The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

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

N O T I C E

IN THE MATTER OF KENNETH L. EDWARDS, PETITIONER

Kenneth L. Edwards, who was definitely suspended from the practice of law for a period of eighteen (18) months, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, June 19, 2009, beginning at 12:00 Noon, in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

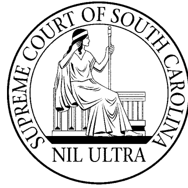
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

May 15, 2009

[1] The date and time for the hearing are subject to change. Please contact the Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.



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N O T I C E

IN THE MATTER OF SAMANTHA D. FARLOW, PETITIONER

Samantha D. Farlow, who was definitely suspended from the practice of law for a period of two (2) years, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, June 19, 2009, beginning at 1:30 p.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

May 15, 2009

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N O T I C E

IN THE MATTER OF VANNIE WILLIAMS, JR., PETITIONER

Vannie Williams, Jr., who was indefinitely suspended from the practice of law, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, June 19, 2009, beginning at 2:30 p.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

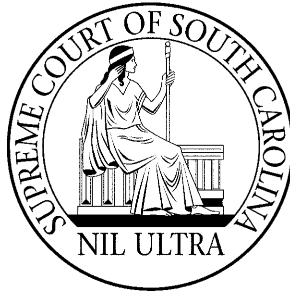
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

May 15, 2009

[1] The date and time for the hearing are subject to change. Please contact the Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 21
May 18, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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The Supreme Court of South Carolina

City of Hartsville, Respondent,

v.

South Carolina Municipal Insurance & Risk Financing Fund, Appellant.

ORDER

The opinion previously filed in this matter is hereby withdrawn, and the attached opinion is substituted in its place.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ James E. Moore A.J.

Columbia, South Carolina

May 18, 2009

THE STATE OF SOUTH CAROLINA
In The Supreme Court

City of Hartsville, Respondent,

v.

South Carolina Municipal Insurance & Risk Financing Fund, Appellant.

Appeal From Darlington County
J. Michael Baxley, Circuit Court Judge

Opinion No. 26625
Heard March 4, 2009 – Re-filed May 18, 2009

AFFIRMED

J. R. Murphy and Jeffrey C. Kull, both of Murphy & Grantland, of Columbia, for Appellant.

Martin S. Driggers, of Driggers & Moyd, of Hartsville, for Respondent.

JUSTICE BEATTY: In this declaratory judgment action, South Carolina Municipal Insurance and Risk Financing Fund (Insurer) appeals the circuit court's order finding the Insurer had a continuing duty to defend the City of Hartsville (City) and ordering it to pay the City the costs it incurred from having to defend against a suit brought

by a Hartsville landowner. Pursuant to Rule 204(b), SCACR, this Court certified this appeal from the Court of Appeals. We affirm the decision of the circuit court.

FACTUAL/PROCEDURAL BACKGROUND

In 1991, Phelix Byrd (Byrd) purchased a 46.358 acre tract of land that lay partly in the City (the City tract) and partly in Darlington County (the County tract). The property was part of what used to be Coker Farms, a National Historic Landmark (NHL) as designated in 1964 by the National Park Service, a division of the United States Department of the Interior. This NHL designation, however, was never filed in the public records of Darlington County nor was any mention of the designation placed on deeds conveying portions of the Coker Farms properties to subsequent purchasers.

Byrd purchased a portion of the Coker Farms property in order to subdivide it and sell parcels to developers for commercial purposes. In 1998, Byrd approached the City about developing a carwash on a .86 acre parcel of the property located in the City. Because the City tract was zoned for agricultural use, Byrd petitioned the City to rezone it as commercial. Fearing that commercial development of any part of the Coker Farms would lead to the revocation of the NHL designation for all of Coker Farms, the City delayed acting on Byrd's petition.

After being assured that rezoning Byrd's property would not affect the NHL designation, the City rezoned the .86 acre parcel from agricultural to commercial pursuant to a City ordinance in February of 1999. By this time, however, Byrd's potential purchaser had lost the financing necessary to develop the property and, as a result, the sale never closed.

In July 1999, the City passed another ordinance which rezoned as commercial the balance of Byrd's property located within the City.

Shortly thereafter, Byrd entered into contracts to sell parcels of the City tract for development. These sales, however, were not

consummated because Darlington County, which maintained the records for both County and City property, would not approve the deeds. The County declined to approve the deeds on the ground the tax records for Byrd's property contained "flags," which stated "N'tl Park Serv. Ord/No Per or Deeds Issued" and, in turn, effectively restricted the issuance of deeds. The County had placed these flags on the tax records for all Coker Farms property in an attempt to protect the NHL designation. The flags were not removed from Byrd's tax records until approximately three years after the City tract had been rezoned.

In 2000, Byrd sued the City and the County, in addition to several other defendants, for damages arising from Byrd's difficulties and delays in being able to commercially develop his Coker Farms properties. In terms of his claims against the City, Byrd specifically pled causes of action for "gross negligence"[1] and "taking or inverse condemnation."

The City, represented by the Insurer,[2] moved for summary judgment on all of Byrd's claims. By order dated February 22, 2002,

[1] In their briefs, the parties refer to this cause of action as one for negligent misrepresentation. However, a review of the pleadings indicates that Byrd titled this cause of action as "gross negligence."

[2] The City procured tort liability insurance from the Insurer in compliance with section 15-78-140 of the South Carolina Code, which provides in pertinent part:

> (b) The political subdivisions of this State, in regard to tort and automobile liability, property and casualty insurance shall procure insurance to cover these risks for which immunity has been waived by (1) the purchase of liability insurance pursuant to § 1-11-140; or (2) the purchase of liability insurance from a private carrier; or (3) self-insurance; or (4) establishing pooled self-insurance liability funds, by intergovernmental agreement, which may not be construed as transacting the business of insurance or otherwise subject to state laws regulating insurance.

S.C. Code Ann. § 15-78-140(b) (2005).

the circuit court granted the City's motion with respect to Byrd's takings and gross negligence claims. The court, however, denied the motion regarding Byrd's cause of action for inverse condemnation.

On March 28, 2002, the Insurer withdrew its defense of the City on the ground the remaining cause of action against the City for inverse condemnation was specifically excluded under the terms of the liability insurance policy the Insurer issued to the City.[3] The City protested the Insurer's withdrawal and requested that it continue to defend the City due to its concerns that the circuit court could permit Byrd to amend his complaint to add claims covered by the Insurer's liability policy. Despite this protest, the Insurer denied its duty to defend but indicated that it would reconsider its position in the event Byrd was permitted to reinstate the negligence cause of action. After the Insurer withdrew its defense, the City retained its own counsel.

Subsequently, the City filed a second motion for summary judgment with respect to Byrd's inverse condemnation claim. At the hearing on this motion, Byrd conveyed his theory that officials with the City and the County "conspired to have Darlington County 'flag' [his] property so that it could not be sold."

By order dated September 11, 2002, the circuit court granted the City's motion concerning the inverse condemnation cause of action, but denied the motion "with respect to the claim that the City of Hartsville has conspired with the County of Darlington in its actions." In so holding, the court reasoned:

---

[3] The following provision is listed under the exclusions section of the liability policy:

> Inverse Condemnation
>
> Inverse condemnation, condemnation, temporary taking, permanent taking, or any claim arising out of or in any way connected with the operation of the principles of eminent domain; adverse possession or dedication by adverse use.

> [A]s to the allegation by [Byrd] that the City of Hartsville was involved with the County in 'flagging' the property, it would be inappropriate, at this time, for Summary Judgment to be granted. However, with respect to any independent acts by the City of Hartsville Officials, the Court finds that Summary Judgment would be appropriate as to those allegations.

Ultimately, on March 20, 2003, the circuit court dismissed the City as a defendant in Byrd's lawsuit. In reaching this decision, the court concluded that "South Carolina Code Section 15-78-60(17), as amended, grants immunity to the City of Hartsville for actions taken by its employees, even if proved, which would have involved an intent to harm Mr. Byrd, the Plaintiff, as it is claimed to have conspired with County employees." In its order denying Byrd's motion for reconsideration, the circuit court stated:

> In its Motion for Reconsideration, [Byrd] contends that these actions by the City of Hartsville, working along side the County of Darlington, would be independent conduct by the City of Hartsville, constituting inverse condemnation. The Court, however, concludes that this would be evidence of a conspiracy and, thus, is in fact, a tort and not a contract and is, thus, barred by the aforementioned Statute. As previously stated, the Court had already concluded in its Order of September 11, 2002, which was unappealed, that there were no independent acts or conduct by the City of Hartsville which would support an inverse condemnation claim.

Byrd appealed to the Court of Appeals. This Court certified the appeal pursuant to Rule 204(b), SCACR. In Byrd v. City of Hartsville,[4] 365 S.C. 650, 620 S.E.2d 76 (2005), this Court affirmed the circuit court's orders, holding: (1) the conspiracy claim was not before the Court given Byrd did not appeal from the circuit court's decision

[4] Because the County settled with Byrd, it was not a party to the appeal.

that the City would be immune from liability under the Tort Claims Act even if there were a conspiracy; and (2) summary judgment in favor of the City was proper because Byrd could not demonstrate that the City inversely condemned his property through regulatory delay.

While Byrd's appeal was pending, the City filed this declaratory judgment action against the Insurer to recover all costs incurred by the City in defending against Byrd's lawsuit after the Insurer withdrew its defense. Specifically, the City claimed the Insurer breached its contract of insurance with the City "while covered claims against [the City], including a tort claim for conspiracy, was still being litigated." Based on this alleged breach of contract, the City claimed it was entitled to be reimbursed for the costs and expenses of having to defend against the Byrd lawsuit since March 28, 2002, through the appeal. In response, the Insurer denied liability to the City on the ground that all claims which remained against the City after the February 22, 2002 order, including the conspiracy claim, were not covered by the liability policy issued to the City.

After a hearing, the circuit court ruled in favor of the City by order dated May 10, 2007. In reaching this decision, the court found: (1) Byrd's conspiracy claim against the City was a tort action that was separate from the cause of action for inverse condemnation; and (2) the conspiracy claim, a common law tort action, was not specifically excluded by the Tort Claims Act. Based on these findings, the court concluded the Insurer was contractually bound to defend the City against all tort claims, including the conspiracy claim. As a result, the court ordered the Insurer to reimburse the City for its defense costs in the amount of $17,642.55.

The Insurer appeals the circuit court's decision.

DISCUSSION

The Insurer argues the circuit court erred in finding it had a continuing duty to defend the City after the cause of action for negligent misrepresentation was dismissed. The Insurer claims its duty

to defend terminated at this point because any remaining duty to defend the City was based on the specifically-excluded inverse condemnation claim. The Insurer contends the remaining civil conspiracy cause of action did not "trigger" a duty to defend because the claim: (1) was not specifically pled by Byrd; (2) arose from the same alleged acts of the City as the inverse condemnation claim and was, therefore, subject to the same exclusion in the liability policy; and (3) constitutes an intentional tort which is barred by sovereign immunity under section 15-78-60 of the Tort Claims Act.

"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). A suit to determine coverage under an insurance policy is an action at law. State Farm Mut. Auto Ins. Co. v. James, 337 S.C. 86, 93, 522 S.E.2d 345, 348-49 (Ct. App. 1999). Therefore, this Court's jurisdiction "is limited to correcting errors of law and factual findings will not be disturbed unless unsupported by any evidence." Id.

Questions of coverage and the duty of a liability insurance company to defend a claim brought against its insured are determined by the allegations of the complaint. C.D. Walters Constr. Co. v. Fireman's Ins. Co. of Newark, N.J., 281 S.C. 593, 316 S.E.2d 709 (Ct. App. 1984). If the underlying complaint creates a possibility of coverage under an insurance policy, the insurer is obligated to defend. Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co., 274 S.C. 468, 265 S.E.2d 38 (1980).

An insurer's duty to defend is separate and distinct from its obligation to pay a judgment rendered against an insured. Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha, 269 S.C. 183, 236 S.E.2d 818 (1977). However, these duties are interrelated. If the facts alleged in a complaint against an insured fail to bring a claim within policy coverage, an insurer has no duty to defend. R.A. Earnhardt Textile Mach. Div. v. S.C. Ins. Co., 277 S.C. 88, 282 S.E.2d 856 (1981). Accordingly, the allegations of the complaint determine the insurer's

duty to defend. Hartford Accident & Indem. Co. v. S.C. Ins. Co., 252 S.C. 428, 166 S.E.2d 762 (1969).

"Although the cases addressing an insurer's duty to defend generally limit this duty to whether the allegations in a complaint are sufficient to bring the claims within the coverage of an insurance policy, an insurer's duty to defend is not strictly controlled by the allegations in the complaint. Instead, the duty to defend may also be determined by facts outside of the complaint that are known by the insurer." USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 657, 661 S.E.2d 791, 798 (2008); see BP Oil Co. v. Federated Mut. Ins. Co., 329 S.C. 631, 638, 496 S.E.2d 35, 39 (Ct. App. 1998) ("Although the determination of an insurer's duty to defend is based upon the allegations in a complaint . . . in some jurisdictions, the duty to defend will be measured by facts outside of the complaint that are known by the insurer.").

I.

As its first argument, the Insurer contends it had no duty to defend the City regarding Byrd's cause of action for civil conspiracy because it was not specifically pled and, thus, did not invoke potential liability coverage.

Although the Insurer conceded this issue during oral argument before this Court, we take this opportunity to reiterate the standard for determining an insurer's duty to defend.

Based on the above-outlined principles, we find Byrd's failure to plead the elements of the civil conspiracy did not negate the Insurer's duty to defend the City on this cause of action. Although a determination of an insurer's duty to defend is dependent upon the insured's complaint, an analysis of this duty involves the allegations of the complaint and not the specifically identified causes of action. Moreover, an insurer's duty to defend may arise from facts outside of the complaint that are known to the insurer.

In the instant case, the City acknowledged that Byrd did not specifically plead civil conspiracy in his original or amended complaints. However, as evidenced by the circuit court's orders, the allegations in these pleadings set forth Byrd's theory that the City and the County conspired to flag his property which prevented him from pursuing commercial development. Therefore, the allegations in the pleadings, the facts known to the insurer, and the circuit court's recognition of Byrd's conspiracy claim, created a possibility of coverage under the Insurer's liability policy. Accordingly, the Insurer was not justified in withdrawing its defense based on Byrd's failure to specifically plead a cause of action for civil conspiracy, particularly given the circuit court's express authorization of Byrd's continued pursuit of this claim. See Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n, 305 S.C. 247, 249, 407 S.E.2d 655, 657 (Ct. App. 1991) (discussing an insurer's duty to defend and stating "[i]n examining the complaint, we must look beyond the labels describing the acts, to the acts themselves which form the basis of the claim against the insurer").

II.

Even if Byrd had pled conspiracy, the Insurer avers that this claim did not provide a basis for coverage independent from that of the inverse condemnation cause of action. Specifically, the Insurer contends that the "heart of the conspiracy claim is 'flagging,' which cannot be separated from the inverse condemnation claim against the County." Relying on the policy language of the inverse condemnation exclusion, the Insurer asserts the conspiracy claim "arose out of" the inverse condemnation claim. Because a claim for inverse condemnation is excluded under the liability policy, the Insurer argues it had no duty to defend the City against the civil conspiracy claim.

For several reasons, we disagree with the Insurer's contention. First, it is instructive to examine the elements of inverse condemnation and civil conspiracy.

The elements of an inverse condemnation are (1) affirmative conduct of a governmental entity, and (2) a taking. Byrd v. City of Hartsville, 365 S.C. 650, 657, 620 S.E.2d 76, 79-80 (2005).

In contrast, the tort of civil conspiracy contains three elements: (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. Pye v. Estate of Fox, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006); Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 610, 538 S.E.2d 15, 31 (Ct. App. 2000) ("It is well-settled in South Carolina that the tort of civil conspiracy contains three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) causing plaintiff special damage.").

"An action for civil conspiracy may exist even though respondents committed no unlawful act and no unlawful means were used." LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988). "Specifically, it is not necessary for a plaintiff asserting a civil conspiracy cause of action to allege an unlawful act in order to state a cause of action, although a civil conspiracy may be furthered by an unlawful act." Id. "Thus, lawful acts may become actionable as a civil conspiracy when the object is to ruin or damage the business of another." Id. (citations omitted) (emphasis added).

"The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se." Pye, 369 S.C. at 567-68, 633 S.E.2d at 511. "Because the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action." Id. at 568, 633 S.E.2d at 511 (emphasis added).

As evidenced by the above-outlined principles, the elements and damages for the two causes of action are distinctly different.

Initially, we note the "object" of the alleged civil conspiracy is not entirely clear from the pleadings. Conceivably, such a conspiracy

could have been intended to prevent Byrd from commercially developing the City tract but also from developing any other potentially acquired properties in the City or the County. Had the City and the County actually conspired, such a conspiracy could have had further reaching implications than just adversely affecting Byrd's City tract in an effort to preserve the NHL designation. Thus, the "object" of the civil conspiracy was not necessarily a "taking" or "inverse condemnation" of Byrd's property.

In terms of the elements of the causes of actions, a claim for civil conspiracy would have required Byrd to establish the existence of an overt act committed by a combination of individuals for the purpose of injuring Byrd. These elements were not present in Byrd's claim for inverse condemnation. Moreover, in order to prevail on his civil conspiracy claim, Byrd did not have to prove that a "taking" occurred.

Secondly, it is significant that the circuit court permitted Byrd to pursue his conspiracy claim after the court simultaneously dismissed the inverse condemnation cause of action. Clearly, this decision evidenced the circuit court's belief that Byrd's claim of civil conspiracy was a tort action that existed separate and independent from the inverse condemnation claim. Although the conspiracy claim was ultimately dismissed by the circuit court under the Tort Claims Act, we find the Insurer had a continuing duty to defend as long as there was a possibility of liability coverage for this tort claim.

Moreover, a review of the applicable exclusion in the liability policy does not support the Insurer's argument. The Insurer relies on the following language:

> Inverse condemnation, condemnation, temporary taking, permanent taking, **or any claim arising out of** or in any way connected with the operation of the principles of eminent domain; adverse possession or dedication by adverse use. (emphasis added).

Even though the facts of both causes of action were "intertwined," Byrd's claim for civil conspiracy was not inextricably connected or necessarily "arose out of" the inverse condemnation cause of action. As evidenced by the discussion regarding the elements of each cause of action, a civil conspiracy claim does not necessarily involve a "taking" or "the operation of the principles of eminent domain."[5]

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[5] In support of its argument that the civil conspiracy claim "arose out of" the inverse condemnation cause of action, the Insurer primarily relies on South Carolina Municipal Insurance and Risk Fund v. City of Myrtle Beach, 368 S.C. 240, 628 S.E.2d 276 (Ct. App. 2006). We find this case is distinguishable from the instant case.

In City of Myrtle Beach, the City was subjected to a class action lawsuit challenging a city ordinance which held landlords secondarily liable for their tenants' water bills. After judgment was granted to the class, the City sought indemnification from its insurer. Id. at 241, 628 S.E.2d at 277. In turn, the insurer filed a declaratory judgment requesting declarations that its liability policy with the City did not cover any of the claims or damages asserted by the class. In support of its action, the insurer relied on a policy provision which specifically excluded inverse condemnation actions. Because the policy excluded coverage for inverse condemnation actions, the insurer contended the class members' claim of a taking in violation of equal protection and due process was also excluded from coverage. Id. at 242, 628 S.E.2d at 277. After converting the motion into cross-motions for summary judgment, the trial court ruled in favor of the City. The insurer appealed. Id. at 243, 628 S.E.2d at 277.

Addressing only the insurer's contention that its policy expressly excluded coverage for claims based on a taking, the Court of Appeals reversed the trial court. Id. at 244, 628 S.E.2d at 278. In so ruling, the court specifically noted that the focus of the appeal was on the coverage provided by the liability policy and not the insurer's duty to defend. On the merits, the court found that the insurer should not have been required to indemnify the City for its loss because "the violation of the class members' rights to due process and equal protection would not have occurred but for the wrongful exercise by the City of its eminent domain power," which in turn fell within the inverse condemnation policy exclusion. Id. at 245, 628 S.E.2d at 278-79.

We believe the City of Myrtle Beach is distinguishable from the instant case given it involved the insurer's duty to indemnify and not the initial duty to defend. Furthermore, unlike Byrd's claim of civil conspiracy, the class members' claim of

Finally, any policy exclusion should be construed narrowly and in favor of the City. Because the Insurer's liability policy does not specifically exclude a cause of action for conspiracy, we find the Insurer was obligated to defend the City regarding this remaining cause of action. See Town of Duncan v. State Budget & Control Bd., Div. of Ins. Servs., 326 S.C. 6, 16, 482 S.E.2d 768, 774 (1997) (recognizing that an insurer is not justified in refusing to defend entire lawsuit containing several causes of action where some causes of action are covered under the policy and some are not); see also McPherson v. Mich. Mut. Ins. Co., 310 S.C. 316, 319, 426 S.E.2d 770, 771 (1993) (stating "rules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed"); Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 421, 392 S.E.2d 460, 461 (1990) (stating terms in an insurance policy should be liberally construed in favor of the insured).

III.

Next, the Insurer asserts the circuit court erred in finding that the Tort Claims Act[6] required it to provide coverage for the conspiracy claim and, in turn, established a duty to defend the City against this cause of action. In support of this assertion, the Insurer relies on the provision of the Tort Claims Act which grants sovereign immunity to a political entity for the intentional acts of its employees. S.C. Code Ann. § 15-78-60(17) (2005) (stating a "governmental entity is not liable for a loss resulting from: employee conduct outside the scope of his official duties or which constitutes . . . intent to harm").

In view of this provision, the Insurer argues that "claims based on intentional harm such as conspiracy are barred by sovereign immunity under section 15-78-60(17)." Therefore, the Insurer contends that "if

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a taking, which included allegations of due process and equal protection violations, necessarily arose out of the City's exercise of its eminent domain power.

[6] S.C. Code Ann. §§ 15-78-10 through -220 (2005 & Supp. 2008).

there is no liability under the Tort Claims Act, [the City] has no grounds for arguing that coverage must be provided." Based on this reasoning, the Insurer avers it had no duty to defend the conspiracy claim.

The Tort Claims Act provides that "[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code Ann. § 15-78-40 (2005).

"The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense." Plyer v. Burns, 373 S.C. 637, 651, 647 S.E.2d 188, 195-96 (2007). "Provisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed in favor of limiting liability." Id.

Notably, it appears the Insurer confuses its duty to defend with its obligation to pay for a covered claim. As we interpret its argument, the Insurer believes that if the City is immune under the Tort Claims Act for civil conspiracy claims then there is no liability coverage and, in turn, no duty to defend.

This argument, however, ignores the fact that sovereign immunity is an affirmative defense which must be raised by the party asserting it as a bar to liability. Logically, then the Insurer had a duty to assert this defense on behalf of the City. Thus, the fact that the circuit court ultimately dismissed Byrd's conspiracy claim under the Tort Claims Act is of no consequence to a determination of whether the Insurer had a duty to defend the City on this claim. See Town of Duncan, 326 S.C. at 16 n.14, 482 S.E.2d at 774 n.14 ("An insurer's duty to defend depends on an initial or apparent potential liability to satisfy a judgment against the insured.").

IV.

Finally, even if it had a duty to defend the City against the conspiracy claim, the Insurer contends the circuit court erred in finding the duty continued after the circuit court dismissed the claim and Byrd failed to appeal the dismissal.

Because we hold the Insurer had a continuing duty to defend the City even after the negligent misrepresentation claim was dismissed, we agree with the circuit court's assessment of costs against the Insurer. See Unisun Ins. Co. v. Hertz Rental Corp., 312 S.C. 549, 554, 436 S.E.2d 182, 186 (Ct. App. 1993) ("An insurer that breaches its duty to defend and indemnify the insured may be held liable for the expenses the insured incurs in providing for his own defense.").

As acknowledged by the Insurer, the liability policy provided for the Insurer "to indemnify [the City] all costs and expenses incurred in the investigation, adjustment, settlement, defense and appeal of any claim or suit for which coverage is afforded by this Section III (General Liability) of this Contract." (emphasis added). Therefore, the Insurer was responsible for the costs and expenses incurred by the City through the appeal of Byrd's lawsuit.

CONCLUSION

Based on the foregoing, we hold the Insurer had a continuing duty to defend the City even after the negligent misrepresentation claim was dismissed given the civil conspiracy claim subjected the City to tort liability. Accordingly, we affirm the order of the circuit court finding the Insurer had a continuing duty to defend and ordering the Insurer to pay the costs and expenses incurred by the City through the appeal of Byrd's lawsuit.

AFFIRMED.

TOAL, C.J., WALLER, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

The Supreme Court of South Carolina

In the Matter of Joseph L. Smalls, Jr., Respondent.

ORDER

This Court retroactively disbarred Joseph L. Smalls. *See In the Matter of Smalls*, Op. No. 26634 (S.C. Sup. Ct. filed Apr. 13, 2009) (Shearouse Adv. Sh. No. 16 at 71). Smalls petitioned this Court to reconsider its requirement Smalls make full restitution prior to petitioning for reinstatement. This Court hereby withdraws the opinion dated April 13, 2009 and substitutes the attached opinion.

IT IS SO ORDERED.

s/ John H. Waller, Jr. A.C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Acting Justice James E. Moore not participating.

Columbia, South Carolina
May 18, 2009

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Joseph L. Smalls, Jr., Respondent.

Opinion No. 26634
Heard March 17, 2009 – Re-filed May 18, 2009

DISBARRED

Attorney General Henry D. McMaster and Assistant Deputy Attorney General Robert E. Bogan both of Columbia, for Office of Disciplinary Counsel.

I. S. Leevy Johnson of Johnson, Toal & Battiste, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, Joseph L. Smalls, Jr., stipulated to misconduct primarily involving his trust accounts. The Commission on Lawyer Conduct panel recommended retroactive disbarment, restitution, and assessment of costs. We find retroactive disbarment, restitution, and costs warranted.

I.

Smalls ran the Smalls Law Firm, in Columbia, which consisted of a general practice with a high volume of real estate closings. Smalls solely possessed check signing authority and maintained control over the firm's bank accounts related to this case.

Smalls stipulated this case arose out of a complaint to Office of Disciplinary Counsel (ODC) because a check for $72,379.67 issued by Smalls for a real estate closing was not honored in 2002. The complaint launched a full ODC investigation into Smalls' multiple law firm bank accounts. As a result of its investigation, ODC petitioned for interim suspension, which this Court granted on May 16, 2002.

Additionally, Smalls conceded he failed to identify client file names or numbers as required by Rule 417, SCACR on "scores" of deposits between 2000 and 2002 into his trust accounts. Smalls further admitted he routinely transferred funds between law firm accounts to "cure" account shortages. This misconduct resulted in multiple insufficient funds penalties and fees. One of Smalls' trust accounts was assessed penalties for approximately seventy-five insufficient funds checks from 2000 to 2002. Another trust account was assessed approximately 11 insufficient funds fees during the same time period.

A bank, where Smalls maintained a trust account and a general operating account, force-closed the accounts in 2002. Upon force-closure, the trust account had a balance of negative $413.57, and the bank returned approximately thirty-five checks in the last seven business days totaling approximately $75,000 due to insufficient funds. The general operating account had a balance of negative $44.69.

The Lawyers' Fund for Client Protection received claims totaling $235,528.82, and the Fund paid out a total of $114,239.04 to forty-seven people. The Fund received $33,541.71 from the appointed Trustee resulting in a net deficit of $80,697.33.

In addition to the above misconduct, Smalls represented a client in a workers' compensation case, which settled for $7,000 in November 2001. The funds were not disbursed to the client prior to Smalls' interim suspension on May 16, 2002. Next, a chiropractor treated one of Smalls' clients. The client assigned part of her settlement to the chiropractor, and the client settled in April 2002. The chiropractor was not paid. Lastly, a court reporter submitted an invoice for a deposition

transcript on or about March 14, 2002 for $342.20. Smalls stipulated this invoice was not paid as he was out of the office due to illness and then suspended.

Upon review of the stipulation of facts and hearing testimony, the panel recommended retroactive disbarment, payment of costs, and restitution. Smalls challenged the panel's report and recommendation.

II.

The panel found clear and convincing evidence of violations of Rules 1.15, 8.4(a), 8.4(b), 8.4(d), and 8.4(e), RPC, Rule 407, SCACR. The panel further found a violation of Rule 417, SCACR. The panel recommended disbarring Smalls retroactively, assessing costs against Smalls, and requiring Smalls to make full restitution to the Lawyers' Fund and to victims. We agree and find retroactive disbarment, imposition of costs, and restitution warranted.

Rule 1.15 requires the safekeeping of a client's property. The evidence indicated Smalls failed to maintain the records of his trust accounts and failed to maintain the integrity of his trust accounts. Accordingly, we agree that Rule 1.15 was violated. Next, we hold subsections (a), (b), (d), and (e) of Rule 8.4 were violated through Smalls mishandling of clients' funds. Lastly, we hold the financial recordkeeping requirements of Rule 417 were ignored.

We acknowledge it is unclear whether Smalls used the unaccounted for money for his personal benefit. What is clear, however, is that Smalls drastically failed to keep clients' property safe and mishandled money, moving funds from one account to another to cover shortages. Accordingly, we find that disbarment is an appropriate sanction under these circumstances. Based on precedent and Smalls' interim suspension since May 16, 2002, we find imposing a sanction of retroactive disbarment adequately protects the public. *See In the Matter of Yarborough*, 380 S.C. 104, 106, 668 S.E.2d 802, 803 (2008) (disbarring retroactively given the duration of Yarborough's indefinite suspension, Yarborough's disciplinary history, and the

Court's finding the purpose of disciplinary proceedings, which is to protect the public and the integrity of the legal system, was satisfied by retroactive disbarment); *In the Matter of Evans*, 376 S.C. 483, 484-85, 657 S.E.2d 752, 752-53 (2008) (accepting agreement to disbar retroactively due to Evans' failure to manage staff and reconcile her records); *In the Matter of Kennedy*, 367 S.C. 355, 361, 626 S.E.2d 341, 345 (2006) (disbarring Kennedy retroactively for failing to follow recordkeeping and money handling requirements, periodically using trust money to pay Kennedy's expenses, and additional misconduct such as mail fraud).

Under Rule 7(b), RLDE, Rule 413, SCACR we further require Smalls to contact ODC within fifteen days of the filing of this opinion regarding setting up a restitution plan for the Lawyers' Fund and other victims, to agree on a payment plan with ODC within sixty days of the filing of this opinion, to make payment of the costs associated with the disciplinary proceedings within ninety days of the filing of this opinion, and to take the Legal Ethics and Practice Program administered by ODC prior to any petition for reinstatement. Failure to comply with the restitution plan may result in the imposition of civil or criminal contempt by this Court.

III.

For the foregoing reasons, we retroactively disbar Smalls to the date of his interim suspension. Within fifteen days of the date of this opinion, Smalls shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

WALLER, ACTING CHIEF JUSTICE, PLEICONES, BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Louis S. Moore, Respondent.

Opinion No. 26650
Submitted April 14, 2009 – Filed May 18, 2009

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and William C. Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Desa A. Ballard, of West Columbia, for respondent.

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 a definite suspension from the practice of law of up to and including one (1) year. We accept the agreement and impose a one (1) year suspension from the practice of law. The facts, as set forth in the agreement, are as follows.

Matter I

Respondent admits closing a real estate purchase transaction for Complainant A, a co-purchaser of the property, without a recordable power

of attorney for the other co-purchaser of the property. In addition, he admits he allowed Complainant A to sign documents for herself and as absent co-purchaser after she indicated she had authority to sign for the absent co-purchaser even though he did not seek verification of Complainant A's authority to sign for the co-purchaser.

Respondent admits that the insurance payments on the settlement statement were not accurate and did not reflect the actual disbursement. Further, respondent admits he failed to insure the title insurance on the transaction was in fact issued and that the closing instructions were followed.

Respondent admits he failed to supervise the paralegal who was handling the transaction and that his lack of supervision resulted in mistakes on the settlement statement and mistakes in post-closing requirements.

Respondent admits he falsely witnessed a signature on a mortgage that was signed by another person.

Regarding this real estate transaction, respondent admits he failed to insure that funds were properly credited to his trust account prior to disbursement, that he failed to properly maintain client ledgers, that he failed to timely reconcile his trust account, and failed to follow Rule 417, SCACR.

Matter II

Respondent admits he failed to refund the Complainants' fee after he agreed to issue the refund. Respondent states he agreed to the refund as an accommodation to the Complainants after they declined to pursue their case. Respondent maintains, however, that he had performed enough work on the Complainants' behalf to entitle him to the fee. ODC does not dispute this assertion.

LAW

Respondent admits that, by his misconduct, he has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1

(lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter); Rule 1.5 (lawyer shall not charge or collect unreasonable fee); Rule 1.15 (lawyer shall not disburse funds from an account containing funds of more than one client or third person unless the funds to be disbursed have been deposited in the account and are collected funds); Rule 5.3 (lawyer shall insure firm has in effect measures giving reasonable assurance that non-lawyer's conduct employed by lawyer is compatible with professional obligations of lawyer); and Rule 8.4 (it is professional misconduct for lawyer to violate Rules of Professional Conduct). Further, respondent admits he did not comply with the financial recordkeeping provisions of Rule 417, SCACR. In addition, respondent admits that his actions constitute grounds for discipline under the following provision of Rule 7, RLDE, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct).

CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for one (1) year. Within fifteen days of the filing of this opinion, respondent shall file an affidavit demonstrating he has complied with the requirements of Rule 30 of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., WALLER, PLEICONES, BEATTY and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ernest Lamar Bradley and
Esther K. Bradley, Petitioners,

v.

John Doe and AccuSweep, Inc., Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 26651
Heard April 22, 2009 – Filed May 18, 2009

DISMISSED AS IMPROVIDENTLY GRANTED

Donald H. Howe, of Howe & Wyndham, and Walter Bilbro, Jr., both of Charleston, for Petitioner.

Margaret F. Horn, of Wilson & Heyward, of Charleston, for Respondent.

PER CURIAM: This Court granted a petition for a writ of certiorari to review the decision of the Court of Appeals in Bradley v. Doe, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007). We dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

TOAL, C.J., WALLER, PLEICONES, BEATTY, JJ., and Acting Justice James R. Barber, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Theresa Claypoole, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26652
Heard March 4, 2009 – Filed May 18, 2009

DISMISSED AS IMPROVIDENTLY GRANTED

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, all of Columbia, and Solicitor Donald V Myers, of Lexington, for Respondent.

PER CURIAM: We granted certiorari to review the Court of Appeals' opinion in State v. Claypoole, 371 S.C. 473, 639 S.E.2d 466 (Ct. App. 2006). We now dismiss the writ as improvidently granted.

TOAL, C.J., WALLER, KITTREDGE, JJ., and Acting Justices James E. Moore and James A. Spruill, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anthony Rivera, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Berkeley County
Daniel Peeper, Trial Judge
Roger M. Young, Post-Conviction Relief Judge

Opinion No. 26653
Submitted April 22, 2009 – Filed May 18, 2009

REVERSED

Appellate Defender Kathrine H. Hudgins, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Matthew Friedman, all of Columbia, for Respondent.

JUSTICE PLEICONES: We granted certiorari to consider an order denying petitioner's application for post-conviction relief (PCR) and now reverse, finding trial counsel ineffective in agreeing to a response to a jury question.

FACTS

Petitioner was acquitted of murder but convicted of armed robbery and received a twenty year sentence. The Court of Appeals affirmed his direct appeal. State v. Rivera, Op. No. 2002-UP-544 (S.C. Ct. App filed August 29, 2002).

At trial, the State's theory was that although petitioner did not actively participate in the murder/robbery, he accompanied the active participants to the scene with knowledge that they intended to commit the robbery. The State sought to convict petitioner of the murder which occurred in the course of the robbery under a "hand of one/hand of all" accomplice liability theory. See State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006). The State's case relied heavily on petitioner's incriminating statement, and the thrust of the defense was to attack the voluntariness of that statement.

The jury was charged on its duty to determine whether petitioner made the statement, and whether the statement was given freely and voluntarily. After two hours of deliberation, the jury sent this note:

> Can we use the defendent's [sic] statement for one charge and not the other if we think he was deceived prior to giving his statement?

After some discussion, the court gave the following written response, without objection:

> Yes – if you find the statement was freely and voluntarily made as to one charge but not the other.

No – if you find it was not freely and voluntarily made as to both charges.

The note was received at 3:25 pm. Some discussion ensued before the written note and answer were sent back to the jury. At 3:29 pm, the jury returned to the courtroom with its verdict, finding petitioner guilty of armed robbery but acquitting him of the murder charge. Immediately after the jury was excused, trial counsel asked for a new trial on the ground that the answer given was incorrect in that a statement is either voluntary or involuntary *in toto*. The motion was denied.

At the PCR hearing, petitioner contended trial counsel was ineffective in agreeing to the trial judge's answer to the jury's inquiry. Trial counsel testified that he was in error in failing to object to the answer. The PCR judge denied relief, holding:

> [Trial judge's] response to the jury question was a correct statement of South Carolina law concerning the voluntariness of a statement. Counsel cannot be ineffective for failing to raise an issue that is without merit.

We granted certiorari to review this ruling.

ISSUE

> Did the PCR judge err in failing to find petitioner's trial counsel ineffective?

ANALYSIS

In order to obtain relief on a claim of ineffective assistance, the applicant must demonstrate both that counsel's performance fell below professional norms, and that the applicant suffered prejudice as a result of counsel's deficient performance. Prejudice is defined as a reasonable probability that had trial counsel not been deficient, the result at trial would

have been different. E.g., Miller v. State, 379 S.C. 108, 665 S.E.2d 596 (2008). Where a PCR judge's ruling is controlled by an error of law, this Court will reverse. Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008).

The trial court erred in instructing the jury that a statement could be voluntary as to one offense but involuntary as to another. Further, the PCR judge committed an error of law in holding this charge was a proper statement of law. We find no evidence to support the PCR finding that counsel was not deficient in agreeing to allow this answer to be given to the jury. The nature of the jury's inquiry, and its immediate return of a split verdict upon receiving the answer, convinces us that the jury agreed there was an element of involuntariness in petitioner's statement. Under these circumstances, petitioner has demonstrated the requisite prejudice, that is, a reasonable probability that had the jury been instructed that a statement is either voluntary or involuntary, it would have found petitioner's statement involuntary and acquitted him of the armed robbery charge as well as the murder charge.

CONCLUSION

The order denying petitioner PCR is

REVERSED.

TOAL, C.J., WALLER, BEATTY and KITTREDGE, JJ., concur.

The Supreme Court of South Carolina

In the Matter of Frank Rogers
Ellerbe, III, Respondent.

ORDER

Respondent was arrested and charged with five (5) counts of failing to file a state income tax return and failing to pay taxes in violation of S.C. Code Ann. § 12-54-44(B)(3) (2000). The Office of Disciplinary Counsel petitions the Court to place respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR. Respondent consents to being placed on interim suspension.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

s/ Costa M. Pleicones J.
FOR THE COURT

Toal, C.J., not participating

Columbia, South Carolina

May 14, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Deborah J. Clegg, as Personal Representative of the Estate of Allison Clegg, Respondent,

v.

Elliot M. Lambrecht, Douglas A. Lambrecht, Rhett Barker, Jan Horan, and Anna C. Lambrecht, Defendants, Of Whom Douglas A. Lambrecht is the Appellant.

Appeal From Beaufort County
Roger M. Young, Circuit Court Judge

Opinion No. 4498
Heard December 2, 2008 – Filed February 5, 2009
Withdrawn, Substituted, and Refiled May 13, 2009

AFFIRMED

John E. North, Jr., and Pamela K. Black, both of Beaufort, for Appellant.

H. Fred Kuhn, Jr., of Beaufort, and Richardson Wieters, of Hilton Head, for Respondent.

PIEPER, J.: The appellant, Douglas Lambrecht (Lambrecht), appeals the denial of a motion to impose sanctions under Rule 11, SCRCP, or pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act (FCPSA).[1] The panel of this court affirmed the trial court's denial of sanctions. We now withdraw our previous opinion from publication and substitute this revised opinion. We affirm.

FACTS

On July 27, 2002, Deborah Clegg (Clegg) filed a complaint as personal representative of her deceased daughter, Allison Clegg, against Lambrecht.[2] Clegg alleged her daughter was killed when Lambrecht's son, Elliot Lambrecht (Elliot), crashed a vehicle into a tree. Clegg argued Lambrecht, as the father of Elliot, was liable based on a negligent entrustment cause of action.

At the time of the accident, Elliot was nineteen years old, living in his own residence. Elliot owned the vehicle involved in the accident, though Lambrecht co-signed on the car loan.

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[1] While we do not necessarily agree that the amended 2005 version of the FCPSA is applicable here in light of the statutory analysis in Ex parte Gregory, 378 S.C. 430, 432 n.1, 663 S.E.2d 46, 47-48 n.1 (2008), neither party asserted the prior version applied; thus, the trial court applied the 2005 version of the FCPSA and it has become the law of the case. Sloan v. Greenville County, 380 S.C. 528, 536, 670 S.E.2d 663, 667 (Ct. App. 2009) (finding an unchallenged ruling by the trial court, right or wrong, is the law of the case) (citing Sloan v. Dep't of Transp., 365 S.C. 299, 307, 618 S.E.2d 876, 880 (2005)). However, were we to apply the prior version of the law, we would reach the same result under the facts of this case.

[2] The complaint also listed Elliot Lambrecht as a defendant.

Before the accident, the state suspended Elliot's driver's license. Consequently, Elliot parked his vehicle at Lambrecht's house. A few weeks thereafter, Elliot asked Lambrecht to give Elliot's sister, Anna, the keys to Elliot's car because her vehicle had broken down. Lambrecht agreed and Anna picked the car up from Lambrecht's house, taking it to her home in Beaufort, South Carolina. Several weeks later, Elliot traveled with a friend to Beaufort to retrieve the vehicle. Although Elliot's driver's license was still suspended, he nonetheless drove the vehicle, picked up Allison Clegg, and crashed into a tree resulting in Allison's death.

On April 7, 2005, the trial court struck Clegg's actions from the docket pursuant to Rule 40(j), SCRCP.[3] The cases were subsequently restored to the roster by consent of the parties.[4]

Prior to trial, Lambrecht moved for summary judgment. The trial court granted the motion, concluding Lambrecht had no duty to control Elliot's conduct because it was uncontroverted that Elliot was an emancipated adult. Further, the court concluded Clegg presented no evidence Lambrecht owned or controlled the vehicle involved in the accident.

On January 17, 2007, after the trial court granted summary judgment in Lambrecht's favor, Lambrecht filed a motion to impose sanctions pursuant to Rule 11 and pursuant to the FCPSA. The trial court first denied the motion; subsequently, in its denial of the motion to alter or amend, the court specified Clegg's claims were filed in good faith and were reasonable. This appeal followed.

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[3] Discovery was allowed to continue while the case was in 40(j) status.

[4] The trial court noted counsel for all defendants consented to restoration of the cases with the exception of Elliott; Elliott appeared neither pro se nor through counsel.

STANDARD OF REVIEW

A request to impose sanctions under the FCPSA is treated as a proceeding in equity. Hanahan v. Simpson, 326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997). Because this is a proceeding in equity tried by a judge alone, we may find facts in accordance with our own view of the preponderance of the evidence. In re Beard, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004). Following the determination of facts, an appellate court applies an abuse of discretion standard in reviewing a decision to award sanctions and the specific sanctions awarded. Id. An abuse of discretion occurs when the trial court's ruling is based upon an error of law or when based upon factual conclusions without evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

DISCUSSION

Lambrecht contends the trial court erred in refusing to impose sanctions by: (1) failing to set forth findings of fact and conclusions of law in its order denying sanctions; (2) using the competence of counsel and the good faith of counsel as the standard for evaluating frivolity; (3) ruling Clegg acted in good faith without an evidentiary basis; (4) failing to find sanctions were mandatory; and (5) failing to award attorney's fees.

Under Rule 11, SCRCP, an attorney may be sanctioned for filing a pleading in bad faith. Gregory, 378 S.C. at 437, 663 S.E.2d at 50; Runyon v. Wright, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996). The rule further provides an attorney may be sanctioned whether or not there are good grounds to support a claim. Gregory, 378 S.C. at 437, 663 S.E.2d at 50.

Under § 15-36-10 of the South Carolina Code (Supp. 2008), an attorney may be sanctioned for:

> (a) filing a frivolous pleading, motion, or document if:

. . . .

> (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
>
> (iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
>
> (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based.

S.C. Code Ann. § 15-36-10(A)(4)(a)(ii)-(iv) (Supp. 2008).

The statute also directs a court to take into account the following factors when determining whether an attorney, party, or pro se litigant has violated the FCPSA:

> (1) the number of parties;
>
> (2) the complexity of the claims and defenses;
>
> (3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery

for alleged violations of the provisions of subsection (A)(4);

(4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;

(5) previous violations of the provisions of this section;

(6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and

(7) other factors the court considers just, equitable, or appropriate under the circumstances.

S.C. Code Ann. § 15-36-10(E)(1)-(7) (Supp. 2008).

Lambrecht first argues the trial court erred in refusing to award sanctions by failing to set forth findings of fact and conclusions of law in its order denying sanctions. We disagree.

Rule 52(a) of the South Carolina Rules of Civil Procedure governs all actions tried upon the facts without a jury. In re Treatment and Care of Luckabaugh, 351 S.C. 122, 131, 568 S.E.2d 338, 342 (2002). The rule indicates a trial court acting without a jury is required to find facts and separately state conclusions of law which constitute the grounds for the court's action. Id.; Rule 52(a), SCRCP. The rule is directorial in nature and if "a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding." Luckabaugh, 351 S.C. at 131, 568 S.E.2d at 342 (quoting Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 123 (1991)). The findings must be sufficient enough for an appellate court to ensure the law has been faithfully executed. Id. at 133, 568 S.E.2d at 343. However, Rule 52(a), SCRCP,

further indicates "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)." (emphasis added). Under Rule 41(b), SCRCP, if a court renders a judgment on the merits against the plaintiff, the court "shall make findings as provided in Rule 52(a)." Here, the trial court simply denied a motion for sanctions; therefore, the trial court was not required to state its findings of fact or conclusions of law to support its denial of sanctions.[5]

Notwithstanding, the trial court actually made findings to address the Rule 11, SCRCP, and the FCPSA grounds raised by Lambrecht as his basis for sanctions; therefore, even if required, the trial court adequately stated its basis for denying sanctions. Specifically, in its order subsequent to the motion to alter or amend, the trial court first indicated it denied sanctions because Clegg's claims against Lambrecht were filed in good faith. Consistent with this type of finding, Rule 11, SCRCP, provides an attorney may be sanctioned for filing a claim in bad faith. Gregory, 378 S.C. at 437, 663 S.E.2d at 50. Consequently, the trial court appropriately considered whether Clegg filed her claim in good faith. See Beard, 359 S.C. at 360 n.4, 597 S.E.2d at 839 n.4 (noting semantic differences between the language used in a trial court's order and a party's specific framing of the issue as "good faith" or "bad faith" are of no legal import because Rule 11 has been interpreted to include actions done in bad faith).

The trial court also denied sanctions because it found Clegg's claim was reasonable. The FCPSA does not require the trial court to state explicitly its grounds for denying sanctions. However, it does instruct a trial court, when determining whether a lawsuit was frivolous, to analyze whether a reasonable attorney would believe, under the same facts, a claim or defense was clearly not warranted under existing law, and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing

[5] While findings by the court are preferred for purposes of appellate review, we cannot say as a matter of law that findings are required when the motion is denied.

law. S.C. Code Ann. § 15-36-10(A)(4)(a)(ii) (Supp. 2008).[6] Accordingly, given the reasonable attorney standard set forth in the FCPSA, the trial court appropriately considered whether Clegg's claim was reasonable. Therefore, the trial court did not err on this asserted ground.

Lambrecht further contends the trial court erred in using the competence and good faith of counsel as its criteria for evaluating frivolity. We disagree. Under Rule 11, SCRCP, a good faith analysis is appropriate. The rule indicates "[t]he signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay." Rule 11(a), SCRCP (emphasis added); see Gregory, 378 S.C. at 437, 663 S.E.2d at 50 (stating under Rule 11, SCRCP, "[t]he party and/or attorney may . . . be sanctioned for filing a pleading, motion, or other paper in bad faith whether or not there is good ground to support it."). By requiring an attorney to attest to the best of his or her knowledge and belief that there is good ground to support the matter, the rule effectively requires attorneys to file claims in good faith. Moreover, the FCPSA indicates the court may take into account "other factors the court considers just, equitable, or appropriate under the circumstances." S.C. Code Ann. § 15-36-10(E)(7) (Supp. 2008). Thus, even

[6] Our state supreme court has previously indicated the standard for a Rule 11, SCRCP, sanction is essentially the same as the standard for a sanction under the former FCPSA. Father v. South Carolina Dep't of Soc. Servs., 353 S.C. 254, 261, 578 S.E.2d 11, 15 (2003); Beard, 359 S.C. at 360, 597 S.E.2d at 839. However, this language is not controlling precedent as to the application of the amended FCPSA. For instance, Father and In re Beard were issued prior to the legislature amending the FCPSA; consequently, these cases do not reflect the "reasonable attorney" paradigm implemented by the amendments to the FCPSA. Compare S.C. Code Ann. § 15-36-10 (Supp. 2008), with S.C Code Ann. §§ 15-36-10, 15-36-20 (2005). Absent the legislature amending Rule 11, SCRCP, to reflect changes made to the FCPSA, the analysis for sanctions under the rule may not necessarily be the same as the analysis under the amended FCPSA due to the subjective versus objective components.

if good faith is not specifically utilized under the FCPSA, this statutory provision would allow the court to consider it as another factor if the court deems it appropriate to do so. In short, we read the court's amended order only as its written attempt to demonstrate both Rule 11 and the FCPSA were at issue; thus, both standards considered by the court were cited in its order reflecting the court's understanding of the different sanction mechanisms before it. Accordingly, the trial court did not abuse its discretion in denying sanctions on the basis it referenced the competence and good faith of counsel.

Lambrecht argues, in the alternative, the trial court had no evidentiary basis for ruling Clegg acted in good faith. In essence, Lambrecht argues Clegg's failure to file a brief opposing sanctions demonstrated an absence of evidence Clegg acted in good faith. This argument has no merit because it incorrectly suggests the party opposing sanctions has the burden to demonstrate sanctions are not warranted; instead, the party moving for the imposition of sanctions has the burden to establish grounds for sanctions by a preponderance of the evidence. Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm), 371 S.C. 91, 97, 637 S.E.2d 316, 319 (Ct. App. 2006). Further, the trial judge who denied the motion for sanctions was also the trial judge who granted summary judgment in Lambrecht's favor; therefore, he was particularly familiar with the substance of the underlying case. See Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000) (stating in an equity case, an appellate court is not required to disregard the findings of the trial judge who was in a better position to judge credibility). Accordingly, the trial court did not err based on Clegg's failure to put forth evidence demonstrating her claims were not frivolous.

Moreover, the evidence presented supports the decision of the trial court finding Clegg filed her claim in good faith. While Lambrecht argues the claim became frivolous when Clegg discovered Lambrecht did not own the vehicle involved in the accident, ownership alone is not dispositive of a negligent entrustment claim. See USAA Prop. & Cas. Ins. v. Clegg, 377 S.C. 643, 657 n.7, 661 S.E.2d 791, 798 n.7 (2008) (stating a negligent entrustment claim may lie against "the owner or one in control of the vehicle" involved in an accident) (quoting Am. Mut. Fire Ins. Co. v. Passmore, 275 S.C. 618, 621, 274 S.E.2d 416, 418 (1981)) (emphasis added). Additionally, although

Lambrecht contends Elliot's emancipation destroyed the negligent entrustment claim, emancipation merely suggests a lack of control over the subject person, which, while potentially relevant, does not necessarily address whether the defendant had ownership or control over the vehicle involved in the accident. See Passmore, 275 S.C. at 621, 274 S.E.2d at 418. Nevertheless, despite Lambrecht's possession of the vehicle's keys and the vehicle being parked at his residence for a period of time, the trial court apparently concluded Lambrecht did not have control of the vehicle at or near the time of the accident and that the negligent entrustment claim therefore should be dismissed. Thus, notwithstanding its ultimate disposition, factual support does appear in the record for the trial court to have concluded Clegg filed the claim in good faith. See Johnson v. Dailey, 318 S.C. 318, 323, 457 S.E.2d 613, 616 (1995) (holding the trial court did not abuse its discretion in denying sanctions, asserted under Rule 11, SCRCP, where sufficient facts in the record supported a conclusion counsel did not act in bad faith).[7]

Lambrecht also contends the trial court erred in refusing to award sanctions because sanctions were mandatory under the FCPSA. We disagree. Under the FCPSA, "[u]nless the court finds by a preponderance of the evidence that an attorney, party, or pro se litigant engaged in advancing a frivolous claim or defense, the attorney, party, or pro se litigant shall not be sanctioned." S.C. Code Ann. § 15-36-10(C)(2) (Supp. 2008).[8] Here, the trial

[7] Lambrecht also argues the claim was frivolous because Clegg did not allege alcohol was involved in the accident. Under prior South Carolina cases, alcohol played a role in the determination of the negligent entrustment claim. Jackson v. Price, 288 S.C. 377, 381-82, 342 S.E.2d 628, 631 (Ct. App. 1986). However, Lambrecht failed to raise this issue to the trial court; therefore, this issue is not preserved for our review. Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (finding an issue not raised to the trial court is not preserved for appellate review). While we can contemplate circumstances in which this type of claim could exist outside the context of alcohol usage, we need not determine this issue.

[8] If a sanction is imposed, the court "shall report its findings to the South Carolina Commission of Lawyer Conduct" and to our state's supreme court. S.C. Code Ann §§ 15-36-10(H), (M) (Supp. 2008).

court found no violation warranting sanctions. Therefore, an award of sanctions was not mandatory. As such, the trial court did not abuse its discretion in denying sanctions.

Lambrecht's final argument is the trial court erred by failing to award attorney's fees he incurred in defense of Clegg's claims against him as sanctions. Because we conclude the trial court did not abuse its discretion in denying sanctions, we need not address whether attorney's fees should have been awarded. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

Based upon the foregoing, the denial of sanctions is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Glenn Ireland Corley, Appellant.

Appeal From Greenwood County
J. C. "Buddy" Nicholson, Jr., Circuit Court Judge

Opinion No. 4544
Heard March 17, 2009 – Filed May 14, 2009

AFFIRMED

C. Rauch Wise, of Greenwood, 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 Harold M. Coombs of Columbia; and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

HUFF, J.: Glenn Ireland Corley was indicted for possession of crack cocaine. Following a bench trial, Corley was convicted as charged and sentenced to three years, suspended upon sixty days with three years of probation. Corley appeals arguing the trial court erred in denying his motion to suppress the evidence. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In the early morning hours of September 24, 2006, Officer Nicholas Futch with the Greenwood City Police Department was conducting surveillance of a residence on Owen Street that was known to have a high level of drug activity. Several cases had been "made" and a number of search warrants had been executed at that particular residence. Futch, who was in the woods on foot at the time, watched from a distance of approximately fifty yards from the home. Officer Futch had observed the house for five to ten minutes when, at around 2:50 a.m., he observed a man approach the location in his vehicle. The man exited his vehicle, walked to the rear of the residence, remained there for less than two minutes, and then returned to his vehicle and left. Officer Futch followed behind this vehicle in his patrol car for a brief period, and initiated a traffic stop when the individual failed to use a turn signal.

Officer Futch approached the vehicle, identified himself, and requested the driver's license, insurance, and registration from the driver, who was identified as Corley. The officer observed Corley was nervous and short of breath, avoided eye contact with him, and appeared fidgety. Corley provided the officer with the documents he requested. Officer Futch asked Corley to step out of his car due to safety concerns based on Corley's nervousness. As the two stepped to the rear of the vehicle, Officer Futch engaged Corley in conversation about where he had just been. Corley told the officer he had been at the home of a friend, Beth Cronnick. Officer Futch had personal knowledge Cronnick did not live at the house Corley had just left, so he asked Corley to point out the home to him. After Corley pointed in a general

area, the officer asked him for directions to the house. Corley's answer indicated an area on a different street, about a block away from the actual residence. He described it as an older style white home; however the actual home was a "dark gray, almost purple house." At that time, officer Futch advised Corley he knew he was being dishonest and that he had observed Corley leave a house he knew to have high drug activity. He then asked Corley if he had gone to the residence to purchase illegal drugs, and Corley responded that he had. With further questioning, Corley indicated the substance was crack cocaine, and that he did not have it on him, but that it was in his vehicle in the cup holder. Officer Futch retrieved a small off-white rock-like substance from the cup holder and placed Corley under arrest for possession of crack cocaine.

The officer stated he did not give Corley his registration and license back until after the arrest. He also issued Corley a verbal warning for the traffic violation subsequent to the arrest. From the time Corley's vehicle came to a stop until he was placed under arrest was less than ten minutes, and was likely only five to seven minutes. Officer Futch acknowledged that when Corley left the residence, it was his intent to stop him because he was suspicious Corley was involved in a drug transaction. His suspicions of illegal drug activity were aroused by the fact that he observed Corley at a residence known for high drug activity, that Corley went to the rear of the residence, that he remained there for only a very brief time, and this occurred in the middle of the night. Officer Futch agreed that he had all the things he needed to write Corley a ticket for the traffic violation, but instead proceeded to ask Corley questions about his observations at the residence. Officer Futch did not advise Corley of his Miranda rights[1] prior to questioning him during the traffic stop.

When the State sought to admit the crack cocaine into evidence, Corley objected asserting it was the result of an illegal search and seizure. Corley moved to suppress the evidence asserting two prongs. First, he argued, under

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[1] A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights. Miranda v. Arizona, 384 U.S. 436 (1966).

State v. Fowler, 322 S.C. 263, 471 S.E.2d 706 (Ct. App. 1996), there was insufficient reason to believe he had committed any crime other than the traffic violation, and the inquiry from the officer went beyond the purpose of the initial stop with this further detention violating his fourth amendment rights under State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002). Second, Corley maintained, assuming arguendo there was sufficient reason to believe he had committed another crime, the inquiries of the officer amounted to custodial interrogation. He therefore asserted because he was not advised of his Miranda rights, his statements and the evidence obtained as a result thereof should be suppressed. The State argued Williams was distinguishable because in that case, the traffic stop was completed before the questioning, as the officer had already returned the defendant's license and registration and issued the citation. The State further distinguished Fowler, arguing the facts were stronger to support reasonable suspicion of drug activity in this case. The State also maintained it was not necessary that Corley be advised of his Miranda rights because the questioning occurred during a routine traffic stop.

The trial court determined it was not going to get into whether there was probable cause for the traffic stop because, based on the testimony of the officer, the real reason for the stop was the suspected drug activity. Accordingly, the court found the question was whether the officer had probable cause to stop Corley in consideration of what he observed at the house in regard to drug activity. Noting that Officer Futch was conducting surveillance on a drug house, the time was 2:50 in the morning, and Corley went to the back of the house and stayed for approximately two minutes before leaving, the court determined there was probable cause to stop Corley on that basis and therefore denied Corley's motion to suppress. Counsel for Corley then requested a ruling on the Miranda issue. The trial court ruled the questioning was pursuant to an investigation into the drug activity and Miranda was therefore not implicated.

After submitting a drug analysis into evidence over Corley's objection, the State rested. Corley presented no evidence in his defense. Based on the testimony of the officer, Corley's stipulation as to chain of custody and the

validity of the chemist's report, and the denial of the motion to suppress, the trial court found Corley guilty as charged. This appeal follows.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous. This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted). In Fourth Amendment search and seizure cases, our review is limited to determining whether any evidence supports the trial court's finding. State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). Upon such review, an appellate court may reverse only when the trial court's decision is clear error. State v. Pichardo, 367 S.C. 84, 95, 623 S.E.2d 840, 846 (Ct. App. 2005). Under the "clear error" standard, the appellate court will not reverse a trial court's finding of fact simply because it may have decided the case differently. Id. at 96, 623 S.E.2d at 846. Additionally, "[a]ppellate review of whether a person is in custody is confined to a determination of whether the ruling by the trial judge is supported by the record." State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003).

LAW/ANALYSIS

Corley argues the trial court erred in failing to suppress the evidence seized because (1) a custodial interrogation was conducted by the investigating officer without advising Corley of his Miranda rights, (2) the officer detained Corley longer than was necessary to write the traffic ticket thereby eliciting an incriminating statement, and (3) the arresting officer did not have a sufficient factual basis to stop Corley independently for alleged drug activity where he never observed a drug transaction. Because we find there is evidence to support the trial court's ruling that Officer Futch had probable cause to stop Corley and investigate for drug activity, we find no error.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The Fourth Amendment does not proscribe all contact between police and citizens, but is designed 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" INS v. Delgado, 466 U.S. 210, 215 (1984) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116 (1976)).

The stopping of a vehicle and the detention of its occupants constitutes a seizure and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures. Delaware v. Prouse, 440 U.S. 648, 653-54 (1979). "Therefore, an automobile stop implicates the Fourth Amendment prohibition against unreasonable searches and seizures, imposing a standard of 'reasonableness' upon the exercise of discretion by state law enforcement officials." State v. Banda, 371 S.C. 245, 252, 639 S.E.2d 36, 40 (2006). "A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity." State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001). "The term 'reasonable suspicion' requires a particularized and objective basis that would lead one to suspect another of criminal activity." Id. In determining whether reasonable suspicion exists, the circumstances must be considered as a whole. Id. If the officer's suspicions are confirmed or further aroused, the stop then may be prolonged and the scope enlarged. Id. Generally, the decision to stop an automobile is reasonable when the police have probable cause to believe a traffic violation has occurred. Banda, 371 S.C. at 252, 639 S.E.2d at 40.

In this case, it is undisputed Officer Futch acted lawfully in stopping Corley's automobile for the traffic violation. Additionally, a minor traffic-violation arrest will not be rendered invalid by the fact it was "a mere pretext for a narcotics search." Arkansas v. Sullivan, 532 U.S. 769, 772 (2001); Whren v. United States, 517 U.S. 806, 812-13 (1996); accord United States

v. Stachowiak, 521 F.3d 852, 855 (8th Cir. 2008). Thus, the subjective intentions of an officer "play no role in ordinary, probable-cause Fourth Amendment analysis." Banda, 371 S.C. at 252 n.3, 639 S.E.2d at 40 n.3. Corley contends, however, Officer Futch did not have reasonable suspicion to investigate for a possible drug violation. He argues the circumstances of his case, including his presence in an area of suspicious activity but without observation of a drug transaction, rendered his stop and search unlawful pursuant to State v. Fowler, 322 S.C. 263, 471 S.E.2d 706 (Ct. App. 1996). We disagree.

In analyzing investigative detentions, courts employ the standard articulated by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968). State v. Nelson, 336 S.C. 186, 192, 519 S.E.2d 786, 789 (1999). "Under this standard, 'a policeman who lacks probable cause but whose observations lead him reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke that suspicion.'" Id. (quoting Berkemer v. McCarty, 468 U.S. 420, 439 (1984)). Thus, the police may briefly detain and question a person upon a reasonable suspicion, short of probable cause for arrest, that the person is involved in criminal activity. State v. Abrams, 322 S.C. 286, 288, 471 S.E.2d 716, 717 (Ct. App. 1996). The scope and duration of a Terry detention must be strictly tied to and justified by the circumstances that rendered its initiation proper. State v. Rodriquez, 323 S.C. 484, 493, 476 S.E.2d 161, 166 (Ct. App. 1996). "Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." Berkemer, 468 U.S. at 439. However, the detainee is not obliged to respond and unless his answers provide probable cause to arrest him, he must then be released. Id. at 439-40.

In Fowler, two police officers were on a routine patrol of a "high drug area" when Fowler was observed coming from the front yard of a suspected drug house. Some fifteen minutes later, the same officers saw Fowler again. Suspecting he might be carrying a weapon, they stopped him and patted him down, finding a large knife and a significant sum of cash in his pockets. After he was arrested for carrying a concealed weapon, a jail strip-search

revealed Fowler had crack cocaine on his person. Fowler moved to suppress the evidence. During the suppression hearing, the officers testified their suspicions were aroused based on Fowler walking in a suspicious manner, appearing as if he was trying to elude them and cutting back behind some houses. Additionally, the officers knew Fowler had a prior drug conviction and was known to carry weapons. Fowler, 322 S.C. at 265, 471 S.E.2d at 707. The trial court granted Fowler's motion finding the stop and frisk were unconstitutional. Id. at 266, 471 S.E.2d at 707-08. This court affirmed, holding the facts did not support the State's position that the officers had an articulable suspicion Fowler was involved in criminal activity, noting the officers did not see a drug transaction take place nor observe Fowler throw anything down, but basically made broad generalizations about his demeanor as they observed him leaving the curtilage of a suspected drug house. Id. at 266-67, 471 S.E.2d at 708.

We find Fowler to be distinguishable. Although both involved areas of high drug activity, the house in Fowler was only a suspected drug house while the residence in this case was a known drug house where several cases had been made and search warrants executed. Additionally, while observing this known drug house, the officer observed Corley walk to the rear of the residence, remain for a very short period of time, and then promptly return to his automobile. This all occurred in the early morning hours. Finally, in Fowler the officers acknowledged they stopped Fowler to do a field interview as part of a pro-active mission to prevent crime and that Fowler, who lived only three blocks from where he was first seen that night, "did not do anything to make the police believe he was armed or involved in drug activity." Id. at 266, 471 S.E.2d at 707. To the contrary, Officer Futch testified he was suspicious Corley was involved in illegal drug activity based on his observations of him at the known drug house.

The trial court concluded Officer Futch had probable cause to stop Corley and investigate for possible drug activity. In considering the circumstances as a whole, and in light of our standard of review limiting us to determining whether any evidence supports the trial court's finding, we find no clear error in the trial court's determination that Officer Futch had

probable cause to stop Corley and investigate based on his suspicion of drug activity.

Corley also contends the trial court erred in failing to suppress the evidence seized from his automobile because he was subjected to a custodial interrogation without the benefit of having been advised of his Miranda rights. He argues this was not a routine traffic stop, but that he was stopped for the purpose of being questioned about illegal drug activity. Corley asserts, because the police officer possessed his license and registration, he was not free to leave, and that this case is factually no different from an officer questioning a suspect about a crime for which he has probable cause to arrest the suspect. We disagree.

First, the law is clear that the police may, in an investigative detention, briefly detain and question a person upon a reasonable suspicion, short of probable cause for arrest, that the person is involved in criminal activity. As previously noted, there is evidence of record to support the trial court's determination Officer Futch had a reasonable suspicion, short of probable cause for arrest, that Corley was involved in criminal activity such that his brief detention and questioning was proper. We find it of no import that the detention was accomplished through a traffic stop. It is undisputed the officer acted lawfully in stopping the car for failure to use a turn signal. See Banda, 371 S.C. at 252, 639 S.E.2d at 40 (holding police acted lawfully in stopping car displaying stolen license tag in spite of evidence the officers were more interested in apprehending a drug target). Further, the United States Supreme Court has observed, even though few motorists would feel free to either disobey a police directive to pull over or to leave the scene of a traffic stop without permission to do so, "persons temporarily detained pursuant to [ordinary traffic] stops are not 'in custody' for the purposes of Miranda," and "[o]nly if the motorist is detained 'to a degree associated with formal arrest' will he be entitled to the Miranda protections for in-custody interrogations." United States v. Sullivan, 138 F.3d 126, 130 (4th Cir. 1998) (quoting Berkemer, 468 U.S. at 440). "Even 'drawing weapons, handcuffing a suspect, placing a suspect in a patrol car for questioning, or using or threatening to use force does not necessarily elevate a lawful stop into a custodial arrest for Miranda purposes.'" Id. at 132 (quoting U.S. v. Leshuk,

65 F.3d 1105, 1109-10 (4th Cir. 1995)). Thus, even though a motorist in a routine traffic stop may be detained and is not free to leave, such a motorist is not "in custody" for Miranda purposes. Id. at 130-31.

We disagree with Corley's assertion that this situation could not be considered a routine traffic stop because the real reason for the stop was for him to be questioned regarding possible drug activity. Our courts make no distinction based upon the subjective intentions of an officer in making a traffic stop, and evidence that the police were more interested in apprehending a drug target does not factor into a probable cause analysis in an otherwise valid stop. Banda, 371 S.C. at 252 n.3, 639 S.E.2d at 40 n.3; Arkansas v. Sullivan, 532 U.S. at 772. We see no distinction between this situation, where the officer's suspicions arose prior to the stop, and one in which those suspicions arose during the stop. As the Fourth Circuit Court of Appeals observed in United States v. Sullivan, routine traffic stops are analogous to Terry stops, where no Miranda warnings are required, and "only when the motorist is detained to an extent analogous to an arrest" are Miranda warnings required. United States v. Sullivan, 138 F.3d at 131. While, without question, Officer Futch's intentions were to stop Corley and question him regarding possible drug activity, the detention of Corley at the time of questioning was not to such an extent as to be analogous to an arrest, but was akin to a Terry stop, for which no Miranda warnings are required. As in United States v. Sullivan, there is no indication here that the officer said anything or conducted himself in a way to suggest Corley was under arrest or was being detained as if he were under arrest. Id. at 132. Accordingly, we hold Corley was not in custody for purposes of Miranda while being questioned by Officer Futch.

In light of our disposition, we need not address Corley's remaining issue that Officer Futch seized Corley for longer than was necessary for the traffic stop, amounting to an illegal detention under State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002). See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of prior issue is dispositive).

For the foregoing reasons, we affirm the trial court's denial of Corley's motion to suppress.

AFFIRMED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,	Respondent,
v.	
Roy Otis Tennant,	Appellant.

Appeal From Abbeville County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 4545
Heard February 18, 2009 – Filed May 18, 2009

AFFIRMED

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of Columbia; E. Charles Grose, Jr., of Greenwood; and Tara Schultz, of Rock Hill, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia, for Respondent.

SHORT, J.: Roy Otis Tennant appeals his convictions of first-degree criminal sexual conduct, kidnapping, and assault and battery of a high and aggravated nature (ABHAN). Tennant argues the trial court erred in: (1) refusing to allow Doctor Donna Schwartz-Watts (Schwartz-Watts) to testify about his mental illness because the testimony pertained to his state of mind and the issue of consent, as well as impeached the alleged victim's testimony; (2) excluding his suicide note because the note was probative to his state of mind and relevant to his defense of consent; (3) excluding his suicide note because the note was admissible under Rule 106, SCRE, the victim was allowed to read a letter from Tennant, and he was entitled to show the context of his writings under the rule of completeness; and (4) refusing to allow him to question the victim and introduce evidence of their sexual relationship because the couple's unusual sexual history included "rough sex," and the infliction of pain was necessary for the jury to understand his defense of consent and to corroborate Schwartz-Watts's testimony. We affirm.

FACTS

Tennant and Victim married in 1992. After nine years of marriage and three children together,[1] Victim received an order of protection against Tennant in February 2001, and filed for divorce. Their divorce was finalized on November 26, 2001.

On the day of their divorce, Victim left the courthouse, went to the laundry, and then to work. While Victim was at work, Tennant repeatedly called her, wanting to discuss the divorce and telling her that he had something for her. After work, she drove to Tennant's grandmother's house[2] to pick up her children. When she arrived, Tennant exited the house carrying a brown paper bag. He approached the driver's door window of her car, began talking to her about the divorce, and again stated he wanted to give her something. Victim informed him she did not want to talk, and she just wanted to pick up her children and go home. Eventually, Tennant got into

[1] Victim had a total of four children; Tennant did not father the eldest.

[2] Victim's children stayed at Tennant's grandmother's house, where Tennant lived, while she worked.

the passenger seat of her vehicle and began searching in his brown paper bag. He began questioning her about an alleged relationship she had with another man, pulled a cord out of his brown paper bag, and strangled her until she lost consciousness.

Victim regained consciousness, and realized she was in the trunk of her car, which was moving. After she kicked the speakers out of the trunk, Tennant stopped the car. He duct-taped her hands together after pulling her out of the trunk, but she convinced him to remove the tape. After removing the duct tape, he told Victim if she ran he would stab her in the legs with his knife. Tennant told her that he did not want a divorce, apologized, and stated he did not mean for things to go this far. He also told Victim that he knew how to choke her without killing her and he wanted to have sex with her. She told Tennant she would have sex with him.[3] Tennant removed Victim's clothes, laid her on the ground beside her vehicle, and had sex with her. Afterwards, he helped her get up and put her clothes back on. Next, Tennant took Victim back to his grandmother's house and instructed her to go to the back bedroom. He told her she was not free to leave until the next morning when she took the children to school. Overnight, they had sex again.

The next morning, while driving her children to school, Victim flagged down a police officer to report the assault. As a result, Tennant was arrested on November 27, 2001. When the police arrested him, he had overdosed on his psychotic medication. Additionally, the police found a note[4] (the suicide note) that read:

> [Victim] you told . . . the police that I raped you and you know I did not. You told me that you wanted to make love to me from the first day I got out of jail.

[3] At trial, Victim testified she would have told Tennant anything because she was scared of him hurting her.

[4] Tennant characterized this note as a suicide note. However, the State maintained this note was not a suicide note, but contended that a different note, not introduced at trial, was the actual suicide note.

> And you hadn't already because you said I might try and use it against you in our divorce. I asked you if you wanted to make love to me and you said yes, and started kissing me.

Tennant was charged with kidnapping, assault and battery with intent to kill, first degree criminal sexual conduct, violating an order of protection, and possession of a firearm or knife during the commission of a violent crime.

Before trial, Tennant submitted a written motion and offer of proof pursuant to South Carolina Code Section 16-3-659.1 (2003), commonly referred to as the Rape Shield Statute. He sought to introduce evidence of Victim's sexual conduct, including their sexual history. Specifically, he contended the proffer outlined the unusual dynamics of their sexual relationship. The proffer contained statements of when and how Tennant and Victim met, allegations of her promiscuity, allegations of her involvement in adultery, statements that Tennant and Victim had a sexual relationship, allegations her promiscuity led to his drug and alcohol problems, allegations she would self-inflict wounds during arguments and blame them on Tennant, letters he wrote to his doctor and the solicitor, and allegations he could not sexually satisfy Victim.[5] He maintained this information was admissible for the following reasons: (1) the information pertained to Victim's motive to make false allegations because she was angry he exposed her affair and he was divulging details of her lifestyle; (2) the information was relevant to Schwartz-Watts's expert opinion that Tennant was mentally ill and depressed at the time of the incident because Victim's allegations cannot be separated from the nature of their sexual relationship; and (3) much of the conduct involved adultery, which is not excluded by the Rape Shield Statute.

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[5] While Tennant maintains on appeal the proffer contains evidence of his sexual history with Victim, including "rough sex," the closest statement in the proffer actually characterizing Victim's sexual preferences to include "rough sex" is located in proffer thirteen. Proffer thirteen references one of Tennant's writings describing their sexual relationship: "I tried everything to satisfy her normal but she wanted me to hurt her and it was not normal and I never done it and she stopped wanting sex."

At trial, prior to Victim's testimony, the State sought to limit Victim's cross-examination pursuant to the Rape Shield Statute. The State conceded Tennant could ask Victim if she committed adultery and, if she denied any adultery, he could prove specific instances of adulterous conduct. However, the State maintained the written proffer addressing Victim's sexual history was not relevant. Additionally, the State argued the proffer contained large amounts of hearsay that was both irrelevant and inadmissible. Tennant argued the Rape Shield Statute did not apply to conduct between Victim and Tennant, or to Victim's adulterous conduct. The trial court determined the Rape Shield Statute allowed very few instances of the victim's sexual conduct with the defendant or any other individual. Accordingly, the trial court ruled Tennant's proffered evidence was not admissible.[6] Tennant requested that the court take up the issue again "either at the end of [Victim's] direct [testimony] or at the end of her testimony altogether." The trial court replied: "Yes. I mean, if I hear something different or if you think you hear something different, then we'll do it." Nevertheless, Tennant did not attempt to elicit any testimony regarding the excluded proffered evidence during Victim's cross-examination, nor did he re-assert the issue of the evidence's admissibility at the close of her direct-examination or testimony.

Additionally, at trial, Tennant unsuccessfully sought to introduce the suicide note. Tennant argued its exclusion hindered him from effectively presenting a defense of consent. The State maintained the note was self-serving hearsay, and objected to its introduction.

Later, during Victim's testimony, she testified she received a letter from Tennant (the response letter) while he was in jail in response to a letter she sent him. The response letter apologized for "everything that happened back in November," discussed religion, and expressed his happiness that she was reading her Bible. It also asked for her forgiveness and friendship after his release from jail. After the response letter was entered into evidence, Tennant again proffered the suicide note. He cited Rule 106, SCRE, and

[6] Moreover, at the close of Tennant's proffer of Schwartz-Watts, the trial court reiterated the exclusion of testimony regarding Victim's prior sexual history pursuant to the Rape Shield Statute.

argued the State introduced a writing to show he was remorseful and asking for forgiveness, and pursuant to Rule 106, the suicide note should be considered at the same time. The State contended the suicide note was not actually a suicide note, and was "not a note in response, or a writing that has any way, a connection to [the response] letter." Additionally, the State argued the suicide note had nothing to do with the response letter and the two were not contemporaneous. Moreover, the State asserted the suicide note was a self-serving statement that attempted to prove consent. The trial court ruled the suicide note inadmissible.

Next, Tennant argued the suicide note was not hearsay because it dealt with his state of mind. He maintained the fact the note was self-serving was not determinative if it was being offered to prove state of mind. Addressing the State's arguments, he contended all the notes were found together. Additionally, he asserted the suicide note should be introduced because it was written the day of the assault, noting "he talked about the events of that day." In sum, he believed the note should be introduced to depict his state of mind at the time of the assault. Again, the State asserted the suicide note was not contemporaneous because it was probably written thirty-six hours after the attack and the response letter was written approximately nine months afterwards on August 5, 2002. The trial court again ruled the suicide note was inadmissible.[7]

After the State rested, Tennant moved to proffer testimony by Schwarts-Watts, a forensic psychiatrist. Schwartz-Watts testified primarily about Tennant's mental illness and drug abuse. She opined he was suffering from mental illness when he attacked Victim. Schwartz-Watts also stated someone with his mental illness would interpret Victim's visiting him in jail as an indication that their relationship was ongoing. Additionally, Schwartz-Watts testified Tennant did not believe he could sexually satisfy Victim: "It

[7] Additionally, at the close of Schwartz-Watts's proffered testimony, the trial court again addressed the admissibility of the suicide note. The trial court determined the "note[] would be introduced literally to prove the truth of the matter to the jury that there was consent, that she agreed to it" and thus, found the suicide note inadmissible.

was his opinion that he could not please her . . . [b]ecause she was very experienced. She had been with other people and she had certain preferences, which he didn't share." Schwartz-Watts maintained his inability to please Victim contributed to his poor self-esteem. On cross-examination, in response to a question concerning Tennant's criminal responsibility, she testified:

> There is no evidence that any [of] the psychotic beliefs that he has would have prevented him from knowing right from wrong. Like if you ask Mr. Tennant if it is wrong to rape your wife, he would absolutely know that the rape or beating of them was wrong. And there has never been any record that I can tell that he's had recurring impulses to harm, rape, or kill his wife. And so, in my opinion, on that day in time even though he was sick he knew the difference between right and wrong. And he certainly was not having any recurring impulses to rape or harm his wife.

Furthermore, when specifically asked by the trial court if she could testify to any information regarding consent in this matter as a defense, Schwartz-Watts stated: "No. That would certainly – that would be outside the realm of my expertise. My opinion would probably be limited to what his mental state was, could he perceive for the mental illness and his own personality are based on the relationship between him and the victim. I couldn't say."

Following the proffer, the trial court questioned the relevance of Schwartz-Watts's testimony, and Tennant maintained her testimony was relevant to his state of mind and the State's burden of proving criminal intent beyond a reasonable doubt. Additionally, he contended Schwartz-Watts's testimony contradicted Victim's testimony that she did not go see him while he was imprisoned and she maintained the relationship was over. Further, the contradictory testimony was relevant to the nature of the relationship between Victim and Tennant. As a result, the trial court recalled Schwartz-Watts, and asked her if she had an opinion as an expert regarding whether Tennant

believed Victim consented to the sexual encounter. Schwartz-Watts replied: "Certainly he believes and he reports to me that he believes it was consensual, but you know, how much of that comes from mental illness and how much of that comes from his being rational, I don't know." Upon further examination by Tennant, Schwartz-Watts testified there was no evidence "that because of a psychiatric disorder" Tennant could have perceived Victim to have consented. The trial court excluded Schwartz-Watts's testimony in its entirety.

The jury convicted Tennant of first-degree criminal sexual conduct, kidnapping, and ABHAN. The trial court sentenced Tennant to two concurrent terms of thirty years' imprisonment, suspended upon the service of twenty years' imprisonment and five years probation for the criminal sexual conduct and kidnapping convictions. Additionally, the trial court sentenced Tennant to a concurrent term of ten years for the ABHAN conviction. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. The trial court is given broad discretion in ruling on questions concerning the relevancy of evidence, and its decision will be reversed only if there is a clear abuse of discretion. State v. Aleksey, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000).

"To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice." State v. White, 372 S.C. 364, 373, 642 S.E.2d 607, 611 (Ct. App. 2007). To prove prejudice, the complaining party must show there is a reasonable probability "that the jury's verdict was influenced by the challenged evidence or lack thereof." Id. at 374, 642 S.E.2d at 611.

LAW/ANALYSIS

I. Doctor Schwartz-Watts's Testimony

Tennant argues the trial court erred in refusing to admit Doctor Schwartz-Watts's expert testimony about his mental illness because her testimony was probative of his state of mind and his defense of consent, and effectively impeached Victim on the issue of whether or not she visited him in jail. We disagree.

"The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion." State v. White, 372 S.C. 364, 373, 642 S.E.2d 607, 611 (Ct. App. 2007). Before expert testimony is admitted, the trial court must determine if the evidence is relevant, reliable, and helpful to the jury. Id. at 374, 642 S.E.2d at 612. "If the evidence is reliable, and relevant, the trial [court] should determine if the probative value of the evidence is outweighed by its prejudicial effect." Id.

Tennant asserts the exclusion of Schwartz-Watts's testimony was prejudicial because Victim's credibility was critical and Schwartz-Watts's testimony proved Victim was lying about their relationship. Tennant also claims the trial court's refusal to admit Schwartz-Watts's testimony violated his right to present a complete defense. However, the trial court determined Schwartz-Watts's testimony was not relevant to the issues at trial. She testified primarily about Tennant's mental illness, but ultimately opined there was no evidence his psychiatric disorder caused his belief that Victim consented to the sexual encounter. Moreover, Schwartz-Watts testified she believed Tennant was suffering from his mental illness at the time of the assault, but did not state the mental illness prevented him from being able to distinguish right from wrong.

Furthermore, when directly asked by the trial court if she could provide an expert opinion on consent, Schwartz-Watts replied in the negative. As to Tennant's argument that her testimony effectively impeached Victim, the record indicates Schwartz-Watts's basis for thinking Victim visited him at jail came from his medical records and statements. Moreover, Victim did not

unequivocally state she did not visit Tennant in jail, but rather stated she did not remember visiting him.

Lastly, Tennant has not effectively established the trial court abused its discretion by finding Schwartz-Watts's testimony was not relevant. He has also failed to present evidence that he suffered prejudice from the exclusion of his mental health history. Ultimately, Tennant failed to prove there is a reasonable probability that the jury's verdict was influenced by the lack of Schwartz-Watts's testimony. Accordingly, we find the trial court did not err in excluding Schwartz-Watts's testimony.

II. Suicide Note

Tennant argues the trial court erred in refusing to admit the suicide note because it was probative of his state of mind and relevant to his defense of consent. Additionally, he asserts the suicide note was admissible pursuant to Rule 106, SCRE, the rule of completeness. We disagree.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Rule 801(a), SCRE. "Hearsay is not admissible except as provided by [the South Carolina Rules of Evidence] or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. An exception to the rule against hearsay is a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." Rule 803(3), SCRE.

Rule 106 of the South Carolina Rules of Evidence states: "When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Our supreme court held in State v.

Cabrera-Pena, 361 S.C. 372, 380, 605 S.E.2d 522, 526 (2004), that when the State elicits portions of a communication made by a defendant, "the rule of completeness requires the defendant be permitted to inquire into the full substance of that conversation."

Here, Tennant's argument that the suicide note is not hearsay because it depicts his state of mind is misplaced. Rule 803(3) specifically excludes a statement of memory or belief to prove the fact remembered. Rule 803(3), SCRE. Additionally, the suicide note does not pertain to Tennant's state of mind other than to assert his memory of the events of the assault. Accordingly, the note is offered to prove the truth of the matter asserted – that Victim consented to the sexual encounter – and is therefore inadmissible hearsay.

Moreover, Tennant's assertion that the rule of completeness requires the admission of the suicide note is erroneous. He sought to introduce the suicide note to put into context the response letter he wrote to Victim almost nine months later. The trial court did not err by rejecting this argument because the contents of the suicide note and the response letter are starkly different, and the writings were not contemporaneous or responsive to one another. Essentially, the two writings are wholly distinct. Accordingly, we find the trial court property excluded the suicide note as inadmissible hearsay.

III. Rape Shield Statute

Tennant argues the trial court erred in refusing to allow him to question Victim and introduce evidence about their unusual sexual history, including "rough sex" and the infliction of pain, because the exclusion of this sexual history evidence denied him his right to present a complete defense. We disagree.

The admission of a victim's sexual conduct is limited by statute:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's

> sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656; however, evidence of the victim's sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant introduced to show source or origin of semen, pregnancy, or disease about which evidence has been introduced previously at trial is admissible if the judge finds that such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. Evidence of specific instances of sexual activity which would constitute adultery and would be admissible under rules of evidence to impeach the credibility of the witness may not be excluded.

S.C. Code Ann. § 16-3-659.1(1) (2003).

As a threshold matter, it is questionable whether this issue is preserved for our review because, although Tennant requested that the trial court address the admissibility of Victim's sexual history during or following her testimony, Tennant neglected to pursue the issue again.

Nevertheless, addressing the merits, Tennant maintains the evidence of their sexual history was necessary for the jury's understanding of his defense of consent, and to corroborate Schwartz-Watts's testimony that he could not sexually satisfy Victim. However, the proffer contained allegations of specific instances of Victim's sexual conduct, including opinion evidence and reputation evidence. The evidence proffered was not intended to be introduced to show source of origin of semen, pregnancy, or disease. Moreover, the evidence of Victim's sexual history was not relevant to any issue at trial. While Tennant contends Victim preferred "rough sex," there is no evidence they ever engaged in "rough sex." Additionally, the record is void of any evidence the sex between Tennant and Victim on the night of the

assault was "rough." Lastly, in Tennant's proffer, he contradicts his assertion he and Victim engaged in "rough sex" by stating he never did anything to hurt her during sex, despite her desires. Thus, the trial court properly excluded the proffered evidence of Victim's sexual history pursuant to the Rape Shield Statute.

CONCLUSION

Accordingly, Tennant's convictions and sentences are

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,	Respondent,
v.	
James F. Russell,	Appellant.

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

Opinion No. 4546
Heard March 17, 2009 – Filed May 18, 2009

AFFIRMED

Appellate Defender M. Celia Robinson, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr., all of Columbia; and Solicitor Robert Mills Ariail, of Greenville, for Respondent.

KONDUROS, J: James F. Russell appeals his conviction for first-degree criminal sexual conduct (CSC) with a minor. He argues the circuit court erred in admitting the victim's (Child) prior consistent statement pursuant to section 17-23-175 of the South Carolina Code (Supp. 2008), because it improperly bolstered Child's testimony and because its probative value was substantially outweighed by its prejudicial impact. We affirm.

FACTS

On the evening of July 10, 2005, Russell attended a party at the home of Child's mother (Mother). Unable to sleep because of noise from the party, Child, who was six years old, got up from his bed and followed Russell outside. Russell led Child to a covered picnic table on one side of the back yard. According to Child, Russell told Child not to tell Mother, and then he pulled Child's pants down and placed his mouth on Child's genitals. Child stated when Russell pulled Child's hand toward Russell's genitals, Child slipped out of Russell's grasp, pulled up his pants, and ran to Mother. Child told Mother about the incident.

Later, an altercation arose between Russell and a friend of Mother's boyfriend, and police were called.[1] Seeing the police cars, Child's grandmother (Grandmother) walked to Mother's house to investigate and translated sign language for the officers. According to Grandmother, Russell was present and repeatedly told her he had not done anything to Child. At the time, she did not know what he meant. On July 13, 2005, Mother reported the sexual assault to police.

On August 4, 2005, Russell was arrested for CSC. At trial, the State presented Child and the investigators who interviewed him. At the end of its case, the State played a videotape of Child's interview with a counselor. Russell objected to introduction of the videotape at the end of the State's case as violative of his Sixth Amendment right to confrontation and as unfairly prejudicial and cumulative to other testimony. The circuit court admitted the

[1] Child's and Grandmother's testimony suggested this altercation occurred later the same evening. However, police dispatch records indicated it likely occurred two nights later, on July 12, 2005.

tape, and Russell was convicted and sentenced to thirty years' imprisonment. This appeal followed.

STANDARD OF REVIEW

The admission or exclusion of evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion accompanied by probable prejudice. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004).

LAW/ANALYSIS

I. Improper Bolstering

Russell contends the circuit court erred in admitting Child's videotaped interview because the statements contained in the tape constituted a prior consistent statement that improperly bolstered Child's testimony. We disagree.

Section 17-23-175(A) of the South Carolina Code (Supp. 2008) permits the admission of out-of-court statements by child sexual abuse victims when the following conditions are met:

> (1) the statement was given in response to questioning conducted during an investigative interview of the child;
> (2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means . . . ;
> (3) the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
> (4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of the trustworthiness.

Russell is correct that the admission of the videotape would likely be error in absence of the statute. Generally, a prior consistent statement is not admissible unless the witness is charged with recent fabrication or improper motive or influence. Rule 801(d)(1)(B), SCRE; State v. Saltz, 346 S.C. 114, 123-24, 551 S.E.2d 240, 245 (2001). In CSC cases, such hearsay statements are admissible, but only to the extent they are limited to the time and place of the assault. State v. Barrett, 299 S.C. 485, 486-87, 386 S.E.2d 242, 243 (1989); State v. Jolly, 304 S.C. 34, 37, 402 S.E.2d 895, 897 (Ct. App. 1991).

However, in this case, the legislature has made a specific allowance for these out-of-court statements by child victims provided certain elements are met. In this case, Russell does not argue the requirements were not met. In essence, Russell argues the statute itself, under any circumstances, permits improper corroboration or bolstering in conflict with the South Carolina Rules of Evidence.[2] However, the South Carolina Rules of Evidence expressly acknowledge the superiority of statutes in such cases: "Except as otherwise provided by rule or by statute, [the South Carolina Rules of Evidence] govern proceedings in the courts of South Carolina . . . ." Rule 101, SCRE (emphasis added). Therefore, Russell's argument, although well-made, must fail.

II. Prejudicial Versus Probative Analysis

Russell contends Child's videotaped interview was improperly admitted because its probative value was significantly outweighed by its prejudicial effect. We disagree.

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[2] At oral argument, Russell attempted to ground his improper bolstering argument in the constitutional protections afforded by the Sixth Amendment of the United States Constitution. However, no constitutional argument was raised in Russell's appellate brief. The issue is therefore not preserved for our review. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal."); S.C. Dep't of Soc. Servs. v. Basnight, 346 S.C. 241, 250, 551 S.E.2d 274, 278 (Ct. App. 2001) ("An appellant may not use oral argument as a vehicle to argue issues not argued in the appellant's brief.").

The State suggests Russell's argument is not properly preserved. At trial, Russell argued the videotape lacked probative value because it was cumulative of Child's trial testimony. On appeal, Russell also argues the videotape is prejudicial because Child is seen drawing a card for his mother and "playfully interacting with the counselor," thereby stirring the emotions of the jurors. We find Russell's argument regarding Child's interaction with the counselor is not preserved for our review. See State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue is not preserved when one ground is raised to the trial court and another ground raised on appeal). Furthermore, while the videotape of Child's interview may have been cumulative to his testimony at trial, it was highly probative to the question of Russell's guilt or innocence. Therefore, we find any prejudice to Russell was outweighed by the probative value of the videotape.

Based on the foregoing, the ruling of the circuit court is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gladys Kelly, Appellant,

v.

Logan, Jolley, & Smith, L.L.P., James D. Jolley, Jr., Luther McDaniel, and David Sumner, jointly and severally, Defendants,

of whom Logan, Jolley, & Smith, L.L.P., James D. Jolley, Jr., and David Sumner are Respondents.

Appeal From Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 4547
Heard March 18, 2009 – Filed May 18, 2009

AFFIRMED

Gloria Y. Leevy, of Greenville, for Appellant.

Samuel W. Outten, William J. Watkins, and Michael J. Bogle, of Greenville and Susan Taylor Wall and Kristina Y. Cook, of Charleston, for Respondents.