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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John B.
Bowden, Respondent.

Opinion No. 25978
Submitted March 25, 2005 – Filed May 9, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Barbara M. Seymour, Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

John P. Freeman, of Columbia, for respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to the issuance of a letter of caution, admonition, or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

Respondent was hired as an associate to manage the Greenville office of the Forquer Law Firm. Respondent worked under the supervision of Robert Forquer who is not licensed in South Carolina and who works in the firm's Charlotte, North Carolina, office.

When respondent learned it was the firm's practice to inflate government recording fees on HUD-1 settlement statements, he questioned Mr. Forquer about the practice. Mr. Forquer assured respondent that the practice was ethical and legal.

Respondent has been informed by ODC that the Forquer Law Firm failed to maintain sufficient records of the recording fee charges and failed to identify and track client funds relating thereto in its accounts. No record of the actual amounts paid for recording fees were kept in the closing files and no accounting of the overcharges was made to clients. The funds obtained in excess of the actual recording fees were used for a variety of purposes including office expenses, correction of errors in closings, payroll or other payments to staff, and payments in various amounts to Mr. Forquer and a former partner, Mr. Green.

While respondent had signatory authority on the firm's bank accounts, he had no access to or responsibility for its financial records. Respondent knew that the management and recordkeeping of the firm's accounts was handled by Mr. Forquer in the firm's Charlotte office. Respondent was unaware that the firm was not complying with the requirements of Rule 417, SCACR, or that Mr. Forquer was using the excess recording fees for firm and personal expenses. Respondent did not profit in any way from the overcharges.

Respondent acknowledges that it was his responsibility 1) to inform his clients they were being charged more than the actual cost of the recording fees and 2) to ensure the accuracy of information contained in the HUD-1 forms in the closings he supervised. Respondent further acknowledges his ethical duty to ensure the firm's compliance with his obligation of safekeeping of funds and financial recordkeeping, particularly when those responsibilities were handled by non-lawyers or lawyers not licensed in South Carolina. Respondent acknowledges that, as office manager and supervisor of associates, he had additional responsibilities to ensure his staff's compliance with the Rules of Professional Conduct.

Respondent has fully cooperated with ODC's investigation.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (addressing lawyer's responsibility for safekeeping client funds); Rule 5.1 (lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if, with knowledge of the specific conduct, the lawyer ratifies the conduct involved); Rule 5.2 (lawyer is bound by the Rules of Professional Conduct notwithstanding lawyer acts at the direction of another person); and Rule 8.3 (lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as that lawyer's honesty, integrity, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority). In addition, respondent admits he failed to comply with Rule 417, SCACR (addressing financial recordkeeping). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of
Barry W. Bellino, Respondent.

Opinion No. 25979
Submitted March 25, 2005 – Filed May 9, 2005

INDEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and C. Tex Davis, Jr., Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Barry W. Bellino, of Pensacola, Florida, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of an indefinite suspension as provided by Rule 7(b)(2) , RLDE, Rule 413, SCACR. We accept the agreement and indefinitely suspend respondent from the practice of law in this state.

The facts, as set forth in the agreement, are as follows.

FACTS

On several occasions over the course of several years, respondent made or attempted to make social contacts with females who were clients or prospective clients. Under the circumstances and/or conditions,¹ the social contacts were inappropriate for attorneys and clients and constituted misconduct. Respondent does not admit the contacts were either illegal or immoral, but he does agree the social contacts constituted misconduct in violation of the Rules of Professional Conduct, Rule 407, SCACR, and that the social contacts constitute grounds for discipline under Rule 7(a)(1) and (5), RLDE, Rule 413, SCACR.

This Court has previously sanctioned respondent for misconduct involving female clients. In In the Matter of Bellino, 308 S.C. 130, 417 S.E.2d 535 (1992), respondent admitted that on two occasions he used unlawful or violent force against female clients with the specific intent to gratify his lust or sexual desires. Respondent was convicted of criminal charges, sentenced to a period of confinement, forfeited pay, and was dismissed from the Marine Corps. The Court imposed a six month suspension, in addition to the thirty-one month interim suspension, and required respondent to take and pass the Multistate Professional Responsibility Examination before applying for readmission. As specified in the order placing him on his current interim suspension, respondent's interim suspension stems from similar behavior with female clients. In the Matter of Bellino, 355 S.C. 82, 584 S.E.2d 119 (2003).

LAW

Respondent agrees his conduct violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.7 (addressing conflicts of interest); Rule 8.4(a) (lawyer shall not

¹ No description of the social contacts or attempted social contacts is provided in the Agreement.

violate Rules of Professional Conduct); Rule 8.4(c) (lawyer shall not engage in conduct involving moral turpitude); and 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and indefinitely suspend respondent from the practice of law. We deny respondent's request to make the indefinite suspension retroactive to July 22, 2003, the date he was placed on interim suspension. Within fifteen days of the date of this opinion, respondent shall surrender his certificate of admission to practice law in this state to the Clerk of Court and shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

INDEFINITE SUSPENSION.

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

JUSTICE BURNETT: This is an action seeking return of property pursuant to the innocent owner provision of S.C. Code Ann. § 44-53-586 (2002). The trial court granted Respondents’ motion for dismissal and summary judgment. This Court certified the case from the Court of Appeals pursuant to Rule 204(b), SCACR. We affirm as modified.

FACTUAL/PROCEDURAL BACKGROUND

James Gadson owned a lot and building in the City of Georgetown. He leased the building to Harriet Ann Singleton Evans. Evans operated the Winyah Grill, a bar and lounge, on the premises.¹ Ronald Lee McCants, an employee of Evans was arrested for distribution of crack cocaine inside Gadson’s building.²

On May 4, 1993, Judge Shuler signed a seizure warrant authorizing the solicitor, on behalf of the Georgetown County Sheriff’s Office and Georgetown City Police Department, to seize the property due to violations of the drug code. Judge Shuler also signed a notice of seizure on May 4, 1993.

On May 13, 1993, the State Law Enforcement Division (SLED) inspected the building and found numerous structural and electrical defects and also determined the fire exits were wholly inadequate. On May 17, 1993, the Resident Fire Marshal and Mayor of Georgetown signed a “notice of unsafe building.” The notice provided that if remedial work was not completed by June 30, 1993, to correct the building, structural, and fire code deficiencies, the City of Georgetown would demolish the property.

¹ The bar is also referred to by other names such as “Shabazz,” “The Elks Club,” “Shabazz Grill,” and “Shabazz Bar and Lounge.”

² Between December 1992 and February 1993, undercover officers purchased controlled substances on at least twenty-six occasions. Between 1984 and 1993, the City’s Police Department has responded to over 180 crime calls at this location.

Also on May 17, 1993, the special prosecutor filed a lis pendens giving notice of the forfeiture action based on the controlled substances violations. City Council revoked Evans' business license on May 24, 1993, due to the controlled substances sales, as well as, building and fire code violations.

In July 1993, the City of Georgetown demolished the building after Gadson failed to take corrective actions to resolve the building defects. On November 2, 1993, the City filed a demolition lien on the property in the amount of \$16,292.50.

By motion dated April 28, 1994, Gadson requested the circuit court "restore" the property to him pursuant to the innocent owner provision of the forfeiture statute. See 44-53-586(b)(1) (2002). On May 20, 1994, Judge Sydney Floyd denied Gadson relief on his motions.

On December 7, 1994, Gadson filed a suit in federal court. On May 3, 1996, Judge Norton signed an order effecting the parties' agreement to voluntarily dismiss the federal suit. The parties agreed Gadson could re-file the federal action prior to the close of the 1996 calendar year. Gadson failed to re-file the federal lawsuit by December 31, 1996.

In late 1996, Gadson died. On June 20, 1997, the probate court appointed the personal representatives of Gadson's estate. On January 28, 1998, Gadson's estate filed a complaint seeking a declaratory judgment dissolving the seizure warrant and lien. On May 5, 1999, the circuit court dismissed the complaint because there was a prior pending action (this action) which provided Gadson's estate the exclusive remedy. The order allowed Gadson's estate to proceed with the April 1994 state court lawsuit.

On October 21, 2003, Appellants filed a motion for summary judgment requesting the seizure warrant and lis pendens placed on the property be dissolved and vacated. Appellants also allege they are entitled to the return of property still in possession of the Respondents, and recovery of the value of property demolished. The circuit court granted the Respondents' motion for dismissal and summary judgment, concluding (1) Appellants

failed to state a claim against the solicitor; (2) there is no genuine issue of material fact regarding Appellants' entitlement to damages under the forfeiture statute; and (3) Appellants have failed to state a claim for attorney's fees. This appeal followed.

ISSUE

Did the circuit court err in granting Respondents' motion for summary judgment?

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Café Assocs., Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995). Further, summary judgment should not be granted even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusion to be drawn therefrom. MacFarlane v. Manly, 274 S.C. 392, 264 S.E.2d 838 (1980). An appellate court reviews the granting of summary judgment under the same standard applied by the trial court. George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001).

LAW/ANALYSIS

Appellants argue the Georgetown City Police Department and the Georgetown County Sheriff's Office, acting through the Solicitor for the Fifteenth Judicial Circuit (hereinafter referred to as the "seizing agency"), had a duty to maintain the seized property after Judge Shuler signed the seizure warrant on May 4, 1993, authorizing the solicitor to seize the property due to controlled substances violations. Therefore, according to Appellants, the seizing agency violated its duty to take reasonable steps to maintain the property when the City of Georgetown demolished the property.

AFFIRMED AS MODIFIED.

**TOAL, C.J., WALLER, PLEICONES, JJ., and Acting Justice
Marc H. Westbrook, concur.**

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Dillon County Magistrate
Frank D. Lee, Respondent.

Opinion No. 25981
Submitted April 5, 2005 – Filed May 9, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Assistant
Deputy Attorney General Robert E. Bogan, both of Columbia, for
The Office of Disciplinary Counsel.

Douglas Jennings, Jr., of Bennettsville, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a confidential admonition or public reprimand pursuant to Rule 7(b)(3) and (4), RJDE, Rule 502, SCACR. In addition, respondent agrees to neither seek nor accept any judicial position in South Carolina without permission of the Court and to neither seek nor accept Court permission without prior notice to Disciplinary Counsel.

The facts, as set forth in the agreement, are as follows.

FACTS

Respondent served as a magistrate in Dillon County for over forty years. On June 25, 2004, respondent engaged in inappropriate contact with a female magistrate court employee at work.

The employee reported the incident to law enforcement on the morning of the next business day, June 28, 2004. The incident became a subject of inquiry by other county officials on June 29, 2004. Respondent resigned by letter dated June 30, 2004, citing health reasons and mandatory retirement in one year as reasons for his resignation.

The incident was investigated by the State Law Enforcement Division (SLED). At the conclusion of the investigation, a warrant charging respondent with simple assault and battery was issued. On January 20, 2005, pursuant to a plea agreement, respondent pled guilty to battery and was fined \$250.00 as resolution of the charge.

Respondent represents he meant no harm or offense to the employee, that he has a jovial and friendly personality, and that he is a frequent “jokester” with office personnel. Respondent represents he intended to engage in jovial activity with the employee and that he regrets his words and actions.

When questioned about this incident by SLED, other female magistrate court employees reported respondent was known to make comments of a sexual nature. The employees stated respondent sometimes made unwelcome physical contact.

Respondent represents that he did not realize the employees took exception to or were offended by what he intended to be jovial conduct and that he would not have engaged in the conduct had he known otherwise. Disciplinary Counsel does not contest this representation.

LAW

By his misconduct, respondent agrees he has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 1(A) (judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); and Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary). In addition, respondent agrees he has violated Rule 7(a)(1) (it shall be ground for discipline for judge to violate Code of Judicial Conduct) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand.¹ Hereafter, respondent shall neither seek nor accept any judicial office in this state, whether by appointment or election, without permission of the Court, and he shall neither seek nor accept permission of the Court without prior notice to Disciplinary Counsel. See Rule 7(b)(7) and (8), RJDE, Rule 502, SCACR. Accordingly, respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

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

¹ A public reprimand is the most severe sanction the Court can impose when a judge no longer holds judicial office. In re O'Kelley, 361 S.C. 30, 603 S.E.2d 410 (2004); In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996).

set Defendant's bond on these charges at \$650.00. On or about August 21, 2003, Jane Doe paid \$650.00 in cash to Respondent as bond for Defendant. Jane Doe reports she saw Respondent place the money in his pocket.

Defendant was released from jail after posting an amount equal to the fines for the charges. Defendant intended that the forfeiture of his money conclude the matter.

Defendant's charges came before another judge for trial on September 2, 2003. This judge had no paperwork concerning Jane Doe's payment of the \$650.00. Defendant was tried in his absence, a bench warrant was issued, and a Non-Resident Violator Compact (NRVC) notice was sent to Respondent on the traffic offense.

After receiving the NRVC and learning that a local police officer with a bench warrant was looking for him, Defendant contacted the presiding judge who subsequently reported the matter to the Chief Magistrate. The Chief Magistrate examined Respondent's books and found no record of Defendant's bond. When questioned by the Chief Magistrate, Respondent acknowledged receiving the money but stated it was missing, that he could not find it, that he made a mistake, and that he would repay the money. The agreement represents Respondent repaid the \$650.00 with funds borrowed from his mother-in-law. Respondent resigned from office on August 1, 2004.

Disciplinary Counsel examined Respondent's financial records for the months of August and September 2003 and found no record of a \$650.00 deposit on or around the date Respondent received the money from Jane Doe. Respondent does not dispute that he placed the money in his pocket. Respondent informed Disciplinary Counsel that he sometimes did not complete all bond paperwork for evening bond hearings until the next day and, in accordance with this practice, surmises he may have taken the money home where it may have been commingled with personal funds on his dresser.

During Disciplinary Counsel's audit of Respondent's magisterial account, one overage was discovered. Respondent acknowledges depositing his personal money into his magisterial account due to his belief that there might be a shortage in the account.

Respondent acknowledges that his failure to receipt and deposit bond money and his failure to maintain accurate financial records violates the Chief Justice's Administrative Order of November 9, 1999 governing money handling and recordkeeping by summary court judges. In addition, Respondent admits his practices violated Canons 1, 1(A), 2, 2(A), 3, 3(A), and 3(C) of the Code of Judicial Conduct and Rules 7(a)(1) and (7) of the Rules for Judicial Disciplinary Enforcement.

LAW

By his misconduct, Respondent has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 1(A) (judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 3 (judge shall perform the duties of judicial office impartially and diligently); Canon 3A (judicial duties of a judge take precedence over all the judge's other activities); and Canon 3C (judge shall maintain professional competence in judicial administration). In addition, Respondent has also violated Rule 7(a)(1) (it shall be ground for discipline for judge to violate Code of Judicial Conduct) and Rule 7(a)(7) (it shall be ground for discipline for judge to willfully violate a valid court order) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand.¹ Hereafter, Respondent shall neither seek nor accept any judicial office in this state, whether by appointment or election, without permission of the Court, and he shall neither seek nor accept permission of the Court without prior notice to Disciplinary Counsel. See Rule 7(b)(7) and (8), RJDE, Rule 502, SCACR. Accordingly, Respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

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

¹ A public reprimand is the most severe sanction the Court can impose when a judge no longer holds judicial office. In re O’Kelley, 361 S.C. 30, 603 S.E.2d 410 (2004); In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,	Respondent,
v.	
Brennan Shay Jackson,	Appellant.

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

Opinion No. 25983
Heard March 16, 2005 – Filed May 9, 2005

AFFIRMED

Jack B. Swerling, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster; Chief Deputy Attorney General John W. McIntosh; Assistant Deputy Attorney General Salley W. Elliott; Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Robert D. Robbins, of Summerville, for Respondent.

JUSTICE WALLER: The appellant Brennan Shay Jackson (Jackson) was convicted of grand larceny and sentenced to ten years. He contends the trial court erred in admitting a photograph of him at a Halloween party when he was dressed as a prisoner and in refusing to allow him to introduce polygraph results in rebuttal after an insurance adjuster had testified that he

had asked Jackson whether he would be willing to take a polygraph. We affirm.

FACTS

Jackson is the nephew of Barbara and Bobby Ayer and the owner of a pawnshop. Jackson also cleaned and did odd jobs for the Ayers three days/week. The State alleged that sometime between June 1 and December 16, 2000, Jackson stole approximately \$190,000-200,000 in old collectible coins and bills from the Ayer's two home safes. There was no sign of forced entry.¹

Jackson testified Barbara paid him between \$500-1,000 per week. Further, he testified Barbara gave him gold and silver coins and old money on many occasions. Barbara, however, testified she paid him only \$100 per week and she never paid him with silver dollars or other old money. Over the years, Barbara had given Jackson large sums of money to help him purchase a car, a truck, and a cruise for Jackson's father, and open the pawnshop.²

Upon discovering that the coins and money were missing, Bobby called his insurance agent. Insurance adjuster Bill Spell investigated the theft. During his investigation, Spell interviewed Jackson and Stephen Phillips who had worked for the Ayers during the fall of 2000. At trial, Jackson admitted he sold some old paper money and coins worth several hundred dollars to John "Smokey" Dukes, Phillips' cousin, at a Halloween party. In fact, Jackson admitted some of the money that was sold to Smokey Dukes came from the Ayer's house. However, he testified his aunt had given him the money. Jackson also admitted he sold approximately \$8,000 worth of Krugerrands to Carolina Gold and Silver and Baxley's Pawnshop. At trial, Phillips testified about Jackson's various cash expenditures between June and December 2000. He specifically testified Jackson spent \$800 to hire a band to

¹Two rings initially thought to also have been stolen were later discovered in the Ayer's home.

² Barbara had made a deathbed promise to her mother (Jackson's grandmother) to take care of Jackson and by all accounts had been extremely generous to Jackson over the years.

play at the farmer's market for a football game; bought some guns; and paid \$2,000 in labor costs for Phillips to build him a dog kennel. He also testified Jackson bought a \$13,000 boat in March 2000. Additionally, there was testimony Jackson paid \$4,000 cash for a cruise in the fall of 2000.

ISSUES

- 1) Did the trial court err in admitting photographs of Jackson in a prisoner's costume at a Halloween party?

- 2) Did the trial court err in denying Jackson's request to introduce evidence that he had passed a polygraph test?

DISCUSSION

1) Photograph

During a pre-trial hearing, Jackson objected to the State's introduction of several photographs taken of appellant at a Halloween party held in 2000.³ Appellant was dressed as a prisoner. The State later sought to introduce only one of the photographs to show appellant was at the party along with two State's witnesses who would testify that Jackson had sold them things stolen from the victims. Jackson contended the photograph was prejudicial because he was dressed in a prison uniform. He argued the photograph was more prejudicial than probative.

On appeal, Jackson contends the photograph gave the impression that he had a light-hearted attitude toward lawlessness and found criminal behavior amusing. Jackson contends the photograph was irrelevant to any

³When the State introduced the photograph during trial, Jackson asked the trial court to note his pre-trial objection to its admission. The State argues that Jackson failed to state his objection in terms of Rule 403, SCRE, and therefore is barred from arguing this rule on appeal. While Jackson did not argue specifically Rule 403, he clearly argued that the prejudicial value of the photo outweighed any probative value. Accordingly, Jackson properly preserved this objection.

issue. Further, he argues he never contested he was at the Halloween party and offered to stipulate he was there.

The State, however, has the right to prove every element of the crime charged and is not obligated to rely upon a defendant's stipulation. State v. Johnson, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). The relevancy, materiality, and admissibility of photographs are matters left to the sound discretion of the trial court. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986). “[T]here is no abuse of discretion if the offered photograph serves to corroborate testimony.” Johnson, 338 S.C. at 122, 525 S.E.2d at 523. 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, 480 S.E.2d 64 (1997). To constitute unfair prejudice, the photographs must create “an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.” State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991). Even if evidence was irrelevant and thus wrongly admitted by the trial judge, its admission may constitute harmless error if the irrelevant evidence did not affect the outcome of the trial. State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991).

The State contends it introduced the photograph to show Jackson was at the party and had sold stolen items. While the photograph does not show any of the stolen items, Jackson testified that in the photograph he was selling some of the alleged stolen goods to Smokey Dukes. Thus, the photograph was clearly relevant.

Further, the photo would not cause the jury to reach a decision on an improper basis. The photo was taken prior to Jackson being identified as a potential suspect and, in fact, prior to the discovery of the crime. We find any prejudice from Jackson having on a prisoner's costume is outweighed by the photograph's probative value. Accordingly, we do not think that the admission of this particular photograph is reversible error.

2) Polygraph test results

Jackson contends the trial court erred in denying his motion to introduce evidence that he had passed a polygraph test given by a private polygrapher. Jackson contends the State opened the door and that he should have been allowed to reply. During the trial, the State presented a recording of a conversation that the insurance investigator Spell had taped with Jackson.⁴ During this conversation, Spell asked Jackson whether he would be willing to take a polygraph.⁵ Jackson answered he would be willing to take a polygraph. Jackson did not make any contemporaneous objection to the reference to a polygraph test. In fact, when the tape of the conversation was initially played, the trial court specifically asked Jackson if he had any objection to the tape being played and he stated no. Immediately after the tape was played, the State moved into evidence and Jackson again stated he had “[n]o objection at all.”

Jackson then informed the trial court that he had a matter he wanted to take up with the court. Jackson stated that the State had opened the door for the admission of polygraph results.⁶ The Solicitor responded that he did not believe the door had been opened and further he pointed out that the Sheriff had offered Jackson a polygraph to be administered by State Law Enforcement Division (SLED) but Jackson never took up his offer. The trial

⁴We note trial counsel was present at this meeting.

⁵The pertinent part of the conversation is as follows:

Spell: Would you be willing to take a polygraph?

Appellant: Yeah. That'd be fine.

Spell: Okay. You don't have any problem doing that?

Appellant: Unhuh. That's fine.

⁶Apparently, prior to trial Jackson had taken a private polygraph and passed. However, neither the results of this polygraph nor the questions asked during the test were proffered for the record.

court told Jackson he would have to hold a Council⁷ hearing to determine if the polygraph results were admissible.

Jackson told the trial court he had not prepared for a Council hearing and after some discussion stated he would think about it overnight. The Solicitor reiterated that if Jackson presented any evidence of polygraph test results, the State “intend[ed] to call the Sheriff to say he was prepared to take [Jackson] to S.L.E.D. and [Jackson] did not take him up on it.” The next morning trial counsel stated he had thought about it and decided that he would simply ask the witness whether Jackson had agreed to take a polygraph and whether one was administered and “leave it at that.” Clearly, Jackson abandoned his motion to admit the polygraph test results.⁸

On appeal, Jackson contends that “while any potential Council issue was waived, the issue of rebuttal was clearly raised and ruled upon by the trial court.” Jackson contends the State “opened the door . . . for evidence that [Jackson] took [a polygraph test] and passed it” and he should have been allowed to introduce polygraph evidence in rebuttal.

When a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. See State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003). However, here, Jackson waived any argument he had when he acquiesced the next morning and stated he would ask Spell if he had administered a polygraph and “leave it at that.” Jackson did not note any objection. Jackson made a decision to not introduce any evidence of the polygraph test results in rebuttal. Accordingly, this issue is not preserved.

In any event, Jackson was not prejudiced. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000) (holding error without prejudice does not warrant

⁷State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999)(holding the admissibility of polygraph tests must be analyzed under Rules 702 and 403, SCRE.).

⁸Spell later testified that he asked Jackson if he would be willing to take a polygraph and his response was “sure” but he never offered Jackson one.

reversal). The testimony before the jury was that Jackson stated he would be willing to take a polygraph and Spell testified he never offered him one. This would not leave the jury with the impression that Jackson had taken and failed a polygraph. Accordingly, based on the foregoing, Jackson's conviction and sentence are

AFFIRMED.

TOAL, C.J., BURNETT, PLEICONES, JJ., and Acting Justice Marc H. Westbrook, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Grace G. Pittman, Appellant,

v.

Keith Stevens, M.D., Respondent,

and

Franklin L. Pittman, Appellant,

v.

Keith Stevens, M.D., Respondent.

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

Opinion No. 25984
Heard March 1, 2005 – Filed May 9, 2005

AFFIRMED

James C. Cothran, Jr., of Spartanburg, and Michael L. Rudasill, of Lawrence & Rudasill, P.A., of Spartanburg, for Appellants.

Andrew F. Lindemann, of Davidson, Morrison & Lindemann, P.A., of Columbia; and Edwin Brown Parkinson, Jr., of Devlin & Parkinson, P.A., of Greenville, for Respondent.

JUSTICE WALLER: This case is a medical malpractice case. The jury returned a verdict for the doctor. The trial court denied the appellants' motion for a new trial on the ground the trial court's erroneously failed to charge two requested jury instructions. We affirm.

FACTS

In June 1998, appellant Franklin Pittman underwent back surgery. The respondent Dr. Keith Stevens was the anesthesiologist. The surgery required that Pittman, a morbidly obese diabetic, be placed in a prone position for approximately four hours. Because of a previous cervical surgery and Pittman's other health conditions, he was more at risk for developing lesions or ulcers at pressure points. To help relieve pressure points during the surgery, Dr. Stevens placed a gel pad under Pittman's face.

Following the surgery, however, Pittman developed a lesion on his forehead – similar to a blister. Although the skin lesion eventually healed, he alleges he suffered nerve damage. Pittman testified that he has constant headaches along with “lightning strikes” or very sharp pains and his head is very sensitive. He brought this action against Dr. Stevens alleging negligence. Pittman's wife brought a loss of consortium claim.

ISSUE

Did the circuit court err in failing to charge two requested jury instructions?

DISCUSSION

At the jury charge conference, Pittman requested two jury instructions, referred to as requested charges Numbers 7 and 8:

Request to Charge No. 7

While evidence of ordinary practice or the uniform custom of persons in similar circumstances is to be weighed and considered with other circumstances in determining whether ordinary care has been exercised, conformity to custom is not in and of itself the exercise of due care as a matter of law.

Request to Charge No. 8

If there is a great degree of danger present, then there is a greater duty of care to prevent injury to other persons. When there is a risk of substantial danger present, and the symptoms of the patient are considered with such a risk, then the physician has a duty to respond in proportion to the risk. The greater the risk of the condition to the patient, the greater the duty of the physician to respond appropriately and to provide the appropriate treatment.

The trial judge stated he would cover these requested charges. After the trial judge had charged the jury, the appellants informed the judge that the requested charge Numbers 7 and 8 had not been included. After commenting on the lack of specific authority to support these requested charges, the trial judge ruled that the charge as a whole was fair. After the jury returned a verdict for the doctor, the appellants moved for a new trial on the ground that the trial judge failed to charge the requested charges. The trial judge denied the motion and stated that he thought his general charge adequately covered the requested charges.

The trial judge is required to charge only the current and correct law of South Carolina. McCourt v. Abernathy, 318 S.C. 301, 305, 457 S.E.2d 603, 606 (1995). When reviewing a jury charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial. Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000) (citing Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999)). A trial court's refusal to give a properly requested charge is reversible error only when the requesting party can

demonstrate prejudice from the refusal. Vogt v. Murraywood Swim & Racquet Club, 357 S.C. 506, 512, 593 S.E.2d 617 (Ct. App. 2004).

We first note that the appellants cite no case law either from South Carolina or any other jurisdiction to support either of these requested charges. The appellants cite to section 27-2 of Judge Ralph King Anderson Jr.'s *South Carolina Request to Charge*. As noted by the trial judge, the requested charges are two paragraphs out of a charge that covers 4½ pages in Judge Anderson's book. The entire charge is then followed by a list of authorities which purports to support the charge. It is not apparent which authorities support the specific paragraphs which the appellants requested the trial court charge.

As to Charge Number 7, the appellants do not cite to any South Carolina case law. In fact, there is actually a South Carolina case directly contrary to requested charge Number 7. In Doe v. Am. Red Cross Blood Serv., 297 S.C. 430, 435, 377 S.E.2d 323, 326 (1989), the Court answered several certified questions in a case involving the standards used by blood banks and the spread of HIV/AIDs through contaminated blood. One of the issues was whether the blood banks were negligent in failing to screen for HIV even though at that time the customary practice was not to screen. The Court held:

in a professional negligence cause of action, the standard of care that the plaintiff must prove is that the professional failed to conform to the generally recognized and accepted practices in his profession. If the plaintiff is unable to demonstrate that the professional failed to conform to the generally recognized and accepted practices in his profession, ***then the professional cannot be found liable as a matter of law.***

Id. at 435, 377 S.E.2d at 326 (emphasis added). The Court specifically deferred “to the collective wisdom of a profession, ***such as physicians, dentists, ophthalmologists, accountants and any other profession which***

furnishes skilled services for compensation.” Id. (emphasis added).¹ Request Number 7 states “conformity to custom is not in and of itself the exercise of due care as a matter of law.” Request Number 7 is directly contrary to the Court’s holding in Doe. Accordingly, the trial judge did not err in failing to charge this proposed jury instruction.

As for Request Number 8, Dr. Stevens contends the issue is not preserved because the appellants alleged error only as to charge number 7 in their Amended Notice of Appeal. We disagree. In their Amended Notice of Appeal, the appellants specifically state they are appealing the trial court’s denial of their “motion for a new trial and the court’s order refusing the [appellants’] request to charge number 7.” The appellants’ motion for a new trial was made on the ground that the trial judge failed to charge both requested jury charges and the Statement of the Issue on appeal encompasses both requests. While the Amended Notice of Appeal does not specifically refer to charge Number 8, it complies with Rule 203(e), SCACR, and the example set out in the appendix² and clearly the appellants’ notice was adequate to inform Dr. Stevens that the appellants were appealing the trial court’s denial of the new trial motion. See Henson v. Int’l Paper Co., 358 S.C. 133, 142, 594 S.E.2d 499, 503 (Ct. App. 2004)(holding the issue statement encompassed the argument).

As to the merits, Request Number 8 is a general negligence law principle and there is no South Carolina case law supporting its application in a medical malpractice action. Furthermore, we found only one case from another jurisdiction discussing this issue, Hinkle v. Cleveland Clinic Found., 2004 WL 2914993 (Ohio App. 8 Dist. filed Dec. 16, 2004). In Hinkle, the court held the trial court’s failure to charge the “greater danger” instruction

¹Apparently, South Carolina is in the minority of the jurisdictions which have ruled on this issue. See Philip G. Peters, The Quiet Demise of Deference to Custom: Malpractice Law at the Millenium, 57 Wash. & Lee L. Rev. 163 (2000).

²The following is the entire body of the example notice set out in the appendix of Rule 203 (e): “Jane C. Roe appeals the order [judgment] of the Honorable George E. Brown dated September 1, 2000. Appellant received written notice of entry of this order [judgment] on September 3, 2000.”

was not error.³ The court also noted that it could “find no case law to support the proposed jury instruction in a medical malpractice case.” Id. at 11.

This type of instruction has been questioned in general negligence actions because the amount of care in relation to the degree of danger is encompassed in the appropriate standard of care which is determined by the facts of each case. See Stewart v. Motts, 539 Pa. 596, 654 A.2d 535 (1995)(holding the highest degree of care practicable is simply another way of phrasing a standard of reasonable or ordinary care under the circumstances). Furthermore, this instruction is even more inappropriate in a medical malpractice case. Every medical decision encompasses varying degrees of danger. Thus, the trial court did not err in failing to charge the jury Request Number 8.

Based on the foregoing, we conclude the trial court did not err in failing to charge the jury the two requested instructions. We remind the bench and the bar that while treatises and other scholarly works are useful research tools, it is necessary to review controlling case law for the current and correct jury charges.

AFFIRMED.

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

³ Although the Ohio instruction is not exactly like the proposed one in this case, it stands for the same principle. It reads, in pertinent part: “GREATER DANGER. The amount of care increases in proportion to the danger that reasonably should be foreseen.” 1 OJI 7.10 (2004).

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

The State,

Respondent,

v.

Phillip W. Preslar,

Appellant.

**Appeal From York County
John C. Hayes, III, Circuit Court Judge**

**Opinion No. 3987
Heard April 4, 2005 – Filed May 2, 2005**

AFFIRMED

**Assistant Appellate Defender Robert M. Pachak,
of Columbia, for Appellant.**

**Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Salley W.
Elliott, and Assistant Attorney General David
Spencer, all of Columbia; and Solicitor Thomas E.
Pope, of York, for Respondent.**

ANDERSON, J.: Phillip Wayne Preslar appeals from his convictions and sentences for two counts of intimidation of a witness. He contends the trial court erred in allowing reference to the prior charges of criminal sexual conduct, the pending charge to which the victim of the intimidation was the victim and chief witness. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Preslar was charged with twelve counts of criminal sexual conduct (CSC) against his daughter, Melissa. While awaiting trial on the CSC charges, Preslar mailed two handwritten letters seeking to convince Melissa to drop the charges. The first letter was sent to “Melissa, Chris & new baby girl.” The letter stated:

[H]ow’s your daughter? or my granddaughter if I may ask? I don’t know her name or how much she weighed when born. Could you write me and let me know? [M]aybe send some pictures of you all!! I would be very grateful [sic]. . . . I know that you’ll take really good care of her. Please do your best, and let her know that I love her, please do this for me Melissa. . . .

. . . I just talked with my lawyer and did not get very good news from him. Seems they want me to plead guilty to Criminal Sexual Conduct 2nd degree. It carries 15 years. Missy, that’s a long time, and I probably won’t make it out alive. Even if I do, I won’t be able to survive, because I won’t be able to work with a criminal record like the one I’ll have. Maybe I should just ask for the Death Penalty because it’s more or less what it will be. God, I don’t know what to do now. What should I do now?

I have to ask you this because you are the only one who can be happy with the results and outcome of this whole situation. I guess it comes down to what you want the Justice System to do to me, for you. I really want you to know that my life is in your hands at this time, and only you can do what’s necessary to

change what happens to me. I keep hearing that you are going to drop the charges, but I just don't know. Melissa, if you have any part of my heart, please think about dropping the charges. I am not begging you to, just asking please. I just don't think I can make it in Prison again, especially 15 years. Missy, my lawyer says that I can take this to Trial, but I don't want to drag out all the shit that they will put any of us thru, if you know what I mean. They will drag out everyone's past by doing a trial and more indictments or warrants could and will come up on others involved.

I will try to keep from going to trial because I don't want them to antagonize you any more than they already have. Melissa, it is very important that you do whatever you do at your own free will, and I want you to know that in no way am I threatening you or anyone else. I just hope and pray that this time you'll save my life from this crooked Justice System. . . . Once again Melissa, [p]lease do what you can to drop these charges so we don't have to suffer any more heartache that the past is going to bring up. . . . I pray that you will help me Missy. (Emphasis in original).

In a second letter, addressed to Melissa's sister, Preslar wrote:

Mandy, tell your sister Missy, not to take this as a threat, or personal, or as an effort to get her to drop these charges, Mandy, by no means am I a snitch, but I will not stand by and give my life to SC's prison system for accusations given to NC, almost 7 years ago. Not when God, myself, and other people know about Chris and Missy's past which they explained to me and my friend just 14 months ago, (68 chev, late 1994?). I don't by no means want to see Melissa hurt by her past with Chris but God won't let me stand by and not bring this in to the open. You know, maybe its God's will that put me here to show this anyway since I never done anything about it back then when I should have and they were sleeping together in Indian Land. I am going to hold off talking with any detectives about this until after Jan. 10th, when

Court starts back up here. Everything depends on whether this goes to trial or not. I truly believe that God is using me to bring other people out of their misery of their own hidden sins in which only God and themselves know of!! (God works in mysterious ways). Only God & Melissa have the power to change the outcome of this unforeseen travesty [sic] of all our lives. I Hope and Pray that God will touch Missy's heart just as he has mine.

Preslar was indicted for two counts of intimidation of a witness under section 16-9-340 of the South Carolina Code (2003). Prior to trial, Preslar moved to prohibit the State from presenting any evidence or mentioning the underlying CSC charges. Preslar's counsel alleged the mention of the CSC charges would be unduly prejudicial and would confuse the jury. The State maintained the underlying charges had to be identified in order to demonstrate why the two letters were so threatening to Melissa.

The court allowed the State to articulate that Preslar was charged with criminal sexual conduct without mentioning the number of charges or that he was currently incarcerated. Portions of the letters were redacted so only those sections specifically alleged to be intimidating were allowed into evidence.

During the trial, it was explained that Preslar was charged with CSC. The State informed the jury that Melissa was the alleged victim in the case and the primary witness if it should proceed to trial. Melissa professed that bringing the charges against her father scared her, "but on the other hand [made her] happy" because "he couldn't mess with [her] no more."

Melissa described in detail why the first letter was intimidating to her. As the alleged victim of Preslar's CSC charges, the references to her daughter made her very uneasy. Melissa stated she "didn't want him to know her or her to know him." She later addressed the threat: "Just my daughter period, don't want him to know her or have anything to do with her or see her or touch her or anything."

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Staten, Op. No. 3955 (S.C. Ct. App. filed March 7, 2005) (Shearouse Adv. Sh. No. 12 at 22). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant. State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). In order for an error to warrant reversal, the error must result in prejudice to the appellant. See State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000); see also State v. Wyatt, 317 S.C. 370, 453 S.E.2d 890 (1995) (error without prejudice does not warrant reversal).

LAW/ANALYSIS

Preslar contends the trial court erred in allowing testimony regarding the nature of his charges. He maintains it was unduly prejudicial for the jury to be told the underlying charges were for CSC, and the testimony should have been excluded as improper character evidence or as a reference to a prior bad act. We disagree.

I. INTIMIDATION OF A WITNESS

In South Carolina, intimidation of a witness is a statutory offense consisting of the following elements:

- (1) an unlawful threat or force;
- (2) to intimidate or impede a witness in the discharge of his duty;

OR

to destroy, impede, or attempt to obstruct or impede the administration of justice in any court.

S.C. Code Ann. § 16-9-340(A) (2003).

II. RES GESTAE

The res gestae theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred. State v. Fletcher, __S.C.__, 609 S.E.2d 572 (Ct. App. 2005); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004). Our supreme court discussed the res gestae theory in State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996):

One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence “furnishes part of the context of the crime” or is necessary to a “full presentation” of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its “environment” that its proof is appropriate in order “to complete the story of the crime on trial by proving its immediate context or the ‘res gestae’” or the “uncharged offense is ‘so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . .’ [and is thus] part of the res gestae of the crime charged.”

Id. at 122, 470 S.E.2d at 370-71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)). When evidence is admissible to provide this “full presentation” of the offense, there is “no reason to fragmentize the event under inquiry by suppressing parts of the res gestae.” State v. Sweat, 362 S.C. 117, 133, 606 S.E.2d 508, 517 (Ct. App. 2004) (internal quotations omitted). Under the res gestae principle, it is important that the temporal proximity of the prior bad act be closely related to the charged crime. Fletcher, __S.C. at __, 609 S.E.2d at 585. Even if the evidence is relevant under this theory, prior to admission the trial judge should determine whether

its probative value clearly outweighs any unfair prejudice. Rule 403, SCRE; Fletcher, __S.C. at __, 609 S.E.2d at 585.

Section 16-9-340 of the South Carolina Code provides:

(A) It is unlawful for a person by threat or force to:

(1) intimidate or impede a judge, magistrate, juror, witness, or potential juror or witness, arbiter, commissioner, or member of any commission of this State or any other official of any court, in the discharge of his duty as such; or

(2) destroy, impede, or attempt to obstruct or impede the administration of justice in any court.

S.C. Code Ann. § 16-9-340 (2003).

In the case sub judice, the evidence was properly admitted under the res gestae theory. The underlying CSC charges were a necessary and integral part of the crime for which Preslar was charged. The nature of those crimes—the explanation that Preslar allegedly victimized his daughter Melissa—was inextricably interwoven in the fabric of the charge of intimidation of Melissa as the victim and primary witness in the case against Preslar.

In order for the jury to fully understand why Melissa would be threatened by Preslar’s references to her baby girl, the jury had to understand what Melissa accused Preslar of doing to her. Without reference to the underlying CSC charges, the jury would not be able to discern the context in which the questions became threats. The reference to the CSC charges was necessary for a full presentation of the evidence to the jury. The explanation that Preslar was charged with CSC and Melissa was his victim is archetypical res gestae evidence. Moreover, the probative value of the evidence outweighed its prejudicial effect. See State v. Wood, 362 S.C. 520, 608

S.E.2d 435 (Ct. App. 2004). Concomitantly, the trial court did not abuse its discretion in admitting the evidence that Preslar was charged with CSC and Melissa was the victim and primary witness in the case.

III. RELEVANCE

For evidence to be admissible, it must be relevant. Rules 401 & 402, SCRE; State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004). “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina.” Rule 402, SCRE; State v. Gillian, 360 S.C. 433, 457-58, 602 S.E.2d 62, 75 (Ct. App. 2004) (internal quotations omitted).

Relevant evidence is defined as “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 401, SCRE; State v. Pagan, 357 S.C. 132, 142, 591 S.E.2d 646, 651 (Ct. App. 2004). Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In re Care and Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451 (2003); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Rule 403, SCRE.

The evidence of Preslar’s charges for CSC was absolutely necessary and relevant for the jury to determine why the letters written to Melissa were threatening and intimidating. While the nature of the charges was prejudicial, as is any evidence against the defendant in a criminal trial, the evidence was essential to proving the elements of the crime for which Preslar is charged. The probative value of the evidence outweighed its prejudicial effect. Apodictically, the trial court properly allowed the testimony regarding Preslar’s charges for CSC.

CONCLUSION

The testimony explaining Preslar's prior charges for CSC to the jury was necessary to explain the context or the res gestae of the crime of intimidating a witness under section 16-9-340. Additionally, the evidence was not unduly prejudicial so as to outweigh its probative value. The trial court did not abuse its discretion. Accordingly, Preslar's convictions and sentences are

AFFIRMED.

BEATTY and SHORT, JJ., concur.

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

Elizabeth Murphy, Appellant,

v.

Jefferson Pilot Communications
Company, WCSC, Inc., d/b/a
WCSC Channel 5, and
Donald M. Feldman, Defendants,
of whom Jefferson Pilot
Communications Company and
WCSC, Inc., d/b/a WCSC
Channel 5 are,

Respondents.

Christopher Murphy, Appellant,

v.

Jefferson Pilot Communications
Company, WCSC, Inc., d/b/a
WCSC Channel 5, and
Donald M. Feldman, Defendants,
of whom, Jefferson Pilot
Communications Company and
WCSC, Inc., d/b/a WCSC
Channel 5 are

Respondents.

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 3988
Heard March 10, 2005 – Filed May 2, 2005

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

John E. Parker and Ronnie L. Crosby, both of
Hampton, for Appellants.

John J. Kerr, of Charleston, for Respondents.

STILWELL, J.: Elizabeth Murphy filed an action against Jefferson Pilot Communications Company (Jefferson Pilot), WCSC, Inc. d/b/a WCSC Channel 5 (WCSC), and Donald M. Feldman, alleging, *inter alia*, defamation and intentional infliction of emotional distress. Elizabeth’s husband, Christopher Murphy, filed a companion claim alleging loss of consortium. The trial court directed verdicts in favor of WCSC and Jefferson Pilot. The jury returned a verdict against Feldman, awarding the Murphys substantial actual and punitive damages. The Murphys appeal. We affirm in part, reverse in part, and remand.

FACTS

Donald Feldman served as “Assistant VP News” for Jefferson Pilot and was the news director of WCSC, a Charleston television station and Jefferson

Pilot subsidiary. He reported directly to the general manager of Jefferson Pilot. Feldman met Sandra Senn, a local attorney, and convinced her to become a voluntary panelist on a political talk show broadcast by WCSC entitled "Carolina Gang." Senn, a former partner in the Stuckey Law Firm, had recently started her own firm. Elizabeth's father, James Stuckey, was the senior partner of the Stuckey Law Firm. Senn and the firm were involved in a dispute regarding business issues relating to Senn's departure from the firm, and Senn mentioned her frustrations springing from the dispute in casual conversations with Feldman.

On July 23, 1999, Feldman telephoned Senn and said that he had just arrived in Atlanta on a flight from Charleston. Feldman told Senn that Elizabeth was on his flight and, while very intoxicated, made slanderous remarks about Senn and WCSC.

A couple of days later, Feldman electronically mailed Senn stating:

I have decided to take an ACTIVE roll [sic] in dealing with this woman. I have come up with my own plan to deal with her. . . . After thinking about it, I am determined not to let this woman attempt to destroy your reputation and my plan will scare the crap out of her. It was selfish of me to stay out of it.

Later the same week, Feldman told Senn he sent a letter (the Letter) to Elizabeth via courier. Feldman provided Senn with a copy of the Letter. The Letter was written on WCSC stationery and stated:

Dear Ms. Stuckey:¹

After what I felt were disturbing and potentially Liable [sic] Statements aboard Delta Flight 852 from Charleston to Atlanta on July 23, 1999. [sic] There

¹ Elizabeth is referred to in the record as both Elizabeth Murphy and Elizabeth Stuckey. We refer to her as Elizabeth.

are several issues I am compelled to discuss with you.

Your unsubstantiated comments against Jefferson-Pilot Communications, WCSC News, Sandy Senn and Me are at the least tasteless and could force our company to take legal action against you and your law firm.

As you so clearly stated, Ms. Senn is a WCSC Air Personality. Therefore, WCSC has a moral as well as a financial interest in protecting her reputation and that of our News Department and its' [sic] programs. It is one thing to criticize an air personalities [sic] delivery, but it is quite another to loudly and publicly discuss their bedroom habits and personal disputes between you, your Law Firm, and her. I am also deeply disturbed that you would question my hiring practices and the motives behind them. I have been in Television News Management for thirty years and maintain WCSC's news as the highest rated and most respected in the market.

As a result, I have instructed a member of our staff to contact Delta Airlines to obtain the passenger manifest and the flight attendant service log for the flight we were on. Atlanta Passenger Service Agent Heath Hamrick will also be contacted. As you recall, he was the individual who repeatedly told you to keep your voice down after our late arrival in Atlanta.

I intent [sic] to use the passenger service manifest to determine which passengers, if any, heard your comments. I will then contact Frank Magid Associates, our research firm, and ask them to interview any Charleston area passengers to see if

your statements will affect their perceptions and viewing habits of Channel Five and Carolina Gang. They will also ask if the perceptions of Ms. Senn have changed.

The flight attendant service log will be used to determine how many bottles [sic] alcohol you were served on the flight.

Once I have this information, I intend to turn to our legal department. They will advise me whether to tell Ms. Senn of the incident and whether our company should take legal action against you and your law firm. If you care to discuss this incident further, please contact me at 402-5740.

In the end, this matter could become far more embarrassing for you and your law firm than for Jefferson Pilot Communications, Ms. Senn, or me.

I would hope we can resolve this matter quickly before there is any more damage to the reputations of anyone.

Sincerely,

Donald M. Feldman
Vice-President/News Director

Subsequently, Feldman told Senn that Elizabeth came to WCSC on two occasions to discuss entering into a civil agreement to refrain from any further defamation of Senn. Senn testified she assisted Feldman in the preparation of the agreement, but never saw a signed copy. At that time, Feldman told Senn that Elizabeth was on the plane with a man who was not her husband. On another occasion, Feldman told Senn he had the passenger manifest and the drink log from the flight.

In late September of 1999, Senn gave a copy of the Letter to Dale DuTremble, the attorney representing her in the dispute with the Stuckey Law Firm. Senn told DuTremble she wanted the airplane defamation incident resolved along with her other dispute with the Stuckey Law Firm. DuTremble met with Feldman at WCSC to discuss the Letter. At the meeting, Feldman repeated all the allegations he claimed occurred on the airplane and reiterated that Elizabeth was traveling with a man other than her husband. Feldman told DuTremble he had the passenger manifest and the drink log, but would not reveal them as he was protecting his source at Delta.

DuTremble informed Susan Wall, the attorney representing the Stuckey Law Firm in its dispute with Senn, of Elizabeth's alleged conduct on the airplane. Wall called Elizabeth. Elizabeth denied having any knowledge of the airplane incident and, subsequent to her conversation with Wall, realized she was attending a soccer game and birthday party in Charleston when the airplane incident allegedly occurred. Elizabeth did not see the Letter, supposedly sent to her in July, until November.

Elizabeth showed the Letter to Stuckey, who called Tom Waring, an attorney who represented WCSC. On November 16, Waring talked with Elizabeth and Stuckey and then contacted Rita O'Neill, WCSC's general manager. O'Neill called Feldman to find out what was going on. Feldman told her about the alleged incident on the airplane and stated Elizabeth attacked Senn and the "Carolina Gang." Feldman also told O'Neill that the former station manager, Chuck Wing, gave permission to write the letter, and that Wing edited the letter. Feldman indicated that Dan McAlister, general counsel for Jefferson Pilot, probably saw the Letter.

The next day, Waring went to WCSC and met with Feldman and O'Neill. Feldman produced a copy of the Letter and stated that he had disposed of the passenger manifest and drink log. Feldman told O'Neill and Waring it was his duty to respond to Elizabeth to protect the station, and he had permission from Wing to write the Letter.

DuTremble testified that beginning in either late 1999 or early 2000, Feldman's story began to unravel. All parties finally realized that Elizabeth was not on the flight as Feldman alleged, and obviously Feldman never had the manifest or log as he originally insisted. In November of 2000, Feldman was arrested on embezzlement charges and, at the time of trial, was incarcerated in federal prison. After his arrest, it became clear the entire incident involving Elizabeth never occurred and was entirely fabricated by Feldman.

As a result of Feldman's defamatory allegations, Elizabeth sought psychiatric treatment and was diagnosed with a major depressive episode, severe major depression, and severe anxiety. Elizabeth took a medical leave from the practice of law.

In 2001, the Murphys filed suit against Jefferson Pilot, WCSC, and Feldman. The Murphys alleged Feldman made slanderous statements about Elizabeth, which he published in the Letter and to Senn. The Murphys alleged Feldman's actions were performed within the scope of his employment with WCSC and as an agent for WCSC and Jefferson Pilot. In addition, they alleged Feldman's conduct amounted to intentional infliction of emotional distress.

The action was tried before a jury over an eight-day period. The trial court denied the Murphys' motions for directed verdicts on liability, and granted the directed verdict motions of WCSC and Jefferson Pilot based on "public policy." The trial court then submitted the case to the jury on only the issue of damages as to Feldman. The jury returned a verdict for Elizabeth of \$3,009,268 in actual damages and \$3,000,000 in punitive damages. The jury returned a verdict in favor of Christopher Murphy for \$3,000,000 in actual damages due to loss of consortium.

The Murphys filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, and in the alternative a motion for a new trial, arguing the trial court erred in directing verdicts in favor of Jefferson Pilot and WCSC and in denying the Murphys' motion for directed verdicts. The trial court denied the post-trial motions. The Murphys appeal.

LAW/ANALYSIS

STANDARD OF REVIEW

In ruling on a motion for directed verdict, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Gilliland v. Doe, 357 S.C. 197, 199, 592 S.E.2d 626, 627 (2004). The court must determine the elements of the action alleged and whether any evidence existed on each element. First State Sav. & Loan v. Phelps, 299 S.C. 441, 446, 385 S.E.2d 821, 824 (1989). An appellate court must apply the same standard when reviewing the trial judge's decision on such motion. See Weir v. Citicorp Nat'l Servs., Inc., 312 S.C. 511, 514-15, 435 S.E.2d 864, 867 (1993) (stating standard for appellate court).

I. Directed Verdicts

The Murphys argue the trial court erred in directing verdicts for WCSC and Jefferson Pilot and erred by refusing to direct verdicts in favor of the Murphys. We find the trial court erred in granting WCSC and Jefferson Pilot directed verdicts but did not err in denying the Murphys' motion for directed verdicts.

The trial judge explained he had studied the law and general principles of vicarious liability but found this case "bizarre" and "unique" and "in the written history of the law there has never been another case like it." Without considering the evidence presented as to the vicarious liability of WCSC and Jefferson Pilot, the court concluded:

To extend vicarious liability to the facts of this case would be beyond reason. If there is any principle guiding the common law, it is reason. There is no reason or public policy to extend the principle of vicarious liability to the facts of this case. I grant the motion for a directed verdict on behalf of WCSC [and Jefferson Pilot].

