lollis had an outstanding mortgage at the time of the fire. In October 1997, Lollis financed his home in order to pay for carpeting, delinquent taxes, and other matters. Because Lollis did not have homeowner's insurance, the finance company required that insurance be placed on the home in order to cover its mortgage. After the fire, the insurance company fully paid Lollis' mortgage. However, Lollis did not receive any money for his personalty destroyed in the fire because the items were not insured.

Agent Tafaoa was convinced Lollis conspired with his wife to commit arson because Lollis possessed the key to the storage room, which contained many of their valuable personal items, when he accompanied Burgess to the law enforcement center. Lollis was arrested a week after the fire and charged with second degree arson.

On July 23, 1998, Lollis was convicted of second degree arson and sentenced to six years incarceration. The Court of Appeals affirmed the decision of the trial court. *State v. Lollis*, Op. No. 99-UP-488 (S.C. Ct. App. filed September 29, 1999). The Court of Appeals denied Lollis' Petition for Rehearing on November 16, 1999. Lollis now seeks an order reversing the Court of Appeals' decision and vacating his sentence. The following issue is before this Court on certiorari:

I. Did the Court of Appeals err by affirming the trial court's denial of Lollis' directed verdict motion?

LAW/ANALYSIS

Lollis argues the Court of Appeals erred in affirming the trial court's denial of his directed verdict motion because the State did not present

substantial circumstantial evidence Lollis was guilty of second degree arson.[1] We agree.

On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. *State v. Burdette,* 335 S.C. 34, 515 S.E.2d 525 (1999); *State v.Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. Brown*, 103 S.C. 437, 88 S.E. 21 (1916). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. *State v. Pinckney*, 339 S.C. 346, 529 S.E.2d 526 (2000); *State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000). Accordingly, a trial judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. *State v. Martin, supra*; *see also State v. Muhammed*, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). "Suspicion" implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. *State v. Hyder*, 242 S.C. 372, 131 S.E.2d 96 (1963).

No direct evidence was adduced at trial linking Lollis to the fire. The State's case depended entirely on circumstantial evidence. When a motion for a directed verdict is made in a criminal case where the State relies exclusively on circumstantial evidence, "[t]he trial judge is required to submit the case to the

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[1]Second degree arson is defined as:

> A person who wilfully and maliciously causes an explosion, sets fire to, burns, or causes to be burned or aids, counsels, or procures the burning of a dwelling house, church or place of worship, a public or private school facility, a manufacturing plant or warehouse, a building where business is conducted, an institutional facility, or any structure designed for human occupancy to include local and municipal buildings, whether the property of himself or another, is guilty of arson in the second degree and, upon conviction, must be imprisoned not less than five nor more than twenty-five years.

S.C. Code Ann. § 16-11-110 (Supp. 1999).

jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000); *see also State v. Stokes*, 299 S.C. 483, 484, 386 S.E.2d 241 (1989); *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989); *State v. Littlejohn*, 228 S.C. 324, 89 S.E.2d 924 (1955). The trial court is concerned with the existence or nonexistence of the evidence, not with its weight. *Mitchell*, 341 S.C. at 406, 535 S.E.2d at 127 (citing *Edwards*, *supra*).

The circumstantial evidence relied upon by the State is not substantial and merely raises a suspicion of guilt. The key pieces of circumstantial evidence relied upon by the State are: (1) the marital relationship between Burgess and Lollis; (2) Lollis' alleged financial trouble; (3) his placement of valuables in the storage room; and (4) his possession of the storage key on the day of the fire. According to the trial judge, Lollis' possession of the storage key is the most significant piece of circumstantial evidence:

> I think that there's some substantial circumstantial evidence or sufficient circumstantial evidence, taking everything in the light most favorable to the State, the things that you mentioned, the relationship, the fact that he owned the property. *But I think one of the strongest things, facts, is that I think I heard testimony that Mr. Lollis had the keys to the storage locker in his pocket where all the stuff that was taken from the house was stored.* And I think that there is sufficient circumstantial evidence. I'd be required to submit it to the jury for their determination.

(emphasis added).

Even viewing the circumstantial evidence in the light most favorable to the State, the evidence presented does not reasonably tend to prove Lollis' guilt. First, Burgess admitted to starting the fire without assistance from Lollis, and without his knowledge. The State presented no evidence of an agreement between them. Second, the State presented no evidence of Lollis' alleged financial trouble. To the contrary, Lollis' testimony he was current on his debts at the time of the fire was uncontradicted. The State's witness from the finance company also testified Lollis was current on his mortgage payments. Furthermore, Lollis did not have insurance on his personal property lost in the fire. Finally, Lollis presented a plausible explanation for placing valuables in

the storage room on the day of the fire – he was trying to protect them from drywall dust as he remodeled his home.

Lollis' mere possession of a storage key is not substantial circumstantial evidence he asked, aided, or procured Burgess to burn the dwelling. The possession of the key only indicates Lollis had access to the storage room on the day of the fire, it in no way demonstrates he aided Burgess with the fire. Lollis fully admits he was visiting the storage room when the fire occurred that morning. However, placing valuables in a storage room, without any other evidence linking him to the fire, does not indicate he aided his wife in destroying their home, especially when he offered a valid reason for placing the items in storage, and Burgess confessed she acted alone. Therefore, the possession of the key does nothing more than arouse suspicion of Lollis' guilt, and is an improper basis to deny a motion for directed verdict.

Finally, in similar arson cases relying on circumstantial evidence, appellate courts have affirmed denials of directed verdict motions when there is clear circumstantial evidence of financial trouble, such as a pending foreclosure proceeding or a significant change in an insurance policy prior to the fire. The instant case does not contain the same quantum of evidence because the State presented no evidence of Lollis' financial difficulty, and no evidence Lollis would receive some financial gain as a result of the fire. *See State v. Harry*, 321 S.C. 273, 468 S.E.2d 76 (Ct. App. 1996) (directed verdict motion denied where there was evidence the fire was intentionally set, defendant purchased $25,000 homeowners' insurance two weeks prior to fire, and defendant provided his insurer with false information concerning his losses); *Carter v. Am. Mut. Fire Ins. Co.*, 297 S.C. 218, 375 S.E.2d 356 (Ct. App. 1988) (trial judge correctly denied motion for directed verdict where there was evidence of defendant's financial difficulties, two mortgages on home, outstanding federal and state tax liens, and trouble paying credit card accounts); *see also State v. Chisholm*, 187 S.C. 275, 197 S.E. 308 (1938) (arson conviction affirmed where there was circumstantial evidence of a mortgage on the house, commencement of a foreclosure proceeding prior to the fire, and changes in insurance coverage by defendant's mother to include all personalty).

CONCLUSION

Based on the foregoing, we **REVERSE** the Court of Appeals' decision.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Duke Power Company, n/k/a Duke Power, a division of Duke Energy Corporation, Appellant,

v.

The Public Service Commission of South Carolina, and Blue Ridge Electric Cooperative, Inc., Respondents.

Appeal From Richland County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 25241
Heard October 3, 2000 - Filed January 24, 2001

AFFIRMED

Richard L. Whitt, of Austin, Lewis & Rogers, of Columbia, and Jefferson D. Griffith, III, of Duke

Power, of Charlotte, North Carolina, for appellant.

F. David Butler, of the Public Service Commission, and Steven W. Hamm and Mary Sowell League, of Richardson, Plowden, Carpenter & Robinson, all of Columbia, for respondents.

JUSTICE BURNETT: This is an appeal from an order of the Circuit Court affirming the order of the Public Service Commission (Commission) ordering Duke Power Company n/k/a Duke Power, a division of Duke Energy Corporation (Duke) to cease and desist from attempting to provide power to the Nason Corporation (Nason), a new construction located within territory assigned to Blue Ridge Electric Cooperative, Inc. (Blue Ridge). We affirm.

FACTS

In April 1969, Duke constructed a 44kv power line that ran from Westminster to Walhalla. The line was built temporarily on a 100kv double circuit line and was named the Darby Line. That same year, the General Assembly enacted the Territorial Assignment Act (Act), S.C. Code Ann. § 58-27-610 through -670 (1976), effective July 1, 1969. The Act required the Commission to assign

> beginning as soon as practicable after January 1, 1970, to electric suppliers, all areas, by adequately defined boundaries which may be by reference to boundaries drawn on maps or otherwise, that are outside the corporate limits of municipalities, and that are more than three hundred feet from the lines of all electric suppliers as such lines exist on the dates of the assignments; provided, that the Commission may leave unassigned any area in which the Commission, in its discretion, determines the

> absence of assignment is justified by public convenience and necessity.

§ 58-27-640. Pursuant to this section, Duke, Blue Ridge, and Haywood Electric Membership Corporation submitted to the Commission a joint application for the assignment of electric service areas in Oconee County. The application included a map of Oconee County (Exhibit A) designating areas to be assigned to the applicants and areas to be left unassigned. The Commission approved the application and incorporated the map into its order (1972 Order). The order was a form order used by the Commission statewide. It stated, in its entirety:

> This matter comes before the Commission on Joint Application of Duke Power Company, Blue Ridge Electric Cooperative, Inc. and Haywood Electric Membership Corporation, under the provision of Section 24-15 of the Code of Laws of South Carolina for the assignment of electric service areas in Oconee County, South Carolina.
>
> The verified Application and attached map, Exhibit A, indicate the areas in Oconee County to be assigned to each applicant and the areas to be left unassigned. The Commission is of the opinion, and so finds, that the approval of this Application is in the public interest and that each of the applicants is able to provide adequate service in the territory assigned;
>
> NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Application is approved, and the areas in Oconee County situated more than three hundred (300') feet from the lines of any electric supplier and outside the corporate limits of any municipality are assigned to the respective applicants or designated unassigned, all as shown on

> Exhibit A incorporated herein by reference and made a part of this Order as fully as if set out herein.

Duke's Darby line ran through territory assigned to Blue Ridge.

In October 1973, Duke added a 100kv circuit to the existing towers and constructed a new 44kv line along the same right of way to replace the 44kv line that had been temporarily strung on the towers. This new line was named the Bear Swamp 44kv line. Poles for the Bear Swamp line have 1974 "birthmarks."[1] In 1981, Duke began serving its first and only customer off the Bear Swamp line pursuant to a statutory exception permitting out-of-territory service to industrial customers with an initial load greater than 750 kilowatts. See S.C. Code Ann. § 58-27-620(2) (1976).

In 1996, Nason decided to build a new plant in Oconee County and asked Duke to be its electrical supplier. Duke began constructing new underground lines with which to serve Nason, and Blue Ridge filed an Emergency Petition for Rule to Show Cause and Petition for Immediate Cease and Desist Order with the Commission. After a hearing on the merits, the Commission granted the requested cease and desist order against Duke. The Commission subsequently filed a second order denying Duke's motion to reconsider. Duke appealed to the Circuit Court, which affirmed the Commission's orders.

DISCUSSION

Did the Circuit Court err in affirming the Commission's finding Duke has no right to serve the customer in question?

Duke asks us to reverse the Commission's determination, affirmed by the Circuit Court, that it has no right to serve the Nason plant.

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[1]Birthmarks are markings or tags attached to poles indicating the date the equipment was erected or placed at a particular site.

We agree with the Circuit Court and Commission that Duke may not serve a customer located wholly within territory assigned to Blue Ridge.

This Court employs a deferential standard of review when reviewing a decision of the Public Service Commission and will affirm that decision when substantial evidence supports it. Porter v. South Carolina Public Service Comm'n, 333 S.C. 12, 507 S.E.2d 328 (1998). This Court may not substitute its judgment for the Commission's on questions about which there is room for a difference of intelligent opinion. Id. Because the Commission's findings are presumptively correct, the party challenging a Commission order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record. Id., S.C. Code Ann. § 1-23-380(A)(6) (Supp. 1999).

Duke's reasons why it should be allowed to serve the customer in dispute are essentially twofold. First, Duke argues the statute permits Nason to choose its electric supplier under the circumstances present here. Second, Duke argues the 1972 Order creates a swath of unassigned territory around its Bear Swamp line. We address each of these arguments in turn.

A. The Statute

Duke asserts it has a right to serve Nason because the customer is located partially within three hundred feet of its Bear Swamp line, thus creating a customer choice situation pursuant to § 58-27-620(1)(d)(iii). This subsection provides that a customer located partially within three hundred feet of certain lines of an electric supplier and partially within a service area assigned to another electric supplier may choose its supplier.

We disagree this subsection applies to give Duke the right to serve Nason. In order for § 58-27-620(1)(d)(iii) to apply to Duke's Bear Swamp line, the line must meet certain criteria: it must have been in existence on July 1, 1969 and it must be a distribution line. § 58-27-610(3). In order for a 44kv line like Duke's Bear Swamp line to be a distribution line, the

parties must agree it is such or the Commission must find the line's "primary purpose and use" is distribution. See § 58-27-610(3). The Commission determined Duke's Bear Swamp line is not a distribution line, but a transmission line, with no appurtenant service rights. There is abundant evidence in the record to support this determination, including the fact that the line was originally constructed as a transmission tie line, the original Darby 44kv line never served any customers, and the current Bear Swamp line has served only one customer in its history, pursuant to a specific statutory exception. Moreover, Duke's testimony reveals that in order to serve the Nason plant, a new distribution line would have to be built, a fact which suggests the Bear Swamp line is not, in fact, a distribution line.

Duke argues the Commission is without authority in this case to determine the nature of its line because the parties agreed the line was a protected distribution line when they drew it on the 1972 map. We find no evidence in the record to support Duke's assertion that mere depiction of the line has any significance as to its nature as a distribution or transmission line. On the contrary, the 1972 Order states that the map "indicate[s] the *areas* in Oconee County to be assigned to each applicant and the areas to be left unassigned" (emphasis added). Nothing in the language of the Order indicates an intent to establish all depicted lines as protected distribution lines. We conclude the map merely depicts the existence of Duke's transmission line through Blue Ridge's territory and does not constitute an agreement of the parties that the line is a protected distribution line.

Furthermore, we reject Duke's argument the Commission is without authority to determine the nature of Duke's line. On the contrary, the statute gives the Commission express authority to determine the nature of a disputed line. § 58-27-610(3). As noted above, the Commission's determination the disputed line is a transmission line is completely supported by the record. Thus, Duke has no right under the statute to serve the Nason plant.

B. The 1972 Order

Duke asserts the 1972 Order creates a six hundred foot wide swath of unassigned territory within territory assigned to Blue Ridge, and that since Nason is located partially within that swath, it may choose its electric supplier. Duke bases its argument on the following language in the 1972 Order:

> [T]he areas in Oconee County situated more than three hundred (300') feet from the lines of any electric supplier and outside the corporate limits of any municipality are assigned to the respective applicants or designated unassigned, all as shown on Exhibit A.

Duke's interpretation is unpersuasive. The language of the Order merely tracks the language of the statute, which provides the Commission shall assign "all areas . . . that are outside the corporate limits of municipalities, and that are more than three hundred feet from the lines of all electric suppliers as such lines exist on the dates of the assignments." § 58-27-640. As explained above, in order for the Bear Swamp line to qualify as a "line" under the statute, it must be a distribution line. § 58-27-610(3). Distribution lines in place prior to July 1, 1969 were protected by "corridor rights," that is, the right to serve all premises located "wholly within three hundred feet" of the supplier's line. § 58-27-620(1)(b) & (c).[2] Pursuant to its statutory mandate, the Commission could not assign territory within protected corridors. Thus, we read the disputed language of the 1972 Order as merely clarifying that territorial assignment does not abrogate existing corridor rights.

The interpretation urged by Duke would require this Court to interpret the 1972 Order in a way that is in direct conflict with the Territorial Assignment Act. We see no basis in either the Order or the statute to interpret the Order as creating a corridor of unassigned territory along Duke's

[2]Duke concedes it does not have corridor rights here.

Bear Swamp line.

AFFIRMED.

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

JUSTICE PLEICONES: I respectfully dissent. In 1972, these parties[3] filed a joint application with the Public Service Commission (PSC) seeking the assignment of territory in Oconee County. In connection with this application, the parties submitted, as a joint exhibit, a map identifying the areas they sought to be assigned to each, and the areas which they asked to be designated as unassigned. The line at issue in this case, as well as other lines, are depicted on the map.

In my opinion, the fact that this power line is represented on the joint exhibit is determinative of the issue whether the line is a distribution line or a transmission line. The purpose of the map was to establish territorial assignments: only distribution lines are relevant to determining these assignments since service rights depend, in part, on proximity to such lines. See S.C. Code Ann. §§ 58-27-610(3); 58-27-620(1976). There was simply no reason for a transmission line to be included in the map, and no evidence that any were. Further, there is no dispute that the line qualifies to be a distribution line, since it was in existence on July 1, 1969,[4] as required under § 58-27-620, and since its voltage level is within the parameters of a distribution line. § 58-27-610(3). Under these circumstances, the only conclusion which can be drawn is that when the parties submitted their joint map and included the line at issue here, they manifested their agreement that this line was, in fact, a distribution line. Id. To reopen these territorial assignment consent orders, many of which like the one at issue here are more than twenty-five years old, and permit electric suppliers to litigate their intentions anew, is to encourage uncertainty where there is now stability.

I would hold that the 1972 PSC order approving the joint application assigning territory "as shown on [the joint map] incorporated herein by reference and made a part of this order" constitutes an agreement by the

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[3]The application was also made by a third party, which has no interest in the present dispute.

[4]The fact that the line was changed out and renamed in 1974 is of no consequence here.

parties that Duke's Bear Swamp line is a distribution line. Further, since the Nason Corporation plant is partially located within 300 feet of this line, it has the right to choose its electric supplier. § 58-27-620(1)(d)(iii). Accordingly, I would reverse the circuit court order affirming the PSC's cease and desist order.

TOAL, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jeffrey L. Jones, Appellant.

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

Opinion No. 25242
Heard October 3, 2000 - Filed January 24, 2001

REVERSED AND REMANDED

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; Assistant Attorney General Jeffrey A. Jacobs, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for respondent.

JUSTICE PLEICONES: Appellant was convicted of two counts of murder, first degree burglary, armed robbery, and criminal conspiracy. He received two death sentences for the murders,[1] concurrent sentences of thirty years each on the burglary and armed robbery charges, and a concurrent five year sentence for conspiracy. Finding four errors in the guilt phase of the trial, we reverse appellant's convictions and sentences, and remand.

A. Facts

The victims were bludgeoned to death with a hammer and a piece of brick in the West Columbia home they shared. Victim John Pipkin was 63, physically handicapped, legally blind, and in poor health. The other victim, Susan Furman, was in her forties and in poor health. Money was taken from the home, most probably an amount between 700 and 1,000 dollars. No physical evidence other than a bloody boot print was found at the scene.

Appellant was employed by Pipkin as a line cook in the canteen at the Strom Thurmond Federal Building in Columbia. On Friday, February 2, 1996, appellant was angry at Pipkin because he believed that Pipkin had deducted an excessive amount from his paycheck for snacks and drinks consumed on the job. It was common knowledge among the employees that

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[1] The jury found the following four statutory aggravating circumstances with reference to both victims:

(a) committed while in the commission of a burglary;

(b) committed while in the commission of a robbery while armed with a deadly weapon;

(c) committed while in the commission of a larceny while armed with a deadly weapon; and

(d) two or more persons were murdered by one act pursuant to one scheme or course of conduct.

The jury found an additional aggravator in the murder of victim Susan Furman: The murder was committed while in the commission of physical torture.

Pipkin ran a cash business, and usually took the profits home with him on Fridays.

Doris Moore called her friend Susan Furman at the home Furman shared with Pipkin at about 6:30 p.m. on Friday, February 2, 1996. While they were on the phone, the doorbell rang at the Pipkin home. Furman told Moore she was not expecting company, and that Pipkin had gone to answer the door. Moore heard a strange man's voice, followed by Furman's scream, and scuffling and knocking noises. After about twenty seconds the phone went dead. Moore called a neighbor of Furman's and Pipkin's, and asked her to check them. The neighbor called John Orr, Pipkin's stepson.

Orr went to the house to check on Pipkin and Furman. He noticed lights that were usually turned on were off, and rang the doorbell several times. When no one answered the door, Orr looked in the windows and saw Furman's body. He entered the house through the storm door, which he was surprised to find unlocked. He then saw Pipkin's body and the blood, and asked another neighbor to call 911. Orr testified that because of the condition of the house's contents, it was clear there had been a struggle.

The victims were killed by blunt trauma to the head, consistent with having been beaten with a hammer. Furman had defensive wounds on her arms.

The State's case against appellant rested entirely on the testimony of appellant's friend, roommate, and self-confessed accomplice, James Brown. Brown testified that after he and appellant finished smoking crack late on the afternoon of February 2, appellant suggested going to Pipkin's home and robbing him. Brown was familiar with Pipkin and Furman because his girlfriend had worked at the canteen, and Brown had been a frequent visitor. Brown testified both he and appellant had been to the Pipkin home before February 2.

According to Brown, he and appellant planned the robbery in the room appellant rented in Brown's parents' house in Cayce. Brown took stockings from his mother's room for disguises, and he and appellant left on foot, headed for Pipkin's West Columbia home. Along the way, Brown and appellant ran into a friend of Brown's, Darryl Good. Good testified that he recalled meeting Brown late that afternoon, and identified appellant as the

man with Brown. Good's testimony is the only evidence independent of Brown's testimony placing the two together in the vicinity of the Pipkin home on Friday, February 2.

Brown testified that as they approached the area where Pipkin lived, appellant gave him a hammer which Brown recognized as belonging to his parents. A few minutes later, appellant picked up a brick and broke it, telling Brown he was bringing it along because there were "some dogs down through there."

Brown testified he and appellant entered Pipkin's fenced yard and walked up on the front porch. Brown pointed out to appellant that Furman, visible through a window, was on the phone. Appellant knocked on the door, and Brown pulled down the stocking he had on his head. Appellant wore gray mittens. Appellant identified himself[2] through the door, and when Pipkin opened it, appellant knocked him down and ran to Furman and began hitting her with the piece of brick. Brown shut the front door and sat down next to Pipkin.

According to Brown's testimony, he hit Pipkin in the head with the hammer once, then gave it to appellant. Brown held Furman's arms while appellant repeatedly hit her in the head. Brown took Furman's wallet and ransacked a back bedroom while appellant remained in the living room area, apparently hitting Pipkin with the hammer. Appellant came back to the bedroom, told Brown to take the now bloody hammer, and "mess with the lock on the back door" to give the appearance of a burglary. Meanwhile, appellant, still wearing mittens, went through Pipkin's briefcase and took the money bag.

According to Brown, he and appellant left through the back door, scaled the fence, and began walking on this rainy night, going from West Columbia across the Jarvis Klapman Boulevard bridge into Columbia. Brown testified he dropped the hammer near Pipkin's home, and that appellant put his mittens in a storm water drain. Following his arrest, Brown led police to the hammer; the mittens were never recovered.

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[2]Why he did so after he and Brown had prepared disguises is unclear from the record.

After returning to Brown's parents' home where they changed clothes and divided the money, Brown testified he and appellant partied through the night. The next day they were smoking crack at a friend's house when someone called to say the police were surrounding Brown's parents' home. Appellant went to check on the situation, then returned to the friend's house. Appellant and Brown later went to the parents' house, and were told to leave. They walked most of the way from Columbia to Sumter that night in a snowstorm. Video tapes from two convenience stores along the Sumter Highway show appellant and Brown together in the stores on Saturday, February 3.

The police were looking for appellant based on information given them by Pipkin's stepson, John Orr. They learned appellant and Brown were often together. They located Brown in Sumter on Tuesday, February 6, and he returned with officers to Lexington. In his first statement, he denied any involvement in the crimes. He was then arrested, and gave a second statement which was largely consistent with his trial testimony. Appellant was later arrested.

Appellant raises six issues on appeal, four alleging error in the guilt phase, and two in the penalty phase.

B. Guilt Phase Issues

Appellant claims he is entitled to a new trial based on three evidentiary errors and one jury charge error. We agree. These four issues are:

(1) Whether the trial judge erred in limiting appellant's cross-examination of Brown?;

(2) Whether the trial judge erred in admitting expert testimony of the "barefoot insole impression" found inside the boot which left the bloody print at the crime scene?;

(3) Whether the trial judge erred in allowing witness Orr to testify he had given police officers appellant's name when they asked if Orr knew anyone who might harbor a grudge against victim Pipkin?; and,

(4) Whether the trial judge erred in altering the reasonable doubt charge given the jury after appellant had given his closing argument in reliance upon the original charge?

1. Impeachment

Brown had an extensive criminal record dating back to 1976, and a history of plea bargaining. His criminal record is reflected below:

INDICTMENT	COUNTY	CHARGE	DISPOSITION
75-GS-32-613	Lexington	Housebreaking	YOA not to exceed 15 months and 18 months probation
76-GS-32-988	Lexington	Housebreaking Larceny by Privily Stealing	Nolle Prossed because of plea on other charges
76-GS-32-989	Lexington	Grand Larceny of a Vehicle	Nolle Prossed because of plea on other charges
76-GS-32-990	Lexington	Housebreaking Larceny	Nolle Prossed because of plea on other charges
76-GS-32-991	Lexington	Housebreaking Larceny	Nolle Prossed because of plea on other charges
76-GS-32-992	Lexington	Grand Larceny of Vehicle	10Y
76-GS-32-993	Lexington	Housebreaking	15Y susp to 10Y and 5Y probation

76-GS-32-994	Lexington	Housebreaking Larceny by Privily Stealing	Nolle Prossed because of plea on other charges
76-GS-32-995	Lexington	Housebreaking Attempted Larceny	15Y susp to 10Y and 5Y probation
76-GS-32-1009	Lexington	Housebreaking Larceny by Privily Stealing	5Y
83-GS-32-335	Lexington	Housebreaking Larceny	15Y susp to 5Y Consecutive to 83-336
83-GS-32-336	Lexington	Housebreaking Larceny	15Y susp to 5Y Consecutive to 83-335
89-GS-40-1671	Richland	Burglary 1st degree	15Y
89-GS-40-1691	Richland	Carrying a Pistol Unlawfully	Nolle Prossed because of plea to other charges
89-GS-40-1692	Richland	Resisting Arrest	Nolle Prossed because of plea to other charges

On direct examination, the State elicited Brown's prior convictions. Brown testified he faced the death penalty for his role in these crimes and that he had not been promised anything in exchange for his testimony. He acknowledged that the solicitor's office would decide after this trial whether to pursue the death penalty against him. He was asked why, with full knowledge of the charges against him, and full knowledge of the possibility of the death penalty, he was testifying at this trial. Brown replied, "Well, I can't save my life, but I can at least save my soul." He then proceeded to narrate his version of the crimes, identifying appellant as the leader and himself as the follower, and minimizing his own participation in the horrific assaults

that killed the victims.

On cross-examination, appellant sought to question Brown about his prior plea bargains, to show his knowledge of the system and the ways it could be manipulated, and to show bias and motive in his trial testimony and its manner of presentation. Appellant's attorney pointed out that he intended to emphasize the past deals Brown had made with the Lexington County Solicitor's office, the same office that would decide Brown's fate in this current case. The judge declined to allow appellant to explore this issue before the jury. Appellant contends this limitation of impeachment pursuant to Rule 608(c), SCRE, was reversible error. We agree.

Under Rule 608(c), "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." This subsection of Rule 608 preserves South Carolina precedent holding that generally, "anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony." State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976)(citing 98 C.J.S. Witnesses §460). Brown's credibility was the central issue in this case.

Appellant's defense was that, rather than acting as appellant's less culpable accomplice, Brown was the sole perpetrator of the offenses.[3] Brown also chose to present himself to the jurors as motivated solely by concern for his salvation, and not by hope of receiving a lesser sentence. Significantly, Brown's most favorable deal had been made with this same solicitor's office.

This situation is unlike that presented in State v. Aleskey, Op. No.25212 (S.C. Sup. Ct. filed November 13, 2000) (Shearouse Adv. Sh.41 at 1). In State v. Aleskey, supra, the defendant sought to impeach an eyewitness about specific charges which had been dismissed against her in New Jersey. That witness was neither the self-confessed accomplice to the

[3]This was not an incredible defense. It is feasible that one person could have overwhelmed the two disabled victims. Further, the woman on the phone with Furman heard only one male voice, only one shoe print was found at the scene, and Brown led the police officers to the hammer.

murder for which the defendant was on trial, nor was there any evidence of her participation in the crime other than a retracted confession by the defendant. Obviously, there was no connection between the prosecutor's office in New Jersey which had dismissed the charges and the solicitor's office which was prosecuting the defendant

In this case, appellant sought to explore past dealings between Brown and the office prosecuting the current charges, not to impeach Brown through those dismissed charges, but rather to expose Brown's bias and prejudice in the present case. This excluded evidence had "a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity" of Brown's testimony. State v. Brewington, supra. We hold the trial judge committed reversible error under Rule 608(c) in refusing to permit appellant to conduct this cross-examination. In light of this holding, we need not reach appellant's argument that he should have been permitted to cross-examine Brown about the dismissed charges under Rule 608(b), SCRE.

2. Expert Testimony

A single boot print was found on Pipkin's bloody kitchen floor. The "steel toe" boots which made the impression, as well as another pair of "high-top" boots, were found in the room appellant rented at Brown's parents' home. Brown claimed appellant wore the "steel toe" boots connected to the crime, while he wore the pair of high-top boots also found in the room.

At trial, the State was permitted to introduce testimony that the "barefoot impressions" left on the "steel toe" boots' insoles were consistent with the boots having been worn by appellant. Appellant contends this "barefoot insole impression" evidence is not scientifically reliable, and further that SLED agent Derrick who conducted the examination was not a qualified expert. Finally, he argues that even if there exists such a science, and even if Derrick were qualified, the prejudicial impact of the testimony outweighed its probative value. We find this "science" unreliable, and reverse the trial court's decision to admit this evidence.

Scientific evidence is admissible under Rule 702, SCRE, if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable, applying the factors found in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); and (4) the

probative value of the evidence outweighs its prejudicial effect. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). The trial judge's decision to admit or exclude the evidence is reviewed on appeal under an abuse of discretion standard. Id.

The central thesis of "barefoot insole impression" evidence is that the primary wearer of footwear, over time, begins to leave an impression of the wearer's foot in the footwear's insole. Inked impressions of the suspected wearer's feet, photos of the suspected wearer's known insoles, and a standing cast of the suspected wearer's foot are compared to the impressions in the boots, both visually and by using calipers to compare distances between toes and other features among the various exhibits. A Canadian researcher (Kennedy), who testified for the State at trial, is currently conducting a study following R.C.M.P.[4] troopers and their new boots throughout the training process. Kennedy has compared the insole impressions made in some 200 Canadian army boots with the feet of the wearers. He began research in the area in 1989 after earlier work done by Dr. Louise Robbins was discredited.[5] Kennedy testified that different researchers use different methods in making these type comparisons, but that he felt his method (the one used by Agent Derrick) was the best. He also testified that he has revised some of his statements, but none of his methods, based on comments received after publication of his peer-reviewed articles.

In conducting the tests here, Agent Derrick relied upon a talk he heard several years earlier, three books, two of which were published before 1989, and a phone conversation with Kennedy.

We agree with appellant that the "scientific" evidence admitted at his trial does not meet the requirements for admissibility, and therefore need not address his contentions that Agent Derrick was not a qualified expert, and that the prejudicial impact of this evidence outweighed whatever probative value it may have had. State v. Council, supra. The Jones reliability factors take into consideration:

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[4]Royal Canadian Mounted Police.

[5]Kennedy is hoping to establish that each human foot is unique, but at present the most that can be said is that a foot may be "consistent" with a barefoot impression.

(1) the publications and peer reviews of the technique;
(2) prior application of the method to the type of evidence involved in the case;
(3) the quality control procedures used to ensure reliability; and
(4) the consistency of the method with recognized scientific laws and procedures. State v. Council, supra.

The State relies most heavily on Kennedy to establish that there is a science underlying "barefoot insole impressions." While Kennedy testified that he had published several peer-reviewed articles, he also testified that he was still in the process of collecting data in order to determine which standards were appropriate for comparison purposes. Further, he candidly acknowledged that earlier work in this area had been discredited.

We find the evidence presented here insufficient to meet the Jones' requirements that: (1) the technique be published and peer-reviewed; (2) the method has been applied to this type evidence; and (3) the method be consistent with **recognized** scientific laws and proceedings. In our opinion, it is premature to accept that there exists a science of "barefoot insole impressions."

An additional issue arises here as the result of the Jones requirement that the quality control procedures used ensure reliability. Neither Agent Derrick nor anyone connected with SLED had ever done this type of test before. Further, Agent Derrick admittedly had not conducted the testing in conformity with SLED's quality control precautions. The director of the SLED laboratories testified that SLED requires a written protocol on all laboratory procedures, which must be "thoroughly tested to prove their scientific validity, accuracy and repeatability." Here, there was no written protocol in existence[6] when Agent Derrick conducted his testing, much less one which had been subjected to SLED's quality control policies.

We find, therefore, that the trial judge erred in permitting expert

[6]An assistant solicitor created a protocol, in anticipation of trial, after Agent Derrick had done the testing here.

testimony purporting to demonstrate that "barefoot insole impression" testing revealed appellant's foot to be consistent with the impression made by the primary wearer of the "steel toe" boot. The admission of this evidence mandates reversal of appellant's convictions.

3. Identification

Victim Pipkin's stepson John Orr, who discovered the bodies, remained at the scene until the police arrived. Over appellant's in camera objection that the evidence improperly put appellant's character in issue, the trial judge allowed this series of questions and answers:

> Q.: Now, Mr. Orr, I was askin' you that night after all the law enforcement officers got there, did you give the police officers the name of a person they should talk to about what happened to [the victims]?
>
> A.: He had asked me if I knew anyone who might have a grudge against [Pipkin].[7]
>
> Q.: Did you give 'em a name?
>
> A.: Yes, sir.
>
> Q.: And what name did you give 'em?
>
> A.: Jeff.

The trial judge then instructed the jury:

> Ladies and gentlemen of the jury, I've allowed this testimony in only for the purpose of allowing the testimony later in which the police officers will explain why they began to look for Mr. Jones particularly. It is not for the purpose of the truth of the

[7]Nowhere in the in camera hearing did the witness indicate the question had been posed as "who had a grudge." He rephrased the inquiry in open court.

> allegation itself. Those [sic] aren't the issue. The issue is why the police officers began to look for Mr. Jones. You will hear testimony from them on that later. That is the only reason that it's introduced at this time. Alright. Go ahead.

Appellant contends this identification of him as the immediate suspect in the double homicide constitutes reversible error. We agree. In German v. State, 325 S.C. 25, 478 S.E.2d 687 (1996), this Court reversed a conviction where there were references to a police officer receiving tips that the defendant was selling crack cocaine. We held these references were improper comments on the defendant's character, and distinguished State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994). Evidence that police began an investigation because of reports of criminal activity are admissible under State v. Brown, supra. However, identification of an individual as the suspect of a criminal investigation, based upon speculation and effectively calling into question that individual's character, is not. German v. State, supra.

The State argues any error in admitting Orr's testimony was harmless. First, they point out the trial judge gave a "limiting" instruction. We decline to hold that a limiting instruction always cures an evidentiary error. Cf. State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986) (curative instruction not always sufficient to alleviate prejudice). Second, the State contends Orr's testimony was merely cumulative to other evidence that appellant was angry on the day of the murders because he felt victim Pipkin had "shorted" him on his pay. Orr's identification of appellant as an individual with a grudge sufficient to commit a double homicide is qualitatively much more damning than the statement that appellant thought Pipkin had shorted him. Under the circumstances of this case, given the extent to which the State's case depended upon the credibility of an admitted accomplice and the defense theory which sought to convince the jury that the accomplice acted alone, we find the admission of this improper character evidence reversible error.

4. Reasonable doubt charge

At the charge conference prior to the guilt phase closing arguments, neither appellant nor the State objected to the trial judge's indication that he planned to give the reasonable doubt charge outlined in State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991). In Manning, this Court suggested that the jury be charged, "A reasonable doubt is the kind of doubt that would

cause a reasonable person to hesitate to act." Id. at 417, 409 S.E.2d at 375.

Appellant's closing argument was designed to exonerate him and inculpate Brown. It focused on the fact the crime could have been committed by a single individual; on the dearth of evidence of appellant's participation other than Brown's inconsistent statements; and on Brown's credibility problems and criminal record. After reviewing the evidence, appellant's attorney turned to the law:

> Now I am gonna talk to you about a couple of concepts that we have in the law. And one is the burden of proof that the state has. Why do we have that? The state goes first. They go first and they get to present their evidence first, and the reason for that is they have the burden of proof. That's the way it should be. Because you know, a lot of times it's impossible or if not impossible to prove that you didn't - - that you weren't somewhere. They have a positive burden of proving that.
>
> The judge is gonna define reasonable doubt, and he's gonna tell you that reasonable doubt, and he's gonna tell you that reasonable doubt is a doubt that would cause a reasonable person to hesitate to act. Well, when you go through this testimony and this evidence in this case, you're gonna hesitate and you're gonna hesitate and you're gonna talk and it's gonna get slow and you're gonna hesitate and you're finally gonna have to stop. And when you stop you're gonna have to say that, you know, he's innocent. The state hasn't carried their burden.

He emphasized again:

> I want you to listen real carefully to the law. I want you to listen particularly carefully when [the judge] talks about reasonable doubt and the burden of proof and the presumption of innocence 'cause those are the concepts . . . . I'm gonna ask you and I'm gonna urge you to listen to the law as the judge charges you; apply it and use your common sense . . . .

Following counsel's argument and appellant's brief statement to the jury, the jury was excused. The solicitor then asked the judge to excise from

his reasonable doubt charge the language:

> . . . .cause a person to hesitate to act based on [appellant's attorney's] closing argument to tell the jury to go in there and discuss the evidence and deliberate you hesitate to act.
>
> Now that's not what the law is. We would request that you not charge reasonable doubt to hesitate to act because based on that argument it's telling that jury well if ya'll deliberate you're hesitating and it's not guilty. So based on the context of the closing argument by [appellant's attorney], that particular piece of law . . . . I think in the context of the closing argument and what was said to the jury it would be extremely prejudicial to charge hesitate to act.

Appellant's attorney responded he had merely argued the law, and that if he had been inaccurate, then the solicitor should have objected during his closing, rather than trying to change the charge after the fact. The solicitor continued to argue the 'hesitate to act' language was "prejudicial out the window" in light of appellant's counsel's argument. The judge took the solicitor's request under advisement and called a recess.

When he returned, the judge stated that he would excise the "hesitate to act" language in order not to "confuse" the jury. Appellant's attorney argued that his closing argument had been structured around the Manning charge given the parties the night before. The judge agreed there was nothing improper about the closing argument, but stated that he wanted the jury to "feel alright" about engaging in deliberation and discussion.

Appellant argues that it was fundamentally unfair to alter the reasonable doubt charge after he structured and delivered his argument around the "hesitate to act" language. We agree.

The Manning charge, although not required, is a correct statement of South Carolina law. Appellant reasonably relied upon the judge's representation that he intended to give that charge to the jury. The decision to alter the charge, after the argument, was fundamentally unfair. See United States v. Kostoff, 585 F.2d 378 (9th Cir. 1978); compare State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996)(no fundamental unfairness

where judge declined to give charge originally agreed to because there was no reliance upon original charge); see also State v. Woomer, 277 S.C. 170, 284 S.E.2d 357 (1981) *subsequent history omitted (*where defendant was induced to take stand under promise of limited questioning, reversible error to subject him to full examination because he relied upon limitation); cf. State v. Day, Op. No. 25167 (S.C. Sup. Ct. filed July 6, 2000)(Shearouse Adv. Sh. No. 28 at 21) (judge's refusal to charge self-defense where warranted unfairly hamstrung counsel's closing argument); cases construing Fed. R. Crim. P. 30, which provides in part, "The court shall inform counsel of its proposed action upon the requests [to charge] prior to their arguments to the jury."

Appellant's attorney told the jury that the judge would charge them reasonable doubt meant a doubt which would cause a reasonable person to "hesitate to act." The effect of the judge's after the fact decision to excise the hesitate to act language from his charge was to diminish appellant's attorney's credibility in the eyes of the jury. Compare State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994)(new trial ordered where judge's comments on counsel's age and gender impugned counsel's credibility in jury's eyes); State v. Simmons, 267 S.C. 479, 229 S.E.2d 597(1976)(new trial where judge threatened defense counsel with jail because conduct affected jury's view of counsel's credibility).

The trial judge erred when he acceded to the solicitor's demand that the reasonable doubt charge be altered. We again remind prosecutors that they are "ministers of justice and not mere advocates." State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). Their special "responsibility carries with it specific obligations to see the defendant is accorded procedural justice. . . ." Comment, Rule 3.8 of Rule 407, SCACR. It does not serve justice nor instill public confidence when we are required to reverse convictions because of errors such as these.

C. Penalty Phase

Appellant raises two penalty phase issues. First, he complains the trial court committed reversible error in admitting four color photos of the victims, and a color video tape of the crime scene. We disagree.

Two of the still photos show victim Pipkin's body at the scene. These photos were properly admitted in the sentencing phase since they accurately

"depict the victim's body in substantially the same condition" in which it was left by the defendant. State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998). The other two photos depict the wounds to victim Furman's head, with her head shaved at the autopsy. While stark, they are no more disturbing than other photos of Furman's wounds introduced without objection. The number and severity of her injuries are shown by these photos, which were properly admitted to "demonstrate the circumstances of crime and the character of the defendant." State v. Powers, supra. The crime scene video was also properly admitted to show the jury the circumstances of the crime. Id.

In his second penalty phase argument, appellant contends the trial judge erred in refusing to charge the jury that, if it found an aggravating circumstance, its sentencing choices would be either death or life without possibility of parole. For the reasons given in my dissent in State v. Kelly, Op. No. 25226 (S.C. Sup. Ct. filed January 8, 2001) (Shearouse Adv. Sh. No. 1 at 13, I would require this charge be given at appellant's retrial. Such a charge is not, however, appropriate under this Court's precedents. Id.; State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); State v. Shafer, 340 S.C. 291, 531 S.E.2d 524 (2000) *certiorari granted* 2000 WL 1057649 (September 26, 2000).

D. Conclusion

For the reasons given above, appellant's convictions and sentences are reversed, and the matter remanded for a new trial.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Donald W. Gay, Appellant.

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

Opinion No. 25243
Heard January 9, 2001 - Filed January 24, 2001

AFFIRMED

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, Senior Assistant Attorney General William Edgar Salter, III, and Solicitor W. Barney Giese, all of Columbia, for

respondent.

JUSTICE WALLER: A jury convicted appellant of murder, and the trial court sentenced him to life imprisonment. He directly appeals the conviction and sentence. We affirm.

FACTS

On December 31, 1995, the partially-clothed body of fifty-year-old Patricia Huffstetler ("victim") was discovered in the tunnel below Interstate 26, near Elmwood Avenue in Columbia ("the tunnel"). She had been stabbed four times in the chest. Approximately 20 feet from the body, there were signs of a struggle, a pair of broken eyeglasses, and drag marks which led to the body.

As part of the investigation, Detective Robert Benson was questioning people at the Salvation Army on January 3, 1996. Appellant approached Detective Benson saying that the detective would want to talk with him. Because of the late hour, Detective Benson asked appellant to come to the police station the next day. Appellant arrived at the station the following morning, and Detective Steve Rice interviewed appellant. Appellant gave Detective Rice a statement in which appellant said that he knew the victim and had last seen her a few days before Christmas. Appellant denied that he had ever been physically involved with the victim.

After hearing about the victim in the news on New Year's Day, the victim's former boyfriend, Greg Hiers, contacted police. Hiers told Detective Benson that, based on information from his Caller ID, he believed the victim had called him from a pay phone at 10:59 a.m. on December 31.[1]

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[1]Hiers also testified that he and the victim had problems with alcohol, they had met at an Alcoholics Anonymous meeting, and after he went to jail for a DUI conviction, the victim began living with Louis Metz.

The pay phone was located outside an Exxon station on Elmwood Avenue. On January 4, 1996, Detective Rice obtained the surveillance tape from the convenience store at the Exxon station for the day of December 31, 1995. That evening, Detective Rice viewed the videotape which showed the victim, together with appellant, in the convenience store from 10:48 to 10:52 a.m. Detective Rice testified that he recognized appellant because he had just interviewed him that morning.

Realizing that appellant had lied about when he last saw the victim, the police located appellant and again questioned him at the station. After being confronted with the videotape, appellant initially denied, but then admitted the tape reflected that he and the victim were together the morning of December 31.

Police searched appellant's room at the Salvation Army. In the room, police seized three trash bags and a duffel bag.[2] A damp, black sweatshirt was retrieved from one of the bags.[3] In addition, police discovered a knife under the pillow of the unoccupied bunk.

The State presented evidence that robbery was appellant's motive for the crime. In the videotape, the victim paid for her purchase at the Exxon convenience store from a white purse, and the cashier testified that the victim paid with a $50 or $100 bill. The police discovered the white purse, without any money in it, in a cemetery located between the Exxon and the tunnel. Police searched appellant's car and found a bill of sale for the car dated January 3, 1996. The seller of the car testified that appellant had purchased the car for

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[2]Appellant was not in the room at the time police conducted their search. There were six bunks in the room; with the exception of one, all the beds were occupied when police arrived. Police concentrated their search in and around the unoccupied bed. The trash bags had papers with appellant's name on them, thus indicating that the belongings were his.

[3]From the videotape, appellant appeared to be wearing a black sweatshirt on December 31.

$270, using mostly large bills.

In addition, the State presented evidence which linked appellant to the knife discovered on the bunk at the Salvation Army. Walter Armstrong testified that approximately four years before trial he gave appellant a knife similar to the one discovered and that he saw appellant with the knife as recently as November 1995. The pathologist testified that the knife was consistent with the weapon which caused the victim's stab wounds.

Finally, the State presented significant forensic evidence linking appellant to the crime. An expert in shoe print identification stated that appellant's Nike sneakers were consistent with a shoe print found near the body in the tunnel. An expert in trace evidence testified that a hair from inside the victim's coat was consistent with appellant's hair. An expert in forensic serology testified that blood stains found on appellant's jacket and his black sweatshirt were consistent with the victim's blood type and also stated that human blood was found on the knife.

Furthermore, an expert in DNA analysis testified that the blood found on the black sweatshirt matched the victim's DNA blood profile. The DNA expert also testified that semen found inside the victim's body matched appellant's DNA profile.[4] In the DNA expert's opinion, the blood on appellant's sweatshirt was the victim's blood and the semen was from appellant.

ISSUES

1. Did the trial court err in excluding evidence of third party guilt?

2. Did the trial court err by admitting a photograph of the victim and her former boyfriend?

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[4]Semen found outside the victim's vaginal area was analyzed and found to be a mixture of appellant's and another unknown male's semen.

3. Did the trial court err in not considering a minimum thirty-year sentence pursuant to the version of S.C. Code Ann. § 16-3-20(A) which was in effect at the time of sentencing?

1. THIRD PARTY GUILT

Appellant argues that third party guilt evidence related to Louis Metz was improperly excluded by the trial court.

Appellant sought to introduce evidence related to Metz in two different ways. First, through various proffers, appellant sought to introduce the following evidence about Metz. Hiers, the victim's former boyfriend, testified in camera that the victim and Metz lived together and that Metz told Hiers many times that he was going to kill the victim. Hiers stated that Metz relayed this threat to him even on the date of the victim's death. However, Hiers recalled that Metz said he was going to kill the victim in phone conversations at 5:30 p.m. and 8:30 p.m. on December 31, and the victim's body had been discovered at approximately 4:00 p.m. that day.

Additionally, appellant proffered testimony that in police interviews: (1) Metz admitted that he argued with, hit, and had sex with the victim on December 31; (2) Betty Jackson stated that Metz told her he hit the victim during an argument on December 31 because the victim had taken $300 from him and that she saw Metz's knuckles were swollen on January 1, 1996.

Appellant also sought to admit evidence that blood and hair samples were taken from Metz. Significantly, however, the forensic experts concluded that none of the evidence matched Metz. After the various proffers, the trial court did not allow appellant to introduce the evidence about Metz.

Second, there was evidence about Metz in appellant's statement to police. Specifically, in his statement, appellant told police that (1) Metz was someone "special" in the victim's life; (2) the victim talked about how Metz would "beat on her;" (3) appellant saw the victim beaten up; (4) the victim told appellant approximately 20 times in six months that Metz had beaten her up and

it was all she could talk about when she was drunk; and (5) the victim acted as if she was scared of Metz. Although the State introduced appellant's statement, it moved to redact the references to Metz. Reasoning that the evidence about Metz did not meet the standard for admissibility of third party guilt evidence, the trial court allowed the redactions.

It is well-settled that the admission and rejection of proffered testimony is within the sound discretion of the trial court and its exercise of such discretion will not be disturbed by this Court on appeal unless it can be shown that there has been an abuse of discretion, a commission of legal error in its exercise, and that the rights of the appellant have been thereby prejudiced. E.g., State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941).

Evidence offered by a defendant as to the commission of the crime by another person is limited to facts which are inconsistent with the defendant's guilt. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999); State v. Parker, 294 S.C. 465, 366 S.E.2d 10 (1988); Gregory, supra. In Gregory, this Court explained that:

> evidence offered by accused as to the commission of the crime by another person must be limited to such facts . . . as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.

Gregory, 198 S.C. at 104-05, 16 S.E.2d at 534-35 (internal quotes and citations omitted). Furthermore, this Court has held that evidence of a third party's motive and opportunity to kill the victim is properly excluded where the appellant nonetheless fails to show that the proffered evidence is inconsistent with his guilt. State v. Williams, 321 S.C. 327, 335, 468 S.E.2d 626, 631,

cert. denied, 519 U.S. 891, 117 S.Ct. 230, 136 L.Ed.2d 161 (1996).

The trial court found that given the totality of the evidence against appellant and the nature of the evidence proffered regarding Metz, the evidence was not inconsistent with appellant's guilt and thus would serve merely to cast suspicion upon Metz. In our opinion, the trial court properly exercised its discretion. See Gregory, supra.

In view of the strong evidence of appellant's guilt – especially the forensic evidence – and the fact that the forensic experts found that the samples from Metz did not match any evidence gathered in this case, the proffered evidence about Metz did not raise "a reasonable inference" as to appellant's own innocence. Gregory, 198 S.C. at 104, 16 S.E.2d at 534. Moreover, while the proffered evidence about Metz may have established evidence of motive and opportunity for Metz to kill the victim, the evidence simply was not inconsistent with appellant's guilt. Williams, supra.

Regarding the evidence about Metz in appellant's statement to police, appellant argues that the trial court erred in allowing his statement to be redacted. Appellant contends Rule 106, SCRE, required that the entire statement be admitted.

Rule 106, SCRE, provides that "[w]hen 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." In State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998), the Court stated that "[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.

The trial court did not violate Rule 106 by admitting appellant's statement because the redacted portion would not have explained or clarified that part of the statement which was admitted. See id. The admitted portion outlined how appellant knew the victim and other general information about the

victim, for example the fact that she drank "quite a lot" of alcohol. The redacted portion addressed the victim's relationship with Metz and therefore did not impact the portion the State admitted.[5] Moreover, for the reasons discussed above, we agree with the trial court that the redacted portion would have been improperly admitted as third party guilt evidence.

Accordingly, the trial court's decision to exclude evidence regarding Metz is affirmed.

2. ADMISSIBILITY OF PHOTOGRAPH

Appellant argues that the trial court erroneously admitted a photograph of the victim and her former boyfriend Greg Hiers because the photograph was irrelevant and was only offered to arouse sympathy for the victim.

During Hiers's testimony, the State admitted a photograph of Hiers and the victim taken in 1993. The photograph shows the two sitting on a bench with Hiers's arm around the victim and city lights in the background. The State established, through testimony from Hiers, that the victim was wearing her eyeglasses in the photograph.

Appellant maintains that this Court's decision in State v. Livingston, 327 S.C. 17, 488 S.E.2d 313 (1997), establishes that the admission of the photograph was improper. The Livingston Court reversed a conviction for felony driving under the influence (DUI) of marijuana where the appellant had caused a car accident, killing a woman in the other car. The woman's husband testified at trial, and a photograph of the two was admitted. This Court held that the photograph was irrelevant to the trial since DUI was the only charge at issue. The Court stated that "a photograph should be excluded if it is calculated to

[5]We note that one part of the admitted statement referenced "Lewie" (i.e. Metz); however, because there was testimony that the victim lived with Metz, this isolated reference did not require any explanation from the redacted portion.

arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate facts." Id. at 20, 488 S.E.2d at 314 (emphasis added).

The State argues that the photograph was relevant to establish the broken eyeglasses which were found in the tunnel 20 feet away from the body were actually the victim's eyeglasses. We agree. This fact was relevant to establishing that a struggle had occurred in the tunnel. See Rule 401, SCRE (evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy). In our opinion, the admission of the photograph was not "calculated to arouse the sympathy or prejudice of the jury;" instead, it was admitted to "substantiate facts" surrounding the circumstances of the murder. Livingston, 327 S.C. at 20, 488 S.E.2d at 314. Moreover, the probative value of the photograph was not outweighed by any unfair prejudicial value. See Rule 403, SCRE (relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value).

We therefore affirm the trial court's admission of the photograph.[6]

3. SENTENCING UNDER S.C. CODE ANN. § 16-3-20(A)

Appellant argues that the trial court erred in sentencing him to a mandatory life sentence where S.C. Code Ann. § 16-3-20(A) allows a minimum sentence of thirty years imprisonment.

The murder was committed on December 31, 1995. At that time, section 16-3-20(A) read in pertinent part: "[a] person who is convicted of . . . murder must be punished by death or by imprisonment for life . . . ." S.C. Code

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[6]Even assuming that the trial court erroneously allowed the photograph into evidence, its admission was harmless. See State v. Langley, 334 S.C. 643, 647-48, 515 S.E.2d 98, 100 (1999) (the erroneous admission of irrelevant evidence may constitute harmless error if the evidence did not affect the outcome of the trial).

Ann. § 16-3-20(A) (Supp. 1995). Appellant was sentenced on September 26, 1997. An amendment to section 16-3-20(A) which took effect on January 1, 1996, changed the section to read, in relevant part: "[a] person who is convicted of . . . murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years." S.C. Code Ann. § 16-3-20(A) (Supp. 1995) (emphasis added); see also 1995 S.C. Acts No. 83, § 10 ("the Act").

Appellant maintains that because the statute in effect at the time of sentencing allowed a thirty-year sentence, whereas the statute in effect at the time of the crime mandated life imprisonment, the trial court should have considered the statute in effect at the time of sentencing.[7] Specifically, appellant relies on this Court's decision in State v. Varner, 310 S.C. 264, 423 S.E.2d 133 (1992). In Varner, the Court stated that "[i]n the absence of a controlling statute, the common law requires that a convicted criminal receive the punishment in effect at the time he is sentenced, unless it is greater than the punishment provided for when the offense was committed." Id. at 265, 423 S.E.2d at 133.

Appellant argues that Varner applies, and therefore, the trial court should have considered a thirty-year sentence. However, the Varner Court indicated that the Legislature could state its intent for new, lesser penalties to take effect based on the date of the crime rather than the date of sentencing. See Varner, 310 S.C. at 266 n.3, 423 S.E.2d at 134 n.3. The Act which amended section 16-3-20 specifically addressed its effective date. Section 62 states that the Act "takes effect January 1, 1996, and applies prospectively to all crimes committed on or after that date . . . ." 1995 S.C. Acts No. 83, § 62 (emphasis added).

Because the Legislature expressly stated its intent for prospective application based upon the date of the crime's commission, the general rule of Varner does not apply. The crime in this case was committed on December 31,

[7]The trial court decided that a life sentence was mandatory.

1995, one day before the amended statute's effective date; therefore, the trial court correctly sentenced appellant to a mandatory life imprisonment term. See S.C. Code Ann. § 16-3-20(A) (Supp. 1995).

Accordingly, appellant's life sentence is affirmed.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Susan Olson,

Appellant/Respondent,

v.

Faculty House of Carolina, Inc., and the University of South Carolina,

Defendants,

South Carolina Department of Labor, Licensing and Regulation,

Intervener,

of whom Faculty House of Carolina, Inc. is

Respondent/Appellant,

and

The University of South Carolina is,

Respondent.

Appeal From Richland County
James R. Barber, III, Circuit Court Judge

Opinion No. 3289
Heard December 12, 2000 - Filed January 22, 2001

AFFIRMED AS ADDRESSED

Robert A. McKenzie and Gary H. Johnson, II, both of McDonald, McKenzie, Rubin, Miller & Lybrand, of Columbia, for appellant/respondent.

William L. Pope, of Pope & Rodgers, of Columbia, for respondent.

Andrew F. Lindemann, of Davidson, Morrison & Lindemann, of Columbia, for respondent/appellant.

Kent Lesesne, of S.C. Department of Labor, Licensing and Regulation, of Columbia, for intervener.

ANDERSON, J.: In this negligence action, Susan Olson appeals the Circuit Court's grants of summary judgment to the University of South Carolina ("the University") and to Faculty House of Carolina, Inc. ("Faculty House"). The court found Olson's action against the University was barred by the statute of limitations. In awarding summary judgment to Faculty House, the court held Olson failed to demonstrate a violation of the South Carolina Handicapped Accessibility Act, specifically S.C. Code Ann. § 10-5-260.[1] Faculty House appeals the denial of its cross motion for summary judgment on Olson's common law negligence action. We affirm as addressed.

FACTUAL/PROCEDURAL BACKGROUND

Susan Olson has suffered from polio since childhood. At the time of the accident giving rise to these actions, she walked with the aid of crutches. On November 6, 1995, Olson was in The Faculty House, which is situated on the University's Columbia campus, when her right crutch encountered an unknown liquid

[1] Since the events giving rise to these actions, the General Assembly substantially revised the Handicapped Accessibility Act, including § 10-5-260. See Act No. 303, 2000 S.C. Acts 2097.

on the floor and slipped out from under her. The Faculty House is a dining club operated by Faculty House in a building leased to it by the University. Olson did not fall, but in maintaining her balance, she tore her left rotator cuff and sustained other injuries. As a result, Olson is now confined to a wheelchair.

Olson filed a tort action against Faculty House on March 4, 1997. When Olson later discovered the University owned the premises on which the Faculty House operates, she sought to add the University as a defendant by motion dated January 22, 1998. The University answered asserting the statute of limitations as a bar and subsequently moved for summary judgment.

On September 30, 1998, the Circuit Court granted the University's motion for summary judgment dismissing it from the action. Olson did not immediately appeal this ruling.

Meanwhile, Olson pursued her actions against Faculty House for a violation of § 10-5-260 and common law negligence. Section 10-5-260 is a provision in this state's chapter governing the accessibility of public and governmental buildings to the disabled.

Faculty House moved for summary judgment on both causes of action. The Circuit Court concluded Olson failed to demonstrate a violation of a duty of care under state handicapped accessibility regulations as a matter of law. The court dismissed Olson's cause of action based on these regulations. However, the court found sufficient questions of material fact existed to preclude summary judgment on the common law negligence action. Faculty House appeals this ruling.

Olson appeals the earlier grant of summary judgment to the University and the grant of summary judgment to Faculty House.

STANDARD OF REVIEW

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. Rule 56(c), SCRCP; Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); see also Wells v. City of Lynchburg, 331 S.C.

296, 501 S.E.2d 746 (Ct. App. 1998) (a trial court should grant motion for summary judgment when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as matter of law). In determining whether any triable issue of fact exists so as to preclude summary judgment, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). If triable issues exist, those issues must go to the jury for consideration. Rothrock v. Copeland, 305 S.C. 402, 409 S.E.2d 366 (1991); Joubert v. South Carolina Dep't of Soc. Servs., 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000).

LAW/ANALYSIS

All actions in negligence require proof of: duty; breach; causation; and damages.

> To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty. If the plaintiff fails to prove any one of these elements, the action will fail. Actionable negligence is based upon the breach of duty to do or refrain from doing some particular act. A breach of duty exists when it is foreseeable that one's conduct may likely injure the person to whom the duty is owed. The damages allegedly sustained must be shown to have been proximately caused, i.e. causally connected, to the breach of duty in order to warrant a recovery. If one neglects a duty which proximately causes injury to another, recovery is warranted.

Vinson v. Hartley, 324 S.C. 389, 399-400, 477 S.E.2d 715, 720 (Ct. App. 1996) (citation omitted).

I. Olson's Appeal of Summary Judgment in Favor of Faculty House[2]

Olson raises the following issues on appeal:

I. Did she establish Faculty House violated American National Standards Institute (ANSI) standards?

II. Does the Handicapped Accessibility Act create a higher duty of care than the common law?

III. Does S.C. Code Ann. § 10-5-260 give rise to a private cause of action permitting the recovery of monetary damages?

IV. Did Olson establish Faculty House's alleged violation of the Handicapped Accessibility Act proximately caused her injury?

A. Duty & Breach

We first address Olson's argument that the South Carolina Handicapped Accessibility Act, S.C. Code Ann. §§ 10-5-210 to -330, established Faculty House's duty of care and this duty was higher than that required by common law. We then turn to whether Olson presented evidence Faculty House breached any alleged duty under the Handicapped Accessibility Act.

Olson maintains the court erred in finding she failed to establish the Faculty House violated the Handicapped Accessibility Act. Olson specifically argues: (1) ANSI standards regarding the recommended coefficient of friction apply to wet floors, as well as dry; and (2) Faculty House failed to properly maintain the floor's elements and components in a safe and usable condition. We disagree.

In 1963, the General Assembly enacted legislation for the construction of public buildings in such a manner as to make them accessible to physically disabled persons. Act No. 174, 1963 Acts 189. Eleven years later, the legislature acted again by passing the Handicapped Accessibility Act:

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[2] We address the other issues raised in Olson's brief within the discussions of the University's and Faculty House's appeals.

> The General Assembly hereby declares that it shall henceforth be the policy of this State to encourage and enable persons who are physically handicapped to achieve maximum personal independence; to become gainfully employed; to use and enjoy all governmental buildings and facilities and all public buildings and facilities; and to otherwise participate fully in all aspects of society. The General Assembly resolves to enact legislation necessary to implement this policy and the purpose of this article is to begin this implementation.

Act No. 1171, 1974 Acts 2794 (codified as Code 1962, § 1-491 (Supp. 1975) & S.C. Code Ann. § 10-5-230 (1986 & Supp. 1999)).

In keeping with this goal, the legislature created the South Carolina Board for Barrier-Free Design ("Board"). Id. (codified as Code 1962, § 1-493 (Supp. 1975) & S.C. Code Ann. § 10-5-230 (1986 & Supp. 1999)). The Board's duties include the establishment, publication, and enforcement of minimum standards and specifications for the removal of architectural barriers to the handicapped in government and public buildings. See id. (codified as Code 1962, § 1-495(1) (Supp. 1975) & S.C. Code Ann. § 10-5-250(1) (1986 & Supp. 1999) ("In this connection the Board shall adopt the latest revisions of the Standard Building Code and the American National Standards Institute specifications A117.1 with such modifications as the Board shall deem appropriate.").

Pursuant to the authority granted to it, the Board adopted ANSI specifications in its regulations. 23 S.C. Code Ann. Regs. 19-400.2(B)(1), as initially promulgated, stated:

> The provisions of these rules and regulations may not adequately provide for every contingency relating to barriers for the handicapped. In **situations not contemplated by the provisions of these rules and regulations, compliance with the Standard "Specifications for Making Buildings and Facilities Accessible To, and Usable By the Physically Handicapped," American National Standards Institute (ANSI), A117.1 (1961 R.71) shall be evidence of compliance with the intent of these rules and regulations.**

(emphasis added).

The Board significantly revised Regulation 19-400 in 1983. Nevertheless, reference to and reliance upon ANSI specifications continue to pervade the regulation:

> **Every building or structure shall have all levels and areas made accessible to the physically handicapped in accordance with American National Standards Institute, Inc., "Providing Accessibility and Usability for Physically Handicapped People", ANSI A117.1** ... and the requirements of this section ....

23 S.C. Code Ann. Regs. 19-400.1(1) (Supp. 1999) (emphasis added).

> **Terms and definitions contained in ANSI A117.1 are herein incorporated by reference**.

23 S.C. Code Ann. Regs. 19-400.2(3) (Supp. 1999) (emphasis added).

Over the years, ANSI standards have changed and the parties in the instant case disagree as to the applicable set of ANSI standards. None of the ANSI guidelines presented include a recommended coefficient of friction. The 1961 ANSI guidelines merely require floors to have a "nonslip" surface. See 1961 ANSI A117.1, §5.5.1. The 1992 ANSI guideline A117.1, §4.5.1 reads:

> Slip resistance is based on a frictional force necessary to keep a shoe or crutch tip from slipping on a walking surface under the conditions of use likely to be found on the surface. **Although it is known that the static coefficient of friction is one basis of slip resistance, there is not as yet a generally accepted method to evaluate the slip resistance of walking surfaces for all use conditions.**

(emphasis added).

ANSI guidelines generally specify that floors "shall be stable, firm, and slip resistant, and shall comply with 4.5." Id.

Viewing the record in the light most favorable to Olson, there is no evidence Faculty House violated an ANSI standard or any other applicable standard regarding floor surfaces. Olson's expert witness, Bryan Durig, testified he knew of no ANSI minimum baseline coefficient of friction for a wet floor. Furthermore, Durig admitted

he knew of no minimum baseline published for a wet floor. He conceded the American Disability Act ("ADA") standards were not in existence in 1976 when the Faculty House was renovated. Durig further averred that based on test results, the floor would not have been unreasonably dangerous had it been dry.

Olson presented evidence regarding standards from the Occupational Safety Health Act (OSHA) and ADA. Ronald Steinaker, P.E., an expert, acknowledged there is no consensus as to whether the OSHA standard of .5 refers to a wet or dry floor. He further admitted there is no consensus as to whether the ADA recommended coefficient of friction of .6 applies to wet or dry floors.

Steinaker tested the floor of the Faculty House and determined it to have a coefficient of friction when dry of .61. This would satisfy OSHA standards and even ADA standards, although they are not applicable. After removing sealer and or wax from the floor, Steinaker found it to have a .55 coefficient of friction when dry.

Olson contends the Faculty House failed to properly maintain a structural or building element or component in a safe and usable condition as required by § 10-5-260. Section 10-5-260 provides: "It is the responsibility of the owner or the occupant of any property which contains structural or building elements or components required to be in compliance with this article, to continuously maintain these elements and components in a condition that is safe and usable by handicapped persons at all times." Olson, however, presented no testimony that the surface material of a floor is a structural or building element as intended by the legislature. The quintessence of statutory construction is legislative intent. Hodges v. Rainey, Op. No. 25149 (S.C.Sup.Ct. filed June 12, 2000) (Shearouse Adv.Sh. No. 24 at 41). While § 10-5-260 may evidence a duty with respect to maintenance of the structural elements of buildings, we do not find it establishes a duty with regard to the floor surface material.

Assuming, arguendo, § 10-5-260 does manifest some duty concerning the floor, Olson did not present any evidence Faculty House failed to maintain the floor elements in a "safe and usable" condition. Olson's sole argument is that the floor was not properly maintained because liquid was on it. We find the plain and ordinary meaning of "maintain" under § 10-5-260 refers to the safety of the structural elements of the floor, not to the presence of a liquid on its surface.

We conclude Olson failed to present any evidence Faculty House violated ANSI,

ADA, OSHA, or other standards or regulations regarding nonslip floors or that the floor material itself was defective or improperly maintained.

Olson argues the language of § 10-5-260 creates a higher standard of care than that required under common law and the court failed to recognize this. However, she cites no case law in support of her assertion. She instead relies solely on a paragraph from 57A Am. Jur. 2d Negligence § 199:

> Persons who are known to have mental or physical disabilities, or who are young and inexperienced, are entitled to a degree of care exercised by others proportioned to their incapacity to protect themselves. They are not to be accorded the same treatment as persons of mature years and of sound mentality. No general rule can be articulated, for the standard of care in situations involving victims having these characteristics requires that a determination of what constitutes "reasonable care" be made in each individual case, taking into consideration the victim's known mental and physical condition. Generally, the greater the disability, the greater is the degree of care required.

This is a general section and does not address statutory standards of care. It is not enlightening on the duty of care owed under the Handicapped Accessibility Act.

The common law regarding the duty of a business person to the business' patrons is well-established:

> [A] merchant is not an insurer of the safety of a customer in his store. His duty is to exercise due care to keep his premises in reasonably safe condition. Proof that a dangerous condition of the floor existed because of the presence of some foreign matter thereon is insufficient, standing alone, to support a finding of negligence. Unless it is inferable from the evidence that the storekeeper was responsible for creating the hazard, knowledge of its existence, either actual or constructive, is essential to recovery against him. The defendant will be charged with constructive notice whenever it appears that the condition has existed for such length of time prior to the injury that, under existing circumstances, he should have discovered and remedied it in the exercise of due care; conversely, absent evidence of such preexistence, the defendant may not be so

charged.

Anderson v. Winn-Dixie Greenville, Inc., 257 S.C. 75, 77, 184 S.E.2d 77, 77 (1971) (citing Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262 (1957); Gilliland v. Pierce Motor Co., 235 S.C. 268, 111 S.E.2d 521 (1959); Wimberly v. Winn-Dixie Greenville, Inc., 252 S.C. 117, 165 S.E.2d 627 (1969); Pennington v. Zayre Corp., 252 S.C. 176, 165 S.E.2d 695 (1969)).

The determination of legislative intent is a matter of law. Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995). If a statute's language is plain and unambiguous, and articulates a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995). Where the provisions of a statute are clear, the court must apply those terms according to their literal meaning. Id. The appellate court cannot construe a statute without regard to its plain and ordinary meaning, and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope. Id.; see also Timmons v. South Carolina Tricentennial Comm'n, 254 S.C. 378, 175 S.E.2d 805 (1970) (where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language).

A rule of statutory construction is that any legislation which is in derogation of common law must be strictly construed and not extended in application beyond clear legislative intent. Smalls v. Weed, 293 S.C. 364, 360 S.E.2d 531 (Ct. App. 1987); South Carolina Dep't of Soc. Servs. v. Wheaton, 323 S.C. 299, 474 S.E.2d 156 (Ct. App. 1996). Therefore, a statute is not to be construed in derogation of common law rights if another interpretation is reasonable. Hoogenboom v. City of Beaufort, 315 S.C. 306, 433 S.E.2d 875 (Ct. App. 1992).

The intent of § 10-5-260 is not to create any greater duty of care than the duty of care established under the common law. The General Assembly did **not** intend to abrogate the common law in favor of a heightened standard of care owed only to disabled persons. We reject the position taken by Olson that the statute articulates a higher standard of care than the common law.

B. Private Cause of Action

As a corollary to the question of the existence of a duty as evidenced by the Act, Olson submits § 10-5-260 creates a private cause of action. Assuming, arguendo, Olson established a breach of the Handicapped Accessibility Act, we find § 10-5-260 does not create a private cause of action.

The main factor in determining whether a statute creates a private cause of action is legislative intent. Dorman v. Aiken Communications, Inc., 303 S.C. 63, 398 S.E.2d 687 (1990). In Dorman, the Supreme Court elucidated:

> The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the statute .... In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability.

Id. at 67, 398 S.E.2d at 689 (quoting Whitworth v. Fast Fare Markets of S.C., Inc., 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985)).

Section 10-5-260 does not evidence any legislative intent that it created a private cause of action. This section states:

> After January 1, 1975, no person may construct or permit the construction of a governmental building or a public building or any facility of either unless the building and facility is designed in compliance with the standards and regulations adopted pursuant to this article.
>
> After January 1, 1975, no person may renovate or permit the renovation of a governmental building or a public building or any facility of either unless the portions or areas being renovated are designed in compliance with the standards and specifications established pursuant to this article.
>
> It is the responsibility of the owner or the occupant of any property which contains structural or building elements or components

> required to be in compliance with this article, to continuously maintain these elements and components in a condition that is safe and usable by handicapped persons at all times.

The Handicapped Accessibility Act does include a private cause of action under another section. Section 10-5-290 reads:

> Any person who is injured, deprived of employment, denied access to public buildings or facilities, or is otherwise deprived of his rights as a citizen as declared in the statement of state policy set forth in Section 10-5-210 may enforce his rights **by injunction** and recover damages in a proper case in the court of common pleas **when his action is based on a violation of regulations promulgated by the board**.

(emphasis added).

This section is only available for a violation of a **regulation promulgated by the Board for Barrier-Free Design**. Faculty House attests that ANSI, OSHA, or other standards are not regulations promulgated by the Board. Conversely, Olson asseverates the Board's adoption of ANSI standards in its regulations was the functional equivalent of promulgating a regulation. Were we to accept Olson's argument, it is unavailing as Olson neither established a violation of ANSI standards under the Handicapped Accessibility Act nor asserted a cause of action pursuant to § 10-5-290.[3] We note additionally that Olson did not move for injunctive relief as provided by § 10-5-290.

A comparison of the language of § 10-5-260 with that of § 10-5-290 makes it abundantly certain the legislature did not intend for § 10-5-260 to create a private cause of action in addition to the one articulated in § 10-5-290.

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[3] Olson's issue on appeal concerning this matter is framed solely as:

> Did the Court err in holding that there is no private right of action for the recovery of money damages for a breach of the duty of care set forth in S.C. Code Ann. § 10-5-260, as amended, such a recovery being provided for only where there is a violation of regulations promulgated by the South Carolina Board for Barrier Free Design as provided in S.C. Code Ann. § 10-5-290, as amended?

The Handicapped Accessibility Act places further enforcement of its provisions solely with public officials rather than private individuals.

> Enforcement--The enforcement of these Regulations including investigations shall be the responsibility of the Building Official of the county or municipality. If the county or the municipality does not have a Building Official, the Chief Fire Inspector shall then enforce these Regulations. If a county or municipality does not have a Building Official or a Chief Fire Inspector, then the Director of Building Codes and Regulatory Services/Inspection Services of the State Budget and Control Board shall enforce these Regulations in the county or municipality.

23 S.C. Code Ann. Regs. 19-400.5(5).

We find the Circuit Court did not err in concluding Olson did not demonstrate a private cause of action under § 10-5-260.

C. Proximate Cause

Olson avers the Circuit Court erred in finding she failed to present evidence the floor's alleged insufficient coefficient of friction proximately caused her accident. In order to be actionable, negligence must be the proximate cause of a plaintiff's injury. Hubbard v. Taylor, 339 S.C. 582, 529 S.E.2d 549 (Ct. App. 2000).

Proximate cause requires proof of both causation in fact and legal cause. Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993). Causation in fact is proved by establishing the plaintiff's injury would not have occurred "**but for**" the defendant's negligence. Id. (emphasis added).

Legal cause, in contrast to the "but for" nature of causation in fact, turns on the issue of foreseeability. Clark v. Cantrell, 332 S.C. 433, 504 S.E.2d 605 (Ct. App. 1998); see also Bishop v. South Carolina Dep't of Mental Health, 331 S. C. 79, 88-89, 502 S.E.2d 78, 83 (1998) ("Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence. Legal cause is proved by establishing foreseeability.") (citations omitted). "The touchstone of proximate cause in South Carolina is foreseeability. Foreseeability is determined by looking to the natural and probable consequences of the act complained of." Vinson v. Hartley, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996). Foreseeability is not determined from hindsight, but rather from the defendant's

perspective at the time of the complained of act. Id. at 324 S.C. at 401, 477 S.E.2d at 721.

"A negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred." Id. In other words, if the accident would have happened as a natural and probable consequence, even in the absence of the alleged breach, then a plaintiff has failed to demonstrate proximate cause.

Olson alleges that "but for" the floor being in violation of the Handicapped Accessibility Act, she would not have been injured. Viewing the record in the light most favorable to Olson, the evidence does not demonstrate that maintenance of the floor or the floor's coefficient of friction was responsible for Olson's accident. Rather, the evidence indicated that "but for" the unknown liquid on the floor, Olson would not have been injured.

Durig maintained the floor was unreasonably dangerous because it was wet, not because of its coefficient of friction. He avowed that based on the test results, **the floor would not have been unreasonably dangerous had it been dry**.

Olson similarly failed to present evidence her fall was foreseeable as the natural and probable consequence of the floor's coefficient of friction. The dry floor had a coefficient of friction of .61. The floor, when dry, met all of the proposed applicable standards regarding nonslip surfaces and coefficients of friction. While the question of proximate cause is ordinarily an issue for the jury, Olson failed to present any evidence the floor itself, not the liquid, was the cause in fact and the legal cause of her injury. See id. at 402, 477 S.E.2d at 721 (stating proximate cause is generally a jury question). The only reasonable conclusion to be drawn from the evidence is that the presence of the liquid proximately caused Olson's injury. The Circuit Court therefore properly declined to submit the case to a jury and granted summary judgment to Faculty House.

II. Olson's Appeal of the University's Dismissal

Olson additionally appeals the grant of summary judgment dismissing the University from the case. The trial court found Olson did not initiate her action within the two years mandated by the South Carolina Tort Claims Act.

The General Assembly promulgated the applicable statute of limitations in § 15-78-110:

> Except as provided for in Section 15-3-40, any action brought pursuant to this chapter is forever barred **unless an action is commenced within two years after the date the loss was or should have been discovered**; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

(emphasis added).

The Tort Claims Act defines "loss" in this case as "bodily injury." S.C. Code Ann. § 15-78-30(f) (Supp. 1999). Olson, therefore, was required to bring this action within two years from her injury on November 6, 1995. Olson, however, did not move to add the University until January 1998.

The University asserts Olson's appeal is not timely because Olson waited more than a year after the ruling before deciding to appeal the order. We agree.

Olson cites Link v. School District of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990), for the proposition that it is permissible to wait to appeal the grant of summary judgment in a multi-claim action until final judgments have been rendered on all other claims. Link, however, did not deal with multiple defendants and is not controlling under the circumstances of this case.

Olson further relies on an unpublished order of this Court in an unrelated case. Unpublished orders by a single judge of this court are not binding on this Court. Cf. Lanham v. Blue Cross & Blue Shield of S.C., Inc., 338 S.C. 343, 349, 526 S.E.2d 253, 256 (Ct. App. 2000) ("[U]npublished opinions [of the appellate courts] have no precedential value.").

Rather, appealability turns on § 14-3-330. See James F. Flanagan, South Carolina Civil Procedure 430 (2d ed. 1996) ("The appealability of trial court orders remains determined by the Supreme Court's jurisdictional statute."). Section 14-3-330 declares:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and **final judgments in such actions**; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order affecting a substantial rights 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 pleadings in any action.
>
> (*3)* A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying or refusing an injunction or granting, continuing, modifying or refusing the appointment of a receiver.

(emphasis added).

The court's grant of summary judgment to the University based on the statute of limitations was a final order because it left nothing further for determination. "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory; **but if it so completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final**." Adickes v. Allison & Bratton, 21 S.C. 245, 259 (1883) (emphasis added); see also Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) ("South Carolina case law has established what constitutes an interlocutory appeal. If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory.

If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment.") (citations omitted).

The order expressly ruled that **all** of Olson's claims against the University were barred by the statute of limitations. This ruling therefore adjudicated all of the claims as to the University. Faculty House did not assert the statute of limitations as a defense. Olson's claims against Faculty House were thus separate and discrete from her claim against the University. The fact Olson had continuing claims against Faculty House was irrelevant to the dismissal of the University. Nothing short of direct appeal could resurrect the action against the University.

In today's world the proliferation of parties is a common occurrence. Were we to adopt Olson's view, a dismissed party would be "on hold" indefinitely.

The timely service of an appeal is a jurisdictional requirement that cannot be waived. Rule 203, SCACR. That rule enunciates, in pertinent part:

> (a) **Notice**. A party intending to appeal must serve and file a notice of appeal and otherwise comply with these Rules.
>
> (b) **Time for Service**
> (1) Appeals from the Court of Common Pleas. A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment ....

Olson failed to timely serve her appeal of the trial court's dismissal of the University. Therefore, this Court may not review the grant of summary judgment.

Assuming, arguendo, she could appeal the dismissal, Olson claims the Handicapped Accessibility Act created an independent cause of action not subject to the Tort Claims Act's statute of limitations. This argument is without merit. We have already concluded § 10-5-260 does not establish a private cause of action in addition to that found in § 10-5-290.

Even if Olson had been permitted to proceed against the University under the Handicapped Accessibility Act, the Tort Claims Act's statute of limitations would bar the action.

The Tort Claims Act is the **exclusive** remedy when a party is injured by a governmental entity. Section 15-78-200 announces:

> **Notwithstanding any provision of law, this chapter, the "South Carolina Tort Claims Act" is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty**. The provisions of this chapter establish limitations on and exemptions to the liability of the governmental entity and must be liberally construed in favor of limiting the liability of the governmental entity.

(emphasis added).

The University is clearly a governmental entity under the provisions of the Tort Claims Act. Section 15-78-30(d) defines "governmental entity" as the State or its political subdivisions. Concomitantly, § 15-78-30(e) declares:

> "State" means the State of South Carolina and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities, including the South Carolina Protection and Advocacy System for the Handicapped, Inc., and institutions, including state-supported governmental health care facilities, schools, colleges, **universities**, and technical colleges.

(emphasis added).

The Tort Claims Act thus governs this action regardless of the Handicapped Accessibility Act. At most, the Handicapped Accessibility Act provides evidence of a duty owed to Olson by the University to maintain its buildings in a manner in which they are accessible to the handicapped — it does not supplant or override the Tort Claims Act.

We find the Circuit Court properly declined to permit Olson to pursue a cause of action based on the Handicapped Accessibility Act. The two-year statute of limitations found in the Tort Claims Act is applicable to all causes of action against the University and other governmental entities whether the alleged duty violated arises

under the Handicapped Accessibility Act, another statute, or common law.

III. Faculty House's Appeal

Faculty House appeals the Circuit Court's denial of its motion for summary judgment on the ground Olson failed to demonstrate Faculty House was negligent by either placing the liquid on the floor or by failing to remove it after having actual or constructive notice of the liquid's presence.

We are aware that generally, the denial of a motion for summary judgment is not immediately appealable. Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1991). Our appellate courts, however, have recognized an exception to this rule. Specifically, the courts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable.

Our examination of the case law regarding this exception begins with the Supreme Court's agreement to consider an appeal of whether a trial court erred in failing to require a party make its complaint more definite in Briggs v. Richardson, 273 S.C. 376, 256 S.E.2d 544 (1979). Additionally appealed to the Court for its review was an issue of whether the trial court erred in overruling the appellant's demurrer. Presented with the question of whether to address the denial of the motion for a more definite complaint, the Briggs Court pronounced: "While not normally appealable, [the] issue [concerning the motion for a more definite complaint] is before the Court due to the appealability of the first issue [regarding the demurrer]." Id. at 379 n.1, 256 S.E.2d at 546 n.1.

This Court has taken a concordant view concerning the propriety of reviewing interlocutory orders not ordinarily immediately appealable.

In Garrett v. Snedigar, 293 S.C. 176, 359 S.E.2d 283 (Ct. App. 1987), partners in a real estate venture brought an action for fraud, breach of contract, and violations of the South Carolina Uniform Securities Act against the organizer, a construction company, and an investment advisor who was retained to market the partnership. The investment advisor was also sued for negligence. The Circuit Court granted the plaintiffs' motion for summary judgment, which concerned the issue of whether their interests in the partnership were securities. The trial court additionally granted the plaintiffs' motion to amend their cause of action for negligence and denied

the investment advisor's summary judgment motion pertaining to this claim. On appeal, the investment advisor argued, inter alia, the trial court erred in acting on the plaintiffs' motion to amend without holding a hearing separate from his motion for summary judgment. In response, the Court stated:

> An interlocutory appeal of this issue ... is not normally allowed. See Davis-McGee Mule Co. v. Marett, 129 S.C. 36, 37, 123 S.E. 323, 323 (1924) ("No appeal can be made except from a final judgment."). An order denying summary judgment cannot be appealed, even after trial. Holloman v. McAllister, 289 S.C. 183, 345 S.E.2d 728 (1986). **However, these issues are properly before us because the issue of whether the Circuit Court erred in granting the motion of the plaintiffs for partial summary judgment is appealable. See Briggs v. Richardson, 273 S.C. 376, 379, 256 S.E.2d 544, 546 (1979) ("While not normally appealable, this issue is before the Court due to the appealability of the first issue."**).

Id. at 183 n.2, 359 S.E.2d at 287 n.2 (emphasis added).

Numerous reviews of denials of summary judgment motions have occurred since Garrett. See Anthony v. Padmar, Inc., 307 S.C. 503, 415 S.E.2d 828 (Ct. App. 1992), cited in 4 Am. Jur. 2d Appellate Review § 170 (1995) (in a case where opposing motions for summary judgment resulted in the trial court granting one and denying the other, the Court of Appeals held the party whose motion was denied may have the denial reviewed on the appeal because the question of whether the trial court erred in granting the other motion was appealable); Pruitt v. Bowers, 330 S.C. 483, 488, 499 S.E.2d 250, 253 (Ct. App. 1999), cert. denied ("[Respondent/Appellant] argues the trial court erred in granting [Appellant/Respondent's] motion to amend her complaint. [Appellant/Respondent] responds that the order granting the motion is interlocutory and thus not appealable. We agree that under the precedent of Briggs v. Richardson ... and Garrett v. Snedigar ... [Respondent/Appellant's] appeal of the amendment order is interlocutory and generally not appealable, but may be considered by the court because it accompanies the appeal of the grant of [Respondent/Appellant's] motion for summary judgment."); Tanner v. Florence City-County Bldg. Comm'n, 333 S.C. 549, 553, 511 S.E.2d 369, 371 (Ct. App. 1999) (this Court ruled: "[A]n order that is not directly appealable will be considered if there is an appealable issue before this court.").

In Davis v. Lunceford, 287 S.C. 242, 335 S.E.2d 798 (1985), the Supreme Court held reviewing the denial of summary judgment was proper to resolve protracted litigation: "Because of the need for final resolution in this [13-year-old medical malpractice] case, we have allowed this direct appeal from the lower court's order denying appellant's motion for summary judgment."). Id. at 243, 335 S.E.2d at 799. The issue of whether the denial was proper was the only one on appeal.

This Court has reviewed the denial of Faculty House's motion for summary judgment as it pertained to Olson's common law negligence claim in accordance with the preceding authorities. We find it important to note that regardless of whether a denial of a motion for summary judgment is reviewable when in tandem with appealable issues, the parties have briefed, with specificity, the **merits** of the denial of Faculty House's motion for summary judgment. Numerous cases have been cited and argued in regard to a final disposition of this issue. In essence, the parties have consented to have the matter adjudicated by this tribunal. It would therefore be strikingly strange to bottom and premise our opinion on a technicality not raised by any party.

The continued viability of Garrett is debatable given the recent decisions of Silverman v. Campbell, 326 S.C. 208, 486 S.E.2d 1 (1997) and Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994).

In Ballenger, the Court stated:

> This Court has repeatedly held that the denial of summary judgment is not directly appealable .... Further, this Court has held that the denial of summary judgment is not reviewable even in an appeal from final judgment.

Id. at 476-77, 443 S.E.2d at 380.

In addition, the Ballenger Court noted that it is "unnecessary [for the trial judge] to make findings of fact and conclusions of law in denying motions for summary judgment." Id. at 478 n.1, 443 S.E.2d at 380 n.1 (citing Rule 52, SCRCP). Thus, there would be no basis on which an appellate court could make its review.

In Silverman, our Supreme Court refused to consider the appellants' claim that the trial court had erred in denying its motion for summary judgment, although it did

consider another issue raised by appellants because it was immediately appealable. Thus, the presence of an immediately appealable issue in the order did not make the denial of summary judgment reviewable in that instance. Id. at 211, 486 S.E.2d at 3; cf. Hollman v. McAllister, 289 S.C. 183, 345 S.E.2d 728 (1986) (declining to address denial of summary judgment after trial while addressing other appealable issues); Davis v. Tripp, 338 S.C. 226, 525 S.E.2d 528 (Ct. App. 1999) (stating denial of summary judgment was not reviewable either before or after final judgment and expressly declining to address denial of summary judgment).

Silverman may represent an attempt to curtail Garrett-style exceptions, thereby requiring a closer inquiry into their continued viability.

Because of the dissonance in the precedent in regard to the appealability of the denial of a motion for summary judgment, we decline to address the issue on the merits.

CONCLUSION

We hold Olson did not establish any violation of ANSI specifications, as referenced in the South Carolina Handicapped Accessibility Act, regarding the "slip-resistance" of Faculty House's flooring. We conclude the General Assembly did not intend to create a heightened standard of care, which businesses would owe solely to their disabled patrons, with the passage of the Handicapped Accessibility Act. We rule § 10-5-260 does **not** create a private cause of action. We find Olson did not satisfy the element of proximate cause by failing to show "but for" the lack of "slip-resistance" on Faculty House's flooring, she would not have incurred her injuries.

The Tort Claims Act governs tort actions brought against the state or its political subdivisions. It is the exclusive remedy for persons injured by a governmental entity. The University is an agency of South Carolina state government. Therefore, the provisions of the Tort Claims Act apply in the instant case. Pursuant to the Tort Claims Act, claimants have two years from the date of injury to institute litigation against a tortfeasor governmental entity. Olson did not add the University to the action until more than two years had elapsed after her fall at the Faculty House. This Court affirms the Circuit Court's ruling that Olson was time-barred in her claim against the University.

Finally, we decline to address the Circuit Court's denial of Faculty House's

motion for summary judgment regarding Olson's common law negligence claim.

For the foregoing reasons, the Circuit Court's judgments are

AFFIRMED AS ADDRESSED.

CURETON AND SHULER, J.J., concur.