The Supreme Court of South Carolina

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OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

December 31, 2001

ADVANCE SHEET NO. 45

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Columbia, South Carolina

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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

Page

25394 - John Doe, M.D. v. SC Medical Malpractice Liability Joint Underwriting Association 12

UNPUBLISHED OPINIONS

2001-MO-074 - Milton Coto v. State
(Richland County - Judge L. Casey Manning)

2001-MO-075 - Stacy Shannon Lay v. State
(Oconee County - Judge William H. Ballenger, Jr. and Judge Alexander S. Macaulay)

PETITIONS - UNITED STATES SUPREME COURT

25319 - Kenneth E. Curtis v. State of SC, et al. Pending

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

PETITIONS FOR REHEARING

None

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

		Page
3423	Jumper v. Hawkins	23
3424	State v. Roy Edward Hook	34
3425	State v. Linda Thompson Taylor	47
3426	State v. Leon Crosby	55
3427	Means v. Gates	69
3428	Harris-Jenkins v. Nissan Car Mart, Inc.	79
3429	Charleston County School District v. Laidlaw Transit, Inc.	87

UNPUBLISHED OPINIONS

2001-UP-545 State v. O'Dell Gagum
(Charleston, Judge J. Michael Baxley)

2001-UP-546 State v. Rodney James Cannon
(Pickens, Judge Henry F. Floyd)

2001-UP-547 Bozard v. Bozard
(Orangeburg, Judge Ruben L. Gray)

2001-UP-548 Coon v. McKay Painting
(Aiken, Judge Rodney A. Peeples)

2001-UP-549 State v. Jeremy Roy Fincher
(York, Judge John C. Hayes, III)

2001-UP-550 State v. Gary W. Woodside
(Berkeley, Judge Edward B. Cottingham)

2001-UP-551 State v. Donald Ray Jernigan
(Lexington, Judge Frank Eppes)

2001-UP-552 Bobian v. Lamoke
(Beaufort, Judge A. Victor Rawl)

2001-UP-553 State v. James Winfield Hunter
(Florence, Judge James E. Brogdon, Jr.)

2001-UP-554 State v. Arthur James Meachum
(York, Judge Lee S. Alford)

2001-UP-555 In The Interest of: Courtney C.
(Orangeburg, Judge Frances P. Segars-Andrews)

2001-UP-556 Woods v. Goodwin Builders
(Richland, Judge William P. Keesley)

2001-UP-557 State v. Marcus Joshua Corley
(Lexington, Judge William P. Keesley)

2001-UP-558 State v. James Scott
(Berkeley, Judge A. Victor Rawl)

2001-UP-559 Wright v. The Kroger Co.
(Aiken, Judge Rodney A. Peeples)

2001-UP-560 Powell v. Colleton County
(Colleton, Judge Gerald C. Smoak, Sr.)

2001-UP-561 State v. Curtis D. Richardson
(Horry, Judge Rodney A. Peeples)

2001-UP-562 State v. Curtis D. Richardson
(Horry, Judge Rodney A. Peeples)

2001-UP-563 State v. Willie Dwight Baker
(Greenville, Judge Lee S. Alford)

2001-UP-564 State v. Paul A. Rice
(Fairfield, Judge William P. Keesley)

2001-UP-565 United Student Aid Funds, Inc. v. SCDHEC
(Richland, Judge Donald W. Beatty)

2001-UP-566 State v. Norman Williams, Jr.

(Florence, Judge James E. Brogdon, Jr.)

2001-UP-567 Charleston County Sheriff's Office v. Nineteen Thousand One Hundred Eighty Eight
(Charleston, Judge R. Markey Dennis, Jr.)

PETITIONS FOR REHEARING

3382 - Cox v. Woodmen	Denied 12-20-01
3393 - Vick v. SCDOT	Denied 12-20-01
3396 - Brown v. Butler	Denied 12-20-01
3402 - State v. Donald Ray Wimbush	Denied 12-20-01
3403 - Christy v. Christy	(2) Denied 12-20-01
3404 - State v. Charles M. Stuckey, Jr.	Denied 12-20-01
3405 - State v. Jerry Martin	(2) Denied 12-20-01
3406 - State v. Yukoto Cherry	Pending
3408 - Brown v. Stewart	Pending
3411 - Lobresti v. Burry	(2) Pending
3413 - Glasscock v. United States Fidelity	Pending
3414 - State v. Duncan R. Proctor #1	Pending
3415 - State v. Duncan R. Proctor #2	Pending
3416 - Widman v. Widman	Pending
3417 - Hardee v. Hardee	(2) Pending
3418 - Hedgepath v. AT&T	(2) Pending

3425 - State v. Linda Thompson Taylor	Pending
2001-UP-419 - Moak v. Cloud	Pending
2001-UP-424 - Boan v. Boan	Denied 12-20-01
2001-UP-430 - State v. Dale Johnson	Pending
2001-UP-435 - State v. Ronald J. Huell	Denied 12-20-01
2001-UP-452 - Bowen v. Modern Classic Mtrs.	Denied 12-20-01
2001-UP-454 - Greenville National v. Simmons	Denied 12-20-01
2001-UP-455 - Stone v. Roadway Express	Pending
2001-UP-456 - Ray v. SC State University	Denied 12-20-01
2001-UP-460 - City of Aiken v. Cannon	Denied 12-20-01
2001-UP-461 - Storage Trailers, Inc. v. Proctor	Denied 12-20-01
2001-UP-465 - Town of Yemassee v. Yisrael	Denied 12-20-01
2001-UP-468 - Shealy v. Hare	Denied 12-20-01
2001-UP-469 - James Schneider v. State	Pending
2001-UP-470 - SCDSS v. Hickson	Pending
2001-UP-476 - State v. Jeffery Walls	Denied 12-20-01
2001-UP-477 - State v. Alfonso Staton	Denied 12-20-01
2001-UP-478 - State v. Leroy Staton	Pending
2001-UP-479 - State v. Martin McIntosh	(2) Denied 12-20-01
2001-UP-493 - State v. Marcus Griffin	Pending
2001-UP-507 - Adams v. Greaves	Pending
2001-UP-513 - Industrial Tractor Co. v. Poovey	Pending
2001-UP-518 - Abbott Sign Co. v. SCDOT	Pending

2001-UP-522 - Kenney v. Kenney	Pending
2001-UP-528 - State v. Kenneth Allen Barnes	Pending
2001-UP-533 - Corbett v. The Cottages at Shipyard	Pending
2001-UP-538 - State v. Edward Mack	Pending
2001-UP-550 - State v. Gary W. Woodside	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3263 - SC Farm Bureau v. S.E.C.U.R.E.	Pending
3271 - Gaskins v. Southern Farm Bureau	Pending
3314 - State v. Minyard Lee Woody	Pending
3321 - Andrade v. Johnson	Granted 12-14-01
3333 - State v. Dennis Zulfer	Pending
3343 - Langehans v. Smith	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	Denied 12-13-01

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	(2)	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-409 - State v. David Hightower		Pending
2001-UP-421 - State v. Roderick Maurice Brown		Pending
2001-UP-425 - State v. Eric Pinckney		Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John Doe, M.D., Respondent/Appellant,

v.

South Carolina Medical Malpractice Liability Joint Underwriting Association, Appellant/Respondent.

Appeal From Charleston County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 25394
Heard October 23, 2001 - Filed December 31, 2001

AFFIRMED IN PART; REVERSED IN PART.

Harold W. Jacobs, of Nexsen Pruet Jacobs & Pollard, L.L.P., of Columbia, for appellant/respondent.

Ray P. McClain, of Charleston, for respondent/appellant.

James B. Richardson, Jr., of Richardson & Birdsong,

of Columbia for amici curiae, South Carolina College of Emergency Physicians, American College of Emergency Physicians, and South Carolina Medical Association.

JUSTICE PLEICONES: Appellant/Respondent South Carolina Medical Malpractice Liability Joint Underwriting Association ("JUA") appeals the circuit court's decision prohibiting JUA from apportioning any part of a settled claim against the liability policy of Respondent/Appellant John Doe, M.D. ("Doe"). Doe appeals the circuit court's denial of attorney's fees. We reverse the trial court's decision enjoining JUA from including Doe in the settlement apportionment and affirm the trial court's denial of attorney's fees.

STANDARD OF REVIEW

Doe captioned his complaint as a declaratory judgment action. In his initial prayer for relief he sought a permanent injunction against JUA and a declaration that JUA committed breach of contract. "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "Actions for injunctive relief are equitable in nature. In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of a preponderance of the evidence." Wiedemann v. Town of Hilton Head Island, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001) (internal citations omitted).

Pursuant to the "main purpose rule," in actions praying for both money damages and equitable relief, "characterization of the action as equitable or legal depends on the plaintiff's 'main purpose' in bringing the action." Floyd v. Floyd, 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991). Doe's main purpose in instituting this action was to enjoin JUA from charging any of the

settlement against his policy.[1] Thus, the "main purpose" of Doe's action was equitable in nature. Accordingly, the factual findings of the trial court are not binding on this Court, and we may take our own view of the facts. Wiedemann, supra.

FACTS/PROCEDURAL HISTORY

Doe filed suit against his professional liability insurance carrier, JUA, following settlement of a medical malpractice lawsuit against Doe and a number of other defendants, and JUA's decision to charge a portion of the settlement to Doe's policy. Although the record does not indicate that JUA's decision had any direct adverse financial consequences to Doe, the record does reveal that as a result of its decision to charge Doe's policy, JUA reported Doe to the National Practitioner Data Bank as required by federal law.[2] Doe testified that being reported to the National Practitioner Data Bank has adverse effects on a healthcare professional's ability to participate in certain healthcare organizations and to practice in certain areas.

Doe sought a declaration "that [JUA's] duty to its insured requires that it have a fair procedure, in cases involving many providers all insured by JUA, to enable a physician to challenge [JUA's] decision to charge a portion of [any] settlement to the physician's policy." In addition, he sought damages for breach of contract and attorney's fees incurred in prosecuting the action.

Doe's complaints grew out of a medical malpractice action brought against him and several co-defendants following the death of Louise Stanton

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[1]Although in his complaint Doe prayed for money damages in an unspecified amount, he made no offer of proof of any such damages at trial, nor did the trial court award him any money damages.

[2]See 42 U.S.C. § 11131 (West 1995). The report provided Doe with an opportunity to recount his version of the underlying incident.

("Stanton"). While a patient in the intensive care unit at Bon Secours St. Francis Xavier Hospital in Charleston, Stanton experienced respiratory distress, and a doctor Mayday was sounded. Doe, at the time on duty in the hospital's emergency department, and several other healthcare professionals responded to the Mayday. Among those responding to the Mayday was Dr. Ball ("Ball"). When the Mayday sounded, Ball was in the hospital visiting another patient. He was not otherwise "on duty" at Bon Secours at the time.

Eventually, the doctors and nurses who responded to the Mayday determined that the cause of Stanton's distress was an improperly placed endotracheal tube. The tube had been inserted to assist Stanton's breathing. After the tube was removed and replaced, Stanton's respiratory distress subsided. Unfortunately, by the time the tube was replaced, Stanton had been deprived of oxygen for twelve minutes and was brain dead. She died two days later.

A certified registered nurse anesthetist ("CRNA"), Geri Wern Wood ("Wood"), was among those responding to the Mayday. Wood testified in a deposition that upon arriving at Stanton's bedside, she listened for breath sounds from the patient. She heard breath sounds in the stomach, suggesting the endotracheal tube might be misplaced, and asked Doe to listen. According to Wood, Doe listened and appeared to be confused by what he heard. Wood announced her opinion to all present in the hospital room that the tube was not in the proper position, and that she thought Stanton should be reintubated. Finally, Wood testified that some ten minutes later, the responding physicians determined Stanton should be reintubated.

JUA insured all co-defendants in the malpractice action. It hired separate counsel to defend Doe. After discovery had commenced, JUA and Stanton's estate settled the claims against all defendants for $500,000. After the case settled, Doe and Ball approached JUA and requested that no portion of the settlement be charged against their respective policies. Both doctors claimed they were immune from liability pursuant to the Good Samaritan

statute, S.C. Code Ann. § 15-1-310 (1977).[3] JUA's manager, Calvin Stewart ("Stewart") testified that when settling a case involving multiple defendants, it was JUA's policy not to charge the policy of any defendant who, as a matter of law, could prevail at trial.

In response to the doctors' requests JUA sought a legal opinion from attorney William L. Pope ("Pope") whether § 15-1-310 would apply to Doe. In Pope's opinion Doe's § 15-1-310 immunity could not be established as a matter of law, but was a question of fact. Pope further posited that Ball had a better argument than Doe that § 15-1-310 shielded him from liability. However, Pope stopped short of saying, as a matter of law, that even Ball came within the ambit of § 15-1-310. Pope explained that he distinguished between Doe and Ball, and the relative strength of their § 15-1-310 defenses, because Doe was being "paid by the hospital to be present at the hospital when he responded to the [Mayday]."

Relying on Pope's legal opinion, JUA did not charge any portion of the settlement against Ball's policy. JUA did charge one-seventh of the $500,000 against Doe's policy.[4] After JUA declined Doe's request to reconsider its decision, he instituted this action.

The trial court found that JUA breached the covenant of good faith and fair dealing by failing to utilize a fair procedure by which the interests of an insured physician can be considered when his policy is to be charged in a settlement, and by failing to treat each physician equally when exercising its

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[3]Section 15-1-310 provides that one who gratuitously provides emergency care at the scene of an accident or emergency shall not be liable for damages for personal injury arising out of the provider's negligence. The statute does not insulate the care giver from liability for damages resulting from gross negligence or wilful misconduct.

[4]The amount charged against Doe's insurance totaled $71,428.57. That same amount was charged against each of the other six defendants' policies.

discretion in determining liability for doctors under settlement agreements. The court further concluded there was no evidentiary basis for JUA's conclusion that Doe's circumstances were "significantly different" from those of Ball, and therefore, JUA breached "its duties to Dr. Doe when it charged a portion of the settlement to Dr. Doe's liability policy without affording Dr. Doe the same discretionary benefit that it had provided [Ball]." The court denied Doe's request for attorney's fees.

From this order, both parties appealed.

ISSUE

Did the trial court err in concluding JUA breached its covenant of good faith and fair dealing by including Doe in the settlement apportionment?

JUA argues the trial court erred when it determined JUA breached its covenant of good faith and fair dealing. We agree.

We have held that

> there is an implied covenant of good faith and fair dealing in every insurance contract 'that neither party will do anything to impair the other's rights to receive benefits under the contract.' . . . [I]f an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action. . . . 'Implicit in the holding is the extension of a duty of good faith and fair dealing in the performance of all obligations undertaken by the insurer for the insured.'

Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 500-01, 473 S.E.2d 52, 53 (1996) (internal citations omitted).

"Bad faith is a knowing failure on the part of the insurer to exercise an

honest and informed judgment in processing a claim. . . . [A]n insurer acts in bad faith where there is no reasonable basis to support the insurer's decision." American Fire & Cas. Co. v. Johnson, 332 S.C. 307, 311, 504 S.E.2d 356, 358 (Ct. App. 1998); see also Cock-N-Bull Steak House v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996).

Furthermore, "a liability insurer owes its insured a duty to settle a personal injury claim covered by the policy, if settlement is the reasonable thing to do." Trotter v. State Farm Mut. Auto. Ins. Co., 297 S.C. 465, 475, 377 S.E.2d 343, 349 (Ct. App. 1988). An insurer who unreasonably refuses or fails to settle a covered claim within the policy limits is liable to the insured for the entire amount of the judgment obtained against the insured regardless of the limits contained in the policy. Id.

The contract of insurance between Doe and JUA provides in part that JUA "shall have the right and duty to defend in his name and behalf any suit against the Insured alleging damages, even if such suit is groundless, false or fraudulent, but [JUA] shall have the right to make such investigation and settlement of any claim or suit as may be deemed expedient[5] by [JUA]."

The trial court determined that JUA breached its covenant of good faith – not by refusing to settle – but by unreasonably charging Doe's policy with a portion of the settlement, or more specifically, by not providing Doe some avenue for input regarding JUA's apportionment decision.

Although our research reveals no cases addressing the narrow issue raised by Doe, we are guided by a number of cases addressing an insurer's

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[5] *Webster's New World College Dictionary* 500 (Michael Agnes, ed., 4th ed., Macmillian 1999), provides the following definitions of "expedient": "1 useful for effecting a desired result; suited to the circumstances or the occasion; advantageous; convenient[.] 2 based on or offering what is of use or advantage rather than what is right or just; guided by self-interest; politic . . . ."

duty to its insured when settling a liability claim against the insured.

In Babic v. Physicians Protective Trust Fund, 738 So. 2d 442 (Fla. Dist. App. 1999), the insured sued his insurer after the insurer settled a medical malpractice action brought against four of its insured physicians. After reaching the settlement agreement, the insurer charged the entire settlement amount against Babic's policy. It made this decision in light of evidence that Babic was more at fault than the doctors released. As required by federal and state law, the insurer reported Babic to the National Practitioner Data Bank, as well as to a state data bank.

The Florida Court of Appeals observed that the plaintiff "does not contend that the defendants have falsely accused him of medical malpractice, he is simply dissatisfied with the allocation of fault and wants to spread the blame." Id. at 446. The court recognized that "any offer of admission of liability, settlement offer, or offer of judgment made by an insurer or self-insurer shall be made in good faith and in the best interests of the insured." Id. at 445. Notwithstanding this obligation, "absent unusual circumstances (not applicable here) a cause of action for breach of a good faith duty owing to an insured will not lie for failure to defend or investigate a claim when the insurer has settled the claim for an amount within the limits of the insurance policy." Id.

In support of its decision, the Babic court cited Shuster v. South Broward Hosp. Dist. Phys. Prof. Liab. Ins. Trust, 591 So. 2d 174 (Fla. 1992). In that case Shuster challenged his liability carrier's decision to settle a number of claims against him. He alleged that the insurer failed to investigate the claims, and despite his protestations, settled the suits for amounts substantially in excess of reasonable settlement values.

The contract at issue in Shuster contained an endorsement, similar to the contract in this case, giving the insurer the authority to "make such investigation and such settlement of any claim or suit as it deems expedient." Id. at 176. According to the court,

> [t]he language of th[is] provision is clear and the insured was put on notice that the agreement granted the insurer the exclusive authority to control settlement and to be guided by its own self-interest when settling the claim for amounts within the policy limits. The obvious intent behind placing the provision in the agreement was to grant the insurer the authority to decide whether to settle or defend the claim based on its own self-interest, and this authority includes settling for the nuisance value of the claim. Therefore, we interpret the provision as granting the insurer the discretion to settle cases for amounts within the policy limits, regardless of whether the claim is frivolous or not. The parties have expressly contracted with respect to the subject matter and this Court declines to rewrite the policy when the insurer merely exercises its rights under the agreement. . . .
>
> We recognize that every contract requires the good faith performance of its provisions. However, the act of settling a claim either for nuisance value, or for an amount lower than the actual value of the suit, is not bad faith performance of the right to settle as one 'deems expedient.'

Id. at 176-77 (internal citations omitted).

Other courts have reached similar conclusions where an insured has challenged an insurer's decision to settle a claim. See generally Mitchum v. Hudgens, 533 So. 2d 194 (Ala. 1988) (insurer's exclusive right to settle claims against its insured imposes a duty raised by law to observe ordinary diligence in exercising that right; this duty does not compel the insurer to seek the insured's permission before settling a claim); Frankel v. St. Paul Fire & Marine Ins. Co., 759 A.2d 869 (N.J. Super. App. Div. 2000) (bad judgment on the part of the insurer does not constitute bad faith given the insurer's broad discretion in disposing of third party claims); Cash v. State Farm Mut. Auto. Ins. Co., 528 S.E.2d 372 (N.C. App. 2000) (recognizing that an insurer, when settling claims with a third party, acts in its own self-interest); Marginian v. Allstate Ins. Co., 481 N.E.2d 600 (Ohio 1985) (where

a contract of insurance provides that the insurer may, as it deems appropriate, settle any claim or action brought against its insured, a cause of action alleging a breach of the insurer's duty of good faith will not lie where the insurer has settled such claim within the monetary limits of the policy).

Doe does not challenge JUA's decision to settle the claims against him, only its decision to charge a portion of the settlement against his policy. We hold that such decisions are subject to the covenant of good faith and fair dealing, and that in order to prevail, the party challenging these decisions must show bad faith on the part of the insurer. See Tadlock Painting Co., supra. To hold otherwise would impose upon an insurer a potentially greater obligation when determining how a settlement is to be apportioned among multiple insureds than the obligation imposed by law when deciding to settle the case initially.

The evidence presented below does not support a finding of bad faith on the part of JUA. The contract unambiguously grants JUA the authority to settle all claims arising under the policy, even claims that are groundless or fraudulent. The law imposes upon JUA a duty to settle within policy limits when settlement is reasonable. Here, JUA was faced with the testimony of CRNA Wood, an eyewitness, trained in the healthcare profession, attesting to Doe's negligence. JUA requested an opinion from counsel whether § 15-1-310 would effectively shield a similarly situated physician from liability. Counsel offered his opinion that Doe's § 15-1-310 defense would be dependent upon the jury's view of the facts.

Under these circumstances, JUA's decisions to settle the case on behalf of Doe and to charge a portion of the settlement against his policy were eminently reasonable. Because Doe has not shown that JUA's decision was made in bad faith, we reverse the trial court's determination that JUA breached the covenant of good faith and fair dealing.[6] See American Fire &

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[6]Nothing in this opinion is to be construed as a determination of Doe's status as a Good Samaritan under § 15-1-310. However, even if we were to

Cas. Co. v. Johnson, supra.

Based on our finding that JUA did not act in bad faith, we affirm the trial court's order denying Doe attorney's fees.

CONCLUSION

For the foregoing reasons, the order of the circuit court is AFFIRMED IN PART AND REVERSED IN PART.

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

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assume that Doe acted gratuitously in rendering services to Stanton, § 15-1-310 does not provide a defense for gross negligence. Wood's testimony alone may have been sufficient to require the trial court to instruct the jury on gross negligence.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joseph K. Jumper,

Respondent,

v.

Anissa R. Hawkins,

Appellant.

Appeal From Lexington County
Robert N. Jenkins, Sr., Family Court Judge

Opinion No. 3423
Heard November 7, 2001 - Filed December 17, 2001

REVERSED AND REMANDED

William F. Gorski, of Lexington, for appellant.

George W. Branstiter, of Branstiter Law Offices, of Lexington; and Deborah R. J. Shupe, of Louthian Law Firm, of Columbia, for respondent.

Guardian ad Litem: Sheila McNair Robinson, of Wilson, Moore, Taylor & Thomas, of West Columbia.

ANDERSON, J.: In this Family Court action, Anissa R. Hawkins ("Mother") appeals an order awarding custody of the parties' minor child, Benjamin David Sims ("Benjamin"), to Joseph K. Jumper ("Father"). We reverse and remand.

FACTS/PROCEDURAL HISTORY

Benjamin was born on January 13, 1991, and is the biological child of Mother and Father. The parties never married. Mother was awarded custody of Benjamin on September 22, 1995. Father commenced this action on June 29, 1998, seeking a change of custody.

The Family Court held a pre-trial conference on May 14, 1999, approximately 10 months before the trial date. Following this conference, the judge issued an order, which memorialized the issues before the court. The order also stated that "[n]o witnesses may be added ten (10) days before trial and the witness list will be exchanged between the parties ten (10) days before trial." Counsel for both parties were present at the pre-trial conference, and these same attorneys represented the parties at trial.

When the trial began on March 7, 2000, Mother made a motion to add Dr. Lisa Jackel, a psychologist, as a witness. Mother stated that Father was informed of this witness as early as February 11, 2000. On that date, Mother's counsel told Father's counsel he had retained Dr. Jackel to testify. Father's counsel had also been advised of the witness' existence by letter faxed to him from Mother's counsel on February 28 or 29, 2000. Upon receiving the fax, Father's counsel wrote on the face of it, "I object to this witness," signed it, and returned it. At trial, Father opposed Mother's motion to allow the witness to testify.

In denying the motion, the Family Court judge stated:

> I don't take lightly deviation from the Rules, and only in certain circumstances where there's absolute necessity for it and there's

> been no fault shown or there's been diligence shown by the parties …. I don't view this as one of those situations. We have a pretrial order that stands in this case. The Court's going to adhere to that …. I'm going to deny the motion. We're going to proceed with the case as set, adhering to the witness list that has been previously sent to the Court.

Mother's counsel moved for reconsideration, which the Family Court denied. In his ruling, the judge stated:

> Well, I can reconsider; and I'll give you the same results. I believe I've taken great pain to explain to you how the Court views the Rules of Practice; and to allow it to be treated as something other than that clearly would undermine even the professionalism of the lawyers coming before the Court. I take this as a very serious matter.
>
> . . . .
>
> …[Y]ou've really not given me any reason to deviate from the standard protocol. We have a standard pretrial order; I'm going to adhere to it. And that's what this case is going to be about. So I deny your motion after reconsidering your request.

By order filed May 4, 2000, the Family Court awarded Father permanent custody of Benjamin. Mother subsequently moved to amend the judgment and for a new trial. The Family Court judge denied Mother's motions in an order filed June 26, 2000. This appeal followed.

ISSUE

Did the Family Court err in excluding Mother's expert witness from testifying?

LAW/ANALYSIS

Sanction: Exclusion of a Witness

Mother argues the Family Court erred in strictly adhering to the pre-trial order and not allowing her to call Dr. Jackel as an expert witness. We agree and find the judge did not consider all of the relevant factors when excluding the witness.

A veracious review of this issue requires an examination of the rules and principles that govern pre-trial procedure in our state. Rule 16(b) of the South Carolina Rules of Civil Procedure concerns orders issued by the trial judge at the pre-trial stage:

> **Pre-trial Orders**. The court shall make a written order which recites the action, if any, taken at the hearing, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified on motion, **or at the trial to prevent manifest injustice**. The order may, **in the court's discretion**, also: (1) **provide that exhibits or witnesses not listed at the hearing may not be called or admitted in evidence at the trial, unless such witness or exhibit is discovered after pre-trial hearing and promptly disclosed to opposing parties**; (2) provide that all motions pending at the time of the hearing which are not presented for disposition are deemed abandoned; (3) provide that all or part of the pre-trial hearing be continued to a future time, or that additional pre-trial hearings be scheduled to promote the orderly and efficient disposition of the action.

(emphasis added).

The Family Court expressly recognizes the Rules of Civil Procedure. See Rule 2, SCRFC(a) ("In addition to the rules set forth in Sections I, II and III of

these Rules of Family Court, the South Carolina Rules of Civil Procedure (SCRCP) shall be applicable in domestic relations actions to the extent permitted by Rule 81, SCRCP.") This recognition, however, is not without exception. See id. ("The following SCRCP, however, shall be inapplicable: 5(a) to the extent it does not require notice to a defendant of every hearing, 8(d) to the extent it provides that the failure to file a responsive pleading constitutes an admission, 12(b) to the extent it permits a 12(b)(6) motion to be converted to a summary judgment motion, 12(c), 13(j), 18, 23, 38, 39, 40(a & b), 42 to the extent it refers to trial by jury, 43(b)(1) to the extent it limits the use of leading questions to cross-examination, 43(i & j), 47, 48, 49, 50, 51, 54(c) to the extent it permits the court to grant relief not requested in the pleadings, 55, 56, 68, 69, 71, 72, 78, 79, and 84."). Rule 16, SCRCP is not excluded by virtue of Rule 2(a), SCRFC. Therefore, Rule 16, SCRCP is applicable in the Family Court's domestic dispute setting.

Rule 16, SCRCP is imbued with discretion to be exercised by the Family Court judge to prevent "manifest injustice." Additionally, Rule 16, SCRCP specifically references "the court's discretion." See James F. Flanagan, South Carolina Civil Procedure 137 ("The language of [Rule 16, SCRCP], particularly the "manifest injustice" standard for modifying the order, suggests that good reason should be required for any changes. The order should not be followed blindly.").

Former Circuit Court Rule 43 is the forerunner to Rule 16, SCRCP. In Hodge v. Myers, 255 S.C. 542, 180 S.E.2d 203 (1971), the Supreme Court considered whether the trial court had the authority to direct Myers and the other defendants to divulge the names and addresses of persons defendants knew had information concerning the accident precipitating the litigation. In its response, the Court analyzed the governing procedural rule — Rule 43 — and the broad discretion it placed in trial judges involving pre-trial matters:

> We hold that when a case reaches the pretrial conference stage the trial judge has a broad authority, both inherent and under Rule 43, to accomplish those things enumerated in the rule, and to expedite the case such that it may go forward without unusual

delay.

….

…At the pretrial conference stage the judge and counsel may consider 'the limitation of the number of witnesses.' If the judge is to attempt to limit the number of witnesses he is, as a matter of discretion, entitled to require the names and addresses of persons who have information helpful to disposition of the case. Counsel is likewise entitled to this information.

Id. at 546-47, 180 S.E.2d at 205-06 (citation omitted).

The Hodge Court also discussed the efficacy and importance of pre-trial conferences:

The purposes of pretrial conferences are to expedite trials or shorten the actual period of trial, to narrow or simplify the issues, to eliminate the doing of useless things and to facilitate the attainment of justice between the parties. Pretrial conferences are designed to prevent surprise and eliminate maneuvering; to encourage the settlement of cases in advance of the formal trial; to limit the issues for trial to those not disposed of by admissions or agreements of counsel; to avoid unnecessary proof of facts at the trial; to avoid the evil of submitting a complicated case to the jury in such a manner as to be incomprehensible to the jury; to compel the factual truth in the controversy short of invading the private, separate counsel of the parties; to amend the pleadings where necessary or to dispose of possible amendments of the pleadings; to obtain agreements concerning material evidence; to procure the presentation and identification of papers, documents, and exhibits of various kinds in advance of the formal trial; to determine the number of expert witnesses; and, in general, to do whatever may be reasonably necessary to facilitate and shorten the formal trial.

Id. at 547, 180 S.E.2d at 206 (quoting 88 C.J.S. Trial § 17(2) (1955)).

In addition to Rule 16, SCRCP, we examine several cases involving disclosure of witnesses decided under the previous Circuit Court Rule 90.[1] In Laney v. Hefley, 262 S.C. 54, 202 S.E.2d 12 (1974) — decided under former Circuit Court Rule 90 — our Supreme Court stated:

> Rule 90(f) provides the procedure to be followed when a party fails to respond to interrogatories but the Rule contains no express provision to govern the trial court … in dealing with the particular noncompliance with which we are here concerned [failure to disclose four witnesses in answers to interrogatories] …. The weight of authority is to the effect that such matters, of necessity, have to be left largely to the discretion of the trial court.

Id. at 58, 202 S.E.2d at 14.

The Court added, "It is impossible to lay down any rule as to the proper course to be followed under such circumstances, and the sound discretion of the trial court should be respected." Id. at 59, 202 S.E.2d at 14 (quoting 2A Barron & Holtzoff, Federal Practice & Procedure § 776 (Wright ed. 1969)).

The Laney Court outlined the general rule regarding testimony of an undisclosed witness:

> We hold that the exclusion of a witness whose name is not given in answer to an interrogatory calling for it is but one of the discretionary powers committed to a trial judge for the proper conduct of litigation …. **We further hold that there is no mandatory rule requiring the trial court to exclude a witness whose name is not given, but that the trial court is under a duty,**

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[1] Prior Circuit Court Rule 90, entitled "Rules for Interrogatories," was repealed in 1985 when the current Rules of Civil Procedure were enacted. James F. Flanagan, South Carolina Civil Procedure 3 (2d ed. 1996).

> **when the situation arises, to delay the trial for the purpose of ascertaining the type of witness involved and the content of his evidence, the nature of the failure or neglect or refusal to furnish the witness' name, and the degree of surprise to the other party, including prior knowledge of the name by said party**.

Id. at 59-60, 202 S.E.2d at 14 (quoting Wright v. Royse, 193 N.E.2d 340, 350 (Ill. App. Ct. 1963)) (emphasis added).

The same factors were cited and used in an analysis involving exclusion of a witness in Moran v. Jones, 281 S.C. 270, 315 S.E.2d 136 (Ct. App. 1984). In Moran, this Court held:

> Exclusion of a witness is a sanction which should never be lightly invoked. Before so ruling, the trial court has a duty to ascertain the type witness involved, the content of his evidence, the nature of failure, neglect or refusal to furnish the witness's name, and the degree of surprise to the other party, including any prior knowledge of the name by the other party.

Id. at 276, 315 S.E.2d at 139 (citations omitted).

Our Supreme Court has additionally ruled:

> When a violation [of Rule 90 involving non-disclosure of a witness] is made to appear, it lies within the discretion of the trial judge to decide what sanction, if any, should be imposed. **The rule is 'designed to promote decisions on the merits after a full and fair hearing, and the sanction of exclusion of a witness should never be lightly invoked.**'

Jackson v. H & S Oil Co., Inc., 263 S.C. 407, 411, 211 S.E.2d 223, 225 (1975) (quoting Carver v. Salt River Valley Water Users' Ass'n., 446 P.2d 492, 496 (1968)) (emphasis added).

This sound discretion standard and analysis has been used since Rule 90 was repealed. See Dunn v. Charleston Coca-Cola Bottling Co., 307 S.C. 426, 415 S.E.2d 590 (Ct. App. 1992), rev'd on other grounds, 311 S.C. 43, 426 S.E.2d 756 (1993).

In Dunn, this Court stated:

> The decision of whether or not to allow a witness to testify who was not previously listed on answers to interrogatories rests within the sound discretion of the trial judge. In deciding whether to allow such a witness to testify, the trial judge should consider the reason the new information was not provided earlier, the purpose of the new information and the prejudice to the opposing party.

Id. at 432, 415 S.E.2d at 593 (citation omitted); see also Reed v. Clark, 277 S.C. 310, 316, 286 S.E.2d 384, 388 (1982) ("Disclosure of information between the parties before trial is designed to avoid surprise and to promote decisions on the merits after a full and fair hearing.") (citation omitted).

In the present case, the Family Court judge had a duty to review and evaluate the proposed witness using the factors listed in the cases discussed above. Although the present case involves a party's failure to comply with a pre-trial order requiring disclosure of a witness, rather than failure to comply with court rules relating to disclosure of a witness, we find the situations are similar enough to require the judge to employ the Laney factors in making his decision. In both instances, the party has a duty to timely disclose information as required by the court, whether it be through a court rule or court order.

The court knew: (1) Dr. Jackel, a psychologist, was Mother's proposed witness; and (2) would be offered as an expert. Thus, the court met its duty in ascertaining the type of witness involved. Laney v. Hefley, 262 S.C. 54, 59, 202 S.E.2d 12 (1974).

Mother never offered any details of Dr. Jackel's testimony, nor did she attempt to proffer the testimony. However, the court never made an inquiry into the content of the evidence Dr. Jackel would offer. By not getting **any**

information about the proposed witness' testimony, the court did not meet its duty of discovering and evaluating the content of the potential evidence. Id.

The trial court must also consider the nature of the failure, neglect, or refusal to furnish the witness' name and the degree of surprise to the other party, including any prior knowledge of the name by the other party. Id. On February 11, 2000, Mother's counsel told Father's counsel that Mother had retained Dr. Jackel to testify for the Defendant. On February 28 or 29, Mother's counsel informed Father's counsel by letter that Dr. Jackel should be added to Mother's witness list. Father's counsel faxed her the letter back stating his objection. In this instance, there was no failure, neglect or refusal to **furnish** the witness' name. The imbroglio was that Mother did not comply with the pre-trial order. The degree of surprise to Father, if any, was minimal, as he had prior knowledge of Dr. Jackel in writing by February 29, 2000, at the latest. Although the trial judge had this information, there is no indication that he considered it in making his ruling.

Here, there does not appear to be a reason why the new information was not provided earlier, especially since Mother knew she wanted to call Dr. Jackel before the ten-day limit and even told Father's counsel about the witness as early as February 11, 2000. There is nothing in the record about the purpose of the witness, and it appears that the court had no information regarding this factor. Concerning prejudice to the opposing party, Father was unable to take the witness' deposition or otherwise discover what her testimony would be. Considering this, the witness' testimony would have arguably prejudiced the Father. These were all additional considerations for the trial judge. Dunn, 307 S.C. at 432, 415 S.E.2d at 593. Nevertheless, there is no evidence to indicate he considered them.

We do not find the court learned and analyzed all of the details and information about Dr. Jackel's proposed testimony, as required by our current case law. In its ruling, the court focused on the pre-trial order. The court stated as part of its ruling, "We have a pretrial order that stands in this case. The Court's going to adhere to that. The Court's going to … use that as the protocol to efficiently and effectively hear the issues in this day and a half case that's been set." Although the pre-trial order was a consideration, the court erred by

focusing solely on the order in making its decision. Rather, the court should also have considered the factors relevant to exclusion of a witness.

CONCLUSION

We hold that even in the face of a pre-trial order mandating the disclosure of a witness by a certain date, a trial judge is required to consider and evaluate the following factors before imposing the sanction of exclusion of a witness:

(1) the type of witness involved;

(2) the content of the evidence emanating from the proffered witness;

(3) the nature of the failure or neglect or refusal to furnish the witness' name;

(4) the degree of surprise to the other party, including the prior knowledge of the name of the witness; and

(5) the prejudice to the opposing party.

The record provides no indication that the trial judge adequately considered these factors when deciding to exclude the witness. Thus, the decision of the Family Court is

REVERSED AND REMANDED.

CONNOR and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Roy Edward Hook,

Appellant.

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

Opinion No. 3424
Heard November 6, 2001 - Filed December 17, 2001

REVERSED and REMANDED

Assistant Appellate Defender Katherine Carruth Link, of South Carolina Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan and Assistant Attorney General Melody J. Brown, all of Columbia; and Solicitor Barbara R. Morgan, of Aiken, for Respondent.

ANDERSON, J.: Ray Edward Hook appeals his conviction for driving under the influence, third offense. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

While driving during the early morning hours of January 15, 1999, Hook was involved in an automobile collision with Roger Smith of the Williston Police Department, who was operating a police department patrol car. The investigating trooper, Joseph Cruz, cited Smith for driving too fast for conditions and charged Hook with driving under the influence.

Both Hook and Smith sustained injuries in the accident and both were taken to a hospital for treatment. Hook was given two intravenous doses of Toradol, a non-narcotic pain killer. The physician also gave Hook a prescription for Darvocet, a narcotic pain killer. After Hook received medical attention, Cruz arrested him, advised him of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), and took him to the detention center for a breathalyzer test. Hook ultimately declined to take the breathalyzer.

Hook was held at the detention center for a number of days. On the day after the accident, he continued to experience severe pain to his side and chest and began spitting up blood. Unbeknownst to law enforcement personnel, Hook had in fact suffered a ruptured spleen which later required surgical removal.

On the day after the accident, Hook's probation agent, Judy Brown, spoke with him and asked that he submit to a drug test. Another probation agent, Marshall Bunch, administered the test. Neither agent advised Hook of his rights under Miranda. After informing Hook he tested positive for cocaine, the probation agents questioned him about cocaine usage. According to the agents, Hook admitted using cocaine on the night before the accident. Brown testified Hook admitted his cocaine use caused the accident.

At trial, Hook's attorney argued several grounds for the exclusion from evidence of the drug test results and Hook's statement to the probation agents. Defense counsel moved *in limine* to exclude the test results and statements on the ground the information was privileged under South Carolina Code Annotated Section 24-21-290 (Supp. 2000).

The court ruled the test results were inadmissible, but the statements were a "clear admission against [Hook's] interest" and were, therefore, admissible.

Later in the trial, the court addressed the issue of voluntariness. After conducting a Jackson v. Denno[1] hearing, the court ruled the statement was voluntary but privileged and thus inadmissible, rejecting Hook's argument the statement was involuntary and was taken in violation of his Fifth Amendment rights.

Hook testified in his own defense. He admitted he drank three beers between 5:00 and 7:30 p.m. on January 14, 2000, but denied his ability to drive a car was impaired at the time of the accident. At the close of his testimony, the solicitor requested permission to impeach Hook's testimony with his statement to the probation agents. Specifically, the solicitor requested permission to question Hook about drug use, then impeach any denial of drug use with testimony from the probation agents concerning his statements to them. The court initially indicated that because Hook took the stand in reliance on the court's prior ruling that the statement was inadmissible, the solicitor would not be allowed to question him about drug use or use his statements for impeachment purposes. However, after hearing additional arguments on the issue, the court reversed its position and ruled the State could use the statements for impeachment. In reaching this determination, the court reasoned Hook opened the door for impeachment in his testimony. The court further reasoned Hook's statements were voluntary inasmuch as he did not assert his privilege to remain silent in the face of the probation agents' questions, and the United States Supreme Court had previously sanctioned using voluntary, but otherwise

[1]378 U.S. 368 (1964).

inadmissible statements, to impeach a defendant when he attempts to commit perjury.

On cross examination, over defense counsel's objection, the solicitor questioned Hook about his statement to the probation agents. Hook admitted he told the officers he used powder cocaine "a couple of days before the accident." He denied, however, using cocaine on the night of January 14 prior to the accident during the early morning hours of January 15. He further denied telling the probation agents he used cocaine on the night of the accident or that his cocaine use caused the accident. The solicitor then recalled Brown, who recited Hook's alleged statements, thereby contradicting Hook's testimony.

LAW/ANALYSIS

I. Statutory Privilege

Initially, we address the efficacy of Section 24-21-290 (Supp. 2000), which provides:

> **Information received by probation agents privileged**.
>
> All information and data obtained in the discharge of his official duty by a probation agent is privileged information, is not receivable as evidence in a court, and may not be disclosed directly or indirectly to anyone other than the judge or others entitled under this chapter to receive reports unless ordered by the court or the director.

Elementally, the statute is trifurcated:

(1) all information and data obtained in the discharge of his official duty by a probation agent is privileged information;

(2) is not receivable as evidence in a court; and

(3) may not be disclosed directly or indirectly to anyone other than the judge or others entitled under this chapter to receive reports unless ordered by the court or the director.

The State contends that the language of the statute in element three "ordered by the court" refers to any court at any time. We reject that contention and rule that the statute is clearly and unambiguously **referencing the court in the probation setting**.

The defendant argues that the verbiage in the statute in element two "is not received as evidence in court" restricts the use of any statements by a probationer to a probation agent except in a probation revocation hearing. We agree.

Finally, we hold the statute creates an **exclusionary privilege**.

The statements made by Hook to the probation officers were nexed to the pending charge involving his custody.

Because we dispose of this case under the analysis of a separate issue, we decline to analyze the utilitarian efficacy of the statute as juxtaposed to factual scenarios involving possible waiver of the privilege.

II. Statement to Probation Agents–Voluntary/Involuntary

On appeal, Hook argues the trial court erred in determining his statement to the probation agents was voluntarily made. We agree.

The Fifth Amendment to the United States Constitution provides, in relevant part, that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V. This provision governs state as well as federal criminal proceedings. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Article 1, Section 12, of the South Carolina Constitution contains a similar provision. S.C. Const. Art. I, § 12 (". . . nor

shall any person be compelled in any criminal case to be a witness against himself.").

The Fifth Amendment does not, of course, operate as a blanket prohibition against the taking of any and all statements made by criminal defendants to law enforcement officials. Volunteered statements, whether exculpatory or inculpatory, stemming from custodial interrogation or spontaneously offered up, are not barred by the Fifth Amendment. State v. Kennedy, 325 S.C. 295, 307, 479 S.E.2d 838, 844 (Ct. App. 1996)(citing Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)).

"The test for determining the admissibility of a statement is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances." State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987); see also State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990) (trial judge's determination of whether statement was knowingly, intelligently and voluntarily made requires examination of totality of circumstances surrounding waiver). The State bears the burden of establishing voluntariness by a preponderance of the evidence.

> If a defendant was advised of his Miranda rights, but nevertheless chose to make a statement, the "burden is on the State to prove by a preponderance of the evidence that his rights were voluntarily waived." State v. Washington, 296 S.C. 54, 370 S.E.2d 611 (1988) (emphasis in original); State v. Neeley, 271 S.C. 33, 244 S.E.2d 522 (1978). The State bears this burden of proof even where a defendant has signed a waiver of rights form.... The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience and conduct of the accused. State v. Linnen, 278 S.C. 175, 293 S.E.2d 851 (1982). The trial judge's resolution of the issue will not be disturbed absent an error of law. State v. Atchison, 268 S.C. 588, 235 S.E.2d 294, cert. denied, 434 U.S. 894, 98 S.Ct. 273, 54 L.Ed.2d 181 (1977).

State v. Franklin, 299 S.C. 133, 137-38, 382 S.E.2d 911, 913-14 (1989). See also State v. McLeod, 303 S.C. 420, 423, 401 S.E.2d 175, 177(1991)(The trial court's "determination of the voluntariness of a statement will not be disturbed unless so manifestly erroneous as to show an abuse of discretion amounting to an error of law."), overruled on other grounds by State v. Evans, 307 S.C. 477, 415 S.E.2d 816 (1992).

In considering whether a statement was voluntarily given, the court must determine the existence or nonexistence of coercive police activity. State v. Salisbury, 498 S.E.2d 655, 666, 330 S.C. 250, 272 (Ct. App. 1998)("Coercive police activity is a necessary predicate to finding a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment.")(citing Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 521-22, 93 L.Ed.2d 473 (1986)); State v. Linnen, 278 S.C. 175, 293 S.E.2d 851 (1982)(statements were given freely and voluntarily, and were therefore admissible, even though interrogating officers encouraged the statements, where officers were not coercive or threatening and statements were not procured by improper influence).

The concept that the privilege against self-incrimination encompasses the right to be free from being penalized for its exercise is well established.

> [W]hen a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution.
>
> . . .
>
> Similarly, our cases have established that a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself.

Lefkowitz v. Cunningham, 431 U.S. 801, 805, 97 S.Ct. 2132, 2135-36 (1977)(holding the threat of removal from political party office for refusal to testify without immunity before a grand jury was coercive); see also Lefkowitz v. Turley, 414 U.S. 70, 80, 94 S.Ct. 316, 322, 324(1973)(threat of loss of public contracts for architects' refusal to waive privilege against self-incrimination was penalty amounting to coercion); Gardner v. Broderick, 392 U.S. 273, 279, 88 S.Ct. 1913, 1916 (1968)(holding a police officer could not be discharged from his employment solely because he refused to forfeit his Fifth Amendment right against self-incrimination; the privilege against compelled self- incrimination could not abide any "attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment."); Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616,(1967)(threat of discharge from employment as police officer for refusal to forfeit privilege against self-incrimination was coercive); State v. Osborne, 301 S.C. 363, 367, 392 S.E.2d 178, 180 (1990)(statements defendant made after being told she would be charged with withholding evidence if she did not make a statement were not voluntary, even though defendant was advised of Miranda rights).

In Minnesota v. Murphy, 465 U.S. 420, 427, 104 S.Ct. 1136, 1142 (1984), the Court found that "the general obligation to appear and answer questions [before a probation officer] truthfully did not in itself convert Murphy's otherwise voluntary statements into compelled ones." "A state may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege." Id. at 435, 104 S.Ct. 1136, 1146. However, the court expressly contemplated:

> The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the

> privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

Id.

In contrariety to Murphy, who was **not** in custody, Hook was in **jail** at the time of the probation interview and all of the statements by Hook were made to the probation agent in the **jail** setting. Indisputably, Hook was in custody. Hook was **not** advised of his Miranda warnings by the probation agents. The Murphy Court emphasized that Murphy was **not** under arrest and a different question would be presented if interviewed by a probation officer in a custodial setting.

The United States Supreme Court has addressed the voluntariness of a statement made while the defendant is in a state of medical urgency. In Mincey v. Arizona, 437 U.S. 385, 398-99, 98 S.Ct. 2408, 2416-17 (1978), the Court found:

> It is hard to imagine a situation less conducive to the exercise of "a rational intellect and a free will" than Mincey's. He had been seriously wounded just a few hours earlier, and had arrived at the hospital "depressed almost to the point of coma," according to his attending physician. Although he had received some treatment, his condition at the time of Hust's interrogation was still sufficiently serious that he was in the intensive care unit. He complained to Hust that the pain in his leg was "unbearable." He was evidently confused and unable to think clearly about either the events of that afternoon or the circumstances of his interrogation, since some of his written answers were on their face not entirely coherent. Finally, while Mincey was being questioned he was lying on his back on a hospital bed, encumbered by tubes, needles, and breathing apparatus. He was, in short, "at the complete mercy" of Detective Hust, unable to escape or resist the thrust of Hust's interrogation. (Citations and footnotes omitted).

Here, Brown went to the jail, in her capacity as a probation officer, for the purpose of determining whether Hook was in compliance with the terms of his probation sentence prohibiting drug use. When Hook denied using drugs, she ordered a drug test. Bunch, the agent who administered the drug test, also went to the jail in his capacity as a probation agent. Bunch testified a probationer must answer the questions posed to him by probation officers, and stated Hook was aware that refusal to take the drug test would constitute a violation of his probation. In addition, Hook was suffering from an undiagnosed ruptured spleen at the time of the interrogation.

We hold the facts and circumstances attendant to this case amounted to the "classic penalty case" the Court alluded to in Minnesota v. Murphy. Although there is no evidence the probation agents expressly threatened to revoke Hook's probationary sentence if he failed to answer their inquiries truthfully, the timing of the interview, the custodial atmosphere, and the other attendant circumstances unquestionably raised the implication revocation would result from any refusal to cooperate. Moreover, while Hook was not suffering from the same level of physical ailments as the defendant in Mincey v. Arizona, we find the following language particularly instructive:

> There were not present in this case some of the gross abuses that have led the Court in other cases to find confessions involuntary, such as beatings, see Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682, or "truth serums," see Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770. But "the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. Alabama, 361 U.S., at 206, 80 S.Ct., at 279. Determination of whether a statement is involuntary "requires more than a mere color-matching of cases." Reck v. Pate, 367 U.S. 433, 442, 81 S.Ct. 1541, 1547, 6 L.Ed.2d 948. It requires careful evaluation of all the circumstances of the interrogation.

Mincey v. Arizona, 437 U.S. 385, 401, 98 S.Ct. 2408, 2418.

We find the totality of the circumstances in this case amounted to coercion egregious enough to render any statement Hook made to the probation officers involuntary.

III. Use of Involuntary Incriminating Statement for Impeachment Purposes

We further hold that because the statements were not voluntarily made, the trial court erred in allowing their use for any purpose, including impeachment.

Generally, a statement obtained in violation of the requirements of Miranda may be used for impeachment purposes. See Oregon v. Hass, 420 U.S. 714, 721-22 (1975) (statement taken in violation of Fifth Amendment right to counsel admissible for impeachment); Harris v. New York, 401 U.S. 222, 224-26 (1971) (statement taken without proper Miranda warnings admissible for impeachment).

Nonetheless, "an accused's involuntary incriminating statement is inadmissible for any purpose, including impeachment." State v. Victor, 300 S.C. 220, 223, 387 S.E.2d 248, 249 (1989). It is clearly the law that the use of an involuntary statement in any manner violates due process of law. In Lefkowitz v. Turley, 414 U.S. 70, 94 S.Ct. 316, 322, 324(1973), the Supreme Court explained:

> The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. McCarthy v. Arndstein, 266 U.S. 34, 40, 45 S.Ct. 16, 17, 69 L.Ed. 158 (1924), squarely held that '(t)he privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to

> subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant.'
>
> In this respect, McCarthy v. Arndstein reflected the settled view in this Court. The object of the Amendment 'was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.' Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 198, 35 L.Ed. 1110 (1892). See also Bram v. United States, 168 U.S. 532, 542--543, 18 S.Ct. 183, 186--187, 42 L.Ed. 568 (1897); Brown v. Walker, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1896); Boyd v. United States, 116 U.S. 616, 634, 637--638, 6 S.Ct. 524, 534, 536--537, 29 L.Ed. 746 (1886); United States v. Saline Bank, 1 Pet. 100, 7 L.Ed. 69 (1828). This is the rule that is now applicable to the States. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 635 (1964). 'It must be considered irrelevant that the petitioner was a witness in a statutory inquiry and not a defendant in a criminal prosecution, for it has long been settled that the privilege protects witnesses in similar federal inquiries.' Id., at 11, 84 S.Ct., at 1495. In any of these contexts, therefore, a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution.

Lefkowitz v. Turley, 414 U.S. 70, 77-78, 94 S.Ct. 316, 322.

In Mincey v. Arizona, 437 U.S. 385, 397-98, 98 S.Ct. 2408, 2416 (1978), the United States Supreme Court elucidated:

> Statements made by a defendant in circumstances violating the strictures of Miranda v. Arizona, supra, are admissible for impeachment if their "trustworthiness . . . satisfies legal standards." Harris v. New York, supra, 401 U.S., at 224, 91 S.Ct., at 645; Oregon v. Hass, supra, 420 U.S., at 722, 95 S.Ct., at 1220. But any criminal trial use against a defendant of his involuntary statement is a denial of due process of law, "even though there is ample evidence aside from the confession to support the conviction." Jackson v. Denno, 378 U.S. supra, at 376, 84 S.Ct., at 1780; Haynes v. Washington, 373 U.S. 503, 518, 83 S.Ct. 1336, 1345, 10 L.Ed.2d 513; Lynumn v. Illinois, 372 U.S. 528, 537, 83 S.Ct. 917, 922, 9 L.Ed.2d 922; Stroble v. California, 343 U.S. 181, 190, 72 S.Ct. 599, 603, 96 L.Ed. 872; see Chapman v. California, 386 U.S. 18, 23 and n. 8, 87 S.Ct. 824, 828, 17 L.Ed.2d 705.

See also New Jersey v. Portash, 440 U.S. 450 (1979)(prior testimony before a grand jury, compelled under a grant of immunity, could not be used for impeachment purposes in a subsequent criminal trial).

CONCLUSION

We hold that an **involuntary incriminating** statement may **not** be used for **any** purpose, including **impeachment**. Recognizing the strictures of due process, we hold Hook's conviction for driving under the influence, third offense, is

REVERSED and the case is REMANDED for a NEW TRIAL.

CONNOR and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Appellant,

v.

Linda Thompson Taylor,

Respondent.

Appeal From Colleton County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 3425
Heard December 4, 2001 - Filed December 17, 2001

REVERSED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Randolph Murdaugh, III, of Hampton, for appellant.

L. Scott Harvin, of Hetrick Law Firm, of Walterboro, for respondent.

ANDERSON, J.: Linda Thompson Taylor was charged with two counts of unlawful issuance of a fictitious motor vehicle driver's license. A jury returned a guilty verdict for both counts. The trial judge sentenced her to six months imprisonment and a $2,500 fine on one count, provided that upon service of three months or the payment of $1,000, the balance of her sentence was suspended and she was placed on probation for two years. The trial judge also ordered Taylor to perform 100 hours of public service. Taylor received a concurrent six month sentence for the other count, which was suspended during probation. Following the verdict, Taylor filed post-trial motions and the trial judge issued an order of verdict in arrest of judgment and entry of judgment of acquittal. The State appeals, arguing the trial judge committed error of law in setting aside the guilty verdicts. We reverse and reinstate the convictions.

FACTS/PROCEDURAL BACKGROUND

Thompson was an employee of the South Carolina Department of Motor Vehicles ("DMV") and worked in the DMV's office in Walterboro. Thompson's arrest arose out of an investigation conducted by the South Carolina Law Enforcement Division concerning illegal aliens obtaining fraudulent driver's licenses. Pursuant to this investigation, Special Agent Terry Hoffman observed Lila Macias and Armando Ramirez, accompanied by Maria Cortez, enter the DMV office in Walterboro on April 24, 1998, around 3:00 p.m. Macias, Ramirez, and Cortez left the DMV office at approximately 5:00 p.m. and drove away in a car driven by Cortez. The Highway Patrol initiated a traffic stop of the car and seized brand new driver's licenses from Macias and Ramirez.

Macias testified she was a native of Mexico and worked at a restaurant in Goose Creek. Someone at the restaurant told Macias that they knew "how to get driver's licenses" and that she could obtain a driver's license from the DMV without providing documentation for $1,000. On the afternoon of April 24, 1998, Macias and Ramirez met with Cortez and she drove them to the Walterboro DMV to obtain driver's licenses. Macias testified she took an eye exam, had her photograph taken, and paid the application fee, but did not take either a written or driving test. Macias identified Taylor as the individual who

processed her application and issued her a driver's license. Macias testified Taylor never requested her social security card or any immigration papers.

Ramirez, who is also from Mexico, testified he traveled to the DMV on April 24, 1998, with Cortez and Macias to obtain a driver's license. Ramirez testified that "[a]nytime someone wanted a license they need to call Maria Cortez," and that for $1,000 she would assist them in getting a license without having to provide any type of documentation. Ramirez was issued a license by Taylor without taking a written or driving test and without presenting a social security card or other identification.

John Romagando was working undercover for SLED on April 24, 1998, and went to the Walterboro DMV to conduct surveillance. Romagando observed Macias and Ramirez at the DMV counter where Taylor was working that afternoon. Romagando testified he never observed either Macias or Ramirez take a driving test. Additionally, Constance Johnson, an employee at the Walterboro DMV, testified that she observed Taylor assisting some "Hispanic" people on the afternoon of April 24th and that she did not see the individuals take a driving test.

Several DMV employees testified regarding the procedures used to obtain a driver's license in South Carolina. To receive a license, an applicant must provide a birth certificate or social security card, take an eye examination, and take both a written and driving test. The results of these tests are noted on DMV Form 447. Form 447 is then sent from the local DMV to the DMV office in Columbia.

Wanda Graham, a DMV field administrator in Columbia, testified she was unable to locate a Form 447 for Macias or Ramirez. The DMV's computer records did not indicate that any type of application was filled out by Macias or Ramirez.

In September 1999, Taylor was tried for two counts of unlawful issuance of a fictitious motor vehicle driver's license, in violation of S.C. Code Ann. § 56-1-515(1). At the close of the State's case, Taylor moved for a directed verdict and the trial court denied this motion. The jury returned guilty verdicts

on both counts and Taylor was sentenced by the trial judge.

On November 8, 1999, a hearing was held before the trial judge regarding Taylor's post-trial motions for a verdict in arrest of judgment and for a new trial and entry of judgment of acquittal. On November 18, 1999, the trial judge issued an order of verdict in arrest of judgment and entry of judgment of acquittal. The State appeals this order.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law. State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973). "It is undisputed that the State may appeal where the verdict is set aside wholly upon an error of law." State v. Dasher, 278 S.C. 395, 400, 297 S.E.2d 414, 417 (1982) (internal emphasis omitted).

LAW/ANALYSIS

The State argues the trial court committed an error of law in issuing an order of verdict in arrest of judgment and entry of judgment of acquittal after the jury returned a verdict finding Taylor guilty of two counts of the unlawful issuance of a fictitious motor vehicle driver's license. We agree.

In a criminal case, "[t]he only post verdict fact-based remedy available … is a motion for a new trial." State v. Miller, 287 S.C. 280, 285, 337 S.E.2d 883, 886 (1985) (Ness, J., concurring in part and dissenting in part) (citation omitted); see also State v. Dawkins, 32 S.C. 17, 24-25, 10 S.E. 772, 773 (1890) (affirming the trial judge's denial of defendant's post-trial motion in arrest of judgment, holding "the [defendant's] remedy would have been by a motion for a new trial, and not by motion in arrest of judgment."). The trial judge in a criminal matter has no authority to grant a judgment notwithstanding the verdict, and has only limited authority to issue a verdict in arrest of judgment.

I. Judgment Notwithstanding the Verdict (JNOV)

As an initial matter, we note that a motion for a JNOV in a criminal case is not recognized in this state. Miller, 287 S.C. at 285, 337 S.E.2d at 886 (Ness, J., concurring in part and dissenting in part) (noting it was improper for trial counsel to move for a JNOV, a civil motion, in a criminal trial and pointing out the impropriety of a criminal JNOV). Our Supreme Court has held that the trial judge in a criminal case committed an error of law in directing a verdict of not guilty after the jury had returned a guilty verdict:

> There is no precedent in this State for such action. This is not a case in which a trial judge has granted a new trial upon the facts (a power which he admittedly has) but rather one in which a trial judge had entered a verdict of not guilty in the face of conflicting evidence (a power he has never had in this jurisdiction) …. To affirm this decision is to grant unprecedented license to trial judges to invade the area where the jury system has been deemed most effective — that is, in assessing the truthfulness of fellow human beings testifying under oath.

Dasher, 278 S.C. at 399-400, 297 S.E.2d at 416 (1982) (internal emphasis omitted). There is no precedent that "gives the trial court authority to change its mind after a guilty verdict has been returned and thereafter, on its own motion, grant a directed verdict of innocence as to the same charge." State v. Scurry, 322 S.C. 514, 518, 473 S.E.2d 61, 63 (Ct. App. 1996).

II. Motion for A New Trial

It is well settled that the grant or refusal of a new trial is within the sound discretion of the trial judge. State v. Simmons, 279 S.C. 165, 303 S.E.2d 857 (1983). "Where there is no evidence to support a conviction, an order granting a new trial should be upheld." State v. Smith, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993) (citation omitted). "However, where there is competent evidence to sustain the jury's verdict, the judge may not substitute his judgment for that of the jury." State v. Prince, 316 S.C. 57, 63, 447 S.E.2d 177, 181 (1993) (citation omitted).

III. Verdict in Arrest of Judgment and Entry of Judgment of Acquittal

A trial court in a criminal matter has only limited authority to issue a verdict in arrest of judgment:

> There are two motions available to defense counsel following a guilty verdict in a criminal case. He may move for verdict in arrest of judgment to prevent entry of judgment on the grounds of the insufficiency of the indictment or some other fatal defect appearing on the face of the record. He may **not** move for verdict in arrest of judgment based on the sufficiency of the evidence to sustain the allegations in the indictment. Secondly, he may move for a new trial upon the facts. Thus, the trial judge has no authority to grant relief on factual grounds after a verdict of guilty that is equivalent to the relief he could have granted at the directed verdict stage.

State v. Miller, 287 S.C. 280, 286, 337 S.E.2d 883, 886-87 (1985) (Ness, J., concurring in part and dissenting in part) (citations omitted) (emphasis in the original).

Our courts have recognized the authority of a trial court to grant a verdict in arrest of judgment to prevent entry of judgment on the insufficiency of the indictment or some other fatal defect appearing on the face of the record. Id. at 286, 337 S.E.2d at 886 (Ness, J., concurring in part and dissenting in part); State v. Brown, 201 S.C. 417, 23 S.E.2d 381 (1942) (ruling that motion for arrest in judgment should have been granted where trial court did not have jurisdiction to impose sentence); State v. Cooler, 30 S.C. 105, 8 S.E. 692 (1889) (finding that the fact a juror was a member of the grand jury that indicted defendant was not grounds for arrest of judgment); State v. Jeter, 47 S.C. 2, 24 S.E. 889 (1896) (holding trial court erred in denying defendant's motion for arrest of judgment where indictment was insufficient); State v. Blakeney, 33 S.C. 111, 11 S.E. 637 (1890) (affirming trial court's denial of defendant's motion for arrest of judgment where indictment was sufficient). However, a defendant "may **not** move for verdict in arrest of judgment based on the sufficiency of the evidence to sustain the allegations in the indictment." Miller, 287 S.C. at 286,

337 S.E.2d at 886-87 (Ness, J., concurring in part and dissenting in part) (citing State v. Hamilton, 17 S.C. 462 (1882) (emphasis in the original).

> A "motion for arrest of judgment" is a postverdict motion made to prevent the entry of a judgment where the charging document is insufficient or the court lacked jurisdiction to try the matter. It has been held that a motion in arrest of judgment is distinguishable from a motion to quash an indictment, in that reasons sufficient to sustain the quashing of an indictment may be insufficient to sustain a motion in arrest of judgment. However, it has also been held that a motion in arrest of judgment is a post-trial motion to quash an indictment.
>
> …[W]hen ruling on a motion in arrest of judgment, the trial court is limited to rectifying trial errors, **and cannot make a redetermination of the credibility and weight of the evidence**.

21 Am Jur. 2d Criminal Law §785 (1998) (emphasis added) (footnotes omitted).

In the present action, Taylor was indicted and tried for the unlawful issuance of fictitious motor vehicle driver's licenses pursuant to § 56-1-515(1), which provides that "[i]t is unlawful for any person to alter a motor vehicle driver's license so as to provide false information on the license or to sell or issue a fictitious driver's license." Taylor contends the trial court's order granting her motion for verdict in arrest of judgment was proper because the State failed to produce sufficient evidence that she "issued" the license, or that they were "fictitious." Because it is inappropriate for the trial court to grant a motion of a verdict in arrest of judgment based on the sufficiency of the evidence, the trial court erred in granting Taylor's motion. Moreover, the State presented sufficient evidence that Taylor issued the fictitious licenses in violation of § 56-1-515. Both Macias and Ramirez testified they obtained a driver's license from Taylor without providing proper identification, documentation, or taking the written and driving examinations; therefore, there was sufficient evidence for the jury to conclude the driver's licenses were fictitious and that Taylor issued them.

CONCLUSION

We hold that a circuit judge may issue an order granting a **POST-TRIAL** motion for a **VERDICT IN ARREST OF JUDGMENT AND ENTRY OF JUDGMENT OF ACQUITTAL** to prevent entry of judgment on the grounds of the insufficiency of the indictment or some other fatal defect appearing on the face of the record. The circuit judge may **NOT** issue an order granting a **VERDICT IN ARREST OF JUDGMENT AND ENTRY OF JUDGMENT OF ACQUITTAL** based on the sufficiency of the evidence to sustain the allegation in the indictment.

Accordingly, we reverse the trial court's order and reinstate Taylor's convictions.

REVERSED.

CONNOR and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Leon Crosby,

Appellant.

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

Opinion No. 3426
Heard December 4, 2001 - Filed December 17, 2001

AFFIRMED

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

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Assistant Attorney General Toyya Brawley Gray,

Assistant Attorney General W. Rutledge Martin; and Solicitor Warren B. Giese, all of Columbia, for respondent.

ANDERSON, J.: A jury found Leon Crosby guilty of voluntary manslaughter. He was sentenced to seventeen years imprisonment. Crosby asserts three errors on appeal. We affirm.

FACTS/PROCEDURAL BACKGROUND

On December 28, 1998, Crosby and his girlfriend, Ketura Young, were visiting Monica Tucker in an apartment Monica shared with Shawanda Knox, and Shawanda's brother, Ryan Knox. Several other people, including Lavaris Dunham ("the victim"), were also visiting the apartment. When Shawanda and Ryan returned home from work with Jessica Herring, a co-worker, Shawanda became upset with the number of people in the apartment and wanted them to leave. Monica refused to ask her guests to leave. Shawanda left and went to a nearby apartment where she called the police to intervene.

During this time, Crosby became upset when the victim commented that he could "take" Crosby's girlfriend. Crosby yelled at the victim, pointed at Ketura, and told the victim to go ahead and try. The victim apologized to Crosby for upsetting him, and Crosby walked outside the apartment to "cool off." Deputy Ernest Nesbitt of the Kershaw County Sheriff's Office approached the apartment in response to Shawanda's call as Crosby exited the apartment. Deputy Nesbitt heard Crosby mention that he needed to "clear his head."

Deputy Nesbitt attempted to resolve the disagreement between the roommates. Shawanda, who had returned after calling the police, again left the apartment upon Deputy Nesbitt's advice. The deputy then departed. Shawanda returned again to retrieve some of her belongings. An argument between Shawanda and Monica ensued, which escalated into a physical altercation outside the apartment involving Shawanda, Monica, Ryan, and Monica's cousin, Jenelle Outten. During the fight, Crosby shot the victim in the neck in the open

doorway of the apartment. The victim died from his injuries.

Crosby and several others fled the scene in Jessica's car. Crosby averred several times to the occupants of the car that he did not intend to shoot the victim. The next morning, Crosby turned himself in to the police. He gave a statement that the victim charged at him while he was attempting to help break up the fight between Shawanda and the others. Crosby stated that when the victim charged him, he "seen (sic) his life in danger" and took his gun out of his pocket, closed his eyes, and pulled the trigger.

At trial, Calvin Hill testified he was inside the apartment when he witnessed Crosby attempting to break up the fight. Hill saw the victim exit the apartment and approach Crosby. Hill heard Crosby telling the victim to back up, and then Crosby walked into the apartment. According to Hill, the victim then "charged" at Crosby with his hands up and without any weapons in them. Hill heard the gunshot as both men were standing in the doorway and then saw the victim fall to the floor.

Ketura testified that when Crosby attempted to break up the fight outside the apartment, the victim told Crosby not to touch the girls and the two men shoved each other. While the two men were near the doorway, Crosby directed Ketura into the apartment, and she then heard the gunshot.

Crosby testified that while attempting to break up the fight, the victim told him to take his hands off Jenelle. The two exchanged words and shoved each other. Crosby stated that as he turned to push Ketura into the apartment out of harm's way, he glanced back to see the victim coming toward him. The victim was reaching behind his back, and Crosby believed the victim had a weapon. Crosby pulled a gun out of his pocket as he turned around and shot the gun, though he did not realize right away that the gun had discharged.

LAW/ANALYSIS

I. INVOLUNTARY MANSLAUGHTER CHARGE

Crosby first argues the trial court erred in failing to charge the jury on the law of involuntary manslaughter because the evidence showed he acted in self-defense and the shooting "appeared more accidental than intentional." We disagree.

At the conclusion of the defense's case, Crosby withdrew his request for a charge on the law of accident, admitting no testimony was presented to show an accidental shooting. Because Crosby's testimony showed he turned around to find the victim "on top of him," Crosby argued the evidence demonstrated he acted recklessly and negligently in handling the gun. Crosby contended he was entitled to a charge on involuntary manslaughter based on the premise that the negligent handling of a loaded gun warrants a finding of involuntary manslaughter.

"The law to be charged to the jury is determined from the evidence presented at trial." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993) (citation omitted). If there is any evidence to support a jury charge, the trial judge should grant the request. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001). The trial court commits reversible error if it fails to give a requested jury charge on an issue raised by the evidence. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999). The trial court's refusal to give a requested jury instruction must be "both erroneous and prejudicial" to warrant reversal. State v. Harrison, 343 S.C. 165, 173, 539 S.E.2d 71, 75 (Ct. App. 2000), cert. denied (citation omitted).

To be entitled to a charge on involuntary manslaughter, there must be evidence that the defendant either:

(1) killed another without malice and unintentionally, but while "engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause

death or great bodily harm"; or

(2) killed another without malice and unintentionally, but while "acting lawfully with reckless disregard of the safety of others."

Burriss, 334 S.C. at 264-65, 513 S.E.2d at 109 (citation omitted). Involuntary manslaughter is at its heart an unintentional act. See Douglas v. State, 332 S.C. 67, 74, 504 S.E.2d 307, 310-11 (1998) ("[W]here a defendant intentionally arms himself and shoots into a crowd … he is not entitled to an involuntary manslaughter charge.") (citations and footnote omitted).

Our Supreme Court has considered whether a killing was intentional or accidental in determining whether the facts of a case supported a charge of involuntary manslaughter. In Burriss, the defendant was threatened and then attacked by the victim and another male. During the fight, the defendant drew a gun and fired two rounds into the ground. One attacker backed away, yet continued to verbally threaten the defendant and urged his accomplice — the victim — to attack the defendant again. At this point, the defendant was on the ground, separated from his gun. As the victim drew closer, the defendant reached for the gun. As he picked it up, the weapon discharged, accidently killing the victim: "When [the victim] began moving threateningly toward [the defendant], he snatched his gun up and it fired. [The defendant] stated he was scared and his hand was shaking when the gun went off: 'It was an accident. I didn't try to shoot nobody.'" Burriss, 334 S.C. at 263, 513 S.E.2d at 108 (footnote omitted).

The defendant was convicted of murder. On appeal, the defendant argued the trial judge erred by refusing to instruct the jury on the law of accident or involuntary manslaughter. The Supreme Court agreed, finding: (1) the factual scenario of the case supported the defendant's argument that the shooting was accidental; and (2) the evidence would sustain a finding the defendant was lawfully armed in self-defense at the time the fatal shot occurred and the negligent handling of a loaded gun supported a finding of involuntary manslaughter. Id. at 263-65, 513 S.E.2d at 108-09. Accordingly, the Burriss

Court reversed the conviction and remanded the case to the Circuit Court with instructions to charge the jury with the law of accident and involuntary manslaughter. Id. at 266, 513 S.E.2d at 110.

By contrast, the defendant in State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996), admitted he and a co-defendant intentionally shot into an advancing crowd, killing two victims. On appeal, the defendant averred the trial judge erred in refusing to charge involuntary manslaughter. The Supreme Court disagreed, finding the defendant was not entitled to a charge of involuntary manslaughter because he had intentionally fired the gun. Pickens, 320 S.C. at 531-32, 466 S.E.2d at 366.

Crosby argues that testimony by Calvin Hill during cross-examination granted him the right to a charge of involuntary manslaughter:

> The Solicitor: [Defense counsel] asked you and referred you specifically and asked you if you had mentioned in your statement [to the police] whether Mr. Crosby told you, "I didn't mean to." Do you remember that?
>
> Hill: Yes.
>
> The Solicitor: When did he tell you that?
>
> Hill: When we got in the car.
>
> The Solicitor: And that was after the shooting?
>
> Hill: Yes.
>
> The Solicitor: And did he tell you that it slipped?
>
> Hill: Yes.

The Solicitor: He said the gun slipped?

Hill: Yes.

During his testimony, Crosby related the sequence of events during his fight with the victim:

Crosby: When I seen him — when I glanced back, I seen his hands behind his back. So I ain't know what kind it was. That's when I reached in my pocket and turned around. By the time I turned around, he was already up on me. And I just pow."

. . . .

Crosby: Going through the door. All right. As he's coming behind me, you know what I'm saying, he had his hand on me like this.

Defense Counsel: Okay. Speak loud.

Crosby: Well, he was already — well, as he was charging me, he done took his hand — by his hand being like that, it frightened me. I ain't never seen what's happening in his left hand.

Defense Counsel: Did you see anything in his hand?

Crosby: No, sir. Not at the moment. I couldn't see his hands.

Defense Counsel: All right then. What happened?

Crosby: That's when I turned around. And that's when his arm slowly from behind his back. And as I turned around, before I could turn around, I've done hit that pocket.

Defense Counsel: You pulled out the pistol.

Crosby: He came up, turned around, and boom.

After a careful review of the record, we find no evidence was presented at trial that would support a charge of involuntary manslaughter. Crosby consistently stated he deliberately retrieved the gun from his pocket and pulled the trigger. Crosby testified: "I went in my pocket and pulled that gun out. I closed my eyes and pulled the trigger." Shooting at a person is an unlawful activity that would normally result in great bodily harm or death. Because Crosby's actions were intentional, unlawful, and would normally cause great bodily harm or death, his actions did not meet the definition of involuntary manslaughter.

Crosby further argues that the trial court erred in failing to charge the law of involuntary manslaughter because the facts of his case are similar to the facts in Burriss. However, the facts are in actuality more similar to the circumstances in Pickens. Crosby admitted he intentionally shot the gun. Furthermore, no evidence was presented that the gun accidentally discharged. Crosby also waived the defense of accident at trial. Although it appears that Crosby may not have intended the shooting to result in the victim's death, no evidence was presented at trial to support Crosby's claim that the shooting was not intentional. The situation presented in the instant case is analogous to the factual circumstances reviewed by the Surpeme Court in State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976), Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1991), and State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994). In each of these cases, the Court ruled the defendant was **not** entitled to an involuntary manslaughter charge.

In State v. Craig, the defendant admitted that he intentionally fired his

shotgun at the victim, but claimed he only meant to shoot over the victim's head. The Supreme Court found no error with the trial judge's refusal to charge the law of involuntary manslaughter. Id. at 269, 227 S.E.2d at 310.

Relying upon Craig, the Supreme Court in Bozeman v. State refused to find fault with defense counsel's failure to request a charge of involuntary manslaughter:

> In State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976), this Court found no error in the refusal to charge the law of involuntary manslaughter when the defendant admitted intentionally firing the gun, but claimed he only meant to shoot over the victim's head. Here, petitioner testified at trial, "I pulled the pistol up and I shot." Petitioner stated that he never aimed the pistol. He did, however, intend to shoot the gun. There is no evidence to support an allegation of mere criminal negligence in the use of a dangerous instrumentality. Because the evidence in the record does not support a charge of involuntary manslaughter, trial counsel's failure to request a jury charge of involuntary manslaughter was not deficient performance.

Id. at 177, 414 S.E.2d at 147.

In State v. Smith, the defendant was convicted of stabbing the victim following an argument over a $2.00 debt the victim owed the defendant. On appeal, the defendant asserted the trial court erroneously denied his request for an involuntary manslaughter jury charge. Following the precedent recited in Craig and Bozeman, the Supreme Court affirmed the trial judge's decision:

> Involuntary manslaughter was recently reviewed in Bozeman v. State, 307 S.C. 172, 414 S.E.2d 144 (1992) (citing State v. Barnett, 218 S.C. 415, 63 S.E.2d 57 (1951)), where we stated:
>
> > [f]irst, involuntary manslaughter may be described as the killing of another without malice and

> unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or bodily harm. The second situation may be described as the killing of another without malice and unintentionally but while engaged in the doing of a lawful act with a reckless disregard of the safety of others.

Id., 307 S.C. at 176, 414 S.E.2d at 146-147.

> Our analysis in Bozeman relied heavily on our earlier decision in State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976). In Craig, we found no error in failing to charge involuntary manslaughter where a defendant intentionally fired a gun, but claimed that he was only firing above the victim's head. In Bozeman, on facts similar to Craig, we stated that there was "no evidence to support an allegation of mere criminal negligence in the use of a dangerous instrumentality."
>
> The record here demonstrates that Smith acted intentionally in wielding the knife. When Evans grabbed Smith, Smith pulled the knife, a dangerous instrumentality, and stabbed at Evans. Just as in Craig, whether Smith intended to harm Evans is irrelevant. The stabbing is clearly not a lawful act, and the intentional use of a dangerous instrumentality does not support the allegation of mere criminal negligence. Because Smith's actions were outside the definition of involuntary manslaughter as we restated recently in Bozeman, the trial court did not commit error in refusing to instruct the jury on the law of involuntary manslaughter.

Id. at 550, 446 S.E.2d at 413.

We conclude no evidence was presented in the case sub judice that would support a charge of involuntary manslaughter.

II. MISTRIAL

Crosby next argues the trial court erred by failing to grant his motion for a mistrial after the solicitor's closing argument. We disagree.

In closing, the solicitor made the following statement:

> There was no self-defense. You have got the power, you 12 have got the power to come back with a verdict that says self-defense. Based on the evidence of this case and the reasonable inferences, I submit to you that would be paramount (sic) [tantamount] to giving Leon Crosby a license to kill.

Crosby immediately objected to the State's argument as appealing to the passion and prejudice of the jury. Before allowing the State's closing argument to continue, the trial judge suggested the solicitor "tone it down a bit."

After the State finished its closing argument, Crosby reiterated his argument regarding the "license to kill" statement and moved for a mistrial. Although the trial court found the "license to kill" statement was "marginally inappropriate," the court determined that a curative instruction would correct the problem, and it denied Crosby's motion for mistrial. The trial court later instructed the members of the jury that they were not to be motivated by sympathy, passion, or prejudice. Crosby did not complain about the curative instruction or move for a mistrial after the trial court instructed the jury.

Crosby now argues the trial court erred in failing to grant the motion for mistrial because the State's "license to kill" argument prejudiced him.

Initially, we note this issue is probably not preserved for review. Although Crosby complained about the State's closing argument, he did not object to the curative instruction given by the trial judge, nor did he move for a mistrial at the end of the jury instructions. Where a curative instruction is given and the objecting party does not contemporaneously challenge the

sufficiency of the corrective charge or move for mistrial, no issue is preserved for review. See State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (holding no issue is preserved for appellate review if objecting party accepts judge's ruling and does not contemporaneously make additional objection to sufficiency of curative charge or move for mistrial).

In any event, the decision to grant or deny a mistrial is within the sound discretion of the trial judge. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989). "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) (citation omitted).

When considering the propriety of a solicitor's closing argument, the trial court is vested with broad discretion, including the discretion to grant or deny the defendant's mistrial motion. State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975); see also State v. McCray, 332 S.C. 536, 506 S.E.2d 301 (1998) (demonstrating appellate review of a trial judge's denial of defendant's mistrial motion is governed by abuse of discretion standard); State v. Brown, 333 S.C. 185, 191, 508 S.E.2d 38, 41 (Ct. App. 1998) ("The propriety of closing argument is vested in the broad discretion of the trial judge.") (citation omitted). The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Furthermore, the solicitor's closing argument must not appeal to the personal biases of the jurors. Id. However, to be entitled to a new trial for improper closing arguments, the test is whether "the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (Ct. App. 2001).

The solicitor's argument in the present case was merely a comment on the lack of evidence of self-defense and clearly did not appeal to the passions or prejudice of the jury. The solicitor stayed within the evidence presented at trial and the reasonable inferences therefrom. Although the trial court found the argument "marginally inappropriate," it was an isolated incident. Reviewing the

entire record, we do not find that the single comment regarding a "license to kill" so infected the trial with unfairness as to make the conviction a denial of due process. Further, the trial judge's curative instruction directed the jurors that their verdict was not to be motivated by passion or prejudice. Accordingly, we find the trial court's curative instruction cured any error in the solicitor's argument, and the trial court did not abuse its discretion in denying Crosby's mistrial motion.

III. PHOTOGRAPH

Crosby argues the photograph of the victim's body was unduly prejudicial and the trial court erred in allowing its admission. We disagree.

The State sought to admit several photographs of the victim's body at trial. A photograph marked Exhibit 8 was taken outside the apartment. Exhibit 8 predominantly showed the victim's feet lying outside the door and a small amount of blood. Crosby did not object to the admission of Exhibit 8. The State later sought to admit a photograph marked Exhibit 9. Exhibit 9 was taken from a different angle to show the entire length of the victim's body, and it also showed some blood. The State argued the position of the body was relevant to its theory that the victim was shot from behind and Exhibit 9 displayed the positioning of the body more accurately than the other photographs. Although Crosby argued Exhibit 9 was unduly prejudicial, the trial court determined the photograph had probative value and was not unduly prejudicial, especially in light of the fact that Exhibit 8 already displayed some blood.

The State admitted Exhibit 9 into evidence during a responding police officer's testimony regarding the location and position of the victim's body. Dr. Joel Sexton, a forensic pathologist, later testified that the victim died from the gunshot wound to the neck that severed the carotid artery and transected the spinal cord.

"The relevance, materiality and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Rosemond, 335 S.C. 593,

596, 518 S.E.2d 588, 589-90 (1999). If the photographs serve to corroborate testimony, it is not an abuse of discretion to admit them. State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1996); State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986). However, photographs calculated to "arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997) (citations omitted).

In the instant case, Exhibit 9 corroborated the testimony of the responding officer regarding the position of the victim's body. The photograph also corroborated the testimony of Dr. Sexton regarding the injuries suffered by the victim. Although the photograph showed some blood, we do not believe the photograph was offensive or calculated to arouse sympathy or prejudice. Further, Crosby did not object to the admission of Exhibit 8, which also showed the victim's body and blood. Because Exhibit 9 was relevant to corroborate the testimony of witnesses and did not appeal to the jury's passions or prejudice, we find the trial court did not abuse its discretion in admitting Exhibit 9 into evidence.

CONCLUSION

Based on the foregoing, the trial court's rulings are

AFFIRMED.

CONNOR and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Roderick Means,

Appellant,

v.

Richard Gates,

Respondent.

Appeal From Berkeley County
R. Markley Dennis, Circuit Court Judge

Opinion No. 3427
Heard December 5, 2001 - Filed December 31, 2001

REVERSED AND REMANDED

Jody V. McKnight, of Riesen Law Firm, of North Charleston, for appellant.

John L. McDonald, Jr., of Clawson & Staubes, of Charleston, for respondent.

ANDERSON, J.: This is a negligence action in which Roderick Means obtained a verdict of $25,000 against Richard Gates for injuries he sustained in an automobile accident. Means appeals, alleging the trial court

erred in excluding the testimony of his expert witness, a neuropsychologist, which was offered to rebut Gates' implication that Means' physical symptoms were not genuine. Means contends the exclusion of this evidence prejudiced his case and resulted in a lower jury verdict. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

This appeal arises out of a three-car chain collision that occurred on August 29, 1996, when Gates ran into the back of another vehicle, which in turn struck Means' vehicle from behind. After the accident, Means was treated for lower back and shoulder pain, as well as numbness in his arms and legs.

Means filed this negligence action against Gates, alleging he suffered physical injury, mental distress, lost wages, and substantial expenditures for past and future medical treatment. In his amended answer, Gates admitted simple negligence in causing the accident, but asserted "Absence of Injuries" as a defense.

At trial, Means testified that he experienced chronic lower back pain as a result of the accident, which interfered with his daily activities and caused him distress. Means stated he had incurred medical expenses of $28,951.34 and lost wages of $1,791.77 to date.

Dr. Gregory Jones, Means' primary treating physician, diagnosed Means with an annular (outer layer) tear and herniated discs in the thoracic, lumbar, and sacrum regions of his spine, along with nerve root compromise. Dr. Jones stated Means probably would require nerve blocks indefinitely to control his pain, a maximum of four a year, at a cost of more than $1,000 per procedure. Dr. Jones stated — to a reasonable degree of medical certainty — that the symptoms generated from Means' disc herniation were a direct result of the August 1996 automobile accident. Dr. Jones assigned Means a 10 percent impairment rating to the lower back and legs.

The defense asserted Means' physical problems predated the August 1996 collision and that the impact was not significant enough to cause the injuries described by Means' treating physician. Gates hired Dr. Robert Sopka to

perform an analysis of the forces involved in the impact. Dr. Sopka is a physics professor and department chair at the Community College of Baltimore County in Catonsville, Maryland with experience in analyzing the physics of motor vehicle collisions. Dr. Sopka testified he additionally worked for Forensic Technologies, a litigation-services group, as a senior physicist, but was not a certified accident reconstructionist.

In a videotaped deposition, Dr. Sopka testified in detail about what he considered the fairly insignificant forces of impact of the "low-speed" accident. Dr. Sopka stated he had reviewed the police report and analyzed the weights of the vehicles and the passengers; further, he had considered the characteristics of the particular makes of vehicles involved in the accident and how they respond to impact, i.e., "how crushable a vehicle is." Dr. Sopka concluded "that the speed change of Mr. Means' Dodge Ram Charger [from the three-car collision] could have been no more than 5.2 miles per hour in a forward direction" and "that the G forces experienced during this collision were no more than 2.4 Gs, again, in the forward direction." Dr. Sopka described one G as the normal acceleration of a falling object caused by gravity. Dr. Sopka observed, "If there's less impact, then there's less crush, and that's the sort of thing we need to evaluate."

Gates also retained a radiologist, Dr. Barry F. Jeffries, to testify regarding what, if any, injuries were caused by the automobile accident. Dr. Jeffries specializes in neuroradiology and is licensed in Georgia and Missouri. Dr. Jeffries explained "[n]euroradiology is that branch of diagnostic radiology that is concerned with the brain, the spinal cord, and the bony covering, such as the skull and the spine. It also includes … [t]he structures of the face and the neck." Dr. Jeffries reviewed Means' X-rays and MRI scans and opined that Means' annular tear, disc herniation, and nerve root impingement were the result of a natural degenerative process and not caused by the August 1996 collision.

To rebut this testimony, Means attempted to introduce the videotaped deposition testimony of a neuropsychologist, Dr. Randolph Waid, who stated to a reasonable degree of medical certainty in the field of clinical psychology that Means suffered from "chronic pain syndrome" that negatively impacted his ability to pursue social, recreational, and vocational activities. He further

opined the chronic pain was probably caused by the August 1996 automobile accident. Dr. Waid concluded Means' physical symptoms appeared genuine and not the result of any psychological disturbance. The trial court ruled the deposition was inadmissible. The jury thereafter returned a verdict for Means of $25,000. This appeal followed.

LAW/ANALYSIS

On appeal, Means contends the trial court erred in refusing to admit any portion of the videotaped deposition of the neuropsychologist who performed a series of psychological tests on him after the accident. Means contends the testimony was necessary to rebut Gates' implication that his injuries were not as severe as he had alleged and were the result of malingering. He contends the exclusion of the testimony was prejudicial and resulted in a jury verdict that was less in dollar amount than the sum of his medical bills. We agree with Means that the exclusion of Dr. Waid's testimony constituted an abuse of discretion and therefore reverse and remand for a new trial.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE.

The admission or exclusion of expert testimony is a matter within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent an abuse of discretion. Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998); Creed v. City of Columbia, 310 S.C. 342, 426 S.E.2d 785 (1993); Gazes v. Dillard's Dep't Store, Inc., 341 S.C. 507, 534 S.E.2d 306 (Ct. App. 2000); Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 529 S.E.2d 45 (Ct. App. 2000), cert. filed.

A court's ruling on the admissibility of a neuropsychologist's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair. Huntoon v. TCI Cablevision of Colo., Inc., 969 P.2d 681 (Colo. 1998) (en banc). "Before the Court of Appeals will reverse a judgment for an alleged error in the exclusion of evidence, the appellant must

show prejudice." Potomac Leasing Co. v. Bone, 294 S.C. 494, 497, 366 S.E.2d 26, 28 (Ct. App. 1988).

Dr. Waid has a bachelor's degree in general psychology from Temple University, a master's degree in psychology from the University of Richmond, and a doctorate in clinical psychology from the University of North Texas following an internship at the Medical University of South Carolina in Charleston ("MUSC").

Dr. Waid worked as the director of psychological services at a private psychiatric facility in Dallas, Texas before returning to Charleston in 1982 to join MUSC's faculty in the departments of psychiatry and neurology. In 1989, he became the director of MUSC's assessment center, where he ran a clinic providing assessments for conditions such as chronic pain, neurological disorders, and psychiatric disorders. In 1998, Dr. Waid became a clinical associate professor in psychiatry and neurology at MUSC and opened a private practice in Mount Pleasant. Dr. Waid is not a medical doctor and is not licensed to prescribe medications.

In his videotaped deposition, Dr. Waid testified Means was referred to him in April 1997 for evaluation of continuing pain and lower back problems after extensive medication, physical therapy, and diagnostic procedures had failed to provide relief. Means was referred to the doctor "to assess for any associated psychological problems along with his chronic pain syndrome and to make recommendations with regard to Mr. Means' rehabilitation needs."

As part of the evaluative process, Dr. Waid gave Means "a battery of psychological tests, primarily to measure for psychiatric difficulties, specifically to measure for depression and anxiety, as well as to measure his complaints related to pain and how they are affecting his life." Dr. Waid testified he "performed … a very extensive broad based psychological test … [called] the Personality Assessment Inventory. It's made up of numerous scales measuring areas of clinical symptomatology. The individual generally has to respond to this rather extensive test in terms of whether the statement is false, slightly true, mainly true, or very true." This test is used to tell "where a person is functioning in different areas of symptomatology."

Dr. Waid stated the test revealed Means "really had no significant elevations that would be suggestive of a psychiatric disturbance." Means did have "moderate elevations consistent with his complaints … about physical functioning; health; and persistent pain …." The test results also indicated there "was some mild or transient depression and anxiety" associated with this condition.

Dr. Waid concluded, "In my opinion[,] Mr. Means was suffering from a chronic pain syndrome that had resulted in a negative impact in his ability to pursue … social, recreational, [and] vocational activities." He stated to a reasonable degree of professional certainty in the field of clinical psychology that the automobile accident of August 29, 1996, probably caused Means' chronic pain syndrome and related difficulties. He further averred he found no reason to believe Means' complaints of pain were not genuine.

Dr. Waid opined Means was "a very good candidate" for using techniques for chronic pain management, including psychological strategies, education, a review of potential medications, electrostimulation, acupuncture, and other methods to assist Means in coping and living with pain more effectively based on Means' "willingness not to overuse medication, his desire to cope and [to] continue … as best he could …." Dr. Waid thought Means would benefit from an outpatient chronic pain rehabilitation program directed by William Key at MUSC, with an estimated cost of around $6,000.

The trial court reviewed the entire videotaped deposition and ruled it was inadmissible. The court acknowledged Dr. Waid had conducted tests and there was "nothing to suggest the tests were not conducted in accordance with [the] acceptable standard[s] of his practice and profession nor that the results were not useful or beneficial." However, the court felt Dr. Waid had not formed a diagnosis, and because he had referred Means to another psychologist, Dr. Key, there was the indication that Dr. Waid "really wasn't treating at all." The court noted "[t]he essence of [Dr. Waid's] testimony is that he believed the plaintiff and believed that he certainly was suffering from pain. And there's no question that this pain caused him great anxiety and he talked about the reasons, the psychological reasons for that …. Other than that, his testimony dealt with a — really a variety of questions, [including] malingering …. Just a litany of …

matters of really no useful benefit in this case."

The trial court stated although Dr. Waid's opinion that Means was not a malingerer would probably be admissible, he had heard nothing to suggest by way of cross-examination or otherwise that Means was a malingerer. The trial judge concluded the testimony was not admissible because Dr. Waid was not really rendering any treatment to Means and the court was unsure of the purpose for the testimony.

In this case, Means was offering the expert testimony of neuropsychologist Dr. Waid to show: a battery of tests had revealed no psychiatric reason for his physical ailments; Means was suffering from chronic pain syndrome, which is a psychological condition, although not a condition of disturbance; and this condition was caused by the August 1996 automobile accident involving Gates. Means contends this testimony was essential to rebut Gates' experts and prejudiced the presentation of his case, as evidenced by the jury's low verdict.

In contrast, Gates contends the trial court properly excluded the evidence because it was not relevant and, even if admissible, was more prejudicial than probative. See Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Rule 402, SCRE ("Evidence which is not relevant is not admissible."); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

"A neuropsychologist is a specialist in the area of clinical psychology, a discipline which focuses on the brain and behavioral relationships of individuals who have brain impairment due to dementia, head injury or other kinds of brain disease." Cunningham v. Montgomery, 921 P.2d 1355, 1357 (Or. Ct. App. 1996).

In Howle v. PYA/Monarch, Inc., 288 S.C. 586, 593, 344 S.E.2d 157, 160 (Ct. App. 1986), this Court observed: "Psychologists have been allowed to give expert opinions as to mental and emotional condition, and often causation, in many different types of cases." (citations omitted). We further stated:

> Section 40-47-40, which defines the term "practice of medicine," neither expressly nor implicitly bars a psychologist from testifying as to diagnosis, prognosis, and causation. A psychologist is not incompetent to give his opinion simply because he is not a licensed medical doctor. At most, a psychologist's lack of a medical license affects his credibility and is a proper subject for cross-examination and for comment during jury argument.
>
> Section 40-55-50, which defines the practice of psychology, likewise neither expressly nor implicitly bars a psychologist from giving testimony as to diagnosis, prognosis, and causation. Indeed, Section 40-55-60, another statute included among those that regulate the practice of psychology, **contemplates that a psychologist may "diagnose, prescribe for, treat or advise a client with reference to complaints" embraced by psychological practice** "as determined by the Board [of Examiners in Psychology]."

Id. at 594, 344 S.E.2d at 161 (emphasis added) (citations omitted) (alteration in original).

In Howle, we held: "[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. (citation omitted).

We note the narrow question on appeal is not the sufficiency of Dr. Waid's professional qualifications or whether his testimony is outside the limits of psychological practice. The trial court expressly acknowledged that Dr. Waid's testimony would be admissible to rebut an accusation of malingering and, contrary to the court's determination, we conclude this is precisely the

implication raised by Gates when he pled "Absence of Injuries" as a defense and presented expert witnesses who asserted: (1) the collision was one of low impact; and (2) that there was no medical basis for Means' claim that the automobile accident caused his symptoms.

We further conclude the determination whether Means suffered from a condition of "chronic pain syndrome" and whether his symptoms had their genesis in a psychological cause were areas within the expertise of the neuropsychologist. Any flaws in Dr. Waid's analysis would go to the weight and credibility of his testimony, not its admissibility, and this expert testimony would supply specialized knowledge that would aid the jury in determining a fact in issue. See Rule 702, SCRE (providing a qualified expert may testify when "scientific, technical, or specialized knowledge will assist the trier of fact … to determine a fact in issue"); Huntoon v. TCI Cablevision of Colo., Inc., 969 P.2d 681 (Colo. 1998) (en banc) (holding the trial court did not abuse its discretion by admitting neuropsychologist testimony, which explained the use of a battery of tests to determine the impact of an injurious event on an individual's ability to carry out everyday activities and identified the causation of the plaintiff's organic brain injury); Sanchez v. Derby, 433 N.W.2d 523 (Neb. 1989) (finding the trial court abused its discretion in excluding the testimony of a neuropsychologist that a motorist's behavioral changes were caused by either a combination of post-traumatic stress disorder and chronic pain syndrome or an organic affective disorder secondary to a mild brain injury — the appellate court stating the dispositive issue was whether the testimony would supply specialized knowledge that would assist the jury in determining a fact in issue).

Finally, we find exclusion of the evidence was not harmless error as there was no equivalent testimony presented to this effect. Cf. Bernard v. Lott, 666 So.2d 702 (La. Ct. App. 1995) (holding the exclusion of a neuropsychologist's opinion regarding whether the plaintiff suffered a brain injury on the basis she was not a medical doctor was harmless error because additional medical experts testified about how the results of the neuropsychologist's testing supported a finding of a brain injury). Accordingly, we hold the trial court erred in excluding the videotaped deposition of Dr. Waid.

CONCLUSION

Based on the foregoing, we conclude the exclusion of the neuropsychologist's testimony was reversible error warranting a new trial.

REVERSED and the case is REMANDED for trial.

CONNOR and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cynthia Harris-Jenkins and George Jenkins,

Respondents,

v.

Nissan Car Mart, Inc.,

Appellant.

Appeal From Beaufort County
Thomas Kemmerlin, Jr., Master-in-Equity
and Special Circuit Court Judge

Opinion No. 3428
Heard December 5, 2001 - Filed December 31, 2001

REVERSED

V.M. Manning Smith, of Moss & Kuhn, of Beaufort, for appellant.

Dragana Davidovic, of Davidovic Law Firm, of Beaufort, for respondents.

ANDERSON, J.: Cynthia Harris-Jenkins and George Jenkins

("the Jenkinses") and Nissan Car Mart, Inc., a retail automobile dealer, entered into an agreement to settle the Jenkinses' civil suit against Nissan Car Mart. Pursuant to this agreement, Nissan Car Mart was required to pay $20,000 to the Jenkinses in exchange for their termination of legal action against the dealer. Nissan Car Mart failed to pay the settlement amount despite being ordered by the Circuit Court to do so. In an order following a Rule to Show Cause hearing, the circuit judge ordered Nissan Car Mart to pay the Jenkinses the $20,000 plus interest and $1,500 in attorney's fees. Nissan Car Mart sought reconsideration, which the Circuit Court denied. Nissan Car Mart appeals the portion of the order awarding the $1,500 to the Jenkinses for attorney's fees. We reverse.

FACTS AND PROCEDURAL HISTORY

The Jenkinses filed a complaint alleging fraud and unfair trade practices against Nissan Car Mart. Nissan Car Mart offered $20,000 to settle the case. The Jenkinses, through their attorney, accepted Nissan Car Mart's offer. Following the Jenkinses' acceptance, Nissan Car Mart wrote to the Jenkinses' attorney, proposing to pay the $20,000 in monthly payments, rather than a lump sum. According to Nissan Car Mart's attorney, these terms were necessary because the dealer did not "have the cas[h] in lump sum." The Jenkinses refused the payment terms. Nissan Car Mart did not pay any of the settlement amount. Consequently, the Jenkinses moved for an order to compel execution of the settlement agreement and requested sanctions against Nissan Car Mart.

The Circuit Court ordered Nissan Car Mart pay — within 30 days of the order — $20,000 plus 8 3/4% interest from the date of the Jenkinses' acceptance of the settlement. The Circuit Court denied the Jenkinses request for sanctions. Nissan Car Mart did not pay the ordered amount within the 30 day period. The Jenkinses moved for sanctions, seeking the incarceration of Bill Leadingham, president of Nissan Car Mart, until Nissan Car Mart paid the $20,000 plus the accrued interest and costs, including attorney's fees.

The Circuit Court held a Rule to Show Cause hearing. Following the hearing, the court issued an order mandating Nissan Car Mart pay the $20,000 settlement amount. The court additionally ordered Nissan Cart Mart pay the

Jenkinses $2,673 in accrued interest and $1,500 in attorney's fees. The court denied Nissan Car Mart's motion for reconsideration. Nissan Car Mart appeals the circuit judge's award of attorney's fees to the Jenkinses.

ISSUE

Whether the Circuit Court erred in assessing attorney's fees against Nissan Car Mart due to its failure to satisfy its settlement agreement with the Jenkinses?

LAW/ANALYSIS

I. The Contempt Power

In Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915 (1982), the Supreme Court discussed the law relating to the contempt power of our courts, specifically compensatory contempt:

> The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. McLeod v. Hite, 272 S.C. 303, 251 S.E.2d 746 (1979); State v. Goff, 228 S.C. 17, 88 S.E.2d 788 (1955) …. **Contempt results from the willful disobedience of an order of the court, and before a person may be held in contempt, the record must be clear and specific as to the acts or conduct upon which such finding is based**. Edwards v. Edwards, 254 S.C. 466, 176 S.E.2d 123 (1970); Bigham v. Bigham, 264 S.C. 101, 212 S.E.2d 594 (1975).
>
> . . . .
>
> Compensatory contempt is a money award for the plaintiff when the defendant has injured the plaintiff by violating a previous

court order. The goal is to indemnify the plaintiff directly for harm the contemnor caused by breaching the injunction. Rendleman, Compensatory Contempt: Plaintiff's Remedy When A Defendant Violates An Injunction, 1980 Ill.L.F. 971. Courts utilize compensatory contempt to restore the plaintiff as nearly as possible to his original position. Therefore it is remedial.

We have recognized compensatory contempt in at least two cases. In Ex Parte Thurmond, 1 Bailey 605 (1830), we stated that when an individual right is directly involved in a contempt proceeding, the court has the power to order the contemnor to place the injured party in as good a situation as he would have been if the contempt had not been committed, or to suffer imprisonment. In Lorick & Lowrance v. Motley, 69 S.C. 567, 48 S.E. 614 (1904), we held that a contemnor may be required to pay damages suffered by reason of his contemptuous action or suffer imprisonment….

….

Compensatory contempt awards have been affirmed also by the United States Supreme Court.

….

Therefore, the compensatory award should be limited to the complainant's actual loss. Included in the actual loss are the costs in defending and enforcing the court's order, including litigation costs and attorney's fees. The burden of showing what amount, if anything, the complainant is entitled to recover by way of compensation should be on the complainant.

Id. at 382, 386-87, 287 S.E.2d at 917, 919-20 (emphasis added).

II. Statutory Attorney Fees

In South Carolina, the authority to award attorney's fees can come only from a statute or be provided for in the language of a contract. There is no common law right to recover attorney's fees. Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997); American Fed. Bank, FSB v. Number One Main Joint Venture, 321 S.C. 169, 467 S.E.2d 439 (1996); Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993); Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989); Dowaliby v. Chambless, 344 S.C. 558, 544 S.E.2d 646 (Ct. App. 2001); Harvey v. South Carolina Dep't of Corrections, 338 S.C. 500, 527 S.E.2d 765 (Ct. App. 2000); Global Protection Corp. v. Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (Ct. App. 1998); Prevatte v. Asbury Arms, 302 S.C. 413, 396 S.E.2d 642 (Ct. App. 1990).

The Jenkinses, in their brief, do not assert any statutory authority that authorizes a judge to award attorney's fees as sanctions for nonpayment of a settlement agreement because no South Carolina statute exists that confers this authority.

III. SCRCP/Attorney Fees

During the Rule to Show Cause hearing, the Circuit Court alluded that its ability to impose sanctions awarding attorney's fees could come from the South Carolina Rules of Civil Procedure ("SCRCP"). In examining the SCRCP, there are several rules that allow the award of attorney's fees as sanctions or costs. None of these rules, however, apply to this particular situation. See Rule 11, SCRCP (allowing an award of attorney's fees when the court finds the opposing party has filed pleadings that were made in bad faith and/or frivolous); Rules 30 and 37, SCRCP (granting award of attorney's fees as sanctions for discovery abuse); Rule 45, SCRCP (allowing attorney's fees for placing on undue burden on a person responding to a subpoena; Rule 54, SCRCP (allows imposing

attorney's fees as costs when authorized by statute);[1] Rule 56, SCRCP (permitting for sanction awarding attorney's fees when affidavits are made in bad faith).

In South Carolina, courts interpret statutes that grant the power to award attorney's fees narrowly because these laws were enacted in derogation of the common law. See Dowaliby v. Chambliss, 344 S.C. 558, 562, 544 S.E.2d 646, 648 (Ct. App. 2001) ("A statute allowing attorney fees is in derogation of the common law and must be strictly construed.") (citations omitted)). Applying this standard by analogy when reading the SCRCP, we conclude the Circuit Court has no power to sanction a party to pay the other party's attorney's fees in a dispute over payment of money in a settlement agreement.

IV. Settlement Agreement

Because no statutory authority exists to grant attorney's fees in this situation, we must look to the language of the settlement agreement itself to determine whether its terms provided for the payment of attorney's fees in the case of breach. Settlement agreements are viewed as contracts between the parties. See Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 540 S.E.2d 843 (2001) (holding the enforcement of the terms of a settlement agreement is a contract and viewed as an action at law); Estate of Revis v. Revis, 326 S.C. 470, 484 S.E.2d 112 (Ct. App. 1997) (using contractual interpretation standard regarding ambiguous language to determine whether to admit parol evidence about a property settlement agreement); Arnold v. Yarborough, 281 S.C. 570, 316 S.E.2d 416 (Ct. App. 1984) (holding that once attorneys agree to settle a case, the settlement cannot be repudiated unless

[1] Rule 54 does not create a right to attorney's fees without authorization from a statute. Black v. Roche Biomedical Labs., 315 S.C. 223, 433 S.E.2d 21, 24 (Ct. App. 1993) ("Rule 54(d) … provide[s] that a prevailing party **shall** ordinarily be entitled to recover certain costs and disbursements. Such costs and disbursements do not, however, include attorney fees.") (emphasis in original) (citation omitted).

fraud exists); Hall v. General Exch. Ins. Corp. of N.Y., 169 S.C. 384, 169 S.E. 78 (1933) (ruling that punitive damages are not available for a breach of settlement agreement unless the breach of contract is accompanied by a fraudulent act).

The language of the settlement agreement between the Jenkinses and Nissan Car Mart does not provide for either party to collect attorney's fees in case of a breach of the agreement. The letter to the Jenkinses' lawyer states that Nissan Car Mart offered $20,000 to settle any and all claims for the current pending litigation. The Jenkinses' lawyer's letter in return merely stated the Jenkinses accepted the cash settlement. No other terms were added. Courts are not allowed to add terms to an unambiguous contract. C.A.N. Enters., Inc. v. South Carolina Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988) ("We are without authority to alter a contract by construction or to make new contracts for the parties. Our duty is limited to the contract made by the parties themselves '… regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully.'") (citations omitted). Since there was no contractual language providing that one party receive attorney's fees for a breach of the agreement and there is no statutory authority to award attorney's fees, the Circuit Court erred when it imposed a sanction on Nissan Car Mart requiring it to pay attorney's fees to the Jenkinses.

V. Civil Contempt/Attorney Fees

Courts, by exercising their contempt power, can award attorney's fees under a compensatory contempt theory. Compensatory contempt seeks to reimburse the party for the costs it incurs in forcing the non-complying party to obey the court's orders. See Poston v. Poston, 331 S.C. 106, 114, 502 S.E.2d 86, 90 (1998) ("In a civil contempt proceeding, a contemnor may be required to reimburse a complainant for the costs he incurred in enforcing the court's prior order, including reasonable attorney's fees. The award of attorney's fees is not a punishment but an indemnification to the party who instituted the contempt proceeding."); Lindsay v. Lindsay, 328 S.C. 329, 345, 491 S.E.2d 583, 592 (Ct. App. 1997) ("A compensatory contempt award may include attorney fees.") (citation omitted); Curlee v. Howle, 277 S.C. 377, 386-87, 287 S.E.2d 915, 919-

20 (1982) ("Compensatory contempt is a money award for the plaintiff when the defendant has injured the plaintiff by violating a previous court order…. Included in the actual loss are the costs of defending and enforcing the court's order, including litigation costs and attorney's fees."). In this case, the judge's order did not find Nissan Car Mart in contempt and we cannot assume he was exercising the contempt power when he awarded attorney's fees to the Jenkinses. The order only refers to his actions as sanctions.

We note and emphasize that South Carolina law does not permit a person to be held in contempt for failure to pay a civil debt, which has arisen solely out of a contractual obligation. Sanders v. Sanders, 30 S.C. 229, 9 S.E. 97 (1889). Furthermore, the Constitution of South Carolina provides "[n]o person shall be imprisoned for debt except in cases of fraud." S.C. Const. art. I, § 19; see also Carter v. Lynch, 429 F.2d 154 (4th Cir. 1970); Stidham v. DuBose, 128 S.C. 318, 121 S.E. 791 (1924).

CONCLUSION

Accordingly, the order of the Circuit Court is

REVERSED.

CONNOR and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charleston County
School District,

Respondent,

v.

Laidlaw Transit, Inc. and
South Carolina
Department of Education

Of Whom Laidlaw
Transit, Inc. is the,

Appellant.

Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

Opinion No. 3429
Heard September 4, 2001 - Filed December 31, 2001

AFFIRMED

John A. Massalon, of Wills & Massalon, of Charleston; Jay Williams and Heidi Dalenberg, both of Schiff, Hardin & Waite, of Chicago, for appellant.

Arnold S. Goodstein, Alice F. Paylor, Donald B. Clark and Kevin R. Eberle, all of Rosen, Goodstein & Hagood, of Charleston, for respondent.

HOWARD, J.: In this declaratory judgment action, Laidlaw Transit, Inc. appeals from a circuit court order dismissing its equitable counterclaims pursuant to Rule 12(b)(6), SCRCP. We affirm.

FACTS/PROCEDURAL HISTORY

On January 17, 1997, the Charleston County School District ("the School District") entered into a written contract with Laidlaw and the South Carolina Department of Education ("the Department of Education"), whereby Laidlaw agreed to provide school bus transportation for the School District. Under the terms of the contract, Laidlaw was to use the Department of Education's school buses, and assumed the responsibility to transport students from January 21, 1997 until June 2000. The contract was based upon a traditional 180-day schedule for each school within the School District, and contained the following clauses in anticipation of changing demands or requirements for transportation during the term of the contract:

> Paragraph 4. Method of Payment. In return for the services to be provided herein, [the School District] agrees to compensate LAIDLAW in the amount of 4,631,000 dollars annually (PRO-RATED FOR 96-97 REMAINING YEAR) said sum is to be paid directly by check or indirectly in the form of credits, as more fully set forth on Addendum I, attached hereto and incorporated herein.

Addendum I provides a four percent rate increase each year and further states "[a]s programs/schools are added or removed and as enrollment changes the cost of transportation will increase or decrease on a prorata [sic.] bus basis based on the existing contract."

Finally, Paragraph 9 contains the following provisions:

a. In the event of reduced funding, the level of service provided to [the School District] by LAIDLAW may be reduced in pro-rata fashion, the specific services to be reduced to be negotiated between [the School District] and LAIDLAW, and approved by [the Department of Education], commensurate with the reduced funding level.

b. If the costs of operating the system exceed the agreed amount currently projected to be appropriated for [the School District] by the General Assembly, as contemplated hereunder, LAIDLAW shall be responsible for notifying [the School District] of any such excess costs and identifying the specific reasons therefor. [The School District] shall be responsible for such excess costs only upon receipt of the notice as provided herein and upon specific acceptance of responsibility therefor. Under no circumstances will LAIDLAW obligate [the School District] or hold [the School District] responsible for any costs/expenses which are not specifically addressed and identified herein or contemplated under this Agreement, unless [the School District] specifically agrees to such. (underlining in original)

The School District brought this declaratory judgment action when it discovered alleged overpayments to Laidlaw for bus services during the 1997-1998 and 1998-1999 school years. The School District also anticipated an overcharge would be forthcoming from Laidlaw for the ensuing year.

In its answer, Laidlaw admitted the written contract, but denied receiving any overpayment. Laidlaw asserted that the services it provided had increased because (1) it had to provide the buses used for transportation; (2) routes were extended or originally understated in length, and (3) additional routes and students were added by the School District to accommodate magnet schools, additional riders, and other activities. Laidlaw also asserted counterclaims for set-off and/or payment for the extra services rendered under equitable causes of action, namely, quantum meruit, contract implied in law, and promissory estoppel.

The School District moved to dismiss the equitable counterclaims pursuant to Rule 12(b)(6), SCRCP, on the grounds that the contract was admitted, and its terms specifically governed any expansion of services or costs, precluding recovery in equity under theories of quantum meruit, implied contract or promissory estoppel. The circuit court agreed, dismissing Laidlaw's counterclaims. Laidlaw appeals.

STANDARD OF REVIEW

A motion to dismiss a counterclaim must be based solely on the allegations set forth in the counterclaim. See Rule 12(b)(6), SCRCP; Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "A Rule 12(b)(6) motion may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the [complainant] to any relief on any theory of the case." Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602-3 (1995). The question is whether in the light most favorable to the complainant, and with every doubt resolved on his behalf, the counterclaim states any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). The counterclaim should not be dismissed merely because the trial court doubts the complainant will prevail in the action. Id.

DISCUSSION

Laidlaw contends it was entitled pursuant to Rule 8(e)(2), SCRCP,[1] to plead its equitable counterclaims as alternative causes of action.

Initially, we note the circuit court did not require Laidlaw to elect between its causes of actions. Instead, the circuit court dismissed Laidlaw's equitable counterclaims because there was a specific contract between the parties and they were limited to that contract. Consequently, the court concluded the equitable issues were not available to Laidlaw.

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[1] "A party may set forth two or more statements of a cause of action or defense alternatively or hypothetically . . . regardless of consistency and whether based on legal or on equitable grounds or on both." Rule 8(e)(2), SCRCP

"It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992). Any allegations, statements, or admissions contained in a pleading are conclusive against the pleader, and a party cannot subsequently take a contrary or inconsistent position. Id.; see Mellon Bank, N.A. v. Carroll, 314 S.C. 468, 445 S.E.2d 466 (Ct. App. 1994).

Here, both the Complaint and the Answer and Counterclaim allege the existence of the same written contract. By its plain terms, the admitted contract controls the services to be performed and the compensation to be paid. Paragraph 9 of the contract explicitly governs the expansion of services and Laidlaw's entitlement to payment for associated costs and expenses. Therefore, Laidlaw's entitlement to payment of consideration is determined by its performance under the terms of the contract. By admitting the contract and its terms, including paragraph 9, the parties have defined their relationship, and their rights and obligations are governed solely by the contract terms.[2]

Laidlaw contends that its allegation in the Answer and Counterclaim that the additional work was performed outside of the contract must be accepted as true in a Rule 12(b)(6) motion, thereby creating a factual issue as to whether the written contract governs the controversy. We find this argument to be without merit. Laidlaw's allegations clearly describe an extension of the same services as those required under the original contract. The characterization of the activity as "outside the contract" is not an allegation of fact, but is an unsupported conclusion which is contrary to the admitted facts. Therefore, the trial judge properly disregarded it. See Gaskins v. S. Farm Bureau Cas. Ins. Co., 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000) (finding Rule 12(b)(6), SCRCP, replaces the Code Pleading rules regarding demurrers and "retains the Code

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[2] Laidlaw also argues the trial court dismissed the counterclaims on the erroneous belief that equitable claims were precluded against a public entity. We find this argument to be without merit. The trial court's ruling was clearly not based on this premise.

Pleading standard . . . rather than the more lenient notice pleading standard found in the federal rules.") (citation omitted); Charleston County Sch. Dist. v. S.C. State Ports Auth., 283 S.C. 48, 50, 320 S.E.2d 727, 729 (Ct. App. 1984) ("A demurrer admits the facts well pleaded in the complaint but does not admit the inferences drawn by the plaintiff from the facts, nor does it admit conclusions of law."); Sease v. City of Spartanburg, 242 S.C. 520, 527, 131 S.E.2d 683, 687 (1963) (finding allegations in the complaint which merely characterize the facts are mere conclusions which are not admitted by a demurrer).

CONCLUSION

For the foregoing reasons, the order of the circuit court is

AFFIRMED.

HEARN, C.J., and CURETON, J., concur.