OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 46

December 5, 2005
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

Page

None

UNPUBLISHED OPINIONS

2005-UP-598-The State v. Judy Martin
(Spartanburg, Judge Reginald I. Lloyd)

2005-UP-599-Michelle Tower v. S.C. Department of Corrections, Employer, and State Accident Fund, Carrier
(Richland, Judge J. Mark Hayes, II)

2005-UP-600-The State v. Terrance V. Smith
(Lexington, Judge Marc H. Westbrook)

2005-UP-601-Douglas N. Yarborough v. Anita J. Yarborough
(Lexington, Judge Richard W. Chewning, III)

2005-UP-602-Danny R. Prince v. Beaufort Memorial Hospital and its employees, servants, and agents
(Beaufort, Judge Alexander S. Macaulay, Judge Jackson V. Gregory, and Judge Curtis L. Coltrane)

2005-UP-603-Robert Calvin Vaughn, by Faye Vaughn v. Salem Carriers, Employer and Virginia Surety Company, Carrier
(Greenville, Judge Edward W. Miller)

2005-UP-604-Ex parte: A-1 Bail Bonding Company (Surety) In Re: State v. Fredrick Larue
(Greenville, Judge Edward W. Miller)

2005-UP-605-Aiken Technical College v. Two State Construction Co., et al.
(Aiken, Judge Reginald I. Lloyd)

PETITIONS FOR REHEARING

4011-State v. Nicholson Denied 11/23/05

4026-Wogan v. Kunze	Pending
4030-State v. Mekler	Pending
4034-Brown v. Greenwood Mills Inc.	Pending
4036-State v. Pichardo & Reyes	Pending
4037-Eagle Cont. v. County of Newberry et al.	Pending
4039-Shuler v. Gregory Electric et al.	Pending
4040-Commander Healthcare v. SCDHEC	Pending
4041-Bessinger v. BI-LO	Pending
2005-UP-535-Tindall v. H&S Homes	Pending
2005-UP-539-Tharington v. Votor	Pending
2005-UP-540-Fair et al. v. Gary Realty et al.	Pending
2005-UP-543-Jamrok v. Rogers et al.	Pending
2005-UP-549-Jacobs v. Jackson	Pending
2005-UP-574-State v. T. Phillips	Pending
2005-UP-577-Pallanck et al. v. Lemieux et al.	Pending
2005-UP-580-Garrett v. Garrett	Pending
2005-UP-585-Newberry Elec. v. City of Newberry	Pending
2005-UP-586-State v. T. Pate	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3780-Pope v. Gordon	Granted 12/01/05
3787-State v. Horton	Pending

3809-State v. Belviso	Pending
3821-Venture Engineering v. Tishman	Pending
3825-Messer v. Messer	Pending
3832-Carter v. USC	Pending
3836-State v. Gillian	Pending
3842-State v. Gonzales	Pending
3849-Clear Channel Outdoor v. City of Myrtle Beach	Pending
3852-Holroyd v. Requa	Pending
3853-McClain v. Pactiv Corp.	Pending
3855-State v. Slater	Pending
3857-Key Corporate v. County of Beaufort	Pending
3858-O'Braitis v. O'Braitis	Pending
3860-State v. Lee	Pending
3861-Grant v. Grant Textiles et al.	Pending
3863-Burgess v. Nationwide	Pending
3864-State v. Weaver	Pending
3865-DuRant v. SCDHEC et al	Pending
3866-State v. Dunbar	Pending
3871-Cannon v. SCDPPPS	Pending
3877-B&A Development v. Georgetown Cty.	Pending
3879-Doe v. Marion (Graf)	Pending

3883-Shadwell v. Craigie	Pending
3890-State v. Broaddus	Pending
3900-State v. Wood	Pending
3903-Montgomery v. CSX Transportation	Pending
3906-State v. James	Pending
3910-State v. Guillebeaux	Pending
3911-Stoddard v. Riddle	Pending
3912-State v. Brown	Pending
3914-Knox v. Greenville Hospital	Pending
3917-State v. Hubner	Pending
3918-State v. N. Mitchell	Pending
3919-Mulherin et al. v. Cl. Timeshare et al.	Pending
3926-Brenco v. SCDOT	Pending
3928-Cowden Enterprises v. East Coast	Pending
3929-Coakley v. Horace Mann	Pending
3935-Collins Entertainment v. White	Pending
3936-Rife v. Hitachi Construction et al.	Pending
3938-State v. E. Yarborough	Pending
3939-State v. R. Johnson	Pending
3940-State v. H. Fletcher	Pending
3943-Arnal v. Arnal	Pending

3947-Chassereau v. Global-Sun Pools	Pending
3949-Liberty Mutual v. S.C. Second Injury Fund	Pending
3950-State v. Passmore	Pending
3952-State v. K. Miller	Pending
3954-Nationwide Mutual Ins. v. Erwood	Pending
3955-State v. D. Staten	Pending
3963-McMillan v. SC Dep't of Agriculture	Pending
3965-State v. McCall	Pending
3966-Lanier v. Lanier	Pending
3967-State v. A. Zeigler	Pending
3968-Abu-Shawareb v. S.C. State University	Pending
3970-State v. C. Davis	Pending
3971-State v. Wallace	Pending
3976-Mackela v. Bentley	Pending
3977-Ex parte: USAA In Re: Smith v. Moore)	Pending
3978-State v. K. Roach	Pending
3981-Doe v. SCDDSN et al.	Pending
3983-State v. D. Young	Pending
3984-Martasin v. Hilton Head	Pending
3985-Brewer v. Stokes Kia	Pending
3988-Murphy v. Jefferson Pilot	Pending

3989-State v. Tuffour	Pending
3993-Thomas v. Lutch (Stevens)	Pending
3994-Huffines Co. v. Lockhart	Pending
3995-Cole v. Raut	Pending
3996-Bass v. Isochem	Pending
3998-Anderson v. Buonforte	Pending
4000-Alexander v. Forklifts Unlimited	Pending
4004-Historic Charleston v. Mallon	Pending
4005-Waters v. Southern Farm Bureau	Pending
4006-State v. B. Pinkard	Pending
4014-State v. D. Wharton	Pending
4015-Collins Music Co. v. IGT	Pending
4020-Englert, Inc. v. LeafGuard USA, Inc.	Pending
4022-Widdicombe v. Tucker-Cales	Pending
2003-UP-642-State v. Moyers	Pending
2003-UP-716-State v. Perkins	Pending
2003-UP-757-State v. Johnson	Pending
2004-UP-219-State v. Brewer	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-366-Armstong v. Food Lion	Granted 12/01/05
2004-UP-381-Crawford v. Crawford	Pending

2004-UP-394-State v. Daniels	Pending
2004-UP-409-State v. Moyers	Pending
2004-UP-422-State v. Durant	Granted 12/01/05
2004-UP-427-State v. Rogers	Pending
2004-UP-430-Johnson v. S.C. Dep't of Probation	Pending
2004-UP-439-State v. Bennett	Pending
2004-UP-460-State v. Meggs	Pending
2004-UP-482-Wachovia Bank v. Winona Grain Co.	Pending
2004-UP-485-State v. Rayfield	Pending
2004-UP-487-State v. Burnett	Pending
2004-UP-496-Skinner v. Trident Medical	Pending
2004-UP-500-Dunbar v. Johnson	Denied 12/01/05
2004-UP-504-Browning v. Bi-Lo, Inc.	Pending
2004-UP-505-Calhoun v. Marlboro Cty. School	Pending
2004-UP-513-BB&T v. Taylor	Pending
2004-UP-517-State v. Grant	Pending
2004-UP-520-Babb v. Thompson et al (5)	Pending
2004-UP-521-Davis et al. v. Dacus	Pending
2004-UP-537-Reliford v. Mitsubishi Motors	Pending
2004-UP-540-SCDSS v. Martin	Pending
2004-UP-542-Geathers v. 3V, Inc.	Pending

2004-UP-550-Lee v. Bunch	Pending
2004-UP-554-Fici v. Koon	Pending
2004-UP-555-Rogers v. Griffith	Pending
2004-UP-556-Mims v. Meyers	Pending
2004-UP-560-State v. Garrard	Pending
2004-UP-596-State v. Anderson	Pending
2004-UP-598-Anchor Bank v. Babb	Pending
2004-UP-600-McKinney v. McKinney	Pending
2004-UP-605-Moring v. Moring	Pending
2004-UP-606-Walker Investment v. Carolina First	Pending
2004-UP-607-State v. Randolph	Pending
2004-UP-609-Davis v. Nationwide Mutual	Pending
2004-UP-610-Owenby v. Kiesau et al.	Pending
2004-UP-613-Flanary v. Flanary	Pending
2004-UP-617-Raysor v. State	Pending
2004-UP-632-State v. Ford	Pending
2004-UP-635-Simpson v. Omnova Solutions	Pending
2004-UP-650-Garrett v. Est. of Jerry Marsh	Pending
2004-UP-653-State v. R. Blanding	Pending
2004-UP-654-State v. Chancy	Pending
2004-UP-657-SCDSS v. Cannon	Pending

2004-UP-658-State v. Young	Pending
2005-UP-001-Hill v. Marsh et al.	Pending
2005-UP-002-Lowe v. Lowe	Pending
2005-UP-014-Dodd v. Exide Battery Corp. et al.	Pending
2005-UP-016-Averette v. Browning	Pending
2005-UP-018-State v. Byers	Pending
2005-UP-022-Ex parte Dunagin	Pending
2005-UP-023-Cantrell v. SCDPS	Pending
2005-UP-039-Keels v. Poston	Pending
2005-UP-046-CCDSS v. Grant	Pending
2005-UP-054-Reliford v. Sussman	Pending
2005-UP-058-Johnson v. Fort Mill Chrysler	Pending
2005-UP-113-McCallum v. Beaufort Co. Sch. Dt.	Pending
2005-UP-115-Toner v. SC Employment Sec. Comm'n	Pending
2005-UP-116-S.C. Farm Bureau v. Hawkins	Pending
2005-UP-122-State v. K. Sowell	Pending
2005-UP-124-Norris v. Allstate Ins. Co.	Pending
2005-UP-128-Discount Auto Center v. Jonas	Pending
2005-UP-130-Gadson v. ECO Services	Pending
2005-UP-138-N. Charleston Sewer v. Berkeley County	Pending
2005-UP-139-Smith v. Dockside Association	Pending

2005-UP-149-Kosich v. Decker Industries, Inc.	Pending
2005-UP-152-State v. T. Davis	Pending
2005-UP-160-Smiley v. SCDHEC/OCRM	Pending
2005-UP-163-State v. L. Staten	Pending
2005-UP-165-Long v. Long	Pending
2005-UP-170-State v. Wilbanks	Pending
2005-UP-171-GB&S Corp. v. Cnty. of Florence et al.	Pending
2005-UP-173-DiMarco v. DiMarco	Pending
2005-UP-174-Suber v. Suber	Pending
2005-UP-188-State v. T. Zeigler	Pending
2005-UP-192-Mathias v. Rural Comm. Ins. Co.	Pending
2005-UP-195-Babb v. Floyd	Pending
2005-UP-197-State v. L. Cowan	Pending
2005-UP-200-Cooper v. Permanent General	Pending
2005-UP-216-Hiott v. Kelly et al.	Pending
2005-UP-219-Ralphs v. Trexler (Nordstrom)	Pending
2005-UP-222-State v. E. Rieb	Pending
2005-UP-224-Dallas et al. v. Todd et al.	Pending
2005-UP-256-State v. T. Edwards	Pending
2005-UP-274-State v. R. Tyler	Pending
2005-UP-283-Hill v. Harbert	Pending

2005-UP-296-State v. B. Jewell	Pending
2005-UP-297-Shamrock Ent. v. The Beach Market	Pending
2005-UP-298-Rosenblum v. Carbone et al.	Pending
2005-UP-303-Bowen v. Bowen	Pending
2005-UP-305-State v. Boseman	Pending
2005-UP-319-Powers v. Graham	Pending
2005-UP-337-Griffin v. White Oak Prop.	Pending
2005-UP-340-Hansson v. Scalise	Pending
2005-UP-345-State v. B. Cantrell	Pending
2005-UP-348-State v. L. Stokes	Pending
2005-UP-354-Fleshman v. Trilogy & CarOrder	Pending
2005-UP-365-Maxwell v. SCDOT	Pending
2005-UP-373-State v. Summersett	Pending
2005-UP-375-State v. V. Mathis	Pending
2005-UP-422-Zepsa v. Randazzo	Pending
2005-UP-425-Reid v. Maytag Corp.	Pending
2005-UP-459-Seabrook v. Simmons	Pending
2005-UP-460-State v. McHam	Pending
2005-UP-471-Whitworth v. Window World et al.	Pending
2005-UP-472-Roddey v. NationsWaste et al.	Pending
2005-UP-483-State v. A. Collins	Pending

2005-UP-506-Dabbs v. Davis et al.	Pending
2005-UP-519-Talley v. Jonas	Pending
2005-UP-523-Ducworth v. Stubblefield	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Marion Bowman, Jr., Appellant.

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 26071
Heard October 6, 2005 - Filed November 28, 2005

AFFIRMED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor David M. Pascoe, Jr., of Summerville, for respondent.

JUSTICE MOORE: Appellant was charged with murder and third-degree arson. The jury found appellant guilty as charged and he was sentenced to death for the murder charge and a ten-year imprisonment term for the arson charge. We affirm.

FACTS

On February 17, 2001, Kandee Martin's (victim's) body was found in the trunk of her burned car. She had been shot to death before being placed in the trunk.

The previous day, several people gathered at Hank Koger's house to socialize and drink alcohol. Appellant, who was wearing black pants, arrived at Koger's house around 11:00 a.m. that day. He subsequently left to purchase meat. When appellant returned, he became upset because his gun had been moved. He accused James Tywan Gadson (Gadson)[1] of taking the gun out of the trash barrel located on Koger's property. Hiram Johnson intervened and told appellant he had moved the gun. The gun was a .380 caliber pistol that appellant had purchased a few weeks before in the presence of Gadson and Travis Felder. After retrieving his gun, appellant left Koger's house.

Later that afternoon, appellant was riding in the car of his sister, Yolanda Bowman, with another woman, Katrina West. Appellant, who had a gun in his back pocket, was sitting in the back seat. He instructed Yolanda to park beside the victim's car. At the time, the victim was speaking to a man. Appellant tried to get the victim's attention, but she indicated to him that he should wait a moment. The man, Yolanda, and Katrina testified as to what appellant said next. The man stated that appellant said, "Fuck waiting a minute. I'm about to kill this bitch." Yolanda stated that appellant said, "Fuck it, that bitch. That bitch be dead by dark." Katrina stated that appellant said, "Fuck that ride. That bitch be dead by dark fall." After

[1]In connection with the victim's murder, Gadson had a plea agreement wherein he would plead to accessory after the fact of murder and misprision of a felony and receive a twenty-year sentence.

appellant's comments, Yolanda drove away and appellant informed her the victim owed him money.

Around 7:30 p.m. that evening, Tywan Gadson saw appellant riding with the victim in her car. They stopped and appellant told Gadson to get in. Gadson had been drinking alcohol since 1:00 and was "feeling in good shape." The victim stopped for gas and they drove off without paying. Appellant allegedly instructed the victim where to drive and instructed her to stop on Nursery Road. Gadson and appellant then exited the vehicle and walked down the road while the victim remained in the car. Appellant told Gadson he was going to kill the victim because she had on a wire. The victim then came down the road, grabbed appellant's arm and stated she was scared. At this point, a car drove by and they all jumped into the woods. Then, the victim started walking to the car with appellant following her. Appellant allegedly shot his gun three times. Gadson stated the victim ran toward him and then stopped and faced appellant and told him to please not shoot her anymore because she had a child to take care of. Gadson stated appellant shot two more times. The victim fell to the ground and appellant dragged her body into the woods. Gadson stated he jumped into the car.

Afterwards, appellant and Gadson parked the victim's car and later retrieved Yolanda's car. They then went to a store to purchase beer and went back to Koger's house around 8:00 p.m. Later, Gadson stayed at Koger's house and appellant left. Around 11:30 p.m., appellant and Hiram Johnson approached James Gadson, Gadson's father. Appellant gave him money to buy four pairs of gloves.

Appellant, Gadson, Hiram Johnson, and Darian Williams, then drove to Murray's Club in the victim's car. Appellant handed out the gloves for the occupants to wear and stated he had stolen the car. They reached the club around midnight. Once at the club, appellant tried to sell the victim's car. Appellant, according to Hiram Johnson, said, "I killed Kandee, heh, heh, heh." Appellant had a gun with him while at the club. They left the club an hour or two after arriving there.

Three people, Carolyn Brown, Valorna Smith, and Travis Felder, left the club together. They stopped by a gas station about 3:00 a.m. before proceeding to Valorna's home. Not long after they were there, appellant knocked on the door and asked for Travis. Travis left and came back after a few minutes. He seemed normal upon his return.

Travis testified appellant, who was wearing black jeans at the time, stated he needed Travis' help to park a car which turned out to be the victim's car. Travis followed appellant to Nursery Road. Appellant parked the car, went into the woods and pulled the victim's body out by her feet. Appellant then put her body in the trunk. While putting her body in the trunk, Travis saw a gun tucked into appellant's waist. Appellant allegedly told Travis, "you didn't think I did it, did you?" Travis testified appellant also stated, "I killed Kandee Martin." Appellant lit the car on fire. Travis then took appellant to his home and went back to Valorna's house.[2]

A resident of Nursery Road who had previously heard gunshots was awakened late in the night by a loud noise. He investigated and discovered a car on fire. The fire was reported at 3:54 a.m. There were .380 Winchester cartridge casings found not far from the scene. The casings, a blood stain, and a shoe were located with the help of a man who had driven by and seen the victim's car stopped on the road around 8:00 p.m. the previous evening.

The next day, police arrested appellant at his wife's house and seized his black pants. His wife testified he had been wearing the pants when he arrived at the house. They found a wristwatch belonging to the victim in appellant's pants.

After the police left, appellant's wife, Dorothy Bowman, found appellant's gun in a chair in her home. She allegedly gave the gun to appellant's father. The next day, appellant's father, Yolanda, and appellant's other sister, Kendra, took the gun and dropped it off a bridge into the Edisto

[2]Travis entered into a plea agreement whereby he would be charged with accessory after the fact to third degree arson in exchange for his testimony.

River. It was later retrieved from the Edisto River and determined to be the gun that was used in the murder.

The arson investigator testified there was the presence of a heavy petroleum product on appellant's jeans, but the product was not gasoline. The items found in the car had gasoline on them indicating that was the product used to start the fire.

While the following evidence did not come out during the guilt phase, during the sentencing phase, a video was introduced during Travis Felder's testimony. The video showed Travis purchasing gasoline in a gasoline can at about 3:14 a.m. Appellant was not with him on the video. Travis stated appellant gave him the can for the gas and told him he needed $2-3 worth. When appellant set fire to the victim's car, he retrieved the gas can from Travis' car.

At the conclusion of the guilt phase, the jury found appellant guilty of murder and third-degree arson.

ISSUES

I. Did the trial court err by failing to instruct the jury on the substantial impairment mitigating circumstance?

II. Did the trial court err by refusing to grant a mistrial when the solicitor cross-examined a witness about the possibility of escape and did the trial court abuse its discretion by allowing the solicitor on re-cross examination of the witness to ask him about prison conditions?

III. Was the trial court without subject matter jurisdiction to try appellant for capital murder?

IV. Did the trial court err by refusing to suppress the watch and liquid material found on appellant's pants because the pants were seized during an allegedly illegal arrest?

DISCUSSION

I

During the sentencing phase of appellant's trial, appellant offered mitigating evidence that there was a history of heavy alcohol use on his mother's side of the family. In the fourth grade, he began experimenting with alcohol by stealing sips from his uncle's drinks. By age 14, appellant was selling drugs and drinking on the weekends. Subsequently, he was drinking every day.

At the end of the sentencing phase, appellant requested the trial court charge the mitigating circumstance that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.[3] The State objected that evidence of this mitigating circumstance was not before the jury because appellant did not want to bring up a diagnosis, if any, regarding a mental health condition that he might have. The trial court ruled the record was void of the requested mitigating factor.

The trial court charged the jury on the mitigating circumstances that appellant did not have a significant history of prior criminal convictions involving the use of violence against another person, that the jury should consider appellant's age or mentality at the time of the crime, and that the jury should consider any other non-statutory mitigating factors.

Appellant argues the trial court erred by failing to charge the jury on the statutory mitigating circumstance regarding substantial impairment based on the evidence of appellant's history of substance abuse, the evidence appellant had been drinking the day of the murder, and the evidence of the "party atmosphere" throughout the day.

[3]S.C. Code Ann. § 16-3-20(C)(b)(6) (2003).

The trial court must submit for the jury's consideration any statutory mitigating circumstances supported by the evidence. State v. Vazquez, 364 S.C. 293, 613 S.E.2d 359 (2005). The trial judge must make an initial determination of which statutory mitigating circumstances have evidentiary support and then allow the defendant to request any additional statutory mitigating circumstances supported in the record. *Id.* Absent a request by counsel to charge the mitigating circumstances, the issue is not preserved for review. *Id.* However, when there is evidence the defendant was intoxicated at the time of the crime, the trial court is required to submit the mitigating circumstances in § 16-3-20(C)(b)(2), (6), and (7). *Id.* (citing State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002) (holding trial court is required to submit mitigating circumstances if there is evidence of intoxication regardless of whether they are requested)); *see also* State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986)[4] (evidence of voluntary intoxication is proper matter for consideration by jury in mitigation of punishment). Where there is evidence the defendant was extremely intoxicated during the commission of the crime, the failure to instruct the jury on statutory mitigating circumstances (2), (6), and (7)[5] is not harmless error. State v. Stone, *supra*.

In the present case, there was evidence presented that appellant possessed beer at different points in the day but none of the evidence indicated appellant was drinking the beer. There was evidence appellant had a history of alcohol and drug abuse; however, his history is irrelevant to whether he was in fact intoxicated on the day of the murder. Appellant presented no evidence he was actually intoxicated at the time of the crime. The evidence indicated appellant may have been drinking that day, but this is not enough to warrant a charge to the jury for the mitigating factor outlined in

---

[4]*Overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

[5]The section 16-3-20(C)(b)(2) mitigator states the murder was committed while the defendant was under the influence of mental or emotional disturbance. The section 16-3-20(C)(b)(7) mitigator states the age or mentality of the defendant at the time of the crime. The trial court in the instant case charged the latter mitigating circumstance to the jury.

§ 16-3-20(C)(b)(6). *See, e.g.*, State v. Vazquez, *supra* (holding that even though drinking was admitted, there was no evidence defendant was intoxicated at time crime was committed; therefore, court did not err by failing to charge the jury on mitigating circumstances relating to intoxication); State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987), *cert. denied*, 484 U.S. 1079 (1988) (same). *Cf.* State v. Young, 305 S.C. 380, 409 S.E.2d 352 (1991) (where there is evidence defendant was intoxicated at time of crime, trial judge required to submit mitigating circumstances relating to intoxication). Therefore, the trial court's decision not to charge the jury on the mitigating circumstances relating to intoxication was not in error.

II

Appellant argues the trial court erred by refusing to grant a mistrial when the State asked James Aiken, a correctional consultant testifying on behalf of appellant, about the possibility of escape and by allowing the State, on re-cross examination, to ask Aiken about prison conditions.

During the sentencing phase, Aiken testified that, as a consultant, he assists in the classification of prisoners and in the training of prison wardens. He testified that if appellant received a life without parole sentence, then he would stay in prison until he was dead. Aiken stated appellant has adjusted relatively well to jail in the past and that he could adapt to prison life in the future. Aiken mentioned appellant would be kept behind gun towers, fences, bars, and concrete.

On cross-examination, Aiken testified inmates can move to less restrictive environments within prison based on their behavior. He stated appellant would never be allowed in a work-release program. He further stated he did not anticipate appellant being disruptive in prison.

On redirect examination by appellant's attorney, Aiken testified appellant would not be going to a "kiddy camp" or a place where he could have "picnic lunches outside the gate." Aiken stated appellant would work because the inmates are usually required to perform cheap labor to pay back

society. He further testified that while appellant would stay in prison for life, he could salvage his life and have redeeming qualities.

On re-cross examination by the State, Aiken repeated his testimony that appellant would never get out of prison if he received a life without parole sentence. The State then asked, "During the time that you have been affiliated with the Department of Corrections of South Carolina, how many inmates have escaped?" Appellant immediately objected. A bench conference was held outside the presence of the jury. The State argued appellant opened the door to the testimony by eliciting testimony from Aiken that appellant "will never get out of that prison."

The trial court concluded the escape testimony should not be presented to the jury. The trial court distinguished appellant's situation from the situation in State v. Plath, 281 S.C. 1, 313 S.E.2d 619, *cert. denied*, Arnold v. South Carolina, 467 U.S. 1265 (1984), because Plath himself was an escapee[6] and, therefore, escape testimony was relevant in that case. Appellant made a motion for mistrial of the sentencing phase based on the escape question. The court denied the motion and offered to give a curative instruction instead. The court instructed the jury upon their return:

> . . . there was a question that was asked before you left and I have ruled that the question was not a proper question and I'm going to ask you to disavow that from your minds for this reason: There are two sentences that you will concern yourselves and we're going to have an opportunity during my charge to talk about them at great length, but for this moment I will tell you, and I think I am reminding you based on the instructions that you have received even preliminarily, but there are two sentences that you will concern yourselves. One, the death penalty, and

[6]In fact, Plath was not an escapee, but his co-defendant John Arnold, who was also an appellant in the Plath case, was the escapee. Plath, 281 S.C. at 7, 313 S.E.2d at 622-623.

> the other is life imprisonment without the possibility of parole. The statute says until the death of the defendant. Those would be the two sentences that you will concern yourselves.

Prior to the motion for mistrial, the State requested that, because appellant had established prison was not a "kiddy camp" and that appellant would probably not be in super maximum security, the State would like to pursue those areas by asking about certain conditions of the general population, such as the work conditions appellant had already covered. The court ruled the State could do so. Appellant responded, "We're on recross, Judge." The court replied that it understood, but ruled the State could go into those areas because those issues "are certainly before the jury at this point."

The re-cross examination of Aiken continued after the curative instruction was given. Aiken testified appellant would not be in super maximum security and he would be able to work and earn a small amount of money. Aiken testified appellant would most likely have certain opportunities in prison, such as bible study, continuing his education, participating in anger management programs, playing basketball, exercising, reading books, and watching movies and possibly television. Aiken made it clear that all of these activities would occur under continuous security.

Mistrial due to Escape Question

We have held in the past that evidence of a prior escape is proper reply to a defendant's presentation of evidence of his good conduct while in prison. *See* State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), *cert. denied,* 463 U.S. 1229 (1983). We have also held that evidence the defendant was an escapee at the time he committed a murder was admissible evidence in the sentencing phase. *See* State v. Plath, *supra*. Appellant's situation, however, is distinguishable from Woomer and Plath in the sense that he has never been an escapee and there was no evidence he had ever attempted to escape confinement. The trial court therefore properly refused to allow Aiken to answer the State's question.

We find the court's curative instruction removed any prejudice because it made it clear that the question asked by the State was improper and asked the jury to disavow that question from their minds. Further, the curative instruction, without mentioning the contents of the escape question again, emphasized that the jury was to be concerned with only two sentences: death and life without the possibility of parole, and that life without parole meant "until the death of the defendant." This instruction was sufficient to cure any alleged prejudice caused by the State's question. Therefore, we hold the trial court did not err by refusing to grant a mistrial in light of its curative instruction. *See* State v. Vazquez, 364 S.C. 293, 613 S.E.2d 359 (2005) (mistrial should be ordered only when an incident is so grievous that prejudicial effect cannot be removed).

Prison Conditions Questions

Appellant argues the trial court erred by allowing the State, on re-cross examination, to ask Aiken about prison conditions.

We find this issue is not preserved for review because appellant did not raise this issue to the trial court before the testimony was presented and did not make a contemporaneous objection when the testimony was actually elicited. Further, the trial court did not rule on this issue as now stated by appellant. *See* State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004) (to be preserved for appeal, issue must be raised to and ruled on by trial court); State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (party cannot argue one ground below and then argue different ground on appeal). *See also* State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court).

We take this opportunity, however, to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison

conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant.

III

Appellant argues the trial court lacked subject matter jurisdiction to sentence him to death because the murder indictment did not allege an aggravating circumstance. He argues that Ring v. Arizona, 536 U.S. 584 (2002), holds that aggravating factors are elements of the offense of capital murder that must be charged in the indictment.

We have recently addressed this issue in several cases. *See* State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005) (under South Carolina law, aggravating circumstances need not be alleged in murder indictment); State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004), *cert. denied*, __ U.S. __, 125 S.Ct. 2942 (2005) (same); State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004) (same). As stated in those cases, the aggravating factors enumerated in S.C. Code Ann. § 16-3-20(C)(a) (2003) are sentencing factors, not elements of murder, and they need not be in the indictment. Therefore, the instant indictment is valid.

IV

Appellant argues his pants were seized during an illegal warrantless arrest and that the watch and liquid material found in and on the pants should have been suppressed.

The murder occurred in Dorchester County. Appellant was arrested, on February 17, 2001, at his wife's home in Orangeburg County pursuant to an Orangeburg County arrest warrant for receiving stolen goods that was issued on December 1, 2000.

On the morning following the murder, several officers went to the residence of appellant's wife, Dorothy. The officers present were a Branchville police officer, an Orangeburg County deputy, and two officers from Dorchester County. The Branchville officer testified that, although he did not have the original, he had a certified copy of the Orangeburg County warrant and that the officers went to Dorothy's house[7] pursuant to that warrant. He further testified Dorothy invited him into the house and he stepped inside and told her they were looking for appellant. He stated he showed Dorothy a copy of the arrest warrant. Dorothy replied to him that she did not know where appellant was and indicated it was okay for the officers to look around. The Branchville officer stated he did not pull out a consent to search form before searching Dorothy's home.

Dorothy confirmed the officers said they had a warrant and that she stated the officers could come in and search her home. Dorothy testified she let the officers in voluntarily and they had her permission to search the home.

Appellant was found hiding behind a bed. He was arrested pursuant to the receiving stolen goods warrant at that time and was transported to the Branchville Police Department. At the time of his arrest, appellant was wearing only underwear and he asked for his clothes. Before his wife could give him his black pants, an officer intervened to search the pants. The officer wanted to check the pants for weapons for safety purposes. When the officer found a lady's watch inside the pants, the officer decided the pants needed to be confiscated.

Appellant argues the trial court should have suppressed the evidence seized at Dorothy's home because the arrest was unlawful and because Dorothy had not consented to the search.

---

[7]Appellant and his wife both testified appellant did not live at the wife's home and that she had been living there for only a short time before appellant's arrest.

Initially, the State argues this issue is not preserved for review because appellant did not renew his objection to the evidence when it was received at trial.

In most cases, making a motion in *limine* to exclude evidence at the beginning of trial does not preserve the issue for review because a motion in *limine* is not a final determination. State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996), *cert. denied*, 520 U.S. 1277 (1997) (same). The moving party must make a contemporaneous objection when the evidence is introduced. *Id.* An exception to this rule is where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question. In that case, the aggrieved party does not need to renew the objection. State v. Forrester, *supra*.

Appellant did not renew his objection when the evidence of the watch found inside the pants and the petroleum on the pants was introduced. The trial court's decision to allow the evidence was not made immediately prior to the introduction of the evidence in question. Therefore, this issue is not preserved for appellate review.

Despite the lack of preservation, we will address the merits. When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is *any* evidence to support the ruling. State v. Missouri, 361 S.C. 107, 603 S.E.2d 594 (2004). The appellate court will reverse only when there is clear error. *Id.*

Appellant was legally arrested pursuant to a valid warrant. The record indicates a warrant for receiving stolen goods had been issued prior to appellant's arrest and that the arresting officer, while possibly not in possession of the warrant itself, was acting pursuant to the warrant when the arrest was made. Consequently, the trial court did not err by refusing the motion to suppress on this ground. *See* State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995), *cert. denied*, 517 U.S. 1248 (1996) (arrest of defendant properly made and clothes seized from defendant at time of arrest could be admitted in murder prosecution, where warrant had been issued prior to arrest

and arresting officer was acting pursuant to warrant, even though warrant not physically in officer's possession); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991), *cert. denied*, 502 U.S. 1103 (1992) (arresting officer who was aware but not in possession of valid arrest warrants was authorized to enter motel room to make arrest).

Further, appellant argues the motion to suppress should have been granted because his wife did not consent to the search of her home. This argument is without merit because appellant's wife specifically testified she gave the officers permission to enter and search the home. There is no evidence to support appellant's assertion. *Cf.* Steagald v. United States, 451 U.S. 204 (1981) (warrantless searches of a home are impermissible absent consent or exigent circumstances).

Additionally, the search of appellant's pants and the seizure of those pants and the watch were permissible as a search incident to arrest. After being arrested, appellant requested that he be allowed to put on his pants. However, before being given the pants, the officer determined the pants should be searched for "safety purposes." This search was reasonable. *See* Chimel v. California, 395 U.S. 752 (1969) (ample justification for a search of arrestee's person and area within his immediate control, that is, the area from within which he might gain possession of a weapon or destructible evidence); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379, *cert. denied*, 409 U.S. 1077 (1972) (same). *See also* State v. Brown, 289 S.C. 581, 347 S.E.2d 882 (1986) (search may be conducted incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest).

Accordingly, the trial court did not err by refusing to suppress the evidence as requested by appellant. *See* State v. Missouri, *supra* (appellate court must affirm trial court's ruling if there is *any* evidence to support the ruling).

PROPORTIONALITY REVIEW

Under State law, S.C. Code Ann. § 16-3-25(C)(3) (2003) requires us to determine in a death case "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." There is no requirement the sentence be proportional to any particular case; however, death sentences have been imposed in similar cases. *See* State v. Binney, 362 S.C. 353, 608 S.E.2d 418, *cert. denied*, 2005 WL 1333888 (2005); State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689, *cert. denied,* 519 U.S. 972 (1996). Accordingly, appellant's sentence is not disproportionate under State law.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richard N. Kennedy, Respondent,

v.

Scott Edward Griffin and Dick Simon Trucking, Inc., Petitioners.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal from Cherokee County
Gary E. Clary, Circuit Court Judge

Opinion No. 26072
Heard October 18, 2005 - Filed November 28, 2005

DISMISSED

William S. Brown, of Nelson Mullins Riley & Scarborough, L.L.P., of Greenville, for petitioners.

Kenneth L. Holland, of Gaffney, for respondent.

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals' decision in Kennedy v. Griffin, 358 S.C. 122, 595

S.E.2d 248 (Ct. App. 2004). After careful consideration, we dismiss the writ as improvidently granted.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James B. Vaught, Individually, and as Attorney in Fact and/or Trustee for J.M. Vaught, Jr., the Heirs of Thomas B. Vaught, the Heirs of Jean V. Powell, Carol V. Lewis, Harry R. Vaught, Vina V. Floyd, and W.M. Vaught, Jr., Appellants,

v.

A.O. Hardee & Sons, Inc., Respondent.

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

Opinion No. 26073
Heard October 5, 2005 - Filed November 28, 2005

REVERSED AND REMANDED

Robert N. Hill, of Newberry; and Richard M. Lovelace, Jr., of Conway, both for Appellants.

Stephen E. Darling and Elizabeth F. Bailey, both of Haynesworth Sinkler Boyd, P.A., of Charleston, for Respondent.

JUSTICE BURNETT: James B. Vaught, individually and as trustee for several relatives (Appellants), raises the issue of whether the trial court erred in excluding evidence of replacement costs as part of the measure of damages for destroyed noncommercial trees. We certified this case for review from the Court of Appeals pursuant to Rule 204(b), SCACR, and conclude the trial court erred in excluding evidence of the measure of damages. We reverse and remand for a new trial.

FACTUAL/PROCEDURAL BACKGROUND

Appellants own a 754-acre tract of land in Horry County which they use primarily for hunting and family picnics. A few days prior to May 28, 2002, employees of A.O. Hardee & Sons, Inc. (Respondent) burned debris for construction of Highway 31 on land adjacent to Appellants' property. On May 28, windy conditions reignited a smoldering pile of debris, and embers were blown into neighboring woods. The resulting fire burned approximately 21 acres of Appellants' tract, destroying an historic tar kiln and more than 1,200 trees, including 116 live oaks.

On January 13, 2003, Appellants filed this lawsuit alleging Respondent negligently ignited a fire on real estate adjacent to their property and allowed that fire to escape onto the Appellants' property. Respondent's Motion in Limine requesting the trial court exclude testimony from Travis Cork, Appellants' forestry consultant, was denied, and the trial judge ruled the proper measure of damages was the difference between the value of the property before and after the fire. The trial judge determined the destroyed trees were relevant only to the extent their destruction diminished the overall value of the land.

Appellant James Vaught testified the destruction of the tar kiln and trees devalued the land by approximately $500,000. Further, the value of the burned merchantable timber was approximately $25,000, although the property had never been used for commercial

purposes. Cork testified he had determined the species, number, and size of the dead trees. He testified the destroyed trees had little or no value as timber. He proferred testimony that Appellants could be made whole by replacement of the destroyed trees. Eli Adams, a nursery owner, was qualified as an expert and proferred testimony that the cost of replacing the trees was approximately $658,000, including $66,000 to replace the destroyed live oaks.

James Ryan, a forester and Respondent's witness, testified the merchantable value of the destroyed trees was $1,070.25. Ryan further testified that if the destroyed live oaks naturally resprouted, they would grow to the size of the destroyed trees in 25 to 40 years.

The trial judge charged that shade trees and certain other type trees had value only by reason of their connection to the land, and that the fair measure of damages to such property "is the injury to the premises as a whole, which would be fixed by ascertaining the difference between the value of the entire premises before and after the fire . . . . [T]he difference in value rule of land before and after the fire applies to undeveloped growing timber, shade and ornamental trees."

The jury returned a verdict for Appellants in the amount of $20,000. Appellants moved for a new trial absolute or for a new trial nisi additur, which were both denied. This appeal followed.

ISSUE

Did the trial court err by prohibiting Appellants from introducing evidence of replacement costs of destroyed noncommercial trees on property used for recreational purposes?

STANDARD OF REVIEW

In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a

review of the record discloses there is no evidence which reasonably supports the jury's findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). The admission of evidence is within the sound discretion of the trial judge, and absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal. Hofer v. St. Clair, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005); Carlyle v. Tuomey Hosp., 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991). To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.*, there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence. Conner, 363 S.C. at 467, 611 S.E.2d at 908; Hanahan v. Simpson, 326 S.C. 140, 156, 485 S.E.2d 903, 911 (1997).

LAW/ANALYSIS

Appellants argue the trial court erred in ruling the proper measure of damages for destroyed noncommercial trees on property used for recreational purposes was the value of the property before and after the fire and the trial court erred in excluding evidence of replacement costs of the destroyed trees. We agree.

Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was in prior to the damages received insofar as this is monetarily possible. See Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000). The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred. *Id.* at 378, 529 S.E.2d at 533.

In Hall v. Seaboard Airline Railway Co., 126 S.C. 330,

332-33, 119 S.E. 910, 910-11 (1923), the Court identified two classes of property damaged by fire:

> (1) That which is essentially connected with the premises and has value only by reason of that connection, such as fruit trees, ornamental and shade trees and shrubs, the young growth of a forest, hedge, grass, and the like; (2) that which has a value independent and separate from the premises as such, such as buildings, fences, merchantable timber, corded or cut wood, and the like, the loss or damage to which is capable of practically exact estimation.

At issue in the present case is property described in the first category. Two general rules of damages have been applied to this type of property: diminution in value and restoration costs. See 22 Am.Jur.2d Damages § 276 (2003) (noting courts generally use the diminution in value rule for damage to shade or ornamental trees but under certain facts and circumstances replacement costs may be the proper measure of damages).[1] To fully compensate the injured party, a court may allow the jury to consider more than one measure of damages, but damages may be awarded under only one theory. *Id.*

The Restatement (Second) Torts § 929 (1979) supports restoration costs as the proper measure of damages for injury to real property in certain circumstances. Section 929 provides in part,

> (1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total

[1] See Thatcher v. Lane Construction Co., 254 N.E.2d 703, 707 (Ohio Ct. App. 1970) ("The general rule that the measure of damages for injury to real estate shall not exceed the difference in the market value of the entire tract immediately before and immediately after the injury is not an arbitrary or exact formula to be applied in every case without regard to whether its application would compensate the injured party fully for losses which are the proximate result of the wrongdoer's conduct.").

> destruction of value, the damages include compensation for (a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred . . . .

Comment (b) to § 929 further states,

> Even in the absence of value arising from personal use, the reasonable cost of replacing the land in its original position is ordinarily allowable as the measure of recovery . . . . If, however, the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused by the trespass, unless there is a reason personal to the owner for restoring the original condition, damages are measured only by the difference between the value of the land before and after the harm.

Several courts cite with approval § 929 of the Restatement. See, *e.g.*, Osborne v. Hurst, 947 P.2d 1356 (Alaska 1997); Dixon v. City of Phoenix, 845 P.2d 1107 (Ariz. Ct. App. 1993); Worthington v. Roberts, 803 S.W.2d 906 (Ark. 1991); Heninger v. Dunn, 162 Cal.Rptr. 104 (Cal. Ct. App. 1980); Klingshirn v. McNeal, 520 S.E.2d 761 (Ga. App. 1999); Leavitt v. Continental Tel. Co. of Maine, 559 A.2d 786 (Me. 1989); Rector, Wardens and Vestry of St. Christopher's Episcopal Church v. C.S. McCrossan, Inc., 235 N.W.2d 609 (Minn. 1975); Keitges v. VanDermeulen, 483 N.W.2d 137 (Neb. 1992); Denoyer v. Lamb, 490 N.E.2d 615 (Ohio Ct. App. 1984); Gross v. Jackson Township, 476 A.2d 974 (Pa. Super. Ct. 1984); Threlfall v. Town of Muscoda, 527 N.W.2d 367 (Wis. Ct .App. 1994). See also Kristine Cordier Karnezis, Annotation, Measure of Damages for Injury to or Destruction of Shade or Ornamental Tree or Shrub, 95 A.L.R.3d 508 § 4 (1979 & Supp. 2005) (discussing cases that allow replacement costs under certain circumstances).

In Keitges, the Nebraska Supreme Court was presented

with the novel question of "whether a plaintiff is entitled to recover the cost of restoring trees and vegetation on land which he holds for residential or recreational purposes when a portion of a natural woods is destroyed." 483 N.W.2d at 140. The Nebraska court concluded Restatement (Second) Torts § 929 was consistent with a prior decision which stated that "the principle underlying allowance of damages is to place the injured party in the same position, so far as money can do it, as he would have been had there been no injury or breach of duty, that is, to compensate him for the injury actually sustained." *Id.* at 142 (quoting "L" Investments, Ltd. v. Lynch, 322 N.W.2d 651, 656 (1982)). The Nebraska court further asserted:

> One person's unsightly jungle may be another person's enchanted forest; certainly the owner of such land should be allowed to enjoy it free from a trespasser's bulldozer. Indeed, a trespasser should not be allowed, with impunity, to negligently or willfully wreak havoc on a landowner's natural woods, and the landowner's attempted recovery for such injury should not be entirely frustrated by the fact that the market does not reflect his personal loss.

Id. at 143. The court held that a landowner who intends to use land for recreational or residential purposes, may recover restoration costs, which may not exceed the market value of the property before the injury, when trees and other growth are destroyed.

In Osborne, the plaintiffs sought to recover for damaged trees destroyed by a fire set by defendant. The trial court granted summary judgment on the issue of the measure of damages for defendant and held that restoration costs were not the proper measure of damages. The Supreme Court of Alaska reversed the ruling and remanded the case to determine damages in accordance with Restatement (Second) Torts § 929. The court had previously recognized that "'a plaintiff who has been injured by an invasion of his land not totally destroying its value may elect as damages either the loss in value' or reasonable restoration costs." 947 P.2d at 1358 (citing G & A Contractors, Inc. v. Alaska Greenhouses, Inc., 517 P.2d 1379,

1385 (Alaska 1974)). The court also noted its prior holding that § 929 should be used to determine whether restoration costs are appropriate. *Id.* at 1359. Further, the court held that if the jury found the plaintiffs had a personal reason for restoring the property, then plaintiffs could elect restoration costs as the proper measure of damages.

In Rector, the plaintiff sought damages for defendant's negligent suffocation of roots of shade trees on plaintiff's property. That court noted:

> Since [1912], courts throughout the country have placed a greater emphasis on the rights of a property owner to enjoy the aesthetic value of trees and shrubbery, notwithstanding the fact they may have little commercial value or that their destruction may, indeed, even enhance the market value of the property.

235 N.W.2d at 610. The Minnesota Supreme Court departed from the traditional measure of damages which was diminution in value of the land and held "where trees and shrubbery have aesthetic value to the owner as ornamental and shade trees or for purposes of screening sound and providing privacy, replacement cost may be considered to the extent that the cost is reasonable and practical." *Id.* at 611. The court held the jury could consider restoration costs and the value of the land before and after the damage. But see Baillon v. Carl Bolander & Sons Co., 235 N.W.2d 613, 615 (Minn. S.Ct. 1975) (refusing to apply the replacement cost rule when destroyed trees were "for the most part, quite small, ill-formed, and not particularly desirable as shade trees or ornamental trees but did serve to prevent erosion and act as a sound barrier").

The reasoning expressed in the Restatement (Second) Torts § 929, Keitges, Osborne, and Rector is persuasive on the measure of damages for damaged/destroyed noncommercial trees, shrubs, and related vegetation. We adopt the following as the measure of damages: The general measure of damages for damaged/destroyed noncommercial trees, shrubs, and related vegetation is the difference in

the value of the entire parcel of land – damaged and undamaged portions – immediately before and after the loss. When the property is restorable to its former condition at a cost less than the diminution in value, then the cost of restoration that has been or may be reasonably incurred or the diminution in value may be the proper measure of damages. When the cost of restoration exceeds the diminution in value, then the greater cost of restoration will be allowed when the landowner has a personal reason relating to the land for restoring the land to its original condition and when the cost of restoration is reasonable in relation to the damage inflicted. However, the landowner may not recover restoration costs which exceed the market value of the entire parcel prior to the loss. See 22 Am.Jur.2d Damages § 256. Further, the jury may consider factors in determining the diminution in value, including but not limited to: the types and sizes of the damaged or destroyed trees and shrubs, the purpose for which the destroyed or damaged trees and shrubs were grown or maintained, the reasonable and practicable replacement costs, and the use of the particular land, including any aesthetic value to the landowners of such trees and shrubs. See Harper v. Morris, 365 S.E.2d 176, 177-78 (N.C. Ct. App. 1988); 75 Am.Jur.2d Damages § 136.

The trial judge abused his discretion by excluding evidence of replacement costs of the destroyed noncommercial trees. There is a reasonable probability the jury's verdict was influenced by the excluded evidence because the jury was not permitted to hear and consider all relevant evidence relating to damages. See Conner, 363 S.C. at 467, 611 S.E.2d at 908.

CONCLUSION

We conclude the trial court erred in excluding evidence of replacement costs of the destroyed noncommercial trees and there is a reasonable probability the excluded evidence influenced the jury's verdict. We decline to address Respondent's additional sustaining ground. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (the Court in its discretion may address an additional

sustaining ground). We reverse and remand for a new trial in accordance with this opinion.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Donald Loren Smith, Respondent.

Opinion No. 26074
Submitted October 18, 2005 - Filed December 5, 2005

INDEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Michael J. Virzi, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Charles J. Hodge, of Spartanburg, for respondent.

PER CURIAM: On May 20, 2005, respondent and the Office of Disciplinary Counsel (ODC) 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 of not less than one but no more than two years or an indefinite suspension. We accept the agreement and indefinitely suspend respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

FACTS

Previously, the Court accepted respondent and ODC's October 10, 2001, Agreement for Discipline by Consent and suspended

respondent from the practice of law for six months. In the Matter of Smith, 347 S.C. 437, 556 S.E.2d 388 (2001). In that agreement, respondent admitted he was a recreational user of cocaine. He warranted he would not willfully use or possess cocaine or any illegal drug in the future.

In the current agreement, respondent admits possessing and using cocaine on several occasions since the October 10, 2001 Agreement for Discipline by Consent. He admits he is a cocaine addict. Respondent agrees that he will neither willfully use or possess cocaine or any other illegal drug in the future nor willfully use or possess any legal drug in a manner contrary to the law. Respondent agrees to submit to random drug testing.

Respondent further represents and agrees:

> that he has entered a drug rehabilitation program and will strictly comply with the directives of such program; that he will undergo random drug testing for a period of one year prior to seeking readmission to the practice of law; and that he will continue voluntary random drug testing for a period of one year after readmission. Any application for readmission will be accompanied by a certificate of completion of a drug rehabilitation program.

Agreement ¶ 3.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects) and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is

prejudicial to the administration of justice).[1] In addition, respondent agrees his misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and indefinitely suspend respondent from the practice of law. Within fifteen days of the date of this opinion, respondent shall surrender his certificate of admission to practice law in this state to the Clerk of Court and shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

INDEFINITE SUSPENSION.

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

---

[1] Respondent's misconduct occurred before the effective date of the Amendments to the Rules of Professional Conduct. See Court Order dated June 20, 2005. The Rules cited in this opinion are those which were in effect at the time of respondent's misconduct.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William T. Dunn, Jr., Respondent.

Opinion No. 26075
Submitted October 18, 2005 - Filed December 5, 2005

INDEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Susan M. Johnston, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

O.W. Bannister, Jr., of Greenville, 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 an indefinite suspension. We accept the agreement and indefinitely suspend respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

FACTS

On two separate occasions, respondent engaged the services of a prostitute. On those occasions, he consumed illegal drugs. Respondent was arrested and later pled guilty to possession of marijuana and possession of methamphetamines.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); and Rule 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving moral turpitude).[1] In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate the Rules of Professional Conduct), Rule 7(a)(4) (it shall be a ground for discipline for a lawyer to be convicted of a crime of moral turpitude or a serious crime), Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law), and Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate the oath of office taken upon admission to practice law in this state).

CONCLUSION

We accept the Agreement for Discipline by Consent and indefinitely suspend respondent from the practice of law. Respondent's request that the suspension be made retroactive to the date of his interim suspension is denied.[2] Within fifteen days of the date of this

---

[1] Respondent's misconduct occurred before the effective date of the Amendments to the Rules of Professional Conduct. See Court Order dated June 20, 2005. The Rules cited in this opinion are those which were in effect at the time of respondent's misconduct.

[2] On February 21, 2003, respondent was placed on interim suspension. In the Matter of Dunn, 364 S.C. 292, 613 S.E.2d753 (2003).

opinion, respondent shall surrender his certificate of admission to practice law in this state to the Clerk of Court and shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

INDEFINITE SUSPENSION.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John Evander White, Jr., Respondent.

Opinion No. 26076
Submitted November 1, 2005 - Filed December 5, 2005

PUBLIC REPRIMAND

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

John P. Freeman, of Columbia, for respondent.

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

FACTS

Matter I

During the late 1998, Client A retained respondent to handle several real estate transactions. The majority of these transactions involved rental properties owned by Client A, Client A's

company, or Client A's mother. The properties were managed by a third party (Manager). Respondent was made aware of the arrangement between Client A and Manager in which Client A would transfer title to the properties to Manager after Manager renovated the properties and secured the necessary financing. From May through December 1998, respondent recorded approximately twenty-one deeds transferring property from Client A to Manager.

In or about October 1998, respondent conducted a closing on three lots in Greenville County. Client A was not present at the closing. Manager presented respondent with the deeds conveying the properties to Manager. The deeds were purportedly signed by Client A on his own behalf and on behalf of his mother as attorney-in-fact. According to respondent, Manager informed him that Client A could not attend the closing and had asked Manager to present the deeds to respondent for closing. The deeds were signed, notarized, and appeared in recordable form. Respondent issued checks from his trust account for the proceeds of the loan payable to Manager and either Client A or Client A's mother as co-payees of Manager. The checks were delivered to Manager. Prior to the closing and the issuance of the checks, respondent did not contact Client A or his mother to verify the representations made by Manager, to confirm the validity of the signatures on the deeds, or to obtain permission to release the checks to Manager.

Subsequent to the transaction, respondent learned that Client A's signatures had been forged and that the checks had been negotiated without Client A's consent. Respondent admits he should not have allowed himself to be duped by Manager. Respondent has reached a financial settlement with Client A.

Respondent admits he failed to promptly respond to the requests for information regarding this matter.

Matter II

Respondent's firm was retained by First Palmetto Savings Bank (Bank) to act as the closing attorney for various real estate transactions. As of October 24, 2002, respondent's firm had failed to supply Bank with the recorded mortgages and final title policies for ten closings. Most of these documents were approximately six months overdue; one closing occurred more than ten months earlier. Bank's repeated attempts to communicate with respondent's firm through written correspondence and telephone calls met with no success.

Eventually, the documents were provided to Bank. Respondent regrets that the documents were not furnished in a timelier manner. Although the transactions occurred in an office location where respondent did not work, he admits that certain internal controls in the office were ineffective. In addition, respondent admits his supervisory responsibility for the office was deficient.

Matter III

Respondent's firm was retained by Bank to act as the closing attorney for a real estate transaction which occurred on March 22, 2002. As of April 21, 2003, respondent's firm had failed to provide Bank with the recorded mortgage and final title policy for the transaction. Bank's repeated attempts to communicate with respondent's firm through written correspondence and telephone calls met without success.

The documents were eventually provided to Bank. Respondent regrets that the documents were not provided to Bank in a timelier manner. Although this transaction occurred in an office location where respondent did not work (and different from the office in Matter II), respondent admits that certain internal controls in the office were ineffective. In addition, respondent admits that his supervisory responsibility for the conduct of the office was deficient.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 5.1 (partner in a law firm shall make reasonable efforts to ensure firm has in effect measures giving reasonable assurance that lawyers in firm conform to Rules of Professional Conduct); Rule 8.1 (lawyer shall not knowingly fail to respond to a lawful demand from a disciplinary authority); and Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct).[1] Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

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

PUBLIC REPRIMAND.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur. MOORE, J., not participating.

---

[1] Respondent's misconduct occurred before the effective date of the Amendments to the Rules of Professional Conduct. See Court Order dated June 20, 2005. The Rules cited in this opinion are those which were in effect at the time of respondent's misconduct.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James T. McBratney, Jr., Respondent.

Opinion No. 26077
Submitted November 1, 2005 - Filed December 5, 2005

DEFINITE SUSPENSION

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

J. Steedley Bogan, of 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 (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a public reprimand or a definite suspension not to exceed thirty (30) days. See Rule 7(b), RLDE, Rule 413, SCACR. We accept the Agreement and definitely suspend respondent from the practice of law in this state for a thirty (30) day period. The facts, as set forth in the Agreement, are as follows.

FACTS

Matter I

In June 1999, Client A retained respondent. Client A had sustained injuries in an automobile accident in July 1998. Although respondent was initially active in handling Client A's case, respondent ceased any work on the matter in October 2000.

During the same period of time, respondent had been retained to represent Client A in regard to a hit and run accident which had occurred in June 1999. Respondent received several telephone calls and written correspondence from Client A's insurance company requesting that respondent provide the company with necessary information to process the claim. Respondent failed to respond to these requests, even after the insurance company informed respondent that it would close its file if respondent did not supply the requested information. Client A was unaware of respondent's lack of diligence in this matter.

In November 2002, respondent notified Client A that he needed to pick up his files for both accident cases. Respondent allowed the statue of limitations to expire on the 1999 case and relatively little progress had been made on the 1998 case since respondent's representation began.

Matter II

In April 2000, Client B retained respondent to handle a claim a false arrest against a finance company. Respondent signed a written contingency fee agreement on April 13, 2000. Respondent represents that, shortly after signing the retainer agreement, he orally informed Client B that he was withdrawing from representation because Client B's case was not viable. There is no written documentation memorializing respondent's withdrawal.

Client B continued to periodically contact respondent seeking an update on his case. The only written evidence of the termination of the attorney/client relationship is a release signed by Client B in June 2003 which states "I, [Client B], acknowledge receipt of my entire file regarding [Defendant A and Defendant B] and therefore do not hold McBratney Law Firm responsible for this matter." This release was signed well after the expiration of the statute of limitations on Client B's case. Respondent is unable to demonstrate that he appropriately advised Client B of the termination of the representation in a manner that would protect Client B's rights and give reasonable notice to Client B to allow him the opportunity to retain subsequent counsel.

Matter III

In or about January 2001, Client C filed an application with the Resolution of Fee Disputes Board (the Board) requesting a refund of the $20,000 retainer paid to respondent for representation in a criminal case. On July 22, 2002, a Hearing Panel of the Board issued a finding and opinion recommending respondent refund $10,000 of the fee to the client. Respondent appealed this decision to the circuit court.

On appeal of the Board's judgment, the circuit court issued an order dated February 3, 2003, upholding the Board's decision and compelling respondent to tender payment within thirty (30) days of the date of the order. Respondent failed to comply with the circuit court's order.

On March 3, 2003, Client C initiated supplementary proceedings seeking compensation. On June 9, 2003, respondent forwarded a payment in the amount of $5,000 to Client C. On July 1, 2003, respondent submitted final payment of $6,167 to Client C to conclude the matter.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep a client reasonably informed about the status of a matter); Rule 1.5 (lawyer's fee shall be reasonable); Rule 1.15 (lawyer shall promptly deliver funds to which client is entitled to receive); Rule 1.16 (upon termination of representation, lawyer shall protect client's interests, including giving reasonable notice to client to allow for time to retain other counsel, surrendering papers and property which client is entitled to receive, and refunding any advance payment of fee which had not been earned); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of the client); and Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct).[1] Respondent further admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(10) (it shall be ground for discipline for lawyer to willfully fail to comply with a final decision of the Resolution of Fee Dispute Board).

CONCLUSION

We accept the Agreement and definitely suspend respondent from the practice of law for a thirty (30) day period.[2] Within fifteen days of the date of this opinion, respondent shall file an

---

[1] Respondent's misconduct occurred before the effective date of the Amendments to the Rules of Professional Conduct. See Court Order dated June 20, 2005. The Rules cited in this opinion are those which were in effect at the time of respondent's misconduct.

[2] ODC's request to appoint an attorney to protect respondent's clients' interests is denied.

affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur. MOORE, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Patricia L. Edge, Miles Green, and all others similarly situated,	Appellants/Respondents,
v.	
State Farm Mutual Automobile Insurance Company and all others similarly situated, and South Carolina Reinsurance Facility,	Defendants,
of whom South Carolina Reinsurance Facility is the,	Respondent,
and State Farm Mutual Automobile Insurance Company is the,	Respondent/Appellant.

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 26078
Heard June 14, 2005 - Filed December 5, 2005

AFFIRMED IN PART AND REVERSED IN PART

A. Camden Lewis and Peter D. Protopapas, both of Lewis, Babcock & Hawkins, L.L.P., of Columbia; Michael G.

Sullivan, of Michael G. Sullivan, P.C., of Columbia; and Richard A. Harpootlian, of Richard A. Harpootlian, P.A., Columbia, for Appellants/Respondents.

Thomas C. Salane, of Turner, Padget, Graham & Laney, P.A., of Columbia, for Respondent South Carolina Reinsurance Facility.

James C. Gray, Jr., B. Rush Smith, III, C. Mitchell Brown, and William C. Wood, Jr., all of Nelson, Mullins, Riley & Scarborough, of Columbia, for Respondent/Appellant State Farm Mutual Automobile Insurance Company.

JUSTICE WALLER: This is an appeal from the dismissal of several causes of action against Respondent/Appellant State Farm Mutual Automobile Insurance Company (State Farm) and all causes of action against Respondent South Carolina Reinsurance Facility (the Facility). State Farm has cross-appealed the partial denial of its motion to dismiss. We affirm in part and reverse in part.

FACTS

In 1996, State Farm insured the plaintiffs, Patricia Edge and Miles Green. Edge and Green's daughter, Shelly Green, were involved in separate automobile accidents. Edge and Shelly were not cited and were found not to be at-fault by the police investigating the accidents. The other driver in Edge's accident, Ann Shull, forfeited her bond and was adjudicated guilty of running a red light in October 1996. Notwithstanding this, State Farm, determined Edge was at-fault. In Shelly's accident, the other driver, Chris Whitner, was found guilty of two traffic violations while Shelly was not charged with any violations. However, State Farm determined Shelly was at-fault.

After the accident, the plaintiffs' policies were ceded to the Facility.[1] As a result of State Farm's fault determination of the accidents, two merit ratings points were assigned to each plaintiff and their premiums increased. Edge's six-month premium beginning in October 1997 increased from $425.77 to $1,088.83, or approximately $660. Green's six-month premium increased from $386 to $1,700, or approximately $1,314.

Instead of paying the higher premium, Edge applied for insurance with Horace Mann Insurance. Horace Mann notified her that State Farm had reported the accident to the Comprehensive Underwriting Exchange and she would be assessed two surcharge points and her premiums would be substantially higher. Edge paid the increased premium for the Horace Mann policy for four days. Horace Mann later removed the surcharge, refunded the increase, and lowered the premium rate after Edge provided documentation that Shull had been convicted in connection with the accident. Green was billed for the higher premiums but subsequently the merit points were removed, and he never actually paid any increased premium.

The plaintiffs brought this action seeking a declaratory judgment and damages for breach of contract, breach of statute, and conspiracy against State Farm and the Facility. The circuit court denied State Farm's 12(b)(8) motion; granted the Facility's motion to dismiss; and in two separate orders, denied in part and granted in part State Farm's 12 (b)(1) and (6) motion dismissing several causes of action.[2]

Basically, the issues in this case center around two underlying questions: 1) whether State Farm can unilaterally determine whether a driver

---

[1]The "Facility is an unincorporated, nonprofit entity created by statute in 1974 to provide high-risk drivers with automobile insurance not available through the voluntary market." Garris v. Governing Bd. of S.C. Reinsurance Facility, 333 S.C. 432, 437, 511 S.E.2d 48, 50 n.1 (1998). The Facility imposes recoupment charges on all drivers to recover its losses. The amount of the surcharge is based upon the individual's driving record. On March 1, 1999, the Facility stopped accepting new policies and will cease to operate in 2006. Id.

[2]We note this action is being brought as a class action, but it has not yet been certified as such.

is at-fault; and 2) whether State Farm's and the Facility's use of the facility rate was authorized and its calculation proper.

Background

Base and Objective Standards Rates

In 1987, the General Assembly enacted legislation which provided for a two-tier rating system for automobile insurers to use which included a base rate and an objective standards rate.[3] The objective standards rate was 25% higher than the base rate. See S.C. Code Ann. § 38-73-455 (repealed by Act No. 154, § 31 eff. Mar. 1, 1999). An insurer's base rate was to be charged to all drivers unless the driver met one or more of the criteria or conditions set forth in S.C. Code Ann. § 38-73-625 (repealed by 1997 Act No. 154, § 31, eff. Mar. 1, 1999). One of the conditions was whether the driver has been at-fault in a prior accident. Section 38-73-455 listed several exceptions to this increase in premiums – one of which was when the other driver involved in an accident was convicted of a moving traffic violation. S.C. Code Ann. § 38-73-455(d). A driver meeting one of the objective standards of § 38-73-625 and not falling within an exception in § 38-73-455 was to be charged the objective standards rate. Furthermore, both the base and objective standards rates were subject to additional surcharges under the Uniform Merit Rating Plan.

Uniform Merit Rating Plan

The Uniform Merit Rating Plan was established in 1976 by regulation to create a uniform system of automobile insurance discounts and surcharges based primarily on a driver's record. S.C. Code Reg. 69-13.1 (repealed by State Reg. Vol. 25, Issue No. 3, eff. Mar. 23, 2001). The regulation applied to all insurers writing automobile policies in South Carolina. Surcharge points were assessed based upon moving traffic violation convictions, accidents, and other indicators for the 36-month period prior to the inception

[3]In 1997, the General Assembly overhauled the automobile insurance system in South Carolina, and many of the statutes involved in this case were repealed - most effective March 1, 1999.

of the policy. If there were no surcharge points, the driver was entitled to receive a 20% safe-driver's discount. One surcharge point, and the driver lost the safe driver discount. Two or more surcharge points increased the premium. If the policy was ceded (or reinsured) to the Facility and without a safe driver discount, the facility rate applied.

There were also recoupment fees assessed against every policyholder which allowed the Facility to recoup its operating losses. The recoupment fee is calculated based upon the number of surcharge points the driver has under the Merit Rating Plan. See infra n.1.

The Facility Rate

S.C. Code Ann. 38-73-1420 (2002) provides for the calculation of the facility rate. The facility rate is calculated by the Facility using two numbers: the expense and pure loss components. The pure loss component is derived from the pure loss component which was filed by the rating organization with the most subscribers or members. The expense component is derived from a filing made by the Facility based upon the expense data of its designated carriers. After the rating organization with the largest number of members files its pure loss component, and it has been approved, then the Facility files its expense component, the actual incurred expenses of the Facility. Once the expense component is approved by the Director of the Insurance Department, the two are added together to form the facility rate to be used by all designated carriers.

ISSUES

1) Did the circuit court err in granting the Facility's motion to dismiss?

2) Did the circuit court err in denying in part and granting in part State Farm's motion to dismiss?

DISCUSSION

Initially, we address the plaintiffs' argument that State Farm's cross-appeal should be dismissed because a denial of a motion to dismiss is not immediately appealable. While State Farm concedes this point, it contends the Court has jurisdiction over its cross-appeal because of judicial economy. We agree.

An order that is not directly appealable may be considered if there is an appealable issue before the court. Briggs v. Richardson, 273 S.C. 376, 256 S.E.2d 544 (1979); Cox v. Woodmen of World Ins. Co., 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001). Here, an order in this case which is appealable is before the Court and, in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy), we will consider State Farm's cross-appeal.

In addressing the issues raised in this case, a threshold decision we must make is whether to adopt the filed rate doctrine. The filed rate doctrine was originally a federal preemption rule which provided that rates duly adopted by a regulatory agency are not subject to collateral attack in court. See Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354 (1988). See also Hamm v. Pub. Serv. Comm'n, 310 S.C. 13, 17, 425 S.E.2d 28, 30 (1993). "The filed rate doctrine stands for the proposition that because an administrative agency is vested with the authority to determine what rate is just and reasonable, courts should not adjudicate what a reasonable rate might be in a collateral lawsuit." Amundson & Assocs. Art Studio v. Nat'l Council on Comp. Ins., 988 P.2d 1208, 1213 (Kan. Ct. App. 1999). Many courts have held the rationale underlying the federal filed rate doctrine applies equally to regulations by state agencies. See e.g. Wegoland, Ltd. v. NYNEX Corp., 27 F.3d 17, 20 (2nd Cir. 1994). The filed rate doctrine bars only collateral attacks brought by private parties and not direct reviews in ratemaking cases or actions brought by a governmental agency. Commonwealth v. Anthem Ins. Cos., Inc., 8 S.W.3d 48, 53-4 (Ky. Ct. App. 1999).

Most courts have held the doctrine bars all actions brought by a private party. These courts reason that making a declaratory judgment or

establishing and enforcing an injunction would inevitably require the court to determine the proper rate "to the same, if not greater, extent as would an attempt to fix damages based upon previously filed rates." Hilling v. Northern States Power Co., 1990 WL 597044, *3 (D.Minn. 1990). See also H.J., Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 490 (8th Cir. 1992)(holding filed rate doctrine to be arguably inapplicable if the claim does not attack the amount of the rate filed, and does not require the court to "second guess" the rate-making agency); Gulf States Utils. Co. v. Alabama Power Co., 824 F.2d 1465, 1472 (5th Cir. 1987)(holding cause of action for fraudulent inducement is not barred by filed rate doctrine if it "would not interfere with the federal agency's rate-making powers"); Litton Sys., Inc. v. AT&T, 700 F.2d 785, 820 (2d Cir. 1983)(holding filed rate doctrine is inapplicable where court is not called upon to even indirectly determine what reasonable rate would have been); Wegoland, Ltd. v. NYNEX Corp., 806 F.Supp. 1112, 1116 (S.D.N.Y. 1992) (holding filed rate doctrine is "arguably inapplicable" in cases where courts are not asked to determine what reasonable rate should be); City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1179 (E.D. Mo. 1982)(holding filed rate doctrine does not bar award of antitrust damages where plaintiffs did not challenge reasonableness of rates, but rather their anti-competitive effect).

Some jurisdictions have recognized that certain circumstances preclude the application of the filed rate doctrine. See e.g. Am. Bankers Ins. Co. v. Alexander, 818 So.2d 1073 (Miss. 2001)(holding claims for breach of fiduciary duty, breach of implied covenants of good faith and fair dealing, and fraud were not barred by filed rate doctrine because these causes of action are founded in the common law).

Additionally, some jurisdictions have specifically applied the filed rate doctrine to ratemaking in the insurance industry. See e.g. Horwitz v. Bankers Life & Cas. Co., 745 N.E.2d 591 (Ill. App. 2001); . Amundson, 988 P.2d 1208; Am. Bankers' Ins., 819 So.2d 1196; Byan v. Prudential Ins. Co. of Am., 662 N.Y.S.2d 44 (N.Y. 1997); North Carolina Steel, Inc. v. Nat'l Council on Comp. Ins., 496 S.E.2d 369 (N.C. 1998); Prentice v. Title Ins. Co. of Minn., 500 N.W.2d 658 (Wis. 1993). However, at least one other state has refused to expand the filed rate doctrine to insurance situations. See e.g.

Mitchell v. Chicago Title Ins. Co., 2004 WL 2137815, *2 (Minn.Dist.Ct. 2004) (specifically declining to expand the filed rate doctrine to include the insurance industry).

Courts which have adopted the filed rate doctrine have given several reasons for doing so, including: (1) preserving the agency's authority to determine the reasonableness of rates; (2) recognizing the agency's expertise with regard to that industry, whereas courts do not; (3) allowing an action would undermine the regulatory scheme because the statute allows for enforcement by the appropriate state officers; and (4) allowing an action may result in different prices being paid by victorious plaintiffs than non-suing ratepayers, which violates the statutory scheme of uniform rates. See e.g. Wegoland Ltd., 27 F.3d 17 at 21-22.

We find the policy reasons behind the filed rate doctrine persuasive. The filed rate doctrine preserves the stability, uniformity, and finality inherent in rates filed with the regulatory agency and what has been determined to be a reasonable rate by that agency. Cullum v. Seagull Mid-South, Inc., 907 S.W.2d 741, 745 (Ark. 1995). Accordingly, we hereby adopt the filed rate doctrine and, furthermore, we find it applicable in the insurance industry. Although not applicable in the present case, we also recognize there are several exceptions as set out above which may prevent its application.

We now turn to the causes of action alleged in the present case. In the 1st cause of action, which applies only to State Farm, the plaintiffs seek a declaratory judgment that insurers must determine the disposition of a traffic citation to the other driver before assigning their insureds a chargeable accident. This cause of action is not the subject of any issue on appeal and thus remains viable.[4]

[4]We note the trial judge dismissed the plaintiffs' 6th cause of action alleging a civil conspiracy against both the facility and State farm. The plaintiffs have not argued this was error. Therefore, any argument as to the dismissal of the 6th cause of action has been abandoned. Video Gaming, Inc., v. S.C. Dep't of Revenue, 342 S.C. 34, 42, 535 S.E.2d 642, 647 (2000)
.

In the 2nd cause of action and part of the 7th cause of action, the plaintiffs seek a declaratory judgment that an insurer cannot raise recoupment fees based upon the assessment of surcharge points without a judicial determination of fault. Specifically, the plaintiffs allege State Farm violated § 38-77-625 when it raised the plaintiffs' recoupment fees without a judicial determination that they were at-fault in their accidents. The trial judge dismissed the 2nd cause of action and corresponding parts of the 7th cause of action finding an insurance company does not need to have a judicial determination of fault prior to increasing recoupment fees.

Section 38-77-625 provides: "If an insured is involved in a motor vehicle accident where he is not the at-fault driver, his facility recoupment charge may not be increased by his insurer because of this occurrence." The parties agree that an insured must be at-fault for there to be an increase in his recoupment fees. However, the issue is how fault is to be determined.

The plaintiffs contend a judicial determination of fault is always required. State Farm, however, argues the statute should not be read to always require a judicial determination of fault.[5] We agree. Words used in a statute should be given their plain ordinary meaning. First Baptist Church v. City of Mauldin, 308 S.C. 226, 417 S.E.2d 592 (1992). It is not reasonable to read this statute as requiring a judicial determination of fault. The plain language of the statute does not require a judicial determination of fault and to require one would unnecessarily burden the courts and result in more litigation. Accordingly, we affirm the dismissal of the 2nd cause of action and parts of the 7th cause of action to the extent they are predicated on the 2nd cause of action.

In the 5th cause of action, the plaintiffs seek a declaratory judgment that the Facility illegally calculated the facility rate and State Farm collected it

[5]The real issue is whether State Farm can make a fault determination which *conflicts* with a judicial determination. As noted above, in the 1st cause of action which remains viable, the plaintiffs are seeking a declaratory judgment that insurers must determine the disposition of a ticket to other driver before assigning their insureds a chargeable accident.

without authority.[6] The trial judge dismissed this cause of action against the Facility finding it barred by the filed rate doctrine. However, in his order partially denying State Farm's motion to dismiss, the trial judge stated the filed rate doctrine had not been adopted in South Carolina and he refused to dismiss these causes of action against State Farm.

Having now adopted the filed rate doctrine, however, we find it bars this cause of action against both the Facility and State Farm. The filed rate doctrine bars any causes of actions which necessarily require a court to determine a reasonable rate. American Bankers' Ins. Co., 819 So.2d at 1213 (holding claims requiring the court to determine what a reasonable rate would have been improperly require a court to "second guess" the regulating agency). This cause of action would clearly require us to determine a reasonable facility rate.[7]

Additionally, we note it was the Facility which calculated and set the facility rate. State Farm was not involved in calculating and setting the facility rate and was, in fact, required to use and collect the approved facility rate. See S.C. Code Ann. § 38-73-920 (2002)(no insurance may be issued except approved filed rates). Further, we note that contrary to the plaintiffs' assertion, South Carolina insureds are not without a remedy. South Carolina insureds can challenge approved rates pursuant to S.C. Code Ann. § 338-73-1030 (2002). This section specifically provides: "Any person or organization aggrieved with respect to any filing which is in effect may make written application to the director or his designee for a hearing thereon . . . "

[6]The trial judge dismissed the 3rd and 4th causes of action against the Facility and the plaintiffs did not appeal the dismissal. At oral argument, the plaintiffs also abandoned these causes of action against State Farm.

[7]Contrary to the dissent's assertions, this case cannot be easily resolved by implementing clear and unambiguous statutes. Resolving this case would necessarily require a court to determine what the proper facility rate should be – which the filed rate doctrine specifically precludes. Furthermore, the dissent's hypothetical discussing a "wrong rate" being applied in footnote 1 is inapplicable in this case. The only cause of action in which the plaintiffs are alleging they were charged the "wrong rate" is the 1st cause of action - which is not the subject of this appeal.

Accordingly, State Farm's motion to dismiss the 5th cause of action should have been granted and thus we reverse the trial judge's denial. We also affirm the grant of the Facility's motion to dismiss this cause of action.

In the 8th cause of action, the plaintiffs allege the Facility and State Farm violated various statutes and regulations and seek damages, including punitive damages. This cause of action relies upon the same statutes which are the basis for the declaratory relief sought in the 2nd, 3rd, 4th, and 5th causes of action. The trial judge dismissed this action against the Facility in its entirety and against State Farm to the extent it relies upon the 2nd cause of action. He denied State Farm's motion to dismiss the parts of this action which rely upon the 3rd, 4th, and 5th causes of action. As stated above, we are reversing the trial judge's denial of State Farm's motion to dismiss the 5th causes of action and the 3rd and 4th causes of action have been abandoned. Accordingly, we also reverse his denial as to the corresponding parts of the 8th cause of action.

Conclusion

Based on the foregoing, we reverse the partial denial of State Farm's motion to dismiss and affirm the partial grant of State Farm's motion to dismiss. We also affirm the dismissal of all of the claims against the Facility.

AFFIRMED IN PART AND REVERSED IN PART.

MOORE, BURNETT, JJ., and Acting Justice Brooke P. Goldsmith concur. TOAL, C.J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent. In my view, this case does not require consideration of the "filed rate doctrine" because this is not a "rate case." Therefore, I would reverse the circuit court's dismissal of Plaintiffs' claims that the South Carolina Reinsurance Facility (the Facility) charged Plaintiffs an illegal "facility base rate," and that State Farm Automobile Insurance Company (State Farm) collected this illegal rate. In addition, I would affirm the circuit court's refusal to dismiss Plaintiffs' claims that State Farm issued unauthorized surcharge points on Plaintiffs' insurance policies, in violation of the parties' insurance contracts and South Carolina law.

In my opinion, the majority mischaracterizes this case as a "rate case," and as a result, improperly considers the applicability of the "filed rate doctrine." Outlined first by Justice Brandeis in *Keogh v. Chicago & N. W. RY. CO.*, 260 U.S. 156, 43 S.Ct. 47 (1922), the "filed rate doctrine" hypothesizes that regulatory rates which are duly adopted via administrative channels and/or administrative proceedings are not subject to collateral attack in court. *See also Comm'r. ex rel. Chandler v. Anthem Ins. Companies, Inc.*, 8 S.W.3d 48, 51 (Ky. Ct. App. 1999) (holding that the filed rate doctrine precludes an agency's liability for damages).

In the traditional "rate case," a plaintiff would argue that he was charged an excessive premium because an administrative body, through the exercise of its discretion, should have adopted a lower premium. This case stands in stark contrast to such a claim. Plaintiffs in the instant case allege that they were improperly charged the wrong rate, though the rate was otherwise valid.[8]

[8] To distinguish this case from a "rate case," it is perhaps helpful to use the following illustration: If Plaintiff claims, "in the exercise of discretion, the agency should have adopted some lower rate instead of a rate of X," then Plaintiff is effectively asking the court to substitute its discretion for the administrative agency's. If instead, a rate scheme authorizes a base rate of X, and further provides that, if certain additional conditions exist, then a rate of Y, Plaintiff is free to argue that he does not meet the requirements for

Specifically, Plaintiffs allege that State Farm assessed unauthorized surcharge points to Plaintiffs' insurance policies in violation of the parties' insurance contracts. In addition, Plaintiffs allege that these unauthorized surcharge points were assessed in violation of South Carolina law. Finally, Plaintiffs allege that the Facility violated S.C. Code §§ 38-73-1400 and 38-73-1420 when calculating the "facility base rate," and that State Farm collected this illegal rate.

In my opinion, these causes of action, essentially claims for declaratory relief and damages in the form of overcharges, can be easily resolved by simply implementing the clear and unambiguous terms of the rates outlined in the South Carolina Code.[9] Accordingly, I would allow the Plaintiffs' above-discussed claims and also decline to address the broader issue of the applicability of the "filed rate doctrine" in South Carolina; the doctrine is simply not implicated in this case.

As a final matter, the trial judge also held that Plaintiffs' claim that only certain policy holders could be charged premiums other than the "base" or "objective" rates was predicated on an erroneous reading of the law. Accordingly, the trial judge dismissed this claim against the Facility. Plaintiffs did not argue that this was error on appeal. Since Plaintiffs' assert an identical claim against State Farm, I would dismiss this claim on the same grounds.

Accordingly, I would reverse in part and affirm in part the ruling of the circuit court. I would allow the case to proceed forward and Plaintiffs to assert (1) that the Facility charged Plaintiffs an illegal "facility base rate," (2) that State Farm collected this illegal rate, and (3) that State Farm issued

---

issuance of the higher rate; Plaintiff is merely disputing the rate's validity "as applied" to him.

[9] I simply fail to see how performing the mathematical computations of (1) subtracting unauthorized surcharge points from Plaintiffs' insurance policies (Plaintiffs' seventh and eighth causes of action) and (2) correctly applying non-discretionary portions of the statutory rate (Plaintiffs' fifth cause of action) constitutes supplanting the Department of Insurance's discretion.

unauthorized surcharge points on Plaintiffs' insurance policies, in violation of the parties' insurance contracts and South Carolina law.

The Supreme Court of South Carolina

In re: Comment 4 to Rule 3.8 of the Rules of Professional Conduct, Rule 407, SCACR.

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, we amend Comment [4] to Rule 3.8 of the Rules of Professional Conduct, Rule 407, SCACR, by deleting the final sentence of the comment which states a prosecutor is required to obtain court approval for the issuance of lawyer subpoenas in grand jury and other criminal proceedings after an opportunity for an adversarial hearing is afforded.

Comment [4] to Rule 3.8 shall now read as follows:

> [4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

This amendment shall become effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Waller, J., not participating

Columbia, South Carolina

December 2, 2005