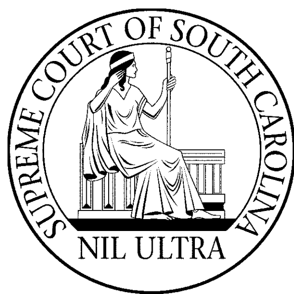

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

December 17, 2001

ADVANCE SHEET NO. 44

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

	Page
25389 - State v. Robert G. McGowan, Jr.	10
25390 - In the Matter of Michael R. Deddish	19
25391 - Jermano Gary v. State	23
25392 - Philbert R. Fuller v. State	27
25393 - Richard Solomon v. State	32
Order - Amendment to Rule 33(g), Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR	41
Order - Amendments to Rule 415, SCACR	43

UNPUBLISHED OPINIONS

2001-MO-073 - Henry Green v. State
(Richland County - Judge James Williams, Jr. and Judge Alexander S. Macaulay)

PETITIONS - UNITED STATES SUPREME COURT

2001-OR-00171 - Robert Lamont Green v. State	Pending

PETITIONS FOR REHEARING

25371 - Anand Patel v. Nalini Patel	Denied 12/12/01
25373 - State v. Max Knoten	Denied 12/12/01
25374 - H. Clinton Sloan, et al. v. The City of Conway, etc.	Denied 12/12/01
2001-MO-064 - State v. Rodney Jennings Russell	Denied 12/12/01

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

Page

3419 Martin v. Paradise Cove Marina, Inc. 48

3420 Brown v. Carolina Emergency Physicians 56

3421 Trivelas v. SCDOT 71

3422 Allendale County Bank v. Cadle 88

UNPUBLISHED OPINIONS

2001-UP-531 Snyder v. Berkeley County School District
(Berkeley, Judge Victor A. Rawl)

2001-UP-532 Parks v. Abbeville County Sheriff
(Abbeville, Judge Wyatt T. Saunders, Jr.)

2001-UP-533 Corbett v. The Cottages at Shipyard Regime, III
(Beaufort, Thomas Kemmerlin, Jr., Master-in-Equity and Special Circuit Judge)

2001-UP-534 Holliday v. Cooley
(Greenville, Judge Jackson V. Gregory)

2001-UP-535 Powell v. Life Insurance Co. of North America
(Cherokee, Roger L. Couch, Special Circuit Judge)

2001-UP-536 Worley v. Worley
(Greenville, Judge Billy A. Tunstall, Jr.)

2001-UP-537 State v. Ronnie H. Wessinger
(Cherokee, Judge J. Derham Cole)

2001-UP-538 State v. Edward Mack
(Richland, Judge L. Henry McKellar)

2001-UP-539 - State v. Antonio Grate

(Georgetown, Judge Paula H. Thomas)

2001-UP-540 State v. Robert Wesley Crum
(Orangeburg, Judge L. Henry McKellar)

2001-UP-541 State v. Antonio Simpson
(Berkeley, Judge R. Markley Dennis, Jr.)

2001-UP-542 State v. Samuel Cooper
(Williamsburg, Judge M. Duane Shuler)

2001-UP-543 Benton v. Manker
(Beaufort, Thomas Kemmerlin, Jr., Master-in-Equity)

2001-UP-544 State v. Christopher Sanders
(Barnwell, Judge Thomas W. Cooper, Jr.)

PETITIONS FOR REHEARING

3382 - Cox v. Woodmen	Pending
3393 - Vick v. SCDOT	Pending
3402 - State v. Donald Ray Wimbush	Pending
3403 - Christy v. Christy	(2) Pending
3404 - State v. Charles M. Stuckey, Jr.	Pending
3405 - State v. Jerry Martin	(2) Pending
3406 - State v. Yukoto Cherry	Pending
3408 - Brown v. Stewart	Pending
3411 - Lopresti v. Burry	(2) Pending
3418 - Hedgepath v. AT&T	Pending
2001-UP-419 - Moak v. Cloud	Pending

2001-UP-424 - Boan v. Boan	Pending
2001-UP-430 - State v. Dale Johnson	Pending
2001-UP-435 - State v. Ronald J. Huell	Pending
2001-UP-452 - Bowen v. Modern Classic Mtrs.	Pending
2001-UP-454 - Greenville National v. Simmons	Pending
2001-UP-455 - Stone v. Roadway Express	Pending
2001-UP-456 - Ray v. SC State University	Pending
2001-UP-460 - City of Aiken v. Cannon	Pending
2001-UP-461 - Storage Trailers, Inc. v. Proctor	Pending
2001-UP-465 - Town of Yemassee v. Yisrael	Pending
2001-UP-468 - Shealy v. Hare	Pending
2001-UP-469 - James Schneider v. State	Pending
2001-UP-470 - SCDSS v. Hickson	Pending
2001-UP-476 - State v. Jeffery Walls	Pending
2001-UP-477 - State v. Alfonso Staton	Pending
2001-UP-478 - State v. Leroy Staton	Pending
2001-UP-479 - State v. Martin McIntosh	(2) Pending
2001-UP-493 - State v. Marcus Griffin	Pending
2001-UP-507 - Adams v. Greaves	Pending
2001-UP-513 - Industrial Tractor Co., Inc. v. Poovey	Pending
2001-UP-518 - Abbott Sign Co. v. SCDOT	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3271 - Gaskins v. Southern Farm Bureau	Pending
3314 - State v. Minyard Lee Woody	Pending
3321 - Andrade v. Johnson	Pending
3333 - State v. Dennis Zulfer	Pending
3344 - Henkel v. Winn	Pending
3346 - State v. Thomas Ray Ballington	Pending
3348 - Thomas v. Thomas	Pending
3351 - Chewning v. Ford Motor Co.	Pending
3352 - Ex Parte Moore v. Fairfield	Pending
3353 - Green v. Cottrell	Pending
3354 - Murphy v. Owens-Corning	Pending
3355 - State v. Leroy Wilkes	Pending
3356 - Keeney's Metal v. Palmieri	Pending
3358 - SC Coastal Conservation v. SCDHEC	Pending
3360 - Beaufort Realty v. Beaufort County	Pending
3364 - SCDSS v. Mrs. H and Mr. H	Pending
3365 - State v. Laterrance Ramon Dunlap	Pending
3369 - State v. Don L. Hughes	Pending
3370 - Bailey v. Segars	Pending
3371 - State v. Curtis Gibbs #2	Pending
3372 - Dukes v. Rural Metro	Pending

3376 - State v. Roy Johnson #2	Pending
3380 - State v. Claude and Phil Humphries	Pending
3381 - Bragg v. Bragg	Pending
3383 - State v. Jon Pierre LaCoste	Pending
3386 - Bray v. Marathon Corporation	(2) Pending
2001-UP-016 - Stanley v. Kirkpatrick	Pending
2001-UP-123 - SC Farm Bureau v. Rabon	Pending
2001-UP-156 - Employer's Insurance of Wausau v. Whitaker's Inc., of Sumter	Pending
2001-UP-159 - State v. Darnell Hunter	Pending
2001-UP-160 - State v. Elijah Price, Jr.	Pending
2001-UP-192 - State v. Mark Turner Snipes	Denied 12-13-01
2001-UP-232 - State v. Robert Darrell Watson, Jr.	Pending
2001-UP-235 - State v. Robert McCrorey, III & Robert Dimitry McCrorey	Pending
2001-UP-238 - State v. Michael Preston	Denied 12-13-01
2001-UP-248 - Thomason v. Barrett	Pending
2001-UP-249 - Hinkle v. National Casualty	Pending
2001-UP-261 - San Souci Owners Association v. Miller	Pending
2001-UP-292 - Franzello v. Bankhead	Pending
2001-UP-298 - State v. Charles Henry Bennett	Pending
2001-UP-300 - Robert L. Mathis, Jr. v. State	Pending
2001-UP-304 - Jack McIntyre v. State	Pending
2001-UP-321 - State v. Randall Scott Foster	Pending
2001-UP-322 - Edisto Island v. Gregory	Pending

2001-UP-323 - Goodwin v. Johnson	Pending
2001-UP-324 - State v. John Williams, III	Pending
2001-UP-325 - Hessenthaler v. Tri-County	Granted 12-12-01
2001-UP-335 - State v. Andchine Vance	Pending
2001-UP-344 - NBSC v. Renaissance Enterprises	Pending
2001-UP-355 - State v. Gavin V. Jones	Pending
2001-UP-360 - Davis v. Davis	Pending
2001-UP-364 - Clark v. Greenville County	Pending
2001-UP-368 - Collins Entertainment v. Vereen	Pending
2001-UP-374 - Boudreaux v. Marina Villas Association	Pending
2001-UP-377 - Doe v. The Ward Law Firm	Pending
2001-UP-383 - Rivera v. Columbia OB/GYN	Denied 12-13-01
2001-UP-384 - Taylor v. Wil Lou Gray	Pending
2001-UP-385 - Kyle & Associates v. Mahan	Pending
2001-UP-389 - Clemson v. Clemson	Pending
2001-UP-391 - State v. Jerome Hallman	Pending
2001-UP-393 - Southeast Professional v. Companion Property & Casualty	Pending
2001-UP-397 - State v. Brian Douglas Panther	Pending
2001-UP-398 - Parish v. Wal-Mart Stores, Inc.	Pending
2001-UP-399 - M.B. Kahn Construction v. Three Rivers Bank	Pending
2001-UP-401 - State v. Keith D. Bratcher	Pending
2001-UP-403 - State v. Eva Mae Moss Johnson	Pending
2001-UP-425 - State v. Eric Pinckney	Pending

PETITIONS - U. S. SUPREME COURT

2000-UP-738 - State v. Mikell Anthony Pinckney	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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The State, Respondent,

v.

Robert G. McGowan, Jr., Petitioner.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal From Horry County
David H. Maring, Sr., Circuit Court Judge

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Opinion No. 25389
Heard September 27, 2001 - Filed December 17, 2001

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AFFIRMED IN RESULT

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Deputy Chief Attorney Joseph L. Savitz, III, South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy

Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Senior Assistant Attorney General Harold M. Coombs, Jr. all of Columbia, and Solicitor John Gregory Hembree, of Conway, for respondent.

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JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' unpublished opinion in State v. McGowan, Op. No. 99-UP-626 (S.C. Ct. App. filed Dec. 9, 1999). We affirm in result.

FACTS

McGowan was convicted of assault and battery with intent to kill (ABIK) and resisting arrest with a deadly weapon. The charges stem from police attempts to arrest McGowan for "disorderly conduct." According to the State's version of the evidence,[1] at approximately 1:00 a.m. on the morning of September 7, 1996, McGowan, who was intoxicated, called police to his home in the Socastee area of Myrtle Beach in order to file a false complaint.[2] Officer James Mills arrived to find McGowan waiting in his driveway. McGowan became loud and boisterous, and began using profanity toward Officer Mills and other officers on the scene. At one point, McGowan retrieved a pistol from his

[1] We view the evidence, as we must, in the light most favorable to the State. State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999) (in reviewing denial of a motion for directed verdict, the evidence must be viewed in light most favorable to the State).

[2] A short time earlier, McGowan had gotten into a fight at a bar with a man named Howard Peel. Upon leaving the bar, McGowan pushed Peel's pickup truck into a ditch with his white Ford Bronco. Police were called to the bar, where they took an incident report concerning the altercation. McGowan called police to his home to falsely report that Peel had come to his home and assaulted him there.

home, which police took from him. When McGowan began "ranting and raving" for the third or fourth time, Mills decided to arrest him for disorderly conduct. Mills advised McGowan to place his hands on the police car, but when Mills went to cuff him, McGowan ran toward his house. Mills chased him, catching him by the ponytail at the front door, and both fell into the living room. McGowan kicked Mills in the groin, then ran to a bedroom where he retrieved a shotgun. Mills' attempt to subdue McGowan with mace was unsuccessful. McGowan pointed the shotgun at Mills, and Mills fired a warning shot with his pistol. McGowan shot at Mills, hitting him in the hand; Mills fired another shot, grazing McGowan, at which point he surrendered. McGowan was thereafter tried and convicted of ABIK and resisting arrest with a deadly weapon. The Court of Appeals affirmed.

ISSUES

1. Was McGowan entitled to a directed verdict on the charges of ABIK?

2. Was McGowan entitled to a directed verdict on the charge of resisting arrest with deadly force on the ground that the underlying arrest for disorderly conduct was unlawful?

1. DIRECTED VERDICT/ ABIK

McGowan claims his underlying arrest for disorderly conduct was unlawful. Therefore, he contends, he was entitled to use deadly force to resist an unlawful arrest, entitling him to a directed verdict on the charge of ABIK. We disagree; even assuming *arguendo* the threatened arrest was unlawful,[3] we find the ABIK charge was properly submitted to the jury.

In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State. State v. Kelsey, 331

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[3] As discussed in Issue 2 below, whether the arrest was lawful was properly submitted to the jury.

S.C. 50, 502 S.E.2d 63 (1998). 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 that the case was properly submitted to the jury. State v. Rowell, 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997). Although the trial court should not refuse to grant the motion where the evidence merely raises a suspicion of the accused's guilt, the case must be submitted to the jury if substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt can be fairly and logically deduced, exists. Id.

This Court has previously recognized that a person has a right to resist an unlawful arrest even to the extent of taking the life of the aggressor if it be necessary in order to regain his liberty. State v. Poinsett, 250 S.C. 293, 157 S.E.2d 570 (1967); State v. Bethune, 112 S.C. 100, 99 S.E. 753 (1919); State v. Robertson, 191 S.C. 509, 5 S.E.2d 285 (1939). However, the cases do not stand for the blanket proposition that one may, in every instance, resist an unlawful arrest to the point of deadly force without fear of repercussion. To the contrary, the cases clearly reveal that only such force as is reasonably necessary under the circumstances may be invoked.

In State v. Bethune, supra, we upheld the following charge concerning the right to resist an unlawful arrest:

> I charge you that a man has the right to defend himself from an unlawful arrest, and for the purpose of so protecting himself he has the right to use whatever force is necessary, even to the taking of life, the life of him who is seeking to make the unlawful arrest, if that be apparently necessary, and if it would have been apparently necessary to a man of ordinary courage in the circumstances. I charge you that, **where one is defending his person from an unlawful arrest, he had the right to use just so much force as is apparently necessary to accomplish his deliverance and no more. He has not the right to use excessive force unless excessive force not only be apparently necessary to him, but would have been to a man of ordinary courage so situated**.

112 S.C. at 101, 99 S.E. at 753. (Emphasis supplied). Thereafter, in State v. Francis, 152 S.C. 17, ___, 149 S.E. 348, 355-356 (1929), this Court stated:

> An unlawful arrest, or an attempt to make an unlawful arrest, stands upon the same footing as any other nonfelonious assault, or as a common assault and battery. The person who is so unlawfully arrested, or against whom such an unlawful attempt is directed, is not bound to yield, and **may resist force with force, but he is not authorized to go beyond the line of force proportioned to the character of the assault,** or he in turn becomes a wrongdoer. . . .
>
> A mere trespass on one's person or liberty is no reason for the taking of life, and if one commits a homicide while resisting an arrest, even though it is unlawful, he cannot justify on the ground of self-defense unless he can show that the killing was apparently necessary to protect himself from death or great bodily harm. . . .
>
> **But such person should use no more force than is necessary to resist the unlawful arrest, and is justified in using or offering to use a deadly weapon only where he has reason to apprehend an injury greater than the mere unlawful arrest**, as danger of death or great bodily harm. . . .
>
> **It not infrequently has been reasoned that an unlawful attempt to restrain a person's liberty is such an aggression as to furnish a complete excuse for slaying the aggressor. The contention, however, has met with little or no favor in the eyes of the courts. On the contrary, it is generally held that the slayer is not excused unless he can show that the homicidal act was done in his necessary defense. While there can be no doubt of the right of the citizen to resist an attempt illegally to restrain his freedom, yet his resistance must not be in enormous disproportion to the injury threatened. He has no right, according to the better view, to take human life to prevent a**

mere trespass upon his person or liberty, when unaccompanied by any imminent danger of great bodily harm or felony.

(Emphasis supplied; internal citations omitted). The Francis court held the issue was for the jury. Id.

Clearly, Bethune and Francis stand for the proposition that a defendant has the right to resist an arrest to the point of deadly force only if **necessary,** and may not use force disproportionate to the injury threatened.

Here, although there was conflicting evidence as to who first responded with deadly force, Officer Mills testified that McGowan first kicked him in the groin, then ran to his room and pulled a shotgun. Only then did Mills spray him with mace and pull his own gun. Mills also testified that he warned McGowan not to point the shotgun at him or he would shoot him; only when McGowan pointed the shotgun at him did Mills fire his weapon. Given this testimony, and viewing the evidence in the light most favorable to the state, whether or not McGowan's response was proportional to the threatened arrest was a matter for the jury. Accordingly, the issue of ABIK was properly submitted to the jury.[4]

2. DIRECTED VERDICT/ RESISTING ARREST

McGowan also contends his arrest for disorderly conduct was unlawful, thereby entitling him to a directed verdict on the charge of resisting arrest with deadly force. We disagree.

Pursuant to S.C. Code Ann. § 16-3-625 (Supp. 2000), a person who resists

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[4] The trial judge stated on two occasions that he would charge the jury that a defendant has the right to resist an unlawful arrest, even to the point of using deadly force. Although the jury charge is not contained in the record, we assume the jury was so charged. State v. Hutto, 279 S.C. 131, 303 S.E.2d 90 (1983) (appellant has burden of presenting adequate record which is sufficiently complete to permit this Court's review).

the **lawful** efforts of a law enforcement officer to arrest him with the use or threat of use of a deadly weapon is guilty of a felony. Accordingly, a person may not be convicted of resisting arrest with a deadly weapon where the underlying arrest is unlawful.[5]

S.C. Code Ann. 16-17-530 (2000) provides, in part:

> Any person who shall (a) be found on any highway or **at any public place or public gathering in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner**, [or] (b) **use obscene or profane language on any highway or at any public place** or gathering or in hearing distance of any schoolhouse or church . . ., shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or be imprisoned for not more than thirty days. (Emphasis supplied).

In State v. Williams, 280 S.C. 305, 306-7, 312 S.E.2d 555, 556 (1984), we adopted the following definition of "public place":

> A place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public. People v. Whitman, 178 App.Div. 193, 165 N.Y.S. 148, 149. Roach v. Eugene, 23 Or. 376, 31 P. 825. **Any place so situated that what passes there can be seen by any considerable number of persons, if they happen to look.** Steph.Cr.L. 115. Also, a place in which the public has an interest as affecting the safety, health, morals, and welfare of the community. A place

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[5] As noted in Issue 1, however, a person may nonetheless be convicted of other offenses, such as ABIK, ABHAN or murder, if the underlying arrest is unlawful and the degree of force used to resist is disproportionate to the threat.

exposed to the public, and where the public gather together or pass to and for. Lewis v. Commonwealth, 197 Ky. 449, 247 S.W. 749, 750.[6]

Emphasis supplied.

Here, there is testimony that McGowan was intoxicated, was acting in a loud and boisterous manner and cursing at police, that his language was loud enough to disturb the neighborhood, and that at some point during the incident, there was a car load of teenagers on the cul-de-sac across the street. Under our definition of "public place" as stated in Williams, we find this is sufficient evidence from which the jury could find, for purposes of the disorderly conduct statute, that McGowan was conducting himself in a grossly intoxicated and disorderly manner in a public place. Accord State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) (statutory aggravating circumstance of "great risk of danger" to more than one person in public place properly submitted to jury where incident occurred on public street and in defendant's yard and several children were playing in public street when incident occurred). See also City of Bismarck v. Nassif, 449 N.W.2d 789 (N.D. 1989)(jury could reasonably have concluded that defendant's front yard was public place where evidence revealed that bystanders nearby could have heard his profanity and threats directed toward police); Loera v. Texas, 14 S.W.3d 464 (Tex. App. 2000)(walkway to private residence could be considered a public place under certain circumstances; matter should be resolved on a case-by-case basis).

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[6] In Town of Springdale v. Butler, 299 S.C. 276, 384 S.E.2d 697 (1989), we held the fact that the defendant was on his private property did not preclude his conviction for disorderly conduct under a town ordinance which did not require the incident occur in a public area. Although Butler could be viewed as an indication that a person's yard or driveway is not a public place, the definition of a public place was not an issue in Butler, and there was no need for this Court to determine whether or not Butler's driveway could, under any circumstances, be considered a public place. Accordingly, Butler is not dispositive.

Accordingly, as the jury could have determined McGowan's conduct was prohibited by the disorderly conduct statute, his arrest was lawful such that he was not entitled to a directed verdict on the charge of resisting arrest with deadly force.[7] Accordingly, the Court of Appeals opinion is

AFFIRMED IN RESULT.
TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

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[7] McGowan also contends his disorderly conduct arrest was unlawful under State v. Perkins, 306 S.C. 353, 412 S.E.2d 385 (1991) (holding that raising voices to police officers, standing alone, is insufficient to convict of disorderly conduct). The Court of Appeals recently distinguished Perkins, holding such an arrest is justified where a defendant is both grossly intoxicated and uses obscene language toward arresting officers. State v. Pittman, 342 S.C. 545, 537 S.E.2d 563 (Ct. App. 2000). Accordingly, this argument is without merit.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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In the Matter of Michael R. Deddish, Respondent.

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Opinion No. 25390
Submitted October 30, 2001 - Filed December 17, 2001

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DEFINITE SUSPENSION

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Henry B. Richardson, Jr., of Columbia, for the Office of Disciplinary Counsel.

Lewis S. Horton, of Charleston, for respondent.

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PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an agreement pursuant to Rule 21, Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a definite suspension of nine months, retroactive to August 10, 2001.[1] We accept the agreement. The following facts are set forth in the agreement.

[1]Respondent was placed on interim suspension by order of this Court dated August 10, 2001.

Facts

I. Assisting in the Unauthorized Practice of Law Matter

Trey Carter, a non-lawyer, organized and was the sole member and sole employee of the Trey Carter Firm, LLC (The Firm). The Firm marketed estate planning and revocable living trusts in South Carolina through newspapers and printed brochures. Carter also gave seminars where he dispensed legal advice to the public.

In the Firm's advertisements and brochures and at these seminars, Carter represented that respondent was a principal in, or associated with, the Firm. Advertisements also touted the Firm as having a locally staffed office and an attorney on staff who was a member of a network of estate planning attorneys and was certified as an elder law trust attorney. Among the services offered to the Firm's clients were preparation of estate plan summaries, revocable living trusts, affidavits of trusts, pour-over trusts, durable powers of attorney, and real estate deeds. The Firm promised to provide changes to any document prepared by the Firm free of charge and unlimited consultations regarding living trust questions. The Firm also offered instructions on how to settle an estate without an attorney.

Respondent was not an employee, partner, or associate of the Firm, but worked as an independent attorney for the Firm. The Firm provided preliminary information to respondent regarding the Firm's clients. Respondent would then meet with the clients, obtain additional information, and complete the contracted for legal documents. One-third of each client's total fee was paid to respondent by the Firm.

Carter's actions constituted the unauthorized practice of law. Doe v. Condon, 341 S.C. 22, 532 S.E.2d 879 (2000). Respondent acknowledges that his association, affiliation, and cooperation with Carter did act to assist Carter in the unauthorized practice of law. Respondent

acknowledges further that his fee arrangement with Carter constituted fee splitting, which is proscribed by Rule 5.4 of the Rules of Professional Conduct, Rule 407, SCACR.

II. Income Tax Matter

Respondent pled guilty to one count of willful failure to file a South Carolina tax return in violation of S.C. Code Ann. § 12-54-40(b)(6)(C) (1976). The failure to file a tax return is a serious crime as set forth in Rule 2(z), RLDE, Rule 413, SCACR.

Law

As a result of his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2(e) (when a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct); Rule 5.4(a) (sharing fees with a non-lawyer); Rule 5.5(b) (assisting in the unauthorized practice of law); Rule 8.4(a) (violating the Rules of Professional Conduct); Rule 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Respondent has also violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(4) (committing a serious crime); and Rule 7(a)(5) (engaging in conduct tending to bring the courts or legal profession into disrepute).

Conclusion

Respondent has fully acknowledged that his actions in the aforementioned matters were in violation of the Rules of Professional

Conduct and the Rules for Lawyer Disciplinary Enforcement. We hereby suspend respondent from the practice of law for nine months, retroactive to August 10, 2001. Upon reinstatement to the practice of law, respondent must comply with the inducements to the clients he represented or for whom respondent prepared documents as a result of the services offered by the Firm to include, but not limited to, additional consultation and updating of documents without additional charge or fee, to the extent advertised by the Firm or represented to the clients by the Firm. 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, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Jermano Gary, Petitioner,

v.

State of South Carolina, Respondent.

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ON WRIT OF CERTIORARI

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Appeal From Kershaw County
J. Ernest Kinard, Jr., Circuit Court Judge

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Opinion No. 25391
Submitted November 28, 2001 - Filed December 17, 2001

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REMANDED

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Assistant Appellate Defender Eleanor Duffy Cleary, of S.C. Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Allen Bullard, and Assistant Attorney General David Spencer, all of

Columbia, for respondent.

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JUSTICE MOORE: Petitioner's application for post-conviction relief (PCR) was dismissed as time-barred under S.C. Code Ann. § 17-27-45(A) (Supp. 2000). We remand.

FACTS

Petitioner pled guilty to murder and was sentenced to thirty years on October 25, 1995. No direct appeal was taken. More than a year later, on November 5, 1996, petitioner filed a PCR application asserting he was indigent and alleging trial counsel was ineffective in advising him to plead guilty.

In response to petitioner's application, the State filed a motion to dismiss on the ground the action was barred by the one-year limitation provided in § 17-27-45(A). After a hearing at which petitioner appeared pro se, the PCR judge dismissed petitioner's application.

ISSUES

1. Does mailing constitute filing under § 17-27-45(A)?

2. Should counsel have been appointed to represent petitioner at the hearing?

DISCUSSION

Section § 17-27-45(A) provides:

> An application for relief filed pursuant to [the Uniform Post-Conviction Procedure Act] must be filed within one year after the entry of a judgment of conviction or within one year after the

sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

Under S.C. Code Ann. § 17-27-40 (1985), the application must be filed with the clerk of the court in which the conviction took place.

At the PCR hearing, no evidence was introduced. Petitioner told the judge he mailed his application on October 22, 1996, which was within the one-year limitation, but claimed he mistakenly sent it to "the wrong place" and "by the time it came back, it was too late." Petitioner's application was summarily dismissed for failure to comply with § 17-27-45(A).

It is clear under South Carolina law that mailing does not constitute filing. When a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer. Fox v. Union-Buffalo Mills, 226 S.C. 561, 86 S.E.2d 253 (1955).[1] The mailing of petitioner's application was therefore not sufficient under § 17-27-45(A).

On appeal, petitioner argues we should allow "equitable tolling" of the statute of limitation because he simply filed in the wrong venue. *See* Burnett v. N.Y. Central R.R. Co., 380 U.S. 424 (1965) (applying equitable tolling for filing in wrong venue and recognizing policy reasons under the specific statutory scheme in question).[2] This issue was not raised below and is not properly before us. Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999) (issue not addressed by PCR judge is not preserved for review). Because we find the hearing afforded petitioner was inadequate, however, we remand for

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[1]Where specifically provided by statute or rule, filing may be otherwise defined. *See, e.g.,* Rule 233(a)(2), SCACR (filing may be accomplished by depositing document in U.S. mail, properly addressed with sufficient first class postage).

[2]We express no opinion on the validity of this defense to the statute of limitation.

appointment of counsel.

Rule 71.1(d) provides:

> If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent. Counsel shall be given a reasonable time to confer with the applicant. Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.

Under this rule, an indigent applicant who is granted a hearing has a statutory right to be represented by a court-appointed attorney. Al-Shabazz v. State, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (1999) *citing* Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992). Petitioner was not appointed counsel to represent him at the hearing and there is no waiver of his right to counsel in the record. Further, in the interest of fairness, we find counsel should be appointed under Rule 71.1(d) when the State moves for dismissal under § 17-27-45(A) and the PCR applicant raises an issue of material fact regarding the applicability of the one-year limitation.

We remand this case for appointment of counsel and an evidentiary hearing regarding petitioner's claim of equitable tolling of the one-year limitation.

REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Philbert R. Fuller, Respondent,

v.

State of South Carolina, Petitioner.

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ON WRIT OF CERTIORARI

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Appeal From Spartanburg County
J. Derham Cole, Trial Judge
Wyatt T. Saunders, Post-Conviction Judge

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Opinion No. 25392
Submitted November 28, 2001 - Filed December 17, 2001

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REVERSED

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Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., all of Columbia, and Assistant Attorney General Kathleen J. Hodges, of Greenville, for petitioner.

Senior Assistant Appellate Defender Wanda H. Haile,

of Columbia, for respondent.

JUSTICE WALLER: We granted the State's petition for a writ of certiorari to review the grant of Post-Conviction Relief (PCR) to respondent, Philbert Fuller. We reverse the grant of PCR and reinstate Fuller's convictions.

FACTS

Fuller was indicted and jointly tried, along with two co-defendants, Alfred Meadows and James McClain, for assault and battery with intent to kill and possession of a firearm or knife during commission of a violent crime.[1] Originally, all three defendants claimed an alibi defense and were represented by the same counsel, attorneys James O. Thomasson, Sr. and R. Scott Davis. Trial counsel testified that all three defendants were advised of the potential for conflicts of interest but that each of the defendants agreed to continued representation. However, when McClain subsequently changed his story, counsel moved to be relieved as his counsel. According to trial counsel, at the hearing on the motion to be relieved, both Meadows and Fuller were advised by the judge of the potential for conflicts.[2] Counsel continued joint representation of Fuller and Meadows as both defendants claimed the same alibi defense and had the same alibi witnesses. Meadows and Fuller both testified at trial, but McClain did not. Counsel testified they did not call McClain to testify as they

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[1] The charges stem from the shooting of a 15 year old boy, Travis Hines, in Spartanburg. Hines was paralyzed from the waist down as a result. The shooting was allegedly in retaliation for the earlier shooting of Terrance Norman, a friend of the defendants.

[2] Further, during the course of trial, Judge Cole inquired of Meadows and Fuller as to whether they had been advised of and understood the possibility of a conflict.

"knew what he was going to say as far as putting him [Fuller] at the scene." [3]

Fuller and Meadows both testified at trial and claimed to have been at the hospital visiting their friend, Terrance Norman, who had been shot earlier that day. Several witnesses corroborated their alibi. However, testimony of the State's witnesses was conflicting: one State's witness placed both Meadows and Fuller at the scene (and claimed McClain was not present), while three State's witnesses placed Fuller at the scene and specifically testified Meadows was not at the scene of the crime. The jury convicted Fuller and McClain; Meadows was acquitted. Fuller was granted PCR on the basis of "the appearance of a conflict of interest."

ISSUE

Was Fuller properly granted PCR on the basis of the appearance of a conflict of interest?

DISCUSSION

To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984). An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. The mere possibility of a conflict of interest is insufficient to impugn a criminal conviction. Id.

Here, the PCR court found the appearance of a conflict based on the fact that Fuller was convicted while Meadows was acquitted, and that counsel were

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[3] From the testimony of attorneys Thomasson and Davis, it appears McClain admitted his participation in the shooting, and that he indicated Fuller was at the scene of the crime.

unable to cross-examine McClain about statements he made to them during their representation of him. Fuller has failed to demonstrate that either of these situations resulted in an actual conflict.

As to the joint representation, counsel testified at PCR that Fuller and Meadows' defenses were consistent; both maintained they had been at the hospital visiting Terrance Norman, who had been shot earlier in the day, and both presented several witness to this effect. The attorneys also testified that both Fuller and Meadows had been advised of the potential for conflicts and agreed to continued joint representation. In fact, counsel believed Fuller and Meadows' alibi defense was stronger if they were tried together, both telling the same story and utilizing the same alibi witnesses. The difference in the outcome of their cases came when several of the State's eyewitness placed Fuller, but not Meadows, at the scene. In fact, three State's witness testified Meadows was not at the scene.[4] The fact that State's witnesses gave inconsistent testimony against Fuller and Meadows simply does not present an actual conflict of interest in the joint representation by Thomasson and Davis.

Moreover, we find no conflict resultant from counsel's prior representation of McClain. Fuller claims that, but for the prior representation, counsel could have called McClain (who did not testify), and impeached him with his earlier statement to police in which he claimed that neither he, Meadows, nor Fuller was present at the scene of the crime. Counsel testified, however, that they had no intentions of calling McClain as a witness because they "knew what he was going to say as far as putting him [Fuller] at the crime scene." We find neither any deficiency, nor any conflict, in counsel's failure to call a witness who, by all indications, would have inculpated Fuller in the crime. Further, Fuller failed to present McClain at PCR and has therefore failed to meet his burden. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (applicant's mere speculation what witness' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice).

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[4] Only one State's witness placed Meadows at the scene; the same witness, however, also maintained that McClain was not at the scene.

We find there was neither an actual conflict, nor the appearance of a conflict of interest in this case.[5] Accordingly, as the ruling of the PCR court is not supported by any evidence, it is reversed. See Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000)(where there is no evidence of probative value to support the findings of the PCR judge, the ruling will not be upheld); Jackson v. State, supra (mere possibility of conflict of interest is insufficient to impugn conviction).

REVERSED.

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

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[5] Moreover, any potential conflict was clearly waived by Fuller at the hearing in which Thomasson and Davis were relieved as counsel for McClain, and the appendix demonstrates that both Meadows and Fuller were questioned by the trial judge and indicated they understood the possibility of a conflict, and that they nonetheless wished to proceed.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Richard Solomon, Respondent,

v.

State of South Carolina, Petitioner.

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ON WRIT OF CERTIORARI

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Appeal From Richland County
J. Ernest Kinard, Jr., Judge

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Opinion No. 25393
Submitted March 22, 2001 - Filed December 17, 2001

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REVERSED

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Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General G. Robert Deloach, III, and Assistant Attorney General David A. Spencer, all of Columbia, for petitioner.

Assistant Appellate Defender Robert M. Pachak, of S.C. Office of Appellate Defense, of Columbia, for respondent.

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JUSTICE MOORE: Respondent was convicted of armed robbery for attacking sixty-nine-year-old Clyde Waymer with a hammer and stealing his wallet. After his direct appeal was dismissed, respondent filed this application for post-conviction relief (PCR) which was granted. The PCR judge found counsel was ineffective for failing to object to the trial judge's omission of a not guilty verdict in submitting the case to the jury.[1] We find counsel was not ineffective and reverse.

DISCUSSION

The trial judge submitted to the jury armed robbery and, as a lesser included offense, strong arm robbery. "Not guilty" was not submitted as an option. The PCR judge found counsel was ineffective for failing to call this omission to the trial judge's attention. Although he made no express finding of prejudice, the PCR judge granted relief.

In a PCR proceeding, the petitioner must meet the standard established in Strickland v. Washington, 466 U.S. 668 (1984), which requires he show (1) counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

Under the particular circumstances of this case, we find counsel's performance was not deficient. Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

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[1]Respondent was also convicted of assault and battery of a high and aggravated nature. Relief was not granted on this charge.

Here, the record indicates that, with respondent's consent, counsel intentionally waived the option to have the jury consider a "not guilty" verdict on the robbery charges.[2] In opening, counsel argued:

> This is a little bit of an unusual case. It is unusual in that what I am about to tell you, you will probably never hear from a defense attorney, and that is that [respondent] is guilty. He committed a crime on March 6, 1996. He hit Mr. Waymer with the hammer and took his billfold.
>
> Now, I could get up here and argue that it wasn't him, it was somebody else, or something else happened, but I am [respondent's] attorney, and he doesn't contest that that happened. He doesn't want me to argue that it wasn't him that day.
>
> Just about everything you hear from the witness stand will be the truth. We don't contest – [respondent] does not want me to contest it. [Respondent], after this happened, turned himself in. He went down to the police station and said, "I committed a crime. I want to confess. And I want to be punished."
>
> . . . .
>
> So, ladies and gentlemen, as we go through the testimony, all we ask is that you listen to the facts. At the end the judge will tell you what the law is. And you will have to decide what crime [respondent] is guilty of. It is not "if" he is guilty of a crime, because he is guilty. The question is: What crime or crimes?

In closing, counsel stated:

> And the facts are that [respondent] robbed Mr. Waymer. He hit

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[2]The record does not support the PCR judge's finding that trial counsel "admitted he made a mistake" in failing to object.

> Mr. Waymer with a hammer and he took his wallet. Those are all the elements of robbery, common law robbery. . . . [Respondent] committed a crime. He committed a felony – common law robbery. He is going to be convicted of that and he is going to be punished.

At the PCR hearing, counsel testified he was unsuccessful in his pre-trial attempts to negotiate a plea to the lesser offense of strong arm robbery. He concluded the only chance of having the charge reduced was to argue the lesser offense to a jury. Because of respondent's prior record and the fact that armed robbery was a no-parole offense, counsel believed respondent had nothing to lose by going to trial despite the strength of the State's case. Counsel made every effort to impress the jury with respondent's willingness to take responsibility for what he had done. The submission of a "not guilty" verdict would have been inconsistent with this trial tactic.

We find, under these circumstances, counsel's strategy was a reasonable one. Because we find counsel was not ineffective, we need not address the prejudice prong under Strickland.[3] The grant of relief is

REVERSED.

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

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[3]The dissent's analysis on the ineffectiveness prong is simply that "counsel can never have a strategic justification for failing to ensure a not guilty verdict is submitted to the jury." *See* Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001) (issues on PCR must be framed as one of ineffective assistance of counsel). We think a case-by-case analysis is the better approach in determining the reasonableness of counsel's strategy since trial strategy is, by necessity, formulated in response to the particular circumstances of each case.

JUSTICE PLEICONES: I agree with the majority that under the facts of this case, trial counsel's performance was not deficient when he chose, as a matter of strategy, not to request a "not guilty" verdict option. I join the dissent, however, to the extent it would overrule State v. Somerset, 276 S.C. 220, 277 S.E.2d 593 (1981). In my opinion, it is reversible error to deny the jury this verdict form when it has been requested by counsel.

CHIEF JUSTICE TOAL: I respectfully dissent. The majority finds counsel articulated a valid and reasonable trial strategy for failing to object to the trial judge's omission of a not guilty verdict in submitting the case to the jury. In my opinion, counsel can never have a strategic justification for failing to ensure a not guilty verdict is submitted to the jury. Furthermore, I would hold failure to submit a not guilty verdict form to the jury is a fundamental error which violates a defendant's sixth and fourteenth amendment rights to have a jury determine guilt beyond a reasonable doubt. Such a fundamental error requires reversal, even absent an express showing of prejudice by the defendant.

The right to have a jury determine whether a defendant is guilty beyond a reasonable doubt is one of the most basic tenants of our system of justice. *Sanstrom v. Montana*, 99 S. Ct. 2450, 2457-2458, 442 U.S. 510, 520, 61 L. E. 2d 39 (1979). As the Seventh Circuit has stated, "This right, emanating from the criminal defendant's constitutional right to trial by jury, is neither depleted nor diminished by what otherwise might be considered the conclusive or compelling nature of the evidence against him." *United States v. England*, 347 F.2d 425, 430 (7th Cir. 1965) (footnotes omitted). A jury is required to presume that an accused is innocent until he is proven guilty. A defendant's admission of the underlying facts of the crime does not necessarily represent an admission by the defendant that he acted criminally or culpably. In fact, the defendant in this case plead not guilty, thereby placing the burden on the state to prove each and every element of the crime beyond a reasonable doubt. *In re Winship*, 90 S. Ct. 1068, 1071-1072, 397 U.S. 358, 361-364, 25 L. Ed. 2d 368 (1970).

The state carries this burden regardless of which particular elements are expressly controverted by a defendant. "[U]nder our system of jurisprudence, it is technically possible for a criminal defendant to enter a plea of not guilty, introduce little or no evidence in his own defense, and rely exclusively on his presumption of innocence and the possible inability of the prosecution to prove his guilt beyond a reasonable doubt. Thereupon, guilt is determined by the jury, not the Court." *United States v. Franzen*, 688 F.2d 1181, 1188 (7th Cir. 1982) (Cudahy, Circuit Judge dissenting) (citing *United*

Brotherhood of Carpenters and Joiners of America v. United States, 67 S. Ct. 775, 783, 330 U.S. 395, 410, 91 L. Ed. 973 (1946)). Under our system of justice, it is possible for the state to fail to prove beyond a reasonable doubt every fact necessary to constitute the elements of the crime charged even though a defendant has admitted the underlying facts of the crime. Therefore, in order for a trial to fulfill the requirements of fundamental fairness and of the Constitution, a jury must always have the option of finding a criminal defendant not guilty. In the instant case, the jury was actually *prevented* from finding the defendant not guilty, since the verdict form only gave the jury a choice between finding the defendant guilty of armed robbery or guilty of common law robbery.

In *Commonwealth v. Edwards*, 147 A.2d 313 (Pa. 1959), Pennsylvania Supreme Court addressed the same issue this Court faces today. In *Edwards*, the defendant admitted a slaying, yet the Pennsylvania Court held that the trial court's failure to include a not guilty verdict with the other five verdict forms given to the jury deprived the accused of a fair trial. The court reasoned:

> To say that a judge need not charge on an indispensable requirement in the law because the defendant is assuredly guilty is to hang that accused first and indict him afterwards. It is the trial and the trial alone which decides whether a defendant is assuredly guilty. The presumption of innocence is not merely a papier-mache figure for dramatic display in the courtroom; it is a reality without which trials become mere playacting with the verdict residing in the judge's pocket before the jury is sworn. Even if, in a hypothetical case, the evidence of guilty piles as high as Mt. Everest on Matterhorn, even if the District Attorney conscientiously believes the defendant to be as guilty as Cain, and no matter with what certainty the Judge view the culpability of the accused at the bar, the defendant is still entitled to

> all the safeguards of a fair trial as announced in the Constitution and the law of the land.

Id. at 313-314. *See also Braley v. Gladden*, 403 F.2d 858 (9th Cir. 1968)[4]; *State v. Knorr*, 921 P.2d 703 (Ariz. Ct. App. 1996) (finding failure to submit a not guilty verdict deprived defendant of a fair trial even though, based on the evidence, it was extremely unlikely that the jury would have acquitted the defendant on the charge); *People v. Stockwell*, 217 N.W.2d 413 (Mich. Ct. App. 1974) (a jury instruction which authorized verdicts of guilty of first or second-degree murder or verdict of not guilty by reason of insanity, but which omitted authorization of general verdict of not guilty, was reversibly erroneous, though it may have been occasioned by defense counsel's choice not to have the trial court instruct on possibility of general verdict of not guilty and though there was no specific objection to the erroneous instruction).

Therefore, I would hold the trial court's failure to submit a not guilty verdict to the jury denied Solomon a fair trial by infringing on his constitutional right to a have a jury determine his guilt beyond a reasonable doubt. As this error goes to the fundamental fairness of a criminal trial, guaranteed by the Constitution, counsel can never have a valid trial strategy for failing to object to such an error and prejudice should be presumed.[5]

For the foregoing reasons, I would **AFFIRM** as modified the PCR

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[4]The defendant in *Bradley* did not denying murdering the victim, but instead argued he was highly intoxicated and, alternatively, he was legally insane at the time. The Bradley Court held that oversight in not furnishing jury a not guilty form along with opposite form constituted severely adverse comment by trial judge and even though unintended was so significantly irregular as to require a new trial.

[5]I would overrule *State v. Somerset*, 276 S.C. 220, 277 S.E.2d 593 (1981) to the extent it is inconsistent.

court’s ruling.

The Supreme Court of South Carolina

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 33(g), Rules for Lawyer Disciplinary Enforcement, Rule 413, South Carolina Appellate Court Rules, is amended to provide that when a petition for reinstatement is withdrawn after the Committee on Character and Fitness begins a hearing, the lawyer must wait two years from the date the petition is withdrawn to reapply for reinstatement. Rule 33(g), as amended, reads as follows:

> (g) **Action by Committee on Character and Fitness.** Within 180 days of the matter being referred to the Committee on Character and Fitness, the Committee shall conduct a hearing. If the petition for reinstatement is withdrawn after the start of the hearing, the lawyer must wait two years from the date the petition is withdrawn to reapply for reinstatement.
>
> At the hearing before the Committee, the lawyer shall have the burden of demonstrating by clear and convincing evidence that the lawyer has met each of the criteria in paragraph (f) above. The chair of the Committee, or any other member of the

Committee as the chair may designate, may issue subpoenas to compel the attendance of witnesses and the production of pertinent books, papers and documents. The willful failure to comply with a subpoena issued under this rule may be punished as contempt of the Supreme Court. Upon proper application, the Supreme Court may enforce the attendance and testimony of any witness and the production of any documents subpoenaed. The hearing shall be open to the public. Disciplinary Counsel shall be allowed to present evidence and make arguments to the Committee. The Committee shall file a report with the Supreme Court containing its findings and recommendations.

The Committee on Character and Fitness may promulgate rules and regulations governing practice and procedure before the Committee. These rules and regulations shall become effective when approved by the Supreme Court.

This amendment shall be effective immediately.

S/Jean H. Toal C.J.

S/James E. Moore J.

S/John H. Waller, Jr. J.

S/E.C. Burnett, III J.

S/Costa M. Pleicones J.

Columbia, South Carolina

December 13, 2001

The Supreme Court of South Carolina

In re Amendments to Rule 415, SCACR.

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, we amend Rule 415, South Carolina Appellate Court Rules, to allow for the issuance of a limited certificate to practice to attorneys on inactive status wishing to provide pro bono representation, to eliminate the requirement that the pro bono attorney be directly supervised, and to relax the prior practice requirement. The amendments shall be effective immediately. Rule 415, as amended, is attached.

IT IS SO ORDERED.

S/Jean H. Toal C.J.

S/James E. Moore J.

S/John H. Waller, Jr. J.

S/E.C. Burnett, III J.

S/Costa M. Pleicones J.

Columbia, South Carolina
December 13, 2001

RULE 415
LIMITED CERTIFICATE OF ADMISSION FOR THE RETIRED AND INACTIVE ATTORNEY PRO BONO PARTICIPATION PROGRAM

(a) The Supreme Court may issue a limited certificate to practice law in South Carolina to any person who:

(1) is or was admitted to practice law in South Carolina or any other state or territory of the United States or the District of Columbia and is retired from the active practice of law or is on inactive status;

(2) has not been retired or on inactive status for more than seven years;

(3) has been a member in good standing in each jurisdiction in which the retired or inactive attorney is or was admitted to practice law;

(4) has not been disciplined for professional misconduct in any jurisdiction within the past fifteen (15) years and is not the subject of any pending disciplinary proceeding;

(5) is associated with an approved legal services organization (Legal Services) which receives, or is eligible to receive, funds from the Legal Services Corporation or is working on a case or project through the South Carolina Bar Pro Bono Program (the Program);

(6) performs all activities authorized by this Rule under the supervision of an attorney who is an active member of the South Carolina Bar employed by, or participating as a volunteer for, Legal Services or the Program and who assumes professional responsibility for the conduct of the matter, litigation, or administrative proceeding in which the retired or inactive attorney participates and;

(7) agrees to abide by the South Carolina Rules of Professional Conduct and all other rules governing the practice of law in this State and to submit to the jurisdiction of the Supreme Court for disciplinary

purposes.

(b) The limited certificate issued under this Rule authorizes the retired or inactive attorney to provide legal services solely to clients approved to receive services from Legal Services or the Program, or to provide other services through the Program such as Ask-A-Lawyer or educational clinics. The retired or inactive attorney issued a limited certificate may:

(1) appear in any court or before any tribunal in this State if the client consents, in writing, to that appearance and the supervising attorney has given written approval for the appearance. The written consent and approval must be filed with the court or tribunal and must be brought to the attention of the judge or presiding officer prior to the appearance;

(2) prepare pleadings and other documents to be filed in any court or before any tribunal in this State on behalf of the client. Such pleadings shall also be signed by the supervising attorney; and

(3) otherwise engage in the practice of law as is necessary for the representation of the client.

(c) An attorney desiring a limited certificate shall file with the Clerk of the Supreme Court an application in duplicate on a form prescribed by the Supreme Court accompanied by:

(1) a certification by Legal Services or the Program stating that;

(A) the retired or inactive attorney is currently associated with Legal Services or the Program;

(B) an active member of the South Carolina Bar employed by, or acting as a volunteer for, Legal Services or the Program will assume the duties of the supervising attorney required by this Rule; and

(C) the retired or inactive attorney meets the requirements of section (a) of this Rule;

(2) a certificate of good standing from each jurisdiction in which the retired or inactive attorney is or was admitted to practice law; and

(3) a sworn statement by the retired or inactive attorney that the retired or inactive attorney:

(A) has read and is familiar with the South Carolina Rules of Professional Conduct and all rules relating to the practice of law in this State and will abide by the provisions thereof; and

(B) will neither ask for nor receive compensation of any kind for the legal services rendered under this Rule.

(d) Any questions concerning the fitness or qualifications of the retired or inactive attorney may be referred by the Supreme Court to the Committee on Character and Fitness for a hearing and recommendation.

(e) The limited certificate shall be revoked immediately upon:

(1) notice by Legal Services or the Program stating that the retired or inactive attorney has ceased to be associated with Legal Services or the Program. Such notice must be sent to the retired or inactive attorney and must be filed with the Clerk of the Supreme Court within five (5) days after the association has ceased. The notice need not state a reason for the cessation of the association; or

(2) a determination by the Supreme Court, in its discretion, that the limited certificate should be revoked. Notice of the revocation shall be sent to the retired or inactive attorney and Legal Services or the Program within five (5) days of the revocation.

(f) Upon the revocation of the limited certificate, the supervising attorney shall immediately file notice of the revocation in the official file of each

matter pending before any court or tribunal in which the retired or inactive attorney was involved.

(g) The confidentiality provisions of Rule 402(i), SCACR, shall apply to all files and records of the Board of Law Examiners, the Committee on Character and Fitness, and the Clerk of the Supreme Court relating to a limited certificate to practice law under this rule.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Civil Lou Martin and Woodrow J. Martin,

Plaintiffs/Respondents,

v.

Paradise Cove Marina, Inc., John B. Anderson, Bonar B. Anderson, Rosalyn Anderson and Phil Galante,

Defendants.

and

Harold Jeffery Bogar and Jeffery H. Bates,

Intervening Plaintiffs,

v.

Paradise Cove Marina, Inc., John B. Anderson, Bonar B. Anderson, Rosalyn Anderson and Phil Galante,

Defendants

and

John S. Divine, III,

Intervening Defendant,
of whom John B.
Anderson is the,

Appellant.

Appeal From Horry County
Rodney A. Peeples, Circuit Court Judge

Opinion No. 3419
Submitted November 6, 2001 - Filed December 17, 2001

REVERSED AND REMANDED

Reynolds Williams and Brad T. Willbanks, both of Willcox, Buyck & Williams, of Florence, for appellant.

Douglas N. Truslow, of Columbia, for respondents.

CURETON, J.: Appellant, John Anderson (Anderson), filed a motion to recover damages under a temporary injunction bond. The circuit court found it lacked subject matter jurisdiction to hear the motion and dismissed the matter. Anderson appeals. We reverse and remand.

FACTUAL/PROCEDURAL BACKGROUND

Paradise Cove Marina, Inc. (PCM) owned land which it planned to develop into a marina. Shareholders of the corporation included John Divine (Divine), Anderson, Civil Lou Martin (Mrs. Martin), and others. Anderson also

formed a separate partnership, JBP, with two other PCM shareholders. In 1989 Divine sold his 20,000 shares of PCM stock to JBP, in return for a $100,000 note which was due on October 27, 1992 (JBP Note). JBP apparently sold the Divine shares back to PCM and took back a $100,000 note, also due on October 27, 1992 (PCM Note). Neither note was paid when due, and Divine obtained a judgment against JBP on February 4, 1993. Sometime later, JBP offered to assign the PCM Note to Divine in satisfaction of his judgment. Divine accepted the PCM Note only as additional security for payment of the JBP Note.

Early in 1994, PCM's shareholders agreed to sell PCM's sole substantial asset, the real estate on which the marina was to be built, and they later voted to pay the PCM Note out of the proceeds. At a subsequent shareholders' meeting, PCM's shareholders rescinded authorization to pay the note. Meanwhile, Mr. and Mrs. Martin filed an action to prevent payment of the PCM Note. They obtained a temporary injunction prohibiting PCM from paying the PCM Note out of the proceeds of the real estate sale. The injunction required the Martins to provide an injunction bond of $126,250 for the payment of costs and damages suffered by any party found to have been wrongfully enjoined. Divine, an intervening party, moved for summary judgment. The circuit court granted the motion for summary judgment and ordered PCM to pay the proceeds from the PCM Note to Divine thereby dissolving the temporary injunction. The circuit court denied the Martins' motions to vacate or reconsider the order. On appeal, this court affirmed the circuit court. Our supreme court denied the petition for a writ of certiorari. The remittitur was sent to the circuit court on June 22, 1999.

On August 9, 1999, Anderson filed a motion, pursuant to Rule 65, SCRCP, to recover $500,000 in damages from the injunction bond. Anderson alleged lost profits on the sale of property and other damages to his business and personal assets resulting from the Divine judgment against him. Anderson also asserted he was entitled to costs and attorney fees.

The Martins moved to dismiss the action for lack of subject matter jurisdiction. They argued that Anderson had ten days in which to move for costs after the circuit court order dissolved the temporary injunction. Alternatively, they argued that Anderson had fifteen days after the appellate courts ruled in his

favor to move for costs pursuant to Rule 222, SCACR. Because he did not move for costs after the circuit court's order, nor did he move for costs after the South Carolina Supreme Court denied the petition for a writ of certiorari, the Martins argued Anderson waived his opportunity to seek costs. They further asserted that after the case was remitted to the circuit court on June 22, 1999, the case was ended with finality and the circuit court no longer had jurisdiction to entertain any matter concerning the case.

Anderson argued the circuit court did not have jurisdiction to entertain a motion for costs after the circuit court granted Divine's motion for summary judgment because the Martins filed an appeal. Anderson further argued that once the appeal was filed, the appellate courts had jurisdiction to consider the entire case, including the validity of the injunction. Anderson admitted the dissolution of the injunction was not an issue raised in the original appeal by the Martins, but he argued that it would not have been prudent to pursue costs from the bond while the rest of the case was before the appellate courts.

The circuit court granted the motion to dismiss for lack of jurisdiction.[1] The court found (1) Anderson or Divine could have petitioned the circuit court for costs prior to the September 28, 1998, Court of Appeals opinion; (2) it had no jurisdiction because the matter was remitted, not remanded, to the circuit court; (3) costs could have been taxed within fifteen days after entry of the appellate judgment pursuant to Rule 222, SCACR; and (4) the doctrine of res judicata applied to the action and deprived the court of jurisdiction. Anderson appeals. We reverse.

STANDARD OF REVIEW

This is an appeal from the grant of a motion to dismiss for lack of subject matter jurisdiction. A question of subject matter jurisdiction is a question of law

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[1] According to the "Order: Disposition of Motions" signed by the circuit court judge, the parties agreed that no written order was necessary and the judge orally dictated his ruling in the record.

for the court. Woodard v. Westvaco Corp., 315 S.C. 329, 332, 433 S.E.2d 890, 892 (Ct. App. 1993), vacated on other grounds by 319 S.C. 240, 460 S.E.2d 392 (1995).

DISCUSSION

I. Subject Matter Jurisdiction

In finding that it lacked jurisdiction to entertain Anderson's motion for damages under the injunction bond, the circuit court held Anderson should have moved for damages under Rule 65(c), SCRCP, during the pendency of the appeal or within fifteen days after filing of the appellate judgment pursuant to Rule 222(d), SCACR. Anderson argues the circuit court erred in this conclusion. We agree.

Initially, we find the circuit court erred in holding Anderson should have moved for costs under the injunction bond within fifteen days pursuant to Rule 222, SCACR. Although Rule 222(d) provides that a party seeking costs must file a motion with the appellate court within fifteen days of the issuance of the remittitur, recovery under the rule is clearly limited to costs incurred in pursuing the appeal, such as the filing fee, the cost of obtaining the transcript, the cost of printing the Record on Appeal and final briefs, and limited attorney fees.

We likewise find the circuit court erred in concluding Anderson's failure to move for damages under Rule 65(c) during the pendency of the appeal divested the circuit court of subject matter jurisdiction. Rule 65(c), SCRCP,[2]

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[2] Except in divorce, child custody and non-support actions where the giving of security is discretionary, no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained . . . . A surety upon a bond or

outlines the procedures for temporary injunction bonds. Recovery under an injunction bond is limited to costs and damages incurred during the period of the temporary restraining order or temporary injunction. See Chambron v. Lost Colony Homeowners Ass'n, 317 S.C. 43, 45, 451 S.E.2d 410, 411 (Ct. App. 1994). Rule 65(c) does not state a time limit within which a party suffering injuries due to a temporary injunction must move to recover damages on the injunction bond. "The general rule is that no right or cause of action accrues for the wrongful issuance of an injunction until there has been a final determination of the action in which the injunction was issued." 43A C.J.S. Injunctions § 320 (1978). However, if an appeal is pending, a suit on the bond is premature. 42 Am. Jur. 2d Injunctions § 341 (2000). But see 43A C.J.S. Injunctions § 320 (1978) (stating some courts find the right to an action on a bond immediately follows dissolution of the bond notwithstanding an appeal from the judgment).

The jurisdiction of the circuit court to hear matters after issuance of the remittitur is well established. For instance, once the remittitur is issued from an appellate court, the circuit court acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court's ruling. See Muller v. Myrtle Beach Golf & Yacht Club, 313 S.C. 412, 414-15, 438 S.E.2d 248, 250 (1993). In Moore v. North American Van Lines, 319 S.C. 446, 462 S.E.2d 275 (1995), the South Carolina Supreme Court held that despite the issuance of the remittitur and the fact that the case was not expressly "remanded" to the circuit court, the circuit court was still vested with jurisdiction to hear the appellant's motion for restitution. Moore, 319 S.C. at 448, 462 S.E.2d at 276. Further, circuit courts are vested with jurisdiction to hear motions for statutory attorney fees and trial costs after the remittitur has been issued. Muller, 313 S.C. at 414-16, 438 S.E.2d at 250; see also Bunkum v. Manor Props., 321 S.C. 95, 98-99,

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> undertaking under this rule submits himself to the jurisdiction of the court . . . . His liability may be enforced on motion without necessity of an independent action.

Rule 65(c), SCRCP.

467 S.E.2d 758, 760 (Ct. App. 1996) (jurisdiction to entertain motion for costs against an appeal bond was properly in the circuit court, not with the master, after the remittitur was issued).

We do not interpret Rule 65(c) to preclude an application to the circuit court for damages on a bond after an appeal has ended and the remittitur has been issued. A motion for costs under an injunction bond is similar to motions for trial costs, attorney fees, and restitution. Accordingly, we find the circuit court had subject matter jurisdiction to entertain the motion after the remittitur was issued.

II. Res Judicata

Anderson also argues the circuit court erred in relying on the doctrine of res judicata to dismiss his claim. We agree.

> Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of res judicata, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.' To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.

Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (citations omitted).

Clearly, the subject matter in this action, individual damages allegedly suffered by Anderson resulting from wrongful injunction, is not the same as the subject matter of the former suit to determine whether PCM had to pay the proceeds of the sale of the marina to Divine as payment on the note.

Accordingly, the circuit court erred in dismissing Anderson's claim based on the doctrine of res judicata.

CONCLUSION

We reverse the circuit court's order and remand for a full hearing to determine the actual damages, if any, incurred by Anderson during the time the temporary injunction was in place. See Chambron, 317 S.C. at 45, 451 S.E.2d at 411 (limiting the recovery of costs and damages for wrongful injunction to the period of the temporary restraining order or temporary injunction). For the foregoing reasons, the judgment below is

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Case No. 97-CP-23-1347

Chris Brown, as Personal Representative of
his Deceased Son, Nathan Andrew Brown,
Appellant,

v.

Carolina Emergency Physicians, P.A.,
Respondent.

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Case No. 97-CP-23-1346

Chris Brown,
Appellant,

v.

Carolina Emergency Physicians, P.A.,
Respondent.

____

Case No. 97-CP-23-1345

Donna Williams Brown,

Appellant,

v.

Carolina Emergency Medicine, P.A., J. Benjamin Crumpler, M.D., and Greenville Hospital System,

Respondents.

Appeal From Greenville County
Hicks B. Harwell, Circuit Court Judge

Opinion No. 3420
Heard September 6, 2001 - Filed December 17, 2001

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

H. Stanley Feldman, of N. Charleston; and Kelley M. Braithwaite, of Columbia, for appellants.

Sally M. Purnell, of Haynsworth, Marion, McKay & Guerard, and E. Brown Parkinson, Jr., both of Greenville, for respondents.

CURETON, J.: In these medical malpractice actions, Donna Brown, Chris Brown, individually, and Chris Brown, as Personal Representative of Nathan Andrew Brown (Appellants[1]), appeal the circuit court orders granting

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[1] Brown is a fictitious name used to protect the identity of the appellants.

summary judgment to Greenville Hospital System, Dr. Benjamin Crumpler, and Carolina Emergency Medicine, P.A. Appellants allege that Dr. Crumpler's negligent failure to adequately treat and/or failure to hospitalize Donna Brown for psychiatric problems resulted in the beating death of sixteen-month-old Nathan Brown. We affirm in part, reverse in part, and remand.

FACTUAL/PROCEDURAL BACKGROUND

In April of 1994, Chris Brown noticed a gradual change in the behavior of his wife, Donna. Donna's usual level of activity decreased and she became lethargic. The family had just moved into a new house. Rather than helping Chris, Donna sat around "not doing anything." Chris testified Donna seemed "depressed."

Chris, a member of the National Guard, was scheduled to depart for a two-week annual training session in New Mexico. Due to his concern for Donna, he requested permission of his commanding officer to stay home. The commanding officer required Chris to obtain a doctor's statement certifying that Donna needed Chris at home. When Donna arrived home on Friday, April 29, 1994, Chris took her to the emergency room at Greenville Memorial Hospital, an affiliate of Greenville Hospital System, to obtain the doctor's statement.

Dr. Crumpler examined Donna in the emergency room of Greenville Memorial Hospital and diagnosed her as suffering from acute delusional psychosis. Crumpler suggested Donna be hospitalized. Neither Chris nor Donna wanted to admit Donna to the hospital. Chris assured Crumpler he would care for Donna at home and bring her back if any problems developed before Monday. Before releasing Donna, Crumpler contacted an adult female family friend and asked her about Donna and the Brown home situation. Based on this conversation, Crumpler believed the plans for Donna were satisfactory. Crumpler gave Chris a note stating he should be excused from Guard duty and advised Chris to take Donna to the Mental Health Center on Monday for follow-up evaluation and treatment. Crumpler prescribed Vistaril.

The next day, Saturday, Chris thought Donna seemed better. By Sunday morning, Donna appeared strangely energetic; she raced around the house singing a hymn. Chris found this disturbing and attempted to get Donna to slow down. He tried to physically restrain Donna's movement. To Chris's surprise, Donna suddenly fell asleep in the middle of struggling with him. Chris took Donna to the bedroom where she remained for approximately thirty minutes. Meanwhile, the Browns' sons, Adam, four, and Nathan, sixteen months, were in the front room of the house.

When Donna awoke, she seemed agitated. Donna resumed walking around the house, singing religious songs. When Donna asked Chris for the key to a shed on their property, Chris refused, fearing for Donna's safety. Donna became angry and repeatedly hit Chris with a rod from the closet. A violent struggle ensued during which Donna struck Chris with the rod, told Chris she hated him, and threatened to kill him.

As Donna and Chris struggled, Adam gave Chris a pipe bender, which Chris thought he could use to pin Donna's arms behind her. In the middle of the struggle, Donna suddenly went limp again and seemed to be asleep. Chris released her and went into the kitchen to call 911. While Chris was on the phone, Donna beat Nathan to death.

Prosecutors charged Donna with murder and two counts of assault and battery with intent to kill. At Donna's criminal nonjury trial, Dr. Larry Montgomery testified Donna is a paranoid schizophrenic who was unable to distinguish between moral and legal right and moral and legal wrong when she killed Nathan. Montgomery opined Donna was not criminally responsible for her actions under the M'Naughten test.[2] He agreed that Donna had not exhibited

[2] In South Carolina, the M'Naughten test is the standard for determining whether a defendant's mental condition at the time of the offense rendered him criminally responsible. Davenport v. State, 301 S.C. 39, 40, 389 S.E.2d 649, 649 (1990). The defendant is considered legally insane if, at the time of the offense, he lacked the capacity to distinguish moral or legal right from moral or

any violent behavior prior to her examination by Dr. Crumpler in the emergency room on April 29, 1994. The State stipulated Donna was not guilty by reason of insanity. At the conclusion of the trial, the court found Donna not guilty by reason of insanity.

After the criminal trial, Donna Brown, Chris Brown, as Personal Representative of Nathan Brown, and Chris Brown, individually, filed actions against Dr. Crumpler, Greenville Hospital System, and Carolina Emergency Medicine. They alleged Dr. Crumpler negligently failed to properly diagnose, treat, and hospitalize Donna, causing her to kill her son by beating him to death on May 1, 1994.[3]

The majority of these actions were subsequently dismissed. The trial court dismissed Chris Brown's actions (both individual and as Personal Representative of Nathan Brown) against Dr. Crumpler and the Greenville Hospital System finding they were filed after the expiration of the statute of limitations. The court denied the motion for summary judgment as to Carolina Emergency Medicine finding it was timely served under the statute of limitations.

The trial court denied Respondents' motion for summary judgment on Donna's claims finding genuine issues of material fact existed as to whether Donna's insanity tolled the statute of limitations during the period of her disability.

The trial court subsequently granted summary judgment on Chris Brown's action against Carolina Emergency Medical and on all of Donna's actions. As to Appellants' allegations of a failure to hospitalize Donna, the court concluded

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legal wrong. Id.

[3] Chris Brown also filed an action as Guardian for Adam Brown. The trial court dismissed this action finding Adam was not a beneficiary under the Wrongful Death Act and there is not a cause of action for loss of parental consortium.

Appellants did not demonstrate a basis for involuntary commitment. In addressing Appellants' allegations of inadequate treatment, the court found Appellants did not show a violation of any standard of medical care which was most probably the proximate cause of any injury. It is from these rulings that Donna and Chris Brown appeal.

STANDARD OF REVIEW

"Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 311, 534 S.E.2d 275, 277 (2000). "In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party." Id.

LAW/ANALYSIS

Issues on Appeal

I. Did the court err in granting summary judgment on the ground no evidence existed supporting an involuntary commitment?

II. Did the court err in excluding Dr. Nagelberg's affidavit?

III. Did the court err in granting summary judgment on the ground Appellants failed to meet the "most probably" proximate causation threshold?

IV. Should this court affirm the trial court based on Respondents' additional sustaining grounds?

I. Involuntary Commitment

Appellants contend the trial court erred in granting summary judgment on the ground no evidence existed to support Donna's need for involuntary hospitalization. We disagree.

In his reply affidavit, Crumpler asserted the only way he could have admitted Donna, given her refusal to be hospitalized, would have been through an involuntary commitment proceeding. An involuntary commitment requires:

> (1) [a] written affidavit under oath by a person stating:
>
> (a) a belief that the person is mentally ill and because of this condition is likely to cause serious harm to himself or others if not immediately hospitalized;
>
> (b) the specific type of serious harm thought probable if the person is not immediately hospitalized and the factual basis for this belief;
>
> (2) a certification in triplicate by at least one licensed physician stating that the physician has examined the person and is of the opinion that the person is mentally ill and because of this condition is likely to cause harm to himself through neglect, inability to care for himself, or personal injury, or otherwise, or to others if not immediately hospitalized. The certification must contain the grounds for the opinion.

S.C. Code Ann. § 44-17-410 (Supp. 2000).

Appellants argued that Crumpler's "diagnosis itself [is] grounds for involuntary commitment." The clear language of the statute, however, requires more than a diagnosis of mental illness to justify the extreme measure of involuntary commitment. This accords with the general rule:

> A mental illness or disorder is not, alone, sufficient to justify a commitment, or deprivation of liberty or privacy. Individuals may not be civilly committed involuntarily or deprived of their liberty or privacy unless they pose a danger to themselves or to others, or are gravely or greatly disabled, and neglect, refuse, or are unable to care for themselves or to provide for their basic needs or to protect their lives or health. A state may not confine individuals involuntarily if they are dangerous to no one and capable of surviving safely in freedom alone or with the help of willing and responsible family members or friends.

56 C.J.S. Mental Health § 49a (1992).

Viewing the record in the light most favorable to Appellants, there is no evidence that the statutory requirements for involuntary commitment were present in this case. Chris assured Crumpler he would take care of Donna if she was not hospitalized. Crumpler's emergency room notes state "[Donna] has not been violent in any way." The social worker's notes concur. Dr. Montgomery agreed that Donna had not exhibited any violent behavior prior to her examination by Dr. Crumpler on April 29, 1994. Crumpler concluded "[i]n [his] medical judgment, circumstances did not exist to proceed with an involuntary commitment against the wishes of the patient and her husband. There was no indication that she was a risk of danger to herself or others based on the circumstances presented."

Because Appellants failed to establish any statutory basis for involuntary commitment, the trial court properly found there was no genuine issue of material fact that Crumpler could not have involuntarily committed Donna. See Rule 56(e), SCRCP ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there

is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.").

II. Dr. Nagelberg's Affidavit

Appellants contend the court erred in excluding the affidavit of Dr. Daniel Nagelberg. We agree.

"The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion." Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997). A witness is not required to work or have worked in the same field or area of practice to be competent to testify as an expert in that area. Haselden v. Davis, 341 S.C. 486, 501, 534 S.E.2d 295, 303 (Ct. App. 2000). Competency to testify as an expert requires a witness to "have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." Gooding, 326 S.C. at 252-53, 487 S.E.2d at 598. Any defect in the education or experience of an expert affects the weight and not the admissibility of the expert's testimony. Id. at 253, 487 S.E.2d at 598.

Gooding involved a medical malpractice action against a hospital and an anesthesiologist. In that case, the supreme court determined that an emergency medical technician/paramedic was qualified to testify as an expert witness in the limited area of intubation, although he was not an anesthesiologist. Id. at 252-54, 487 S.E.2d at 597, 598; see also Lee v. Suess, 318 S.C. 283, 286, 457 S.E.2d 344, 346 (1995) (finding a doctor's limited exposure to a particular field merely goes to the weight of his testimony and not its admissibility).

Nagelberg is a licensed psychologist practicing in Savannah, Georgia. He received a doctoral degree in clinical psychology from Bowling Green State University in 1980 and has been licensed in Georgia since 1981. The court found Nagelberg's affidavit did not demonstrate he was competent "to testify with regard to the standard of care of an emergency room physician or what the

requisite knowledge would or should be for an expert practicing in the field of emergency medicine." Thus, the court excluded Nagelberg's affidavit.

Nagelberg's testimony concerned the limited area of the diagnosis and treatment of mental illnesses.[4] In Howle v. PYA/Monarch, Inc., 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986), this court stated "a psychologist, once qualified as an expert witness by reason of education, training, and experience, is competent to testify as to diagnosis, prognosis, and causation of mental and emotional disturbance." Id. at 594, 344 S.E.2d at 161. "At most, a psychologist's lack of a medical license affects his credibility . . . ." Id.

Based on the above, we find the court abused its discretion in declining to qualify Nagelberg as an expert in the diagnosis and treatment of mental illness and in excluding his affidavit from consideration in opposition to the motion for summary judgment. The trial court found that even with consideration of Nagelberg's affidavit, Respondents were entitled to summary judgment. We review the court's order granting summary judgment with consideration of Nagelberg's affidavit.

III. Proximate Causation

Appellants argue the trial court erred in granting summary judgment on their action for inadequate treatment based on a failure to present expert testimony of proximate causation. We agree.

> In a medical malpractice action, it is incumbent on the plaintiff to establish proximate cause as well as the negligence of the physician. Negligence is not

[4] One sentence of Nagelberg's affidavit refers to the standard of care for an emergency physician. "In conclusion, the dreadful tragedy that took place at [the Brown] home within hours from her release should have been reasonably foreseen by an expert with the requisite knowledge to practice in the field of emergency medicine."

> actionable unless it is a proximate cause of the injury complained of, and negligence may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided. When one relies solely upon the opinion of medical experts to establish a causal connection between the alleged negligence and the injury, the experts must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence. The reason for this rule is the highly technical nature of malpractice litigation. Since many malpractice suits involve ailments and treatments outside the realm of ordinary lay knowledge, expert testimony is generally necessary. When it is the only evidence of proximate cause relied upon, it must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection.

Ellis v. Oliver, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996) (citations omitted).

Appellants presented affidavits from Nagelberg and Dr. John Cusack. Cusack worked as an emergency physician prior to becoming a psychiatrist. Nagelberg averred in his affidavit that "[t]he proper treatment of choice for acute delusional psychosis is through hospitalization and medicine and not through counseling." Nagelberg further stated "[i]t is my firm professional opinion and belief that, given Ms. Brown's diagnosis of acute delusional psychosis, it would not be reasonable to first of all allow her to leave the hospital and second of all to treat such a dangerous condition with a mere referral for mental health counseling a few days later." Nagelberg continued: "[Donna's condition] warranted either a psychological evaluation to be performed by a licensed psychologist or a psychiatric consultation to be performed by a licensed psychiatrist." Nagelberg further stated "[i]n my opinion, the departure by Dr.

Crumpler from the standard of care was the proximate cause of the tragedy in this case."

Cusack's affidavit opined "[t]he standard of care for an emergency room physician dictates that optimally the patient should have been immediately hospitalized. Dr. Crumpler neither hospitalized the patient, nor called a psychiatrist for consult. To compound these errors, Dr. Crumpler prescribed Vistaril, an antihistamine medication, which was inappropriate considering his diagnosis that Ms. Brown was psychotic. Vistaril is a medication which would offer only minimal palliation without addressing the psychotic core of this patient's illness." The affidavit further stated Donna "should have been hospitalized or prescribed an antipsychotic medication while emergently treated and prescribed daily antipsychotic medication until her follow-up appointment . . . ."[5] Cusack continued: "The gravity of Ms. Brown's psychiatric illness was beyond referral for simple counseling at Mental Health. The standard of care for an emergency physician would appear to me to have been breached in this case as set forth above. Further, if the patient had been hospitalized and prescribed proper medication, the probability of a fatal outcome would have been significantly diminished."[6]

Viewing this evidence and all inferences which can be reasonably drawn from it in the light most favorable to the non-moving parties, we find that Cusack and Nagelberg's affidavits are sufficient to meet the standard required to survive summary judgment. <u>See</u> <u>Baughman v. Am. Tel. & Tel. Co.</u>, 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991) (stating that the determination of whether expert medical testimony is sufficient to establish causation does not require that the expert actually use the words "most probably").

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[5] The affidavit originally stated Donna should have been "hospitalized <u>and</u> prescribed an antipsychotic medication." The "and" was crossed through, replaced with "or," and initialed by Dr. Cusack.

[6] The "and" in this sentence, toward the end of Cusack's affidavit, was not altered.

IV. ADDITIONAL SUSTAINING GROUNDS

Carolina Emergency Medicine argues this court should affirm the trial court's order on the ground that service of process on Carolina Emergency Medicine was ineffective.[7] We agree.

Questions of fact arising on a motion to quash service of process for lack of jurisdiction over the defendant are to be determined by the court. Lawson v. Jeter, 243 S.C. 103, 106, 132 S.E.2d 276, 277 (1963). The findings of the circuit court on such issues are binding on the appellate court unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law. Id.

Carolina Emergency Medicine is a group of emergency room doctors, including Crumpler, that provide emergency physician services to Greenville Memorial Hospital. Carolina Emergency Medicine does not maintain an office and its only public physical presence is in the hospital emergency room. Appellants' process server, Selena Riddle, went to the hospital to serve Carolina Emergency Medicine. In her affidavit, Riddle stated she was directed to Katie Gillespie who allegedly indicated she was the manager of Carolina Emergency Medicine. Based on Gillespie's claim, Riddle served Gillespie as an agent for Carolina Emergency Medicine.

Dr. Jeffrey Leshman, the president of Carolina Emergency Medicine, and

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[7] A respondent may raise on appeal any additional reasons the appellate court should affirm the trial court's ruling. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 722-23 (2000) (appellate court may review respondent's additional reasons and rely on them or any other reason appearing in the record to affirm the lower court's judgment; it is within appellate court's discretion whether to address any additional sustaining grounds).

Gillespie, provided affidavits establishing that Gillespie was an employee of the hospital and was not authorized to accept service on behalf of Carolina Emergency Medicine.

Carolina Emergency Medicine argues Appellants' service of process on Gillespie, an emergency room secretary employed by the hospital, was ineffective.

Service may be made upon a corporation "by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." Rule 4(d)(3), SCACR. See Roche v. Young Bros. of Florence, 318 S.C. 207, 210, 456 S.E.2d 897, 899 (1995) ("Service on a corporation may be made by hand delivering a copy of the summons and complaint to an officer of the corporation or to an authorized agent of the corporation."). In order to be effective, service must be made on an actual agent. Hammond v. Honda Motor Co., 128 F.R.D. 638, 643 (D.S.C. 1989).

In determining whether an alleged agent has authority to receive process for a defendant, this court concluded:

> [t]he courts must look to the circumstances surrounding the relationship and find authority which is either express or implied from the type of relationship between the defendant and the alleged agent. Claims by one to possess authority to receive process or actual acceptance of process by an alleged agent will not necessarily bind the defendant. Rather, there must be evidence the defendant intended to confer such authority.

Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 67 (Ct. App. 1996) (construing service upon an agent under Rule 4(d)(1), SCRCP). "Without

specific authorization to receive process, service is not effective when made upon an employee of the defendant, such as a secretary." Id. at 523-24, 473 S.E.2d at 67.

Even under our limited standard of review, we find Appellants failed to show sufficient compliance with Rule 4(d), SCRCP, to effect service on Carolina Emergency Medicine. See Jensen v. Doe, 292 S.C. 592, 594, 358 S.E.2d 148, 148-49 (Ct. App. 1987) (plaintiff has the burden of showing the court has personal jurisdiction over defendant). Accordingly, we affirm the trial court's grant of summary judgment as to Carolina Emergency Medicine.[8]

CONCLUSION

In conclusion, we reverse the circuit court's exclusion of Dr. Nagelberg's affidavit. We affirm the court's grant of summary judgment dismissing Chris and Donna's actions against Carolina Emergency Medicine for ineffective service of process. We affirm the court's grant of summary judgment on the remaining actions based on negligent failure to hospitalize Donna. We reverse and remand the court's grant of summary judgment on the remaining actions as to the suits based on negligent failure to adequately treat Donna.

For the foregoing reasons, the judgment of the trial court is hereby

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

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[8] We decline to address Greenville Hospital System's remaining additional sustaining ground. See I'On, 338 S.C. at 420 n. 9, 526 S.E.2d at 723 n. 9 (holding appellate court may decline to address respondent's additional sustaining grounds when it reverses trial court's decision).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Nicholas N. Trivelas and Peggy Trivelas,

Respondents,

v.

South Carolina Department of Transportation and E. H. Sistrunk Trucking, Inc.,

Defendants,

of Whom,

South Carolina Department of Transportation, is,

Appellant.

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Appeal From Aiken County
Rodney A. Peeples, Circuit Court Judge

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Opinion No. 3421
Heard November 13, 2001 - Filed December 17, 2001

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REVERSED AND REMANDED

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Andrew F. Lindemann, William H. Davidson, II, and James M. Davis, Jr., all of Davidson, Morrison

& Lindemann, of Columbia, for appellant.
Richard A. Harpootlian and Robert G. Rikard, both of Richard A. Harpootlian, P.A.; and Leigh J. Leventis, all of Columbia, for respondents.

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ANDERSON, J.: Nicholas Trivelas was injured in a motor vehicle accident involving a vehicle owned and operated by the South Carolina Department of Transportation ("DOT"). Trivelas and his wife, Peggy, filed this action against DOT, alleging damages resulting from the accident. The trial court granted partial summary judgment in favor of the plaintiffs. DOT appeals, asserting the trial court erred in finding DOT was negligent per se. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

On the afternoon of November 19, 1997, DOT was contacted to assist in clearing lumber that had fallen from a truck traveling on the eastbound lanes of Interstate 20 near mile marker three in Aiken County. David Monborne, a maintenance equipment operator and truck driver for DOT, was transporting a back-hoe to the scene of the lumber spill. Monborne was traveling on the westbound lane of Interstate 20 and driving a DOT dump truck pulling a trailer containing the back-hoe. The truck did not have a flasher or any special lights. A van driven by Trivelas struck the right corner of the DOT trailer as Monborne was turning into the median to approach the lumber spill on the east side of the interstate.

In his deposition, Monborne stated he moved into the left lane of traffic as he approached the lumber spill. Monborne then turned on his left-hand signal to indicate he was going to turn into the median. Monborne stated he "started slowing down real gradually" and slowed to less than ten miles per hour before turning into the median.

Trooper William Lynn was assisting with the lumber spill that afternoon and observed the traffic accident involving Trivelas and the DOT truck. Lynn

stated the DOT truck's left turn signal was blinking as it turned into the median and that the truck was almost completely off the roadway when the van driven by Trivelas struck the right corner of the trailer. The trooper further stated that following the accident, he checked the DOT truck and all of the lights and blinkers on both the truck and trailer were working properly.

Trooper Lynn spoke with Trivelas immediately after the accident. During his deposition, Trooper Lynn described his conversation with Trivelas:

> He told me that he was traveling west bound, that as he approached the area he noticed the truck and all of the patrol cars on the east bound side of the road way, and that his attention was directed over there for a short time, and when he looked back the truck in front of him, which was the DOT truck, had slowed down sharply and he wasn't able to avoid an impact. They say [Trivelas] tried to brake and still hit it. I didn't really question him in depth, but that is basically what he told me.

The trooper additionally testified:

> I feel like his attention was distracted to the other side of the roadway. He was watching the wrong thing — you know, we call it rubber necking[,] which we see everyday.
>
> I feel like he was — his attention was transfixed on what was going on in the east bound lane and it — by the time he realized something was going on in front of him, it was too late for him to do anything other than just lock his brakes up and run into the back of the trailer.
>
> From my standpoint as a trooper, his attention should have been in front of him to the traffic that was going on in front of him.

Additionally, DOT deposed Kendrick Richardson, an engineer who conducts accident reconstruction analysis. Richardson opined the "accident

occurred as a direct result of Mr. Trivelas not behaving in an attentive manner when driving."

The plaintiffs commenced this negligence action against DOT and E.H. Sistrunk Trucking, Inc., the owner of the truck transporting the lumber. The case was scheduled for trial on August 28, 2000. On August 22, 2000, the plaintiffs filed a motion for partial summary judgment against DOT, asserting DOT was negligent as a matter of law. The motion for partial summary judgment was heard in chambers on August 24, 2000. On August 28, 2000, the trial court issued an order granting the plaintiffs' motion for partial summary judgment, finding that DOT's actions constituted negligence as a matter of law, or "negligence per se." The order also indicated that the trial court had considered the deposition transcripts of various witnesses and the deposition testimonies as presented in the arguments of counsel. This appeal follows.

STANDARD OF REVIEW

Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Green v. Cottrell, 346 S.C. 53, 550 S.E.2d 324 (Ct. App. 2001), cert. pending; Bruce v. Durney, 341 S.C. 563, 534 S.E.2d 720 (Ct. App. 2000); see also Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) ("Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.").

Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing, and Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party opposing summary judgment. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App.

1997).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000); Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 511 S.E.2d 699 (Ct. App. 1999), aff'd, 341 S.C. 320, 534 S.E.2d 672 (2000). "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Carolina Alliance for Fair Employment, 337 S.C. at 485, 523 S.E.2d at 799.

An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. Bray v. Marathon Corp., 347 S.C. 189, 553 S.E.2d 477 (Ct. App. 2001), cert. pending; Brockbank, 341 S.C. at 800, 534 S.E.2d at 692; Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998); see also Estate of Cantrell, 302 S.C. 557, 559, 397 S.E.2d 777, 778 (Ct. App. 1990) ("On appeal from summary judgment, the reviewing court must consider the facts and inferences in the light most favorable to the nonmoving party. The judgment may be affirmed only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.") (citations omitted).

LAW/ ANALYSIS

I. Section 56-5-800

DOT contends S.C. Code Ann. § 56-5-800 shields it from liability for negligence as a matter of law for the incident arising out of the plaintiffs' cause of action. This statute provides that certain provisions of the Uniform Act Regulating Traffic on Highways "shall not apply to persons, motor vehicles and other equipment while actually engaged in work upon the highway but shall apply to such persons and vehicles when traveling to or from such work." S.C. Code Ann. § 56-5-800 (1991); see also Howard v. South Carolina Dep't of Highways, 343 S.C. 149, 154, 538 S.E.2d 291, 293 (Ct. App. 2000) (stating § 56-5-800 "denies per se negligence to potential claimants[,] which forces them

to prove negligence in the specific context of roadway repair operations").

We note there is no indication in the record DOT raised this argument to the Circuit Court. Furthermore, the trial judge did not address the issue in his summary judgment order. Additionally, DOT failed to raise this matter in any post-trial motion. Therefore, this issue is not preserved for appeal. See I'on v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (stating parties should raise all necessary issues and arguments to trial court and attempt to obtain a ruling); Townsend v. City of Dillon, 326 S.C. 244, 486 S.E.2d 95 (1997) (holding issues not ruled upon by the trial judge are not preserved for appellate review); Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991) (ruling issue was not preserved for appellate review where the trial court did not explicitly rule on the appellant's argument and the appellant made no Rule 59(e) motion to alter or amend the judgment); see also Jean Hoefer Toal, et al., Appellate Practice in South Carolina 65 (1999) (reciting the well settled rule that an appellate court will only rule upon issues that were properly preserved at the trial level).

II. Negligence Per Se

The Circuit Court ruled the driver of the DOT vehicle violated §§ 56-5-1560 and 56-5-1920, thus constituting negligence as a matter of law. DOT argues this ruling was in error. We agree.

A. Existence of Statutory Duty: Sections 56-5-1560 and 56-5-1920

Section 56-5-1560(a) states: "No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic **except when reduced speed is necessary for safe operation or in compliance with law**." (emphasis added).

Section 56-5-1920 provides:

> Whenever any highway has been divided into two or more roadways by leaving an intervening space or by a physical barrier

> or clearly indicated dividing section so constructed as to impede vehicular traffic, every vehicle shall be driven only upon the right-hand roadway **unless directed or permitted to use another roadway by official traffic-control devices or police officers**. No vehicle shall be driven over, across or within any such dividing space, barrier or section **except through an opening in such physical barrier or dividing section or space or at a crossover or intersection as established**, unless specifically prohibited by public authority. For clarification, a left turn across a painted median is authorized unless prohibited by an official traffic-control device.

(emphasis added).

DOT contends there was sufficient evidence to create material issues of fact as to whether: (1) the DOT truck was driving across an opening in the median in compliance with § 56-5-1920; and (2) it was necessary for the DOT vehicle to drive below the minimum speed limit. DOT also asserts that because its truck was responding to a lumber spill, which was creating a traffic hazard, there was a material issue of fact regarding whether DOT was permitted to cross the median by a police officer.

DOT presented evidence that its truck crossed an open area of grass in the median to respond to the Highway Patrol's request for assistance in clearing away the debris of the lumber spill. Monborne testified he slowed to approximately ten miles per hour to safely turn into the median. Viewing the evidence in the light most favorable to DOT, we find the trial court erred in concluding there was undisputed evidence that the driver of the DOT truck violated §§ 56-5-1560 and 56-5-1920. Furthermore, our case law has recognized that a violation of a traffic statute does not constitute negligence per se under explanatory or excusatory circumstances. Davis v. Boyd, 262 S.C. 679, 207 S.E.2d 101 (1974); Myers v. Evans, 225 S.C. 80, 81 S.E.2d 32 (1954).

B. Proximate Cause

To prevail in an action for negligence, the plaintiff must prove the following three elements:

(1) a duty of care owed by defendant to plaintiff;

(2) defendant's breach of that duty by a negligent act or omission; and

(3) damages to plaintiff proximately resulting from the breach of duty.

Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000); Jeffords v. Lesesne, 343 S.C. 656, 541 S.E.2d 847 (Ct. App. 2000); Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996).

Plaintiffs assert DOT is liable for damages on the theory of negligence per se due to DOT's alleged violations of §§ 56-5-1560 and 56-5-1920. Negligence per se is negligence arising from the defendant's violation of a statute. See Coleman v. Shaw, 281 S.C. 107, 314 S.E.2d 154 (Ct. App. 1984); see also 28 Words & Phases Negligence Per Se 683 (1955) (citing Boylston v. Armour & Co., 196 S.C. 1, 12 S.E.2d 34 (1940)).

In Rayfield v. South Carolina Department of Corrections, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988), we enunciated the test for determining when a duty created by statute will support an action for negligence:

> In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect.
>
> If the plaintiff makes this showing, he has proven the first

> element of a claim for negligence: viz., that the defendant owes him a duty of care. If he then shows that the defendant violated the statute, he has proven the second element of a negligence cause of action: viz., that the defendant, by act or omission, failed to exercise due care. This constitutes proof of negligence per se.

Id. at 103, 374 S.E.2d at 914-15.

A statute can establish a duty to plaintiff. Whitlaw v. Kroger Co., 306 S.C. 51, 410 S.E.2d 251 (1991). A breach of the duty can be found with a showing of violation of the statute. Id. The finding of a statutory violation, however, does not automatically lead to the recovery of damages. Seals v. Winburn, 314 S.C. 416, 445 S.E.2d 94 (Ct. App. 1994). The plaintiff must prove the violation proximately caused the injury complained of by the injured party. Id.; see also Rayfield, 297 S.C. at 104, 374 S.E.2d at 915 ("Negligence per se simply means the jury need not decide if the defendant acted as would a reasonable man in the circumstances. The statute fixes the standard of conduct required of the defendant, leaving the jury merely to decide whether the defendant breached the statute. If he did, his failure to take due care is established as a matter of law. The only issue then left for the jury to determine is the third element of negligence, viz., whether the defendant's conduct proximately caused damage to the plaintiff."); 1 John E. Parker & Jack L. Nettles, Automobile and Truck Accidents 206, in South Carolina Practice Manual (Howard-Möise ed. 2000) ("While the violation of a statute is negligence per se, such violation is not actionable unless the specific violation is a proximate cause of the injury ….") (footnote omitted).

In Oliver v. South Carolina Department of Highways and Public Transportation, 309 S.C. 313, 422 S.E.2d 128 (1992), our Supreme Court recited the well established rules concerning proximate cause:

> Proximate cause requires proof of both causation in fact, and legal cause. "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." Whitlaw v. Kroger Co., 306 S.C. 51, 410 S.E.2d 251, 253 (1991)

> (quoting Bramlette v. Charter- Medical-Columbia, 302 S.C. 68, 74, 393 S.E.2d 914, 916 (1990)).
>
> . . . .
>
> "Legal cause is proved by establishing foreseeability." Id. "The standard by which foreseeability is determined is that of looking to the 'natural and probable consequences' of the complained of act." Young v. Tide Craft, Inc., 270 S.C. 453, 462, 242 S.E.2d 671, 675 (1978).
>
> . . . .
>
> Furthermore, legal cause is ordinarily a question of fact for the jury. Only when the evidence is susceptible to only one inference does it become a matter of law for the court. Matthews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (1962).

Id. at 316-17, 481 S.E.2d at 130-31.

This Court recently revisited the issue of proximate cause in Parks v. Characters Night Club, 345 S.C. 484, 548 S.E.2d 605 (Ct. App 2001):

> This case hinges on whether Characters breached a duty owed to Parks and whether this breach was the proximate cause of Parks' injuries. It is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant's negligence. Olson v. Faculty House, 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001) [cert. granted].
>
> To prove causation, a plaintiff must demonstrate both causation in fact and legal cause. Id. Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's negligence. Id. Legal cause turns on the issue of foreseeability. Id. An injury is foreseeable if it is the natural and probable consequence of a breach of duty. Id. Foreseeability is not

> determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach. Id. It is not necessary for a plaintiff to demonstrate the defendant should have foreseen the particular event which occurred but merely that the defendant should have foreseen his or her negligence would probably cause injury to someone. Greenville Mem'l Auditorium v. Martin, 301 S.C. 242, 391 S.E.2d 546 (1990).

Id. at 491, 548 S.E.2d at 609; see also McNair v. Rainsford, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998) ("In a negligence action, the plaintiff must prove proximate cause. Negligence is not actionable unless it is a proximate cause of the injury. Proof of proximate cause requires proof of both causation in fact and legal cause. 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. A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence.") (citations omitted); F. Patrick Hubbard & Robert L. Felix, The South Carolina Law of Torts 129 (2d ed. 1997) ("Determining whether a breach [of duty] was the cause-in-fact of an injury is primarily an empirical issue, which is often phrased in terms of a 'but for' test: Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence.") (footnotes and some internal quotation marks omitted).

As a general rule, the question of proximate cause is one of fact for the jury. Ballou v. Sigma Nu Gen. Fraternity, 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986); see also Hadfield v. Gilchrist, 343 S.C. 88, 99, 538 S.E.2d 268, 274 (Ct. App. 2000) ("Proximate cause is a question for the finder of fact.") (citations omitted); Vinson v. Hartley, 324 S.C. 389, 402, 477 S.E.2d 715, 721 (Ct. App. 1996) ("Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence.") (citations omitted); 8 Am. Jur. 2d Automobiles & Highway Traffic § 1169 (1997) ("The question of proximate cause in motor vehicle accident cases is ordinarily for the jury, even where the evidence is

undisputed, if different inferences may fairly be drawn therefrom. Where it is not plain that reasonable men could not reasonably find a causal relation between defendant's act and the injury, or a part of the injury, the court must leave it to the jury to find as a fact whether defendant's conduct was a substantial factor in producing the injury, or part of the injury….") (footnotes omitted); W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 41, at 264-65 (5th ed. 1984) ("Although it is not without its complications, the simplest and most obvious problem connected with 'proximate cause' is that of causation in 'fact.' This question of 'fact' ordinarily is one upon which all the learning, literature and lore of the law is largely lost. It is a matter upon which lay opinion is quite as competent as that of the most experienced court. For that reason, in the ordinary case, it is peculiarly a question for the jury.") (footnote omitted).

"Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law." Ballou, 291 S.C. at 147, 352 S.E.2d at 493 (citation omitted); see also Small v. Pioneer Mach., Inc., 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct. App. 1997) ("The particular facts and circumstances of each case determine whether the question of proximate cause should be decided by the court or by the jury. Only when the evidence is susceptible to only one inference does it become a matter of law for the court.") (citations omitted); Leon Green, Rationale of Proximate Cause 132 (1927) ("Causal relation is one of fact. It is always for the jury, except when the facts are such that they will support only one reasonable inference.") (footnote and emphasis in original omitted).

III. Comparative Negligence

The Circuit Court held there was no evidence of comparative negligence by Trivelas. We disagree.

In Nelson v. Concrete Supply Company, 303 S.C. 243, 399 S.E.2d 783 (1991), our Supreme Court adopted the doctrine of comparative negligence. Under the doctrine of comparative negligence, negligence by the plaintiff does not automatically bar recovery by the plaintiff, provided his negligence is not

greater than that of the defendant. Ott v. Pittman, 320 S.C. 72, 463 S.E.2d 101 (Ct. App. 1995). The Court of Appeals discussed the doctrine's effect on our trial courts in Brown v. Smalls, 325 S.C. 547, 481 S.E.2d 444 (Ct. App. 1997):

> The doctrine of comparative negligence replaces the harsh rule of contributory negligence. In the application of the doctrine of comparative negligence by a trial jury to a factual scenario, the litigants receive a careful, exhaustive factual review of their own conduct. In adopting the court-made rule of comparative negligence in Nelson, our Supreme Court in essence followed what is known as the "New Hampshire rule."

Id. at 559, 481 S.E.2d at 450-51 (citations omitted).

The Brown Court explained the jury's role in a comparative negligence case:

> **Ordinarily, the negligence of a party is a question of fact for the jury**.
>
> . . . .
>
> As a general rule, under a "less than or equal to" comparative negligence rule, determination of respective degrees of negligence attributable to the plaintiff and the defendant presents a question of fact for the jury, at least where conflicting inferences may be drawn. **Accordingly, apportionment of negligence, which determines both whether a plaintiff is barred from recovery or can recover some of his damages and the proportion of damages to which he is entitled, is usually a function of the jury**.

Id. at 558-59, 481 S.E.2d at 450-51 (emphasis added) (citations omitted); see

also Lydia v. Horton, 343 S.C. 376, 395, 540 S.E.2d 102, 112-13 (Ct. App. 2000), cert. granted ("Comparison of a plaintiff's negligence with that of the defendant is a question of fact for the jury to decide.") (quoting Creech v. South Carolina Wildlife & Marine Resources Dep't, 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997)).

In the present action, DOT provided deposition testimony from an accident reconstruction expert, as well as the state trooper who witnessed the accident. Each opined that Trivelas' inattentiveness and failure to properly reduce his speed was the proximate cause of the collision between the DOT truck and Trivelas' van. Additionally, Trooper Lynn stated in deposition that following the accident, Trivelas told him he was distracted and was not observing the traffic directly in front of him when the accident occurred. Viewing the evidence in the light most favorable to DOT, we find there are genuine issues as to material facts in regard to "**proximate cause**" and "**comparative negligence**" precluding the grant of summary judgment. Concomitantly, we rule the trial court erred in granting partial summary judgment in favor of the plaintiffs.

IV. Notice/Summary Judgment

Additionally, DOT argues the trial court erred in hearing the plaintiffs' motion for partial summary judgment less than ten days after the motion was served. In view of our resolution of DOT's other grounds for appeal, we need not address this remaining issue.

CONCLUSION

The grant of summary judgment in favor of the plaintiffs is

REVERSED and the case is REMANDED for trial.

SHULER, J., concurs.

HOWARD, J., concurs in result only in a separate opinion.

HOWARD, J., (concurring in result only): Although I agree with the factual analysis, I would dispose of this appeal on a different basis. In my opinion, the procedural irregularities require reversal and would allow for a reconsideration of the original summary judgment motion filed by Trivelas, which was limited to whether or not the South Carolina Department of Transportation was negligent as a matter of law.

The motion was filed less than ten days before trial and was heard by the circuit judge in chambers on the eve of trial as a part of the pre-trial conference. Rule 56 (c), SCRCP, requires a ten day notice to the opposing party, which allows time to prepare and file a proper response to the motion. Because the motion was heard in chambers without a court reporter, the nature of any procedural objection raised to the trial court is not available to us. SCDOT argues that it objected to hearing the motion, but Trivelas disputes this. The final written order does not address the timing of the motion, and no subsequent motion was made pursuant to Rule 59, SCRCP, asking the court to rule on any objection. Consequently, the record does not reflect that the trial judge ruled on the issue, and it is not preserved for our review. See Summersell v. S.C. Dep't of Pub. Safety, 337 S.C. 19, 522 S.E.2d 144 (1999).

The order granting summary judgment recites that the trial judge considered not only deposition excerpts filed with the brief supporting the motion, but also "deposition testimonies as presented in the arguments of counsel." As the attorneys stated in oral argument, they were apparently allowed to summarize the factual information contained within depositions which had not been filed with the court at the time the motion was considered. Not surprisingly, the parties now disagree as to what was and was not presented to the judge in the unrecorded hearing.

Following the hearing, SCDOT filed excerpts from the deposition of Trooper Lynn which contained statements by Mr. Trivelas implying he was

inattentive prior to the impact. This is the testimony which the majority cites in its factual analysis. This testimony is contained in lines 14 though 23 of page 17 in Lynn's deposition. Unfortunately, the order of summary judgment does not refer to these lines, although it does cite other lines contained on the same page of the deposition.

Trivelas contends he submitted the specific lines mentioned in the final order prior to the hearing, but not the entire page. SCDOT does not dispute this, but argues that the critical testimony was summarized during the arguments, and the entire page was then mailed to the clerk of court for inclusion in the record. Page 17 of Trooper Lynn's deposition appears in our record on appeal, but Trivelas objects to its inclusion and has moved to strike it.

Trivelas asks us not to consider Trooper Lynn's testimony as to Trivelas's inattention prior to the collision because it was not filed at or prior to the hearing. However, this argument works both ways, and if applied, undermines the trial court's decision because the trial judge based his ruling in part upon Trivelas' deposition testimony, which also was not filed with the court. According to the order, Trivelas testified in his deposition that another vehicle was in front of him and swerved into the adjoining lane at the last moment, leaving Trivelas with no time to react to the SCDOT truck and trailer. However, no part of Trivelas' deposition is contained in the record or was filed with the court at the time of the hearing.

There is no valid basis upon which we can rule, other than to believe one attorney's memory over that of another. The result of the procedural irregularities recited above underscores the importance of clearly marking, filing and establishing an accurate record of the information provided to the trial court for consideration in a motion for summary judgment. Arguments of counsel are not evidence, and absent stipulation, they do not provide a factual basis for summary judgment. See Rule 56 (c), SCRCP ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

and that the moving party is entitled to a judgment as a matter of law.”). Furthermore, we cannot base a factual review upon them. Cobb v. Benjamin, 325 S.C. 573, 581 n.2, 482 S.E.2d 589, 593 n.2 (Ct. App. 1997) (“[W]here there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record.”). I would rule that it is an error of law to base a decision on “deposition testimonies as presented in the arguments of counsel,” as was done in this case, unless copies of the deposition testimony are properly filed in the record or the parties have stipulated to the facts. See Id.; Rule 56 (c), SCRCP.[1]

For the foregoing reasons, I would reverse and remand for further proceedings, but would allow reconsideration of the motion made by Trivelas, following proper notice and opportunity to file affidavits and deposition testimony as allowed by the rule.

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[1]Although Rule 56 (f) provides that the court “may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just,” the court ruled at the hearing, and did not defer the decision pending the filing of depositions or other supplemental information. The written order was not prepared and filed until after the deposition excerpts were filed with the clerk, but the trial judge did not continue the hearing until they were received. Indeed, there is no indication he was ever aware they were filed or had an opportunity to consider them.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

____

Allendale County Bank,

Respondent,

v.

George W. Cadle, Peerless Group, Inc., JEJ Construction, Inc., Red Earth Environmental, Inc., Steffen Robertson and Kirsten (U.S.), Inc., E & J Landscaping, Inc. and Wastemasters of South Carolina, Inc.,

Defendants,

Of whom Steffen Robertson and Kirsten (U.S.), Inc. and E & J Landscaping, Inc. are,

Appellants.

____

Appeal From Allendale County
Perry M. Buckner, Special Referee

____

Opinion No. 3422
Heard November 6, 2001 - Filed December 17, 2001

____

AFFIRMED

____

Gary H. Smith, III, of Braithwaite, Smith, Massey & Brodie, of Aiken; and Ladson H. Beach, Jr., of Orangeburg, for appellants.

Walter H. Sanders, Jr., of Fairfax, for respondent.

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CURETON, J.: Allendale County Bank ("Bank") brought this action to establish the priority of its mortgage on real estate located in Allendale County after it mistakenly filed a satisfaction of the mortgage. The special referee cancelled the mortgage satisfaction and concluded Bank had a first lien on the property, with priority over Steffen Robertson and Kirsten (U.S.), Inc. ("SRK") and E & J Landscaping, Inc. ("E&J"). Both SRK and E&J (collectively, "Appellants") appeal. We affirm.

FACTS

This action arises out of a dispute regarding the priority of lienholders on real estate owned by George W. Cadle. The property consisted of approximately five tracts of land with a total of more than 340 acres in Allendale County. Cadle operated the Appleton Sanitary Landfill on a portion of the land that is now known as the Wastemasters of South Carolina, Inc. Landfill.

Cadle had been doing business with Bank for a number of years. He executed three mortgages on his property in favor of Bank in 1982, 1987, and 1989.

In 1993, Cadle executed a fourth mortgage on his property in favor of Bank and a 10-year promissory note for $390,000. The mortgage, dated September 17, 1993, was recorded in the Office of the Clerk of Court for Allendale County at Book 82, Page 535. According to the parties, the fourth mortgage was actually a consolidation of the three prior mortgages.

In 1996, Cadle contracted to sell to Wastemasters of South Carolina, Inc. approximately 306 acres comprising what was formerly the Appleton Sanitary Landfill.

As part of the ongoing arrangements in the sale to Wastemasters, Cadle wished to extinguish the first three mortgages on the property executed in 1982, 1987, and 1989. However, Cadle's attorney prepared four Satisfactions of Mortgage for execution by Bank. On June 10, 1996, three separate Satisfactions of Mortgage were filed in the Allendale County Clerk's Office for the mortgages executed in 1982, 1987, and 1989. In addition, however, a fourth Satisfaction of Mortgage was recorded purporting to satisfy a mortgage from Cadle to Bank dated September 17, 1983 and was recorded in Mortgage Book 82, Page 535. As a result, the 1993 mortgage was marked as satisfied of record despite the fact that the Satisfaction of Mortgage form contained a typographical error stating the mortgage date was September 17, 19**8**3 instead of 19**9**3.

In 1997, Appellants filed mechanics' liens in the Allendale County Clerk's Office, claiming nonpayment for materials and/or services they had provided to Wastemasters for improvements to the real property (landfill) owned by Cadle.[1] SRK filed an amended mechanic's lien with the clerk's office seeking the sum of $135,822.07 on June 25, 1997. E&J filed its mechanic's lien against the property for the amount of $341,243.60 on May 12, 1997.

The problem in this case arose when Bank realized it had mistakenly marked the fourth mortgage, executed in 1993, as satisfied when only the first three mortgages should have been satisfied. After Bank realized its mistake, Cadle executed a new mortgage in favor of Bank on the same property described in the original mortgages. It was recorded in the clerk's office on December 23, 1997.

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[1] The evidence contained in the record shows that E&J began its work for Wastemasters on the landfill in August or September 1995. SRK entered into a contract with Wastemasters on or about December 8, 1995 to furnish services for the landfill.

In October 1998, Bank filed this mortgage foreclosure action, asserting Cadle had executed a note with an unpaid balance due of $277,741.15, plus interest, attorney's fees, and costs, which was secured by a 1993 mortgage that was "re-recorded" in 1997.[2] Bank asked that its mortgage be foreclosed and declared a first lien on the property, with the liens of the Appellants designated junior to its mortgage.

Appellants SRK and E&J each answered and asserted their liens were superior to Bank's. In November 1999, the matter was referred to a special referee to enter a final order with direct appeal to this court.

The referee found Bank's 1993 mortgage was satisfied by mistake and that neither of the Appellants had relied on Bank's satisfaction of the mortgage in providing improvements to the property. The referee concluded that, as a matter of equity, Bank's mortgage should be reinstated as a first lien on the property with Appellants' mechanics' liens being junior in priority to Bank's lien. Appellants appeal, asserting Bank's mortgage was not entitled to priority over their mechanics' liens.[3]

STANDARD OF REVIEW

An action to foreclose a real estate mortgage and for cancellation of a mortgage satisfaction on the basis of mistake lies in equity. First Palmetto Sav. Bank v. Patel, 344 S.C. 179, 183, 543 S.E.2d 241, 243 (Ct. App. 2001). Thus, this Court has jurisdiction to determine the facts in accordance with our own view of the preponderance of the evidence. Id.; see also Dockside Ass'n v. Detyens, 294 S.C. 86, 88, 362 S.E.2d 874, 875 (1987) ("An action to foreclose

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[2] The complaint states the 1993 mortgage secured a note executed by Cadle on February 23, 1998, and the note was attached to the complaint. According to the referee's order, the 1998 note was a renewal of the prior note made after Bank reinstated its mortgage in 1997.

[3] The remaining defendants are not parties to this appeal.

a real estate mortgage is one in equity. In equity cases, we may find facts in accordance with our own view of the evidence.").

LAW/ANALYSIS

I. Priority of Bank's Mortgage

Appellants first contend the referee erred in ruling they were not entitled to priority as they were first to file their liens pursuant to Section 30-7-10 of the South Carolina Code. We find no error.

Section 30-7-10 provides in relevant part as follows:

> All deeds of conveyance of lands, . . . all mortgages . . . of any real property, . . . all statutory liens on buildings and lands for materials or labor furnished on them, . . . are valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors), or purchasers for valuable consideration without notice, only from the day and hour when they are recorded in the office of the register of deeds or clerk of court of the county in which the real property is situated. In the case of a subsequent purchaser of real estate, or in the case of a subsequent lien creditor on real estate for valuable consideration without notice, the instrument evidencing the subsequent conveyance or subsequent lien must be filed for record in order for its holder to claim under this section as a subsequent creditor or purchaser for value without notice, and the priority is determined by the time of filing for record.

S.C. Code Ann. § 30-7-10 (Supp. 2000).

Section 30-7-10 sets forth the general rule for priority under the law.

However, Bank is asserting equitable grounds for relief from strict application of the general rule. Accordingly, we agree with the referee that section 30-7-10 is not determinative of the parties' rights in this instance.

As this Court recently reiterated: "Equitable principles may be applied to cancel a mortgage satisfaction." First Palmetto Sav. Bank, 344 S.C. at 183, 543 S.E.2d at 243. This rule has long been recognized in South Carolina:

> The principle which underlies all of the reported decisions in this class of cases is, when the legal rights of the parties have been changed by mistake, equity restores them to their former condition, when it can be done without interfering with any new rights acquired on the faith and strength of the altered condition of the legal rights and without doing injustice to other parties.

Young v. Pitts, 155 S.C. 414, 420, 152 S.E. 640, 642 (1930) (quoting Lumber Exch. Bank v. Miller, 40 N.Y.S. 1073 (N.Y. Sup. Ct. 1896)). "Thus, a mortgage that has been mistakenly satisfied may be reinstated only where there is no third party who, without notice of the mistake, subsequently and in good faith acquires an interest in the property." First Palmetto Sav. Bank, 344 S.C. at 184, 543 S.E.2d at 243; see also Young, 155 S.C. at 420, 152 S.E. at 642 ("[A] satisfaction entered through mistake does not destroy the priority of the mortgage unless others are misled and injured thereby.").

At the hearing in the case before us, John Harter, president of Bank, testified he understood Cadle's property was being purchased and that the buyer had requested Cadle to satisfy all old mortgages of record. Harter testified the September 17, 1993 mortgage was a consolidation of the prior mortgages and that he was not authorized, nor did he intend, to satisfy the September 17, 1993 mortgage, as the note securing this mortgage had not been paid. Harter further stated Cadle's attorney prepared and presented to him four Satisfaction of Mortgage forms purporting to satisfy mortgages from 1982, 1983, 1987, and 1989. After examining the satisfaction forms and finding none of them purported to satisfy a mortgage from the 1990s, Harter executed the forms

which were then recorded by Cadle's attorney.

Harter stated if any of the mortgage satisfaction forms had been dated 1993, he never would have signed them. Harter acknowledged he did not personally check Bank's vault to see how many old mortgages Bank held, but he knew the most recent mortgage was exectued in the 1990s when he started working at Bank, and that all of the satisfaction forms he was signing were for mortgages dated in the 1980s.

The only witness to testify for the Appellants, Ed Salisbury, president of E&J, stated that his firm started working for Wastemasters on the landfill on Cadle's property around August or September of 1995. Further, Salisbury expressly acknowledged the presence or absence of a mortgage would not have affected his work on the property.

We agree with the special referee's findings that Bank's satisfaction of the 1993 mortgage was by mistake and that Appellants have failed to show any detrimental reliance or prejudice resulting from the mistaken filing of the satisfaction. E&J's and SRK's interests were created in the Wastemasters's landfill at the time the labor was performed or the material furnished. See Shelley Constr. Co. v. Sea Garden Homes, Inc., 287 S.C. 24, 26, 336 S.E.2d 488, 489 (Ct. App. 1985) (Inchoate liens arise for debt due for labor performed or materials furnished when labor is performed or materials furnished.); Charleston Lumber Co. v. GPT, 303 S.C. 350, 353, 400 S.E.2d 508, 510 (Ct. App. 1991) (Mechanic's lien arises, inchoate, when labor is performed or material furnished, but to be valid it must be perfected and enforced in accordance with Mechanic's Lien statutes). Although Appellants did perform work on the property, there is no evidence that either of them performed a check of the title to the property prior to undertaking to do any work on the premises. Since none of the mortgage satisfactions were filed until June 1996 and the 1993 mortgage was still of record at the time Appellants obtained liens on the property, there could have been no reliance on the mistaken satisfaction prior to furnishing labor or materials to improve the property.

SRK argued for the first time at oral argument before this court that its reliance argument is based on the status of the record at the time it filed the mechanic's lien action, since there was no mortgage on record at this time. SRK contends it would not have expended the money to prosecute this action if it was aware that the 1993 mortgage was still on record. We find this issue is not preserved for our review because the trial judge never ruled on the issue. An issue not raised to or ruled on by the trial court is not preserved for appellate review. Schofield v. Richland County Sch. Dist., 316 S.C. 78, 82, 447 S.E.2d 189, 191 (1994).

However, even if this issue were preserved, a review of the case law provides no support for this argument since the issue of reliance on the mistaken satisfaction is viewed at the time the interest is created in the property. In this case, the interest was created in the property at the time the material or labor was furnished. See Maxwell v. Epton, 177 S.C. 184, 181 S.E. 16 (1935); Young v. Pitts, 155 S.C. 414, 152 S.E. 640 (1930); First Palmetto Sav. Bank v. Patel, 344 S.C. 179, 543 S.E.2d 241 (Ct. App. 2001); MI Co. v. McLean, 325 S.C. 616, 482 S.E.2d 597 (Ct. App. 1997).

Consequently, we affirm the referee's determination that Bank's 1993 mortgage should be reinstated with priority over any claims held by the Appellants. See Young, 155 S.C. at 420, 152 S.E. at 642 (stating where the satisfaction of a mortgage is "entered through mistake, the law regards it as never having been entered at all, unless entering the satisfaction brought about prejudice to others dealing with the property").

II. Effect of Bank's Negligence

Appellants next argue the referee erred in ruling Bank could assert its priority despite Bank's own negligence in causing the release of the 1993 mortgage. We disagree.

Appellants contend Bank's failure to investigate the accuracy of the

documents signed by Bank's president was negligent. Appellants cite MI Co. v. McLean, 325 S.C. 616, 482 S.E.2d 597 (Ct. App. 1997), for the proposition that a mortgagee's negligence in the unintended release of a mortgage renders it ineligible to seek reinstatement of the instrument. Based on their assertion that negligence is a bar to equitable relief, Appellants maintain the priority of Bank's mortgage should be calculated from the time the 1997 mortgage was filed, thus rendering Bank's mortgage lien junior to their liens.

Appellants specifically quote the following language from MI Co., in support of their arguments:

> [W]here the mortgage cancellation is attributable to the mortgagee who . . . makes the fraud possible through his negligence, the court will not interfere to protect the mortgagee at the expense of the innocent person deceived by the fraud. In the equitable principle involved, use of the concept "negligence" refers to lax conduct on the part of one innocent party, but for which the other innocent party would have been protected from the deceit.

Id. at 624-25, 482 S.E.2d at 602 (citation omitted) (emphasis added).

Contrary to Appellants' assertion, the negligence of the mortgagee does not automatically result in denial of equitable relief. Rather, the test is whether there has been reliance by an innocent third party on the mistaken satisfaction. See, e.g., Young, 155 S.C. at 420-21, 152 S.E. at 642 (referencing cases holding that "where the holder of a note secured by a mortgage, by his own fault caused the satisfaction of the mortgage of record, he was, nevertheless, entitled to have the mortgage reinstated as against the mortgagor and subsequent creditors, who had no knowledge of the release and were not induced thereby to extend credit on the faith of the real estate being unencumbered.") (citing Stanley v. Valentine, 79 Ill. 544 (1875) and McConnell v. Bank, 103 N.E. 809 (Ind. App. 1914)).

We find that Appellants are unable to establish their reliance upon Bank's

mistaken satisfaction. We note that the only witness to testify on behalf of Appellants stated there was no reliance on the records in Allendale County before performing work at the landfill, and his work was unaffected by whether or not a mortgage existed on the property. Accordingly, we find any negligence on the part of Bank did not irrevocably destroy its entitlement to equitable relief.

III. Bank's Alleged Misconduct

Appellants finally contend the referee erred in ignoring Bank's inequitable conduct in this matter. Appellants assert that, since Bank is seeking relief in equity, its conduct is subject to equitable principles and Bank is not entitled to priority of its mortgage. We find no error.

Appellants contend the problem with the mortgages arose in this case only because Bank failed in 1993 to release the three existing mortgages that were being consolidated into the 1993 instrument. They assert Bank's failure to do so was not the result of mistake or negligence. Rather, it was "a calculated decision by Bank that contributed to a commission of fraud and deceit by Mr. Cadle upon his creditors."

Bank's chairman, Walker R. Harter, admitted during his testimony that Bank was aware Cadle wanted to leave the three superseded mortgages in place, apparently because he had some outstanding judgments and he wanted his creditors to believe they were further down the priority chain than they really were. According to Harter, Bank accommodated Cadle because he was a long-term customer.

We find the issue is not preserved for our review. Initially, we note Appellants failed to plead the doctrine of "unclean hands" as an affirmative defense in their answers. See Rock Hill Nat'l Bank v. Honeycutt, 289 S.C. 98, 104, 344 S.E.2d 875, 879 (Ct. App. 1986) (Because the theory of unclean hands was not pled or raised to trial judge it could not be raised on appeal.); see also Dye v. Gainey, 320 S.C. 65, 70, 463 S.E.2d 97, 100 (Ct. App. 1995) (Goolsby, J., concurring and dissenting) ("The majority in a footnote discounts Dye's

failure to appeal the trial court's reliance on the doctrine of unclean hands, implying this reliance was improper because Gainey had not yet filed a responsive pleading and never raised the doctrine as an affirmative defense."); see also Rule 8(c), SCRCP (requiring "any other matter constituting an avoidance" to be pled affirmatively).

In addition, the referee did not specifically rule on this allegation in his detailed order and there is no indication it was raised in a motion to alter or amend the judgment. Although there was some testimony at trial regarding Bank's motivation for allowing the three prior mortgages to remain on the record after the fourth mortgage was recorded in 1993, we can find no specific assertion by Appellants that Bank should not be allowed to have priority on the basis of "unclean hands," as it now asserts on appeal. See Holy Loch Distribs. v. Hitchcock, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000) ("In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court."); First Union Nat'l Bank v. Hitman, Inc., 306 S.C. 327, 331 n.5, 411 S.E.2d 681, 683 n.5 (Ct. App. 1991) (noting Hitman's "unclean hands" defense that the bank had acted inequitably in conducting a sale was not preserved where Hitman never objected to the sale on this basis and "did not make this specific defensive argument to the trial judge although its witnesses did complain about the delay[,] the trial judge did not rule on it[,] and Hitman did not file a post-trial motion to obtain a ruling").

In any event, even assuming Appellants' argument concerning Bank's inequitable conduct were preserved, Appellants are unable to demonstrate any prejudice in this regard. The only defense witness to testify, Ed Salisbury, the president of E&J, testified that he did not rely on the presence or absence of the mortgages in deciding whether to render services and/or materials which were the basis for his company's mechanic's lien. See Wilson v. Landstrom, 281 S.C. 260, 267, 315 S.E.2d 130, 134 (Ct. App. 1984) ("Since prejudice to the defendant is a necessary element of the 'unclean hands' defense, the doctrine cannot bar relief on the facts before us."). Accordingly, we find this argument affords no basis for reversal.

CONCLUSION

For the foregoing reasons, the decision of the referee is

AFFIRMED.

STILWELL and SHULER, JJ., concur.