CONTENTS

SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

None

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2001-UP-151 Fields v. Willis
(Horry, Judge Robert S. Armstrong)

2001-UP-152 Rogers (Hall) v. Rogers
(Marion, Judge Haskell T. Abbott, III)

2001-UP-153 Stokes v. Stokes
(Kershaw, Special Referee John W. Wells)

PETITIONS FOR REHEARING

3270 - Boddie-Noell v. 42 Magnolia Partners	Pending
3282 - SCDSS v. Basnight	Pending
3289 - Olson v. Faculty House	(2) Pending
3292 - Davis v. O-C Law Enforcement Comm.	Pending
3296 - State v. Yukoto Cherry	Pending
3297 - Silvester v. Spring Valley	Pending
3298 - Lockridge v. Santens of America, Inc.	Pending
3299 - SC Property & Casualty v. Yensen	(2) Pending
3300 - Ferguson v. Charleston/linc	Pending
3301 Horry County v. The Insurance Reserve	Pending
3307 - Curccio v. Caterpillar	Pending
3308 - Brown v. Greenwood School	Pending
3314 - State v. Mynyard Lee Woody	Pending
2000-UP-677 - Chamberlain v. TIC	Pending
2000-UP-707 - SCDSS v. Rita Smith	Denied

2000-UP-783 - State v. Clayton Benjamin	Pending
2001-UP-015 - Milton v. A-1 Financial Service	Pending
2001-UP-016 - Stanley v. Kirkpatrick	(1) Denied (1) Granted
2001-UP-022 - Thomas v. Peacock	Pending
2001-UP-026 - Phillip v. Phillips	Denied
2001-UP-047 - Kirt Eliot Thompson v. State	Pending
2001-UP-053 - Howard v. Seay	Pending
2001-UP-069 - SCDSS v. Taylor	Pending
2001-UP-077 - Jones v. Murrell	Pending
2001-UP-078 - State v. James Mercer	Pending
2001-UP-079 - State v. Corey E. Oliver	Pending
2001-UP-091 - Boulevard Dev. V. City of Myrtle Beach	Pending
2001-UP-093 - State v. Frank Demas Jones	Pending
2001-UP-102 - State v. Richard Yaney	Pending
2001-UP-106 - John Munn v. State	Pending
2001-UP-114 - McAbee v. McAbee	Pending
2001-UP-116 - Joy v. Sheppard	Pending
2001-UP-122 - State v. Robert Brooks Johnston	Pending
2001-UP-123 - SC Farm Bureau v. Rabon	(2) Pending
2001-UP-126 - Ewing v. Mundy	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3069 - State v. Edward M. Clarkson	Pending
3102 - Gibson v. Spartanburg Sch. Dist.	Pending
3173 - Antley v. Shepherd	Pending
3190 - Drew v. Waffle House, Inc.	Pending
3195 - Elledge v. Richland/Lexington	Pending
3197 - State v. Rebecca Ann Martin	Pending
3200 - F & D Electrical v. Powder Coaters	Pending
3205 - State v. Jamie & Jimmy Mizzell	Granted
3215 - Brown v. BiLo, Inc.	Pending
3216 - State v. Jose Gustavo Castineira	Pending
3217 - State v. Juan Carlos Vasquez	Pending
3218 - State v. Johnny Harold Harris	Pending
3220 - State v. Timothy James Hammitt	Pending
3221 - Doe v. Queen	Granted
3225 - SCDSS v. Wilson	Pending
3231 - Hawkins v. Bruno Yacht Sales	Pending
3236 - State v. Gregory Robert Blurton	(2) Pending
3240 - Unisun Ins. v. Hawkins	Pending
3241 - Auto Now v. Catawba Ins.	Pending
3242 - Kuznik v. Bees Ferry	Pending
3248 - Rogers v. Norfolk Southern Corp.	Pending

3249 - Nelson v. Yellow Cab Co.	Pending
3250 - Collins v. Doe	Pending
3252 - Barnacle Broadcast v. Baker Broadcast	Pending
3254 - Carolina First v. Whittle	Pending
3255 - State v. Larry Covington	Pending
3256 - Lydia v. Horton	Pending
3257 - State v. Scott Harrison	Pending
3264 - R&G Construction v. Lowcountry Regional	Pending
3271 - Gaskins v. Souther Farm Bureau	Pending
3272 - Watson v. Chapman	Pending
2000-UP-291 - State v. Robert Holland Koon	Pending
2000-UP-341 - State v. Landy V. Gladney	Denied
2000-UP-382 - Earl Stanley Hunter v. State	Pending
2000-UP-426 - Floyd v. Horry County School	Pending
2000-UP-484 - State v. Therl Avery Taylor	Pending
2000-UP-491 - State v. Michael Antonio Addison	Pending
2000-UP-503 - Joseph Gibbs v. State	Pending
2000-UP-509 - Allsbrook v. Estate of Roberts	Denied
2000-UP-528 - Ingram v. J & W Corporation	Denied
2000-UP-540 - Charley v. Williams	Denied
2000-UP-547 - SC Farm Bureau v. Chandler	Pending
2000-UP-550 - McKittrick v. Sheriff Chrysler	Pending
2000-UP-552 - County of Williamsburg v. Askins	Pending

2000-UP-560 - Smith v. King		Pending
2000-UP-588 - Durlach v. Durlach		Pending
2000-UP-593 - SCDOT v. Moffitt		Pending
2000-UP-595 - Brank Brewster v. State		Pending
2000-UP-596 - Liberty Savings v. Lin		Pending
2000-UP-601 - Johnson v. Williams		Pending
2000-UP-603 - Graham v. Graham		Pending
2000-UP-607 - State v. Lawrence Barron		Pending
2000-UP-608 - State v. Daniel Alexander Walker	(2)	Pending
2000-UP-613 - Norris v. Soraghan		Pending
2000-UP-620 - Jerry Raysor v. State		Pending
2000-UP-627 - Smith v. SC Farm Bureau		Pending
2000-UP-631 - Margaret Gale Rogers v. State		Pending
2000-UP-648 - State v. Walter Alan Davidson		Pending
2000-UP-653 - Patel v. Patel	(2)	Pending
2000-UP-655 - State v. Quentin L. Smith		Pending
2000-UP-657 - Lancaster v. Benn		Pending
2000-UP-658 - State v. Harold Sloan Lee, Jr.		Pending
2000-UP-662 - Cantelou v. Berry		Pending
2000-UP-664 - Osteraas v. City of Beaufort		Pending
2000-UP-678 - State v. Chauncey Smith		Pending
2000-UP-697 - Clark v. Piemonte Foods		Pending
2000-UP-705 - State v. Ronald L. Edge		Pending

2000-UP-708 - Federal National v. Abrams	Pending
2000-UP-717 - City of Myrtle Beach v. Eller Media Co.	Pending
2000-UP-719 - Adams v. Eckerd Drugs	Pending
2000-UP-724 - SCDSS v. Poston	Pending
2000-UP-729 - State v. Dan Temple, Jr.	Pending
2000-UP-738 - State v. Mikell Pinckney	Pending
2000-UP-766 - Baldwin v. Peoples	Pending
2000-UP-771 - State v. William Michaux Jacobs	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Bernard Laux, Appellant.

Appeal From Charleston County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 25262
Heard February 6, 2001 - Filed March 19, 2001

AFFIRMED

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

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William E. Salter, III, of Columbia, and Solicitor George M. Ducworth, of Anderson, for respondent.

JUSTICE WALLER: Appellant, Bernard Laux, was convicted of murder and sentenced to thirty years. We affirm.

FACTS

Laux was charged with the murder of his long-time friend and drinking buddy, Frank Joseph (Butch) Beylotte, III, who allegedly owed Laux $2000.00. Beylotte's body was found on John's Island in the early morning hours of March 4, 1997, having been shot in the head and shoulder, and apparently run over by an automobile.

Beylotte was last seen alive with Laux in the late evening hours of March 3, 1997, at the Golden Key Club and the Hayloft Lounge in Charleston. The following morning, police went to Laux' apartment to find him. According to the *in camera* testimony of Detective Michael Conkey, he went to Laux' apartment at 11:15 am and was met at the door by Dee Cooke, who answered the door in her night clothes, appearing to have just gotten out of bed. Cooke told Conkey she lived there with Laux and that it was her apartment.[1] Cooke consented to police searching the one-bedroom apartment, and signed a waiver to that effect. According to Conkey, he saw female clothing in the bedroom and hair spray and brushes in the bathroom. Conkey did not recall seeing a suitcase on the floor.

Dee Cooke testified *in camera* that she had been living with Laux for about one week, that she had a key to the apartment, and that she had told police she lived there and had consented to the search of the apartment. Although she was still "living out of [her] suitcase some," she testified that a number of her personal items were in the bedroom and bathroom.

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[1] Conkey also had information from Golden Key employees that Cooke lived in the apartment with Laux.

Laux. Conkey went to Laux' apartment and was met by Cooke, who answered the door in her bedclothes at 11:15 am, told him this "was her apartment," and that she "stayed there with Mr. Laux." She then orally consented to a search of the apartment, and signed a written consent search waiver of rights form in which she stated she was "the owner or person in charge of the item or premises to be searched." Moreover, Conkey observed female clothing in the bedroom and hair spray and hair brushes in the bathroom. Conkey did not recall seeing a suitcase on the floor of the apartment.[5]

Dee Cooke verified that she had told police she lived in the apartment and had given her consent to the search, and that a number of her personal effects were in the bathroom and bedroom. She also testified that she possessed a key to the apartment. However, she acknowledged that she had only been staying there for about a week, and that she was still "living out of her suitcase some."

Under these circumstances, we find it was entirely reasonable for Detective Conkey to assume Cooke had authority to consent to the search of the premises. Accord United States v. White, supra (although roommate who had shared apartment with accused for only two weeks was without actual authority to consent to entry of accused's bedroom, officers nonetheless reasonably relied on roommate's apparent authority to consent); United States v. Ramirez, 115 F.Supp.2d 401 (S.D.N.Y. 2000)(objectively reasonable for officers to conclude defendant's girlfriend had authority to consent to search of his apartment where she had property at the apartment, had been staying there for at least one week prior to the search, and she opened the door and let officers inside); State v. McCaughey, 904 P.2d 939 (Idaho 1995)(facts not known to officer at time of search not relevant to question of whether they reasonably believed defendant's wife could consent to search). See also U.S. v. Kinney, 953 F.2d 863, 866-67

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[5] We have viewed photographs of the search scene in which a closed "suitcase" is shown on the floor of the bedroom. The suitcase is small, brown, and leather and somewhat resembles a large attache case. We find nothing in its appearance which would have alerted Conkey's attention to the fact that Cooke was not a permanent resident of the premises.

(4th Cir. 1992) (joint resident's consent to search closet valid because officers had reasonable belief in apparent authority because she possessed closet key and opened closet in presence of officers); U.S. v. Thomas, 120 F.3d 564, 571 (5th Cir. 1997), cert. denied 522 U.S. 1061 (1998) (babysitter had apparent authority to consent to search of common areas of apartment, including bedrooms and areas he was permitted to use and given free access to as a babysitter).

We hold it was objectively reasonable for officers to conclude Cooke had apparent authority to consent to the search of the residence. Accordingly, the trial court's ruling denying Laux' motion to suppress is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Belinda Sue Pearson, Respondent,

v.

Tommy L. Bridges, M.D., Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
Frank P. McGowan, Jr., Circuit Court Judge

Opinion No. 25263
Heard February 20, 2001 - Filed March 19, 2001

AFFIRMED IN RESULT

Gregory A. Morton and Ashby W. Davis, both of Donnan, Morton, Davis & Snyder, P.A., of Greenville, for petitioner.

Larry C. Brandt, P.A., of Walhalla, for respondent.

CHIEF JUSTICE TOAL: We granted certiorari in this medical malpractice action to review the Court of Appeals' decision upholding the jury's $755,000 damage award to Belinda Sue Pearson ("Pearson").

FACTUAL/ PROCEDURAL BACKGROUND

On May 1, 1992, Dr. Tommy L. Bridges ("Dr. Bridges") examined Pearson, then a twenty-six year old, who had known problems with gallstones. Dr. Bridges recommended Pearson have her gallbladder removed. Because it was less painful and recovery time was shorter, Dr. Bridges recommended a laparoscopic surgery instead of an open procedure. During the laparoscopic gallbladder surgery on May 6, 1992, Dr. Bridges mistakenly cut the common bile duct instead of the cystic duct. After realizing the mistake, Dr. Bridges converted the surgery to an open procedure, and attempted to repair the common bile duct by inserting a stent. After the surgery, a stricture[1] formed where the bile duct had been cut, necessitating a second surgery by Dr. Bridges in early November 1992 to redo the repair and again stent the bile duct.

Pearson was referred to another doctor in 1993. On September 3, 1993, Pearson had another surgery to replace the stent in her bile duct. The stent was replaced several times because of blockage. In April 1994, Pearson appeared to be doing well, and the stent was removed. However, in May 1994, another stricture developed, and Pearson underwent surgery to insert another stent. That stent was removed in November 1995. At the time of trial in 1997, Pearson had not had any further strictures.

Pearson filed a medical malpractice action against Dr. Bridges in April 1995. In March 1997, the case was tried before a jury. The jury ultimately returned a verdict in favor of Pearson and awarded her $755,000 in damages.

[1]A stricture is a narrowing of the duct caused by the build up of scar tissue.

	cholangioplasty would need to be performed. Projected Cost: $20,107.56
Scenario Three:	If scenario two failed and surgery was required. Projected Cost: $38,683.62
Scenario Four:	If scenarios two and three failed, a possible liver transplant. Projected Cost: $237,128.39

Dr. Bridges did not object to Pearson's presentation of testimony and evidence on scenario number one. He did object to the presentation of the expert's testimony concerning scenarios two, three, and four.[3]

Pearson's expert testified there was a twenty-five to thirty percent chance scenario number two would occur. The expert then testified scenario number three would occur only if the number two stent procedure failed. He further testified if number two and three occurred and failed, Pearson might need a liver transplant. Pearson's other medical expert testified, "to a reasonable degree of medical certainty, Ms. Pearson will not need a liver transplant -- that is greater than 51 [percent]."

Dr. Bridges argued at trial, and now argues on appeal, the testimony was inadmissible because Pearson was required to prove the future expenses would "most probably" occur. The trial judge overruled Dr. Bridges' objections, and admitted the testimony.

The majority of the Court of Appeals agreed with the trial court that the

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[3]There is no dispute that if Pearson incurs these future medical expenses, they would be the proximate result of Dr. Bridges' negligence. The dispute in this case is over the *probability* that these damages will arise in the future.

evidence was admissible, holding, "the most probable standard required to prove causation is not the standard to be applied in determining the admissibility of evidence of future damages. Rather, the evidence must be beyond speculation or conjecture and reasonably certain to occur." *Pearson*, 337 S.C. at 533, 524 S.E.2d at 113. The Court of Appeals was correct in finding the "most probable" standard is not the standard of admissibility in South Carolina.[4] However, whether future medical expenses are "reasonably certain" to occur is also the incorrect standard to use in determining admissibility. Whether future damages are "reasonably certain" to occur is the *standard of proof* for future damages, not the *standard of admissibility*. *Haltiwanger v. Barr*, 258 S.C. 27, 186 S.E.2d 819 (1972) (to recover future damages in a negligence case, the plaintiff must prove the damages are reasonably certain to occur).[5]

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[4]The "most probable" standard is the standard required to prove proximate cause. *See Armstrong v. Weiland*, 267 S.C. 12, 225 S.E.2d 851 (1976) ("when the opinions of medical experts are relied upon to establish causal connection of negligence to injury, the proper test to be applied is that the expert must, with reasonable certainty, state that in his professional opinion the injuries complained of *most probably* resulted from the alleged negligence of the defendant"). We reaffirm the requirement that plaintiff must prove defendant's negligence, in probability, proximately caused plaintiff's injuries.

[5]The trial judge properly charged the jury on the standard of proof. His charge, in relevant part, stated: "your verdict should include an amount to cover any damages that the evidence shows will be reasonably certain to occur in the future. . . I further instruct you that the existence or amount of damages may not be left to conjecture, speculation or guess." The issue of whether the jury's verdict was supported by the evidence is not before this Court. However, we note the jury returned a general verdict in this case in the amount of $755,000. Dr. Pearson never requested a special verdict form separating the elements of damage, and, therefore, there is no way of knowing whether any allowance was made for future medical expenses. The uncontested actual medical expenses in this case were $197,508.43. The remaining damage award could have been awarded for pain and suffering, future pain and suffering, mental anguish, loss of enjoyment of life, impairment of ability to work, etc. There is simply no way

The question in this case is whether the evidence was properly admitted, *not* whether the evidence was sufficient to support a verdict including future damages. The Court of Appeals decision confuses these two standards.[6]

Under current South Carolina law, the standard of admissibility for evidence of future damages is "any evidence which tends to establish the nature, character, and extent of injuries which are the natural and proximate consequences of the defendant's acts . . . if otherwise competent." *Martin v. Mobley*, 253 S.C. 103, 109, 169 S.E.2d 278, 281-282 (1969). "The fact that future medical expenses might conceivably be small and are difficult to estimate would not deprive the plaintiff of the right to have the jury determine whether any award for future medical be made, and if so, what amount." *Kelly v. Brazell*, 253 S.C. 564, 567-568, 172 S.E.2d 304, 306 (1970). In *Kelly*, the trial judge charged the jury an award could not be based on speculation and that damages must be proven by the preponderance of the evidence. This charge created a jury question as to whether the need for future treatment had been proven. *See Haltiwanger*, *supra* (it is the duty of the jury to estimate, as best it can, the future damages which are reasonably certain to be accrued by the plaintiff).

In *Martin*, *supra*, the doctor testified that his opinion as to the extent of the plaintiff's permanent disability was, "[t]hese patients have a general disability in the neighborhood of ten or fifteen percent disability following this type of surgery." This Court found no error in the admissibility of the testimony since, "[t]he fact that the doctor had not had opportunity to consider whether the

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to determine if the jury allocated any money for future medical expenses.

[6]The Court of Appeals indicates that *Martin v. Mobley*, 253 S.C. 103, 169 S.E.2d 278 (1969), changed the standard for admissibility of future medical expenses. The question in that case, as in this one, was whether the evidence of future damages was admissible. The earlier cases cited by the Court of Appeals referred to the requirement that future damages must be established with "reasonable certainty" involved the standard of proof. Therefore, the Court of Appeals erred in finding that *Martin* changed the standard of admissibility.

plaintiff's permanent disability was more or less than that which generally followed such a condition and operation affected . . . only the weight and not the admissibility of the proffered evidence." *Id.* at 109, 169 S.E.2d at 281.

The evidence of the medical expenses of scenarios two, three, and four was admissible. These scenarios tended to establish the extent of Pearson's injuries. *Id.* The fact that Pearson's experts testified that the possibilities of scenarios two, three, and four occurring were 30 percent or less went to the weight of the evidence not its admissibility. *Id.* Whether Pearson proved the expenses were "reasonably certain" to occur so she would be entitled to an award of future damages was a question for the jury to determine. *Haltiwanger*, *supra*. [7]

CONCLUSION

For the foregoing reasons, we **AFFIRM** the decision of the Court of Appeals in **RESULT**.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

[7]We note that even if the future damages testimony was inadmissible, Dr. Bridges has failed to prove any prejudice since the jury returned a general verdict. *See* Footnote 4.

(1984)(per curiam)(quoting Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576, 585 (1967)(footnotes omitted)). See also Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)(Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that searches conducted outside judicial process, without prior approval by magistrate or judge, are per se unreasonable, subject only to specifically established exceptions). The Court recognized one such exception in Terry v. Ohio, wherein the Court held "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot," the officer may briefly stop the suspicious person and make "reasonable inquiries" aimed at confirming or dispelling his suspicions. Terry, 392 U.S. at 30, 88 S.Ct. at 1884, 20 L.Ed.2d at 911.

A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity. Terry, 392 U.S. at 30, 88 S.Ct. at 1884, 20 L.Ed.2d at 911; State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991); Blassingame, 338 S.C. at 248, 525 S.E.2d at 539. See also State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977)("It is recognized that the police may briefly detain and question a person upon a reasonable suspicion, short of probable cause for arrest, that he is involved in criminal activity.").

The term "reasonable suspicion" requires a particularized and objective basis that would lead one to suspect another of criminal activity. United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); State v. Lesley, 326 S.C. 641, 486 S.E.2d 276 (Ct. App. 1997). In determining whether reasonable suspicion exists, the whole picture must be considered. United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989); Blassingame, 338 S.C. at 248, 525 S.E.2d at 539. If the officer's suspicions are confirmed or are further aroused, the stop may be prolonged and the scope enlarged as required by the circumstances. Blassingame, 338 S.C. at 248, 525 S.E.2d at 539; State v. Kirkpatrick, 320 S.C. 38, 462 S.E.2d 884 (Ct. App. 1995).

Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968)(officer must be able to specify particular facts on which he based his belief suspect was armed and dangerous; officer is not entitled to seize and search every person on the street; mere knowledge of suspect being known narcotics dealer who put his or her hand into a pocket as police approached does not provide justification). Cf. United States v. Moore, 817 F.2d 1105 (4th Cir. 1987)(justification found where suspect was only person observed in vicinity of building late at night, shortly after alarm sounded, and street was dark, officer was alone, and suspected crime was burglary); State v. Fowler, 322 S.C. 263, 471 S.E.2d 706 (Ct. App. 1996)(in order to support his decision to "frisk" defendant subsequent to valid Terry stop, officer must be able to specify particular facts on which he based his belief suspect was armed and dangerous; reasonable person in officer's position must believe frisk was necessary to preserve officer's safety).

The scope of a search authorized by Terry is limited. In Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993), a police officer stopped a suspect and conducted a patdown search. Although the search did not reveal any weapons, the officer conducting the search felt a small lump in the suspect's nylon jacket. The officer testified: "'[A]s I pat-searched the front of his body, I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane.'" Id. at 369, 113 S.Ct. at 2133, 124 L.Ed.2d at 341. The officer then reached into the suspect's pocket and retrieved a small plastic bag containing one-fifth of one gram of crack cocaine.

On appeal, the Supreme Court held that police officers may seize nonthreatening contraband detected through the sense of touch during a protective patdown search permitted by Terry, but only if the officers' search stays within the bounds marked by Terry. Id. at 373, 113 S.Ct. at 2135-36, 124 L.Ed.2d at 344. Specifically, the Court explained:

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for

> weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Dickerson, 508 U.S. at 375-76, 113 S.Ct. at 2137, 124 L.Ed.2d at 346. Further, the Dickerson Court instructed:

> "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . ." Adams [v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612, 617 (1972)]. Rather, a protective search--permitted without a warrant and on the basis of reasonable suspicion less than probable cause--must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." Terry, supra, at 26, 88 S.Ct. at 1882, 20 L.Ed.2d 889; see also Michigan v. Long, 463 U.S. 1032, 1049, and 1052, n.16, 103 S.Ct. 3469, 3480-81, and 3482, n.16, 77 L.Ed.2d 1201 (1983); Ybarra v. Illinois, 444 U.S. 85, 93-94, 100 S.Ct. 338, 343-44, 62 L.Ed.2d 238 (1979). If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry and its fruits will be suppressed. Sibron v. New York, 392 U.S. 40, 65-66, 88 S.Ct. 1889, 1904, 20 L.Ed.2d 917 (1968).

Dickerson, 508 U.S. at 373, 113 S.Ct at 2138, 124 L.Ed.2d at 344.

The courts of this state have recognized and applied the principle that law enforcement officers are not granted, under the purview of Terry, a general warrant to rummage and seize at will,[1] and that any evidence stemming from an

[1]See Texas v. Brown, 460 U.S. 730, 748, 103 S.Ct. 1535, 1546-47, 75 L.Ed.2d 502, 518 (1983) (Stevens, J., concurring in judgment)(Supreme Court "has been sensitive to the danger . . . that officers will enlarge a specific

of the poisonous tree. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994). Accordingly, Woodruff's conviction for trafficking in crack cocaine is

REVERSED.

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

General Toyya Brawley Gray; and Solicitor Walter M. Bailey, of Summerville, for respondent.

HEARN, CJ.: Joseph Myers appeals his convictions for assault and battery with intent to kill (ABIK) and assault and battery of a high and aggravated nature (ABHAN). He argues the trial court erred in admitting character evidence and in submitting a confusing verdict form to the jury. We affirm.

Myers attended a cookout in February 1998. When Robert Thomas arrived, the two began to argue and were asked to take their argument outside the house. Once outside, the confrontation turned physical, and Myers stabbed Thomas in the neck and abdomen. Mary Young also suffered a cut as she tried to persuade them to leave.

The Orangeburg County Grand Jury indicted Myers on charges of ABIK for assaulting Thomas and ABHAN for assaulting Young. At trial, Thomas testified over defense objection that he picked up a board as he left the house because "I kn[e]w [Myers] was dangerous and I kn[e]w that he carried a knife." Thomas said he dropped the board when Young asked them to leave. As he walked away, Myers's girlfriend blocked his way, asking him if he wanted to fight. Myers then reached around his girlfriend and began stabbing Thomas.

Myers testified in his own defense. He admitted stabbing Thomas, but claimed he only did so because Thomas threatened him with the board. He feared Thomas would hit him with the board if he turned to leave. Myers testified Thomas did not drop the board until after the stabbing.

At the close of the case, the court held a hearing to discuss the jury charges and verdict form. The court decided to submit two lesser included offenses under the ABIK indictment and one lesser included offense under the

evidence presented. State v. Somerset, 276 S.C. 220, 221, 277 S.E.2d 593, 594 (1981); State v. Rogers, 275 S.C. 485, 486, 272 S.E.2d 792, 792 (1980). A jury should be instructed that one verdict it can reach is "not guilty," especially where the crime charged is of a serious nature. State v. Griggs, 184 S.C. 304, 315-16, 192 S.E. 360, 365 (1937) (stating that where the trial judge in his charge instructed the jury that if it had a reasonable doubt as to appellant's guilt it must find him not guilty, there is no reversible error if the trial judge then fails to tell the jury that "not guilty" is one verdict it could render). Here, we believe the trial judge's clear and cogent jury instructions ameliorated any possible prejudice emanating from the failure to include "not guilty" on the verdict form.

The trial judge carefully explained the verdict form, which read that each interrogatory must be answered "unanimously . . . beyond a reasonable doubt." The judge informed the jury no fewer than fifteen times that the State had the burden of proving Myers "guilty beyond a reasonable doubt." While reading the verdict form to the jury, the judge stated at least an additional eight times that the State must find Myers "guilty beyond a reasonable doubt." Further, the words "reasonable doubt" were mentioned at least seventeen times to the jury, and the jury was advised no less than nine times of its duty to find Myers "not guilty" if the State failed to meet its burden of proof. Additionally, although the verdict form did not have the words "not guilty"on it, neither did it contain the word "guilty." Thus, given the charge, we do not find that the verdict form prevented the jury from finding Myers not guilty.

AFFIRMED.

CURETON and SHULER, JJ., concur.

ANDERSON, J.: John Hamilton appeals from his convictions for assault and battery with intent to kill (ABIK) and possession of contraband. Hamilton was sentenced to life imprisonment without parole for ABIK and ten years for possession of contraband. He argues the trial court erred in (1) excluding psychiatric testimony as irrelevant and (2) denying his motion for a mistrial due to the Solicitor's improper comments during closing arguments. Additionally, Hamilton claims the trial court lacked subject matter jurisdiction because the indictment for possession of contraband was insufficient. We affirm.

FACTS/PROCEDURAL BACKGROUND

Hamilton was an inmate at the Broad River Correctional Institute (Broad River) in Richland County, South Carolina. Inmates at Broad River are housed in four dormitories, each divided into two wings. Each wing houses approximately 125 inmates and is manned by one correctional officer. On December 13, 1996, Officer Brandon Jeter was the correctional officer on duty in Hamilton's dormitory wing.

Hamilton worked that morning at his prison job and returned to the dormitory around lunchtime. Hamilton did not intend to return to work for the afternoon, but had forgotten to inform his supervisor, which can result in disciplinary action for an unauthorized absence. Hamilton stated he asked Officer Jeter to allow him to exit the dormitory. Jeter refused, saying he would open the door after he sorted the mail. According to Hamilton, by the time Jeter finished sorting the mail, it would have been too late for him to get to his job and his supervisor would have written him up for refusing to work. He would then have been placed on lockup, which is administrative segregation.

A nearby inmate, Karim Almatin, heard Officer Jeter and Hamilton arguing and convinced Hamilton to step into his room, which was located next to Jeter's desk. Almatin told Hamilton he "need[ed] to let it go." While

Hamilton was in Almatin's room, he heard Officer Jeter open the door for a dorm worker.[1] Hamilton attempted to slip out of the door behind the dorm worker. Jeter refused to allow Hamilton to exit as he was wearing dormitory shoes, similar to flip flops, which the inmates are not permitted to wear outside. Hamilton cursed at Jeter but retreated into the dorm.

Hamilton went back into Almatin's cell. When the dorm worker returned, Officer Jeter opened the door. Hamilton again attempted to exit. This time, he successfully forced his way into the common area. Officer Jeter and Hamilton exchanged words. Jeter asked the yard officer, Tara Hopkins, to take Hamilton to a holding cell while Jeter wrote him up for a disciplinary infraction. Hopkins told Jeter she could not take Hamilton to the holding cell because he was wearing improper shoes. Jeter and Hopkins testified Hamilton yelled words to this effect: "I'll teach you mother f____rs who to mess with."

Hamilton turned around and walked back into the dorm area. Officer Hopkins followed him. Hopkins lost sight of Hamilton, stating he "vanished" as she entered the unit. Hopkins next saw Hamilton approaching Jeter with a homemade knife (shank) in his hand.

Officer Jeter was sitting at his desk sorting mail when he heard Officer Hopkins yell: "Move . . . Get your gas, get your gas." Jeter looked up and saw Hamilton running toward him fumbling with something behind his back. Jeter jumped out of his chair. Hamilton chased him around the office and stabbed him in the back with the shank. Officer Jeter struck Hamilton and was eventually able to spray him with pepper gas. While trying to get away from Hamilton, Jeter dropped the gas and his keys.

Hamilton again pursued Officer Jeter. Officer Hopkins intervened with a billy stick, striking Hamilton on the wrist to knock the shank out of his hand.

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[1]A dorm worker is an inmate allowed more access to common areas by virtue of good behavior. The position is comparable to that commonly referred to as prison trustee.

The shank did not fall because it was tied to Hamilton's wrist. Hamilton attempted to stab Jeter by reaching around Hopkins. Jeter and Hopkins testified Hamilton yelled: "I'm gonna kill, I'm gonna kill you, mother f____."

Officer Hopkins retrieved Officer Jeter's gas and sprayed Hamilton with it. Almatin and another inmate retrieved the keys and assisted Hopkins and Jeter. Hopkins called for assistance and other officers arrived. At least one officer escorted Hamilton outside the dormitory. At that time, Hamilton did not have the shank.

The incident occurred around 11:15 a.m. Thereafter, approximately eight officers instituted a lock-down,[2] a shake-down,[3] and a body strip search of all inmates in the dormitory wing. About 1:45 p.m., Officer Gregory Wells found a shank hidden in a mop head in a room about twenty-five feet from the site of the incident. Wells testified he noticed a small amount of wet blood on the mop head, which led him to inspect the mop.

Officer Jeter suffered serious injuries and stayed in the hospital approximately five days. The shank went between Jeter's ribs and penetrated his lung, requiring surgery to remove a portion of the lung. Jeter had not returned to work as a corrections officer at the time of the trial in November of 1998.

Hamilton testified at trial. He admitted he usually carried a shank and that he carried his shank that day. In addition, Hamilton admitted he stabbed Jeter. Yet, he denied the shank found by Officer Wells was his shank. He further denied threatening to kill Jeter. Hamilton conceded the assault was vicious. Hamilton declared he "wasn't being malicious" when he assaulted Jeter; rather, the verbal altercation "just escalated" and the incident was a result of the "heat of the moment."

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[2]Return of all inmates to their cells.

[3]Full search of all cells.

(1991); State v. Jeffcoat, 279 S.C. 167, 303 S.E.2d 855 (1983). Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears. Alexander, 303 S.C. at 380, 401 S.E.2d at 148; State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986). Only relevant evidence is admissible. See State v. Petit, 144 S.C. 452, 142 S.E. 725 (1928). "'All that is required is that the fact shown legally tends to establish, or to make more or less probable, some matter in issue and to bear directly or indirectly thereon.' It is not required that the inference sought should 'necessarily follow' from the fact proved. Evidence is relevant if it makes the desired inference more probable than it would be without the evidence." Jon P. Thames & W.M. Von Zharen, A Guide to Evidence Law in South Carolina 28 (1987)(quoting Francis v. Mauldin, 215 S.C. 374, 378, 55 S.E.2d 337, 338 (1949)).

However, not all relevant evidence is admissible. Petit, 144 S.C. at 466, 142 S.E. at 730-31. Our Supreme Court, in State v. Petit, discussed the admissibility of testimonial evidence:

> We feel sure that one of the main reasons for much of the misunderstanding as to when evidence should be allowed, and when it ought to be refused, is due to failure to properly distinguish between the legal terms, "relevancy" and "competency," so often used in the law of evidence, and, too generally but erroneously, supposed to be exactly synonymous. Many efforts have been made by courts, judges, and law writers to define the words so as to differentiate them correctly. In all the definitions we have read of "relevancy," we have been impressed much with that given by the New York Supreme Court:
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> > "The meaning of the word relevant, as applied to testimony, is that it directly touches upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of it. It comes from the French relever, which means to assist." Platner v. Platner, 78 N.Y. 95.

As to the other word "competency," or rather, "competent evidence," Black's Law Dictionary gives approval to this definition from Mr. Greenleaf:

> "That which the very nature of the thing to be proven requires, as the production of a writing when its contents are the subject of inquiry."

In the "Preliminary Definitions" on the subject of Evidence, in Corpus Juris, there will be found a part of one sentence that expresses very clearly a thought we now have in mind, namely:

> "* * * It is clear that evidence may be logically relevant and yet inadmissible because not competent, that is, because not the character of proof which the law permits in the particular case." 22 C. J. 65.

Irrelevant evidence is never, properly, admissible in a cause; competent evidence is always admissible; relevant evidence may, or may not, be admissible, depending upon its competency.

Taking together the approved definitions of "relevancy" and "competency" as they are to be applied in the introduction of evidence in the trial of a cause, a fair and brief statement of a rule to keep in mind, seems to us, to be this: Any evidence that assists in getting at the truth of the issue is relevant, unless, because of some legal rule, it is incompetent.

Petit, 144 S.C. at 466-67, 142 S.E. at 730-31 (emphasis omitted). In State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941), the Court affirmed the trial judge's refusal to permit the admission of relevant evidence which would confuse the jury. The Court stated:

> At the outset we repeat the time-honored tenet that ordinarily the conduct of a trial, including the admission and rejection of

> proffered testimony, is largely within the sound discretion of the trial Judge and his exercise of such will not be disturbed by this Court on appeal unless it can be shown that there has been an abuse of discretion, a commission of legal error in its exercise, and that the rights of the appellant have been thereby prejudiced. . . . .
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> . . . .
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> . . . When it became clear to the presiding Judge that the [evidence sought to be admitted] was unconnected (as testified to by the appellant himself) with the miscellaneous items upon which the State was seeking conviction he, we think not improperly, ruled out further evidence concerning the former. The situation seems to us to have been one peculiarly appropriate for the exercise of discretion as to admissibility of evidence and to guard against the confusion of the jury by the injection of collateral issues. . . . .

Gregory, 198 S.C. at 103-04, 16 S.E.2d at 534. The Gregory Court found no abuse of discretion.

Relevant evidence may be excluded for undue prejudice even though no specific exclusionary rule requires exclusion. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991); Jon P. Thames & W.M. Von Zharen, A Guide to Evidence Law in South Carolina 28 (1987). The Supreme Court adopted the language of Rule 403 of the Federal Rules of Evidence in State v. Alexander, 303 S.C. at 382, 401 S.E.2d at 149:

> It does not appear that this Court has ever explicitly approved of this general rule, although such a test has been applied in a variety of contexts. We now adopt the language, in pertinent part, of Federal Rule of Evidence 403 that, "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." (Footnote omitted).

to be charged and informs the defendant of the circumstances he must be prepared to defend. Locke v. State, 341 S.C. 54, 533 S.E.2d 324 (2000).

In reviewing the sufficiency of an indictment, an appellate court must "look at the issue with a practical eye in view of the surrounding circumstances." State v. Gunn, 313 S.C. 124, 129, 437 S.E.2d 75, 78 (1993).

Hamilton relies upon State v. Tabory, 262 S.C. at 139-40, 202 S.E.2d at 853-54, to support his contention the indictment was insufficient. Tabory is inapposite because the indictment in Tabory did not charge a violation of the section relating to contraband.

Viewing the indictment "with a practical eye," we find it stated the charge with sufficient certainty to enable both the trial court and Hamilton to know what crime it alleged. The indictment specifically identified the contraband involved, incorporated the statute, section 24-3-950, by reference, and named the offense in the title. Under the circumstances of this case, we determine the indictment vested the trial court with subject matter jurisdiction.

CONCLUSION

We hold Dr. Rathle's testimony was not relevant. Additionally, even if the testimony was relevant, the evidence should be excluded under Rule 403, SCRE, as tending to confuse the jury. We rule the Solicitor's comments during closing argument were highly inappropriate. We caution judges to strictly monitor the argument of Solicitors. Given the overwhelming evidence of Hamilton's guilt and based on a review of the record as a whole, we conclude the Solicitor's comments did not infect Hamilton's trial with unfairness so that he was denied a fair trial. Thus, the trial court did not err in overruling defense counsel's objections and motion for mistrial. Finally, Hamilton's indictment was sufficient to convey subject matter jurisdiction on the court. Accordingly, Hamilton's convictions are

AFFIRMED.

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

Robert J. Chambless, opposed the petitions. The probate court found Thelma Chambless was in need of a guardian and appointed Robert Chambless, but determined a conservatorship was unnecessary. The probate court awarded attorney's fees to Dowaliby, which the circuit court affirmed. Robert Chambless appeals on behalf of his mother, challenging the award of attorney's fees. We reverse.

FACTS

This appeal arises from a dispute between siblings Marilu Dowaliby and Robert J. Chambless over the care of their mother, Thelma Chambless. On June 11, 1998, Dowaliby filed separate petitions in the Charleston County Probate Court seeking the appointment of a guardian and a conservator for Thelma Chambless. Dowaliby alleged her mother was suffering from dementia and was incapacitated. In the petitions, Dowaliby asked that she be appointed as guardian and conservator.

Robert Chambless, as next of kin, filed an answer and counterclaim to Dowaliby's petitions admitting their mother suffered from dementia and was unable to manage her own affairs. However, he denied the need for the appointment of a conservator, stating their mother had set up an independent trust on April 23, 1994, appointing him to be the trustee in the event of her incapacity.[1] Also on April 23, 1994, Thelma Chambless executed a durable power of attorney in favor of her son, Robert, as well as a will naming him the executor. Robert Chambless attached copies of the trust, the power of attorney, and the will to his answer.

Chambless asserted their mother had transferred to the trust the deeds to her real property prior to becoming incapacitated and that all liquid assets were being held in the trust for the purpose of their mother's lifetime care. He asked that their mother be declared incompetent and that the court recognize

[1] The Thelma I. Chambless Trust included assets such as Thelma Chambless's personal residence (valued at $85,000), some home furnishings, and investments of approximately $40,000. The total estate was valued at about $137,000.

> ward even if the expenses occurred before the appointment of a guardian. (citations omitted).

The probate court found Dowaliby's petitions benefitted Thelma Chambless because a guardian was appointed to provide for her care, comfort, and maintenance, and the guardian was required to consult with and/or inform her daughter and grandchildren regarding health care and placement decisions. The court found Thelma Chambless was further benefitted by the court's validation of the trust.

The circuit court affirmed the award, and Chambless appeals.

LAW/ANALYSIS

On appeal, Chambless asserts Dowaliby is not entitled to an award of attorney's fees.

It is well established that "[a]ttorney's fees are not recoverable unless authorized by contract or statute." Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997); see Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993) ("The general rule is that attorney's fees are not recoverable unless authorized by contract or statute."); Duke Power Co. v. South Carolina Pub. Serv. Comm'n, 284 S.C. 81, 100, 326 S.E.2d 395, 406 (1985) ("Ordinarily, an attorney must look to his client for compensation for services performed by his employment" unless authorized by contract or statute.); Prevatte v. Asbury Arms, 302 S.C. 413, 415, 396 S.E.2d 642, 643 (Ct. App. 1990) ("Under the common law of South Carolina, a prevailing party has no right to recover attorney's fees. In the absence of a common law right, the plaintiff must plead either a contract or a statute to receive enhanced damages or attorney's fees.") (citation omitted).

Because there is no contractual provision at issue here, we must determine whether there is a statutory basis for Dowaliby to recover attorney's