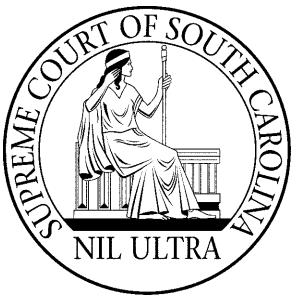

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

November 12, 2002

ADVANCE SHEET NO. 37

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

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UNPUBLISHED OPINIONS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

UNPUBLISHED OPINIONS

2002-UP-679 - The State v. Christopher Ford
(Dillon, Judge J. Ernest Kinard, Jr.)

2002-UP-680 - Donald Strable v. Nicholas Strable
(Laurens, Judge James W. Johnson, Jr.)

PETITIONS FOR REHEARING

3533 Food Lion v. United Food	Pending
3545 - Black v. Patel	Pending
3547 - Mathis v. Hair	Pending
3550 - St v. Williams Donvoan	Pending
3551 - William Stokes v. Metropolitan	Pending
3552 - Bergstrom v. Palmetto Health Alliance	Pending
3555 - Cowan, K. Et al. V. Allstate Ins. Co	Pending
2001-UP-522 - Kenney v. Kenney	Pending
2002-UP-478 - St v. Eldridge Hills	Pending
2002-UP-509- Baldwing Const. V. Graham	Pending
2002-UP-513 - E'Van Frazier v. Athaniel Badger	Pending
2002-UP-514 - Frank McCleer v. City of Greer	Pending
2002-UP-516 - State v. Angel Parks	Pending
2002-UP-517 - Rabon v. Todd	Pending
2002-UP-522 - State v. Herbert Baker	Pending

2002-UP-537 - Walters v. Austen	Pending
2002-UP-538 - State v. Richard Ezell	Pending
2002-UP-546 - State v. Larry Moseley	Pending
2002-UP-547 - Stewart v. Harper	Pending
2002-UP-549 - Davis V. Greenville Hospital	Pending
2002-UP-570 - Hartzog v. Revco	Pending
2002-UP-574 - State v. Tarone Johnson	Pending
2002-UP-586 - Ross v. USC	Pending
2002-UP-587 - Thee Gentlemen's Club v. Hilton Head	Pending
2002-UP-588 - State v. Fate McClurkin	Pending
2002-UP-589 - Joan Black v. William Black	Pending
2002-UP-599 - Florence v. Flowers, Gillian	Pending
2002-UP-609 - Brown, Gerald v. Shaw, Adger	Pending
2002-UP-611 - Allgood, V., et al. v. GE Capital	Pending
2002-UP-613 - Summit Con v. General Heating	Pending
2002-UP-614 - Bannum v. City of Columbia	Pending
2002-UP-615 - The State v. Kintrell Floyd	Pending
2002-UP-620 - Quantum Varde v. Limerick Wood	Pending
2002-UP-622 - McCray v. R.H. Moore	Pending
2002-UP-662 - The State v. Jermiah Morgan	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3250 - Alice Pilgrim v. Yvonne Miller	Pending
3314 - State v. Minyard Lee Woody	Pending
3362 - Johnson v. Arbabi	Pending
3393 - Vick v. SCDOT	Pending
3404 - State v. Charles M. Stuckey, Jr.	Pending
3406 - State v. Yukoto Cherry	Pending
3414 - State v. Duncan R. Proctor #1	Pending
3415 - State v. Duncan R. Proctor #2	Pending
3420 - Brown v. Carolina Emergency	Pending
3466 - State v. Kenneth Andrew Burton	Pending
3468 - United Student Aid v. SCDHEC	Pending
3476 - State v. Terry Grace	Pending
3477 - Adkins v. Georgia-Pacific	Pending
3479 - Converse Power Corp. v. SCDHEC	Pending
3481 - State v. Jacinto Antonio Bull	Pending
3485 - State v. Leonard Brown	Pending
3486 - Hansen v. United Services	Pending
3488 - State Auto v. Raynolds	Pending
3489 - State v. Sharron Blasky Jarrell	Pending

3491 - Robertson v. First Union National	Pending
3494 - Lee v. Harborside Café	Pending
3495 – Ferrell Cothran v. Alvin Brown	Pending
3497 - Paresha Shah v. Richland Memorial	Pending
3500 - The State v. Reyes Cabrera-Pena	Pending
3501 - State v. Demarco Johnson	Pending
3503 - State v. Benjamin Heyward	Pending
3504 - Wilson v. Rivers	Pending
3505 - L-J v. Bituminous	Pending
3511 - Maxwell v. Genez	Pending
3512 - Cheap O's v. Cloyd	Pending
3515 - State v. Robert Garrett	Pending
3516 - Antley v. Nobel	Pending
3520 – Alice Pilgrim v. Yvonne Miller	Pending
3521 - Pond Place v. Poole	Pending
3523 - State v. Eddie Lee Arnold	Pending
3525 - Arscott v. Bacon	Pending
3527 - Griffin v. Jordan	Pending
3535 - State v. Ricky Ledford	Pending
2001-UP-324 - State v. John Williams, III	Pending
2001-UP-391 - State v. Jerome Hallman	Pending

2001-UP-461 - Storage Trailers v. Proctor	Pending
2001-UP-476 - State v. Jeffery Walls	Pending
2001-UP-477 - State v. Alfonso Staton	Pending
2002-UP-478 - State v. Leroy Stanton	Pending
2001-UP-479 - State v. Martin McIntosh	Pending
2002-UP-012 - Gibson v. Davis	Pending
2002-UP-029 - State v. Kimberly Renee Poole	Pending
2002-UP-038 - State v. Corey Washington	Pending
2002-UP-064 - Bradford v. City of Mauldin	Pending
2002-UP-098 - Babb v. Summit Teleservices	Pending
2002-UP-151 - National Union Fire Ins. v. Houck	Pending
2002-UP-160 - Fernanders v. Young	Pending
2002-UP-171 - State v. Robert Francis Berry	Pending
2002-UP-174 - RP Associates v. Clinton Group	Pending
2002-UP-198 - State v. Leonard Brown	Pending
2002-UP-220 - State v. Earl Davis Hallums	Pending
2002-UP-223 - Miller v. Miller	Pending
2002-UP- 241 - State v. Glenn Rouse	Pending
2002-UP-256 - Insurit v. Insurit	Pending
2002-UP-266 - State v. John Lipsky	Pending
2002-UP-281 - State v. Henry James McGill	Pending

2002-UP-284 - Hiller v. SC Board Architectural	Pending
2002-UP-288 - Yarbrough v. Rose Hill Plantation	Pending
2002-UP-290 - Terry v. Georgetown Ice. Co.	Pending
2002-UP-313 - State v. James S. Strickland	Pending
2002-UP-319 - State v. Jeff McAlister	Pending
2002-UP-326 - State v. Lorne Anthony George	Pending
2002-UP-363 - Curtis Gibbs v. SCDOP	Pending
2002-UP-368 - Roy Moran v. Werber Co.	Pending
2002-UP-381 - Rembert v. Unison	Pending
2002-UP-393 - Wright v. Nichols	Pending
2002-UP-395 - State v. Tommy Hutto	Pending
2002-UP-401 - State v. Robert Warren	Pending
2002-UP-411 - The State v. Leroy Roumillat	Pending
2002-UP-412 - Hawk v. C&H Roofing	Pending
2002-UP-448 - State v. Isaac Goodman	Pending
2002-UP-477 Gene Reed v. Farmers	Pending

PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of R. Daniel Day, Jr., Respondent.

Opinion No. 25552
Heard September 17, 2002 - Filed November 4, 2002

PUBLIC REPRIMAND

Attorney General Charles M. Condon, Assistant Deputy Attorney General J. Emory Smith, Jr., and Assistant Disciplinary Counsel Barbara M. Seymour, all of Columbia, for the Office of Disciplinary Counsel.

R. Daniel Day, Jr., of Seneca, pro se.

PER CURIAM: This is an attorney disciplinary matter. After a hearing, the Commission on Lawyer Conduct concluded respondent committed misconduct and recommended a public reprimand. Neither the Office of Disciplinary Counsel nor respondent except to the recommended sanction.

Matter I

At the hearing, Attorney to Assist Disciplinary Counsel (ATA) Donald C. Coggins, Jr., testified he mailed a letter to respondent requesting respondent contact him for an appointment. Coggins testified respondent did

not respond. Respondent testified he did not remember receiving Coggins' letter, but agreed he was responsible for mail delivered to his office.

ATA William M. Hagood, III, testified he mailed respondent two letters, the second of which asked respondent to contact him to schedule an appointment. Hagood stated he left two messages with respondent's office; respondent did not contact him. Ultimately, respondent complied with a deposition subpoena. Respondent acknowledged he did not respond to Hagood in a timely manner.

Matter II

Client A testified, although respondent withheld money for tax purposes during a real estate transfer, he failed to forward the money to the Department of Revenue (DOR). Client A stated he informed respondent of the error and it took approximately six weeks to clear up the matter. Client A testified, on occasion, respondent failed to timely respond to his communications.

Respondent testified his office erroneously closed Client A's file. He explained, once he realized the DOR transaction had not been completed, he immediately contacted the DOR, forwarded the taxes, plus interest, and eventually was able to get the purchasers to sign the necessary documentation.[1] Respondent accepted responsibility for this matter, noting he should have corrected the matter more quickly.

Matter III

Client B testified he hired respondent to represent him in a criminal matter. He stated, after his conviction and sentence, he repeatedly contacted respondent for file material but respondent was not forthcoming. Respondent testified he gave Client B his file when Client B was in court for an unrelated matter.

[1] There is no claim respondent misappropriated these funds.

Matter IV

Respondent represented parties during a closing in early May 1998. The seller intended to convey 8.2 acres of land and retain approximately one acre of contiguous property.

The buyer testified, a month or two after the closing, he discovered he had purchased the one acre parcel and immediately went to respondent's office to discuss the situation. Respondent stated he would take care of the problem. The buyer testified he telephoned respondent approximately twenty times; respondent returned only two calls. The buyer was notified in late May 1999 that the corrected deed had been filed in April 1999.

A mortgage broker testified he obtained the loan and mortgage for the buyer. He explained how the closing documents erroneously described the sale of the one acre rather than the eight acres. The broker testified that once the error with the property was discovered, respondent contacted him to correct the situation. By this time, the loan and mortgage had been sold to another lender and the new lender had difficulty locating the documents. The broker testified he and respondent "worked constantly" in an attempt to get the new lender to locate the documents as quickly as possible.

Respondent testified, at the closing, the parties reviewed the survey and deed. No one noticed any error. Once the buyer contacted him about the error, respondent stated he ordered a new survey of the eight acres. He testified it took quite a long time for the lender to locate the original loan papers. Respondent apologized to the buyer for the error.

Matter V

Client C testified he received a copy of an order appointing respondent to represent him on his post-conviction relief application.

According to Client C, respondent did not contact him until after he filed a complaint with the Commission on Lawyer Conduct.

Respondent stated he did not receive the order of appointment. After he received communication from the Commission on Lawyer Conduct informing him of Client C's complaint, he obtained a copy of the order of appointment from the Oconee County Clerk of Court's office.[2] Ultimately, respondent represented Client C at the PCR hearing and obtained a favorable ruling.

Matter VI

Party A testified he sued respondent's client, Client D, in magistrate's court claiming Client D owed him money for appraisal work. According to Party A, while in magistrate's office for jury selection, respondent telephoned Party A and asked for copies of the invoices. Party A testified respondent indicated Client D owed Party A and a trial was unnecessary. Immediately after the conversation, Party A faxed the invoices to respondent but did not receive a response.

A week later, Party A sent a letter to respondent inquiring about the status of the unpaid invoices; again, he received no response. Thereafter, Party A testified he telephoned respondent's office "probably 25 days in a row," but received no response. Ultimately, the case was restored to the trial roster. Approximately a year later, the parties settled.

Respondent testified, at the time he filed the answer, he requested Party A provide copies of the appraisals. The magistrate telephoned Party A when he did not appear for jury selection. According to respondent, Party A

[2] According to the parties' stipulation, the Oconee County Clerk of Court places orders of appointment in cubbyholes at the courthouse. As a result of this incident, respondent stated he instructed the Clerk of Court to mail orders to his office.

then sent some invoices, but not the requested appraisals. Respondent testified he never promised Party A his client would settle the matter.

Matter VII

Client E testified respondent agreed to represent her in a personal injury matter. She admitted respondent told her he had previously represented the potential defendants on other matters, but at the time stated he did not have a conflict. While she admitted respondent sent her to two other attorneys, she testified these attorneys were to assist respondent with her case. Not until later did respondent tell Client E he had a conflict and would not be able to represent her.

Respondent testified he immediately told Client E he could not represent her in her personal injury claim as he had a conflict and, therefore, recommended two other attorneys. He stated he represented Client E on other matters.

Matter VIII

Client F testified she was charged with causing an automobile accident. She retained respondent the same month to represent her as a plaintiff in the matter. Client F stated respondent failed to return her telephone calls on five occasions. She testified, several months after she filed a complaint with the Commission on Lawyer Conduct, respondent served the pleadings in the action.

Client F agreed respondent advised it would be better to file suit after the traffic charge against her was resolved. She testified she did not remember respondent informing her that her own insurance company had paid the defendant's damages and was not supporting her claim.

Respondent testified he told Client F her claim would be difficult to substantiate as the witnesses to the automobile accident were "wishy-

washy," but admitted he could have been clearer. He stated he did not communicate with Client F properly or frequently enough.[3]

Matter IX

Client G paid respondent a retainer on January 28, 1999, and terminated his representation by letter dated February 15, 1999. Client G complained respondent had not contacted him and failed to return his telephone calls.

On March 15, Client G filed a complaint with the Commission on Lawyer Conduct. Three days later, the Commission requested respondent provide a response. By letter dated April 7, 1999, Disciplinary Counsel again requested respondent respond to the matter. By letter dated April 14, 1999, respondent stated he had interviewed Client G and prepared pleadings. He stated his office advised Client G to return to the office to review and sign the pleadings.

Respondent testified he did not remember receiving Client G's February 15th letter. He stated he had prepared Client G's pleadings and was waiting for him to return to the office to review and sign the papers. Respondent returned Client G's retainer.

After considering the testimony and exhibits from the hearing, the Commission on Lawyer Conduct concluded respondent breached various provisions of the Rules of Professional Conduct (Rule 407, SCACR) and the Rules for Lawyer Disciplinary Enforcement (Rule 413, SCACR). Finally, the Commission concluded respondent committed misconduct by failing to cooperate with the investigations of the Office of Disciplinary Counsel. Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982).

While this Court is not bound by the findings of the Commission on Lawyer Conduct, its findings are entitled to great weight, particularly when

[3] Respondent ultimately represented Client F at trial.

the inferences to be drawn from the testimony depend on the credibility of witnesses. Matter of Moore, 329 S.C. 294, 494 S.E.2d 804 (1997); Matter of Yarborough, 327 S.C. 161, 488 S.E.2d 871 (1997). Nonetheless, the Court may make its own findings of fact and conclusions of law. Id. A disciplinary violation must be proven by clear and convincing evidence. Id.

We conclude the testimony at the hearing establishes by clear and convincing evidence respondent engaged in misconduct by failing to handle client matters diligently and competently, by failing to adequately communicate with clients, by failing to promptly deliver funds, and by neglecting legal matters.[4] In addition, we conclude respondent failed to respond to requests for information from the Office of Disciplinary Counsel. In the Matter of Treacy, supra. We note respondent has acknowledged his error.

This Court has imposed a wide range of sanctions where misconduct involves neglect of legal matters, failure to deliver funds, failure to handle client matters diligently and competently, failure to communicate with clients, and failure to cooperate with the Commission on Lawyer

[4] We find violations of Rule 407, SCACR, particularly Rule 1.15 (failure to deliver promptly to client or third party funds or files the client or third party was entitled to receive), Rule 1.3 (failure to act with reasonable diligence and promptness in representing a client), Rule 1.4(a) (failure to keep a client reasonably informed about the status of a matter and comply promptly for requests for information), Rule 1.1 (failure to represent a client competently), Rule 1.2 (failure to consult with a client as to the objectives of the representation and the means by which they are to be achieved), Rule 8.4(a) (violated the Rules of Professional Conduct), and Rule 8.4(e) (engaged in conduct that is prejudicial to the administration of justice). Further, we find violations of Rule 413, SCACR, specifically Rule (7)(a)(1) (violating the Rules of Professional Conduct) and Rule 7(a)(5) (engaged in conduct tending to pollute the administration of justice or to bring the courts or legal profession into disrepute and engaged in conduct demonstrating unfitness to practice law).

Conduct. See Matter of Mayer, 325 S.C. 1, 478 S.E.2d 286 (1996) (public reprimand); Matter of Shibley, 320 S.C. 362, 465 S.E.2d 356 (1995) (60 day suspension); Matter of Tootle, 319 S.C. 392, 461 S.E.2d 824 (1995) (4 month suspension); Matter of Ballard, 312 S.C. 227, 439 S.E.2d 846 (1994) (1 year suspension); Matter of Nida, 315 S.C. 132, 432 S.E.2d 462 (1993) (9 month suspension); Matter of Acker, 308 S.C. 338, 417 S.E.2d 862 (1992) (6 month suspension). In this instance, we find respondent's misconduct warrants a public reprimand. Respondent is hereby publicly reprimanded for his misconduct. In addition, respondent is ordered to pay the costs of the disciplinary proceeding ($2,504.78). This amount shall be remitted to the Commission on Lawyer Conduct in accordance with Rule 413, SCACR.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dan B. Kennedy and
Christine Marilyn
Kennedy, Petitioners,

v.

George C. Bedenbaugh, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Saluda County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 25553
Heard June 12, 2002 - Filed November 12, 2002

AFFIRMED

Kenneth W. Ebener, of Moore, Taylor, & Thomas, P.A., of West Columbia, for petitioners.

Joseph W. Hudgens, of Pope & Hudgens, of

Newberry, for respondent.

JUSTICE MOORE: We granted this petition for a writ of certiorari to determine whether the unity of title needed to establish an easement by necessity can exist where a person owns one tract of land in fee simple and an adjoining tract of land with another person as tenants in common. We find unity of title is not so established and affirm the Court of Appeals.

FACTS

Petitioners and respondent are adjoining landowners of property. Respondent's tract and petitioners' tract (hereinafter referred to as the land-locked tract) were originally joined as one piece of property owned by Jacob Lindler.

In 1884, Lindler conveyed the land-locked tract to S.B. Holley alone. The deed mentions that the tract has a right of way to reach a road. In 1888 and 1889, Lindler conveyed two tracts (respondent's tract), which adjoined the land-locked tract, to S.B. Holley and his wife, C.D. Holley.

In 1908, C.D. Holley died. At the time of her death, she and S.B. Holley owned respondent's tract as tenants in common.[1] By the terms of C.D. Holley's will, she devised her interest in respondent's tract to S.B. Holley for life. At his death, the Will directed that the property be sold and the proceeds equally divided among her children and a granddaughter, Carrie Parrot.

S.B. Holley subsequently remarried and later died in 1917. By his Will,

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[1]Tenancy in common is "[a] form of ownership whereby each tenant (*i.e.*, owner) holds an undivided interest in property. . . . The interest of a tenant in common does not terminate upon his or her prior death (*i.e.*, there is no right of survivorship)." *Black's Law Dictionary* 1022 (Abridged 6th Ed. 1991).

he devised one-third of his interest in respondent's tract to his second wife, Mary Louise Holley. He also devised a life estate in the land-locked tract to Mary Louise Holley with the remainder to his granddaughter, Carrie Parrot West (formerly Carrie Parrot) and her husband, Nolan West. The residuary clause was in favor of his children and Carrie Parrot West.

Following the deaths of C.D. Holley and S.B. Holley, the ownership of the tracts was: (1) respondent's tract: one-sixth undivided interest in Mary Louise Holley and five-sixths undivided interest in the children of S.B. and C.D. Holley and their granddaughter, Carrie Parrot West; (2) land-locked tract: a life estate in Mary Louise Holley with remainder in Carrie and Nolan West.

Thereafter, in 1918, respondent's tract was conveyed to John A. Smith.[2] Smith subsequently conveyed the tract to respondent in 1972. As for the land-locked tract, in 1923, Mary Louise Holley surrendered her life estate to Carrie Parrot West. West and her husband then conveyed the property to the Lexington Water Power Company in 1928. After six more owners, the land-locked tract was conveyed to petitioners in 1989.

Petitioners brought this action seeking an easement by necessity over property of several adjoining landowners, including respondent.[3] Both parties moved for summary judgment. The trial court found respondent was entitled to summary judgment on the ground that there was not the requisite unity of title, severance, and necessity at the time of severance to give rise to an easement by necessity.

The Court of Appeals affirmed. Kennedy v. Bedenbaugh, Op. No. 2000-UP-288 (S.C. Ct. App. filed April 18, 2000). The Court of Appeals found

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[2]An action, known as the Oxiner action, was brought to approve this sale because Carrie Parrot West was a minor at the time. Carrie appeared by guardian ad litem and stated the sale should be approved.

[3]All other defendants were subsequently dismissed from the action.

S.B. Holley's ownership did not meet the requirements of unity of title because he owned respondent's tract with his wife, C.D. Holley, as tenants in common, and therefore, did not have absolute ownership of both tracts at the same time. Further, the only severance that occurred while there was the requisite unity of title was Lindler's conveyances of the two tracts at different times to different grantees. However, at this time there was no necessity for a right of way because Lindler had granted S.B. Holley a right of way to a road that apparently no longer exists. Accordingly, the Court of Appeals concluded the trial court had properly granted respondent's motion for summary judgment.

ISSUE

> Whether the unity of title needed to establish an easement by necessity can exist where a person owns one tract of land in fee simple and an adjoining tract of land with another person as tenants in common?

DISCUSSION

"From the earliest period of our judicial history the acquisition of an easement of right of way over another's land, by necessity, has been clearly recognized and protected." Brasington v. Williams, 143 S.C. 223, 238, 141 S.E. 375, 380 (1927). The legal requirements of an easement by necessity are: (1) unity of title, (2) severance of title, and (3) necessity. *Id.* To establish unity of title, the owner of the dominant estate must show that his land and that of the owner of the servient estate once belonged to the same person. *Id.* In other words, petitioners have to show that their land-locked tract and respondent's tract were, at one time, owned by the same owner.

While the tracts were at one time both owned by Jacob Lindler, this is not the time at which an easement by necessity could have arisen. Lindler conveyed the land-locked tract to S.B. Holley. The deed conveying the land-locked tract mentions that S.B. Holley's interest includes a right of way to a road. Therefore, an easement by necessity could not have arisen at the time

Lindler conveyed the land-locked tract to S.B. Holley because S.B. Holley had access to a road from the land-locked tract.

Therefore, we must determine whether there is another time at which unity of title existed. Petitioners contend unity of title existed when S.B. Holley owned the land-locked tract in fee simple and owned respondent's tract with his wife, C.D. Holley, as tenants in common. However, unity of title did not exist at this time.

For unity of title to exist there must have been an absolute ownership of both tracts of land. *See* 25 Am. Jur. 2d *Easements and Licenses* § 39 (1996) (must have been absolute ownership of both tracts). *See also* Potter v. Potter, 112 S.E.2d 569, 572 (N.C. 1960) (unity of title must have amounted to absolute ownership of both quasi-dominant and quasi-servient tenements); Bradley v. Bradley, 96 S.E.2d 417, 420 (N.C. 1957) (same). S.B. Holley's holding of respondent's tract as a tenant in common did not make him an absolute owner of that tract. Without a right of survivorship,[4] upon C.D. Holley's death, her one-half undivided interest in respondent's tract went to her heirs, not to her husband.[5] Accordingly, holding one tract in fee simple and the other tract as a tenant in common does not meet the requisite unity of title needed for an easement by necessity to be created. *See* 25 Am. Jur. 2d *Easements and Licenses* § 39 (way of necessity does not arise, for example, where grantor merely owned undivided interest in land over which right is claimed); 28A C.J.S. *Easements* § 94 (1996) (right of way of necessity does not exist over land owned by grantor as tenant in common, or in favor of land formerly held jointly or in common by grantor); 94 A.L.R.3d *Unity of Title for Easement by Implication* § 10 (1979) (insufficient unity of title to support,

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[4]There is no right of survivorship as between co-tenants unless the parties attach such a right. *See* Davis v. Davis, 223 S.C. 182, 75 S.E.2d 46 (1953); 86 C.J.S. *Tenancy in Common* §5 (1997).

[5]S.B. Holley received a life estate of C.D. Holley's interest in respondent's tract upon her death. However, his interest was limited to the duration of his life, and, as a result, does not qualify as absolute ownership.

upon severance, an easement by necessity where alleged common owner of relevant parcels held only an undivided interest in common in one of parcels). *See also* Gray v. Magee, 292 P. 157 (Calif. App. 4 Dist. 1930) (right to easement by necessity does not arise when only interest of grantor in adjoining land over which right of way is claimed is that of co-tenant with other parties); Garvin v. New York, 190 N.Y.S. 143 (N.Y. Ct. Cl. 1921) (one cannot have right of way of necessity over land which grantor never owned except as tenant in common). *Cf.* Reed v. West, 82 Mass. 283 (1860) (plaintiff's fee ownership of dominant tract and tenancy in common ownership of servient tract did not create unity of title such that use of easement by prescription over servient tract was extinguished).

CONCLUSION

We find the trial court properly granted respondent's motion for summary judgment because the unity of title needed to establish an easement by necessity does not exist where a person owns one tract of land in fee simple and an adjoining tract of land with another person as tenants in common. *See* Garvin v. Bi-Lo, Inc., 343 S.C. 625, 541 S.E.2d 831 (2001) (summary judgment is appropriate when it is clear there is no genuine issue of material fact and conclusions and inferences to be drawn from facts are undisputed). Given our conclusion that summary judgment was properly granted on this ground, we need not address petitioner's argument that the additional grounds cited by the trial court for granting summary judgment were improper. Consequently, the decision of the Court of Appeals is
AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Ae Khingratsaiphon, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Aiken County
Rodney A. Peeples, Circuit Court Judge

Opinion No. 25554
Heard October 9, 2002 - Filed November 12, 2002

AFFIRMED

Chief Attorney Daniel T. Stacey, of South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Tracey Colton Green, all of Columbia; and Solicitor Barbara R. Morgan, of Aiken, for respondent.

JUSTICE BURNETT: We granted a writ of certiorari to review the Court of Appeals' decision affirming petitioner's direct appeal.[1] State v. Khingratsaiphon, Op. No. 2001-UP-052 (S.C. Ct. App. Filed January 29, 2001). We affirm.

ISSUE

Did the Court of Appeals err by holding evidence supported the trial judge's determination the arresting officer had authority to frisk petitioner and, therefore, properly denied petitioner's motion to suppress?

FACTS

Petitioner argues the Court of Appeals erred by holding there was evidence which supported the trial judge's determination the arresting officer had authority to conduct a frisk. Specifically, he contends the trial judge incorrectly premised his ruling on a finding the arresting officer heard "gun" shouted prior to the frisk and, therefore, there was no evidence supporting the trial judge's ruling. We disagree.

During the suppression hearing, the parties offered the following evidence. On June 23, 1997, between 9:00 a.m. and 10:30 a.m., an Aiken pawn shop was robbed and its owner was shot to death. South Carolina Law Enforcement Division (SLED) Agent Roger Sharpe testified, the morning following the crime, SLED agents conducted a roadblock next to the pawn shop. As a result of the roadblock, the agents determined a black Honda was parked in the pawn shop's lot on the morning of the crime. An Asian male was seen standing beside the vehicle.

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[1] Petitioner was convicted of murder, possession of a firearm during the commission of a violent crime, armed robbery, and criminal conspiracy to commit armed robbery and sentenced to concurrent terms of life, five years, thirty years, and five years, respectively.

During the roadblock, Mr. Wilson who worked across the street from the pawn shop, volunteered that his relative, Curtis Kesl from Charlotte, North Carolina, had been in Aiken on the morning of the crime. Wilson was uneasy about Kesl. He stated, in the past, Kesl had driven a Honda.

Agent Sharpe spoke with other members of Kesl's family. According to Sharpe, they were also uneasy about Kesl as Kesl had been in trouble before.

Kesl's cousin, Terry Wilson, testified, two weeks before the pawn shop crime, an Asian male accompanied Kesl to Aiken. The men stayed with Wilson over the weekend. Previously, Kesl made a collect telephone call to Wilson. Telephone records revealed Kesl had called Wilson from a Charlotte location.

Later on the morning of the roadblock, officers located an abandoned black Honda and determined it had been stolen from Charlotte on the morning of the shooting. Agent Sharpe relayed the above information to authorities in North Carolina and asked if Kesl could be located through that telephone number.

North Carolina authorities determined the Charlotte telephone number provided by Ms. Wilson was registered to Oua Vang at 305 Jones Street, Unit 3.

Charlotte-Mecklenburg Policeman G.C. Lyman testified on June 25, 1997, he was contacted by an agent with the State Bureau of Investigation in North Carolina and, among other information, was informed that an Asian had a possible connection to the shooting at the Aiken pawn shop. In addition, he knew Curtis Kesl, a white male, was possibly connected with the case.

On the same day, Lyman and two other officers proceeded to Vang's apartment. Three Asian males were standing outside. Each were wearing warm clothing in spite of the hot, humid weather. Lyman stated they wore baggy, solid blue clothing with long sleeves and bandanas around their

necks, clothing which was consistent with gang attire. Lyman observed the name of a Hmong gang scrawled on a wall facing the apartment.

Lyman stated the officers asked who lived in the apartment; all three indicated they did not live there.[2] According to Lyman, "somebody muttered something about somebody's relative, but it was not very clear and they were not very responsive." The officers then asked the three men for identification. Petitioner walked into the apartment, stating his identification was inside. Lyman testified that, had he had time to respond to petitioner, he would have requested petitioner not go inside; he was concerned both that his baggy clothing could be concealing a weapon and that there could be a weapon inside the apartment.

Lyman followed petitioner inside the apartment; he saw a white male and an Asian male in the living room/kitchen. He then followed petitioner up the stairs. Petitioner looked toward one bedroom then went into another bedroom, reached behind a curtain, and retrieved a wallet. Without opening the wallet, he stated it was not his and replaced it. At that point, petitioner started to open the closet. Because he did not want him to go into the closet for fear petitioner could obtain a weapon, Lyman testified he told petitioner he did not need identification and to return outside. Petitioner started down the stairs. At the same time, the Asian man who had been in the living room/kitchen was walking up the stairs. Lyman stated he told both men to go downstairs.

Lyman testified:

> At that point, I heard a commotion, which I subsequently found out was Officer Simmons yelling "gun," but I didn't hear him clearly because of the distance involved. I felt the need for a frisk at that time because my safety was in jeopardy and quickly frisked him and immediately felt

[2] Another investigator testified that the officers identified themselves as police officers to the three men outside the apartment.

in the front a large handgun. Retrieved it, it was 45 caliber Llama automatic pistol,[3] I stuck that in my back pocket.

Lyman arrested petitioner for carrying a concealed weapon and possession of a weapon by a minor.

After hearing argument, the trial judge stated as follows:

> . . . during the totality of the circumstances here, that there was graffiti on the wall, that they did have information that it was an Asian, and this gentlemen defendant is from Thailand, he is an Asian, and because of the exigent circumstances of long-sleeved blue shirts, not normally worn during the summertime, and blue bandanas, which was indicia of some gang problems they had had up in the Charlotte-Mecklenburg area.
>
> And I accept the testimony of the officer in this case that when he said the fellow said he had no id and then he said he was going inside to get his id that the door was open. And under those suspect circumstances, that it was proper for the officer to follow him into that house. And, in particular, even accepting the testimony of the defendant he was going in there to stash the gun, or to throw it in the closet, I believe he testified to. <u>In particular, when the fellow decided he better, the policeman decided he better take the fellow back outside and, of course, "gun" was hollered, he had the right to search him for his own protection, just as he had the right to search the suspect with baggy clothes on for which a gun or oozie or another dangerous type of weapon could have been underneath the clothes, that they had the right to search him. . . .</u>

The pistol seized from petitioner during the frisk was admitted at trial. Petitioner's videotaped statement was also admitted.

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[3] It was later determined the weapon belonged to the pawn shop.

On appeal, petitioner argued the police did not have reason to believe he was armed and dangerous and, therefore, the frisk was illegal. After reviewing the testimony from the suppression hearing, the Court of Appeals held "the record contains ample evidence supporting the trial judge's determination that the circumstances amounted to reasonable suspicion by the officer that [petitioner] was armed and dangerous." State v. Khingratsaiphon, supra. The Court of Appeals referred to the trial judge's language underlined above, noting the trial judge's decision was not premised on the belief Officer Lyman heard the exclamation "gun" before conducting the frisk, but rather simply that "gun" was shouted. Id. Ultimately, the Court of Appeals concluded the frisk was valid and the handgun and statement were properly admitted. Id.

DISCUSSION

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Evidence seized in violation of the Fourth Amendment must be excluded from trial. See Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

The Fourth Amendment "applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." United States v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607, 614 (1975). 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 v. Ohio, 392 U.S.1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). "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, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621, 629 (1981). In determining whether reasonable suspicion exists, "the totality of the circumstances - the whole picture -" must be considered. Id. 449 U.S. at 417, 101 S.Ct. at 695, 66 L.Ed.2d at 629.

Subsequent to a valid Terry stop, a police officer may search the individual for weapons where the officer has reason to believe the person is armed and dangerous. Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). In assessing whether a suspect is armed and dangerous, "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Terry v. Ohio, supra, 392 U.S. at 27, 88 S.Ct. at 1883, 20 L.Ed.2d at 909. "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. 392 U.S. at 21, 88 S.Ct. at 1880, 20 L.Ed.2d at 906.

In State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000), this Court considered the standard of review it would apply on appeal from a motion to suppress based on Fourth Amendment grounds. We concluded the appellate court would not review the trial judge's ultimate determination de novo but, rather, would apply a deferential standard of review. We stated:

> [W]e will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling.

Id. S.C. at 66, S.E.2d at 666.

Contrary to petitioner's claim, Brockman does not hold the appellate court may not conduct its own review of the record to determine whether the trial judge's decision is supported by the evidence.

Applying Brockman here, we conclude the evidence from the suppression hearing supports the trial judge's decision a reasonably prudent man would have believed petitioner was armed and dangerous when Officer Lyman conducted the frisk. Officer Lyman knew an Asian male was a suspect in the pawn shop shooting. Petitioner, an Asian male, and two other Asian males were outside the apartment from which a murder suspect had

placed a telephone call. Petitioner and the two other men were dressed in baggy clothing (which could easily conceal a weapon), attire which Officer Lyman associated with "gang clothing," and the name of an Asian gang appeared on a nearby wall. All three men denied living in the apartment. Nevertheless, petitioner went inside the apartment after stating his identification was inside.

Following petitioner inside the apartment, Officer Lyman observed two other men, both of whom fit the description of the murder suspect(s), inside the apartment. After following petitioner upstairs and observing petitioner search unsuccessfully for identification, Officer Lyman directed petitioner downstairs. At this moment, one of the men from the living room/kitchen was walking upstairs towards Officer Lyman and petitioner. At the same time, the officer heard a commotion outside. Because there are specific and articulable facts in evidence which support the trial judge's conclusion a reasonably prudent man would have considered petitioner armed and dangerous, the Court must affirm. Id.

Assuming the trial judge incorrectly based his ruling on the fact Officer Lyman heard "gun" before conducting the frisk, the Court must nonetheless affirm his decision because other articulable facts (baggy clothing, gang graffiti, the approach of another individual, hearing a "commotion") support the trial judge's decision upholding the frisk. Id. The decision of the Court of Appeals is affirmed.

AFFIRMED.

TOAL, C.J., MOORE and WALLER, JJ., concur.
PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Douglas A. Barker, Respondent

Opinion No. 25555
Heard October 10, 2002 - Filed November 12, 2002

DEFINITE SUSPENSION

Attorney General Charles M. Condon and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Coming B. Gibbs, Jr., of Gibbs & Holmes, of Charleston; and Desa A. Ballard, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, the Subpanel and the full Panel recommended respondent Douglas A. Barker be definitely suspended for nine months. We impose a six-month definite suspension.

FACTS

On October 12, 1998, respondent, acting pro se, initiated a divorce action against his wife, Diana Spreeuw Barker (Wife). Respondent alleged

that "since September 26, 1997, the parties hereto have lived separate and apart due to irreconcilable differences and seek a decree of divorce on the ground of separation for a period of one year." The complaint also sought joint custody for the couple's two daughters. Respondent prepared Wife's pro se Answer admitting to the allegations in the Complaint and asking the family court to adopt their settlement agreement.

On October 26, 1998, both respondent and Wife appeared pro se before the family court. At the hearing, respondent testified that he and his wife had "been living separate and apart since September 26, 1997." In addition, respondent called a corroborating witness who testified that respondent and Wife had been living separate and apart since September 1997. The family court granted respondent a divorce based on one year's continuous separation and approved the settlement agreement which included a joint custody arrangement for the couple's two children.

Respondent and Wife, however, had not been continuously separated for that year. In April 1999, respondent filed a Rule 60, SCRCP, motion with the family court informing the court of this fact.[1] As a result of the false statements made by respondent, the family court vacated the divorce as well as the approval of their agreement.

In addition to the false statements regarding the couple's continuous separation, respondent was charged with making a false statement to the family court on the financial declaration he filed at the October 1998 hearing. Respondent listed no creditors on the declaration, and no entry was made regarding a retirement fund. During the divorce litigation that ensued after the October 1998 divorce order was vacated, respondent listed several debts and a retirement fund.

Respondent testified at the hearing before the Subpanel. He admitted that the statements regarding continuous separation in the divorce complaint and at the hearing were false and that he made the misrepresentations to the family court with the intention of getting both the divorce granted and the

[1] Respondent also filed a self-report with Disciplinary Counsel.

settlement agreement approved. Moreover, he stated the corroborating witness knew her testimony was false. He explained his primary concern was joint custody of the children because he was their primary caregiver. Regarding the financial declaration, respondent stated that any omissions were not made with the intent to deceive Wife. Respondent acknowledged, however, that he did not make full financial disclosure **to the court** at the October 1998 divorce hearing.

DISCUSSION

The Subpanel recommended a definite suspension for nine months and that respondent pay the costs of the disciplinary proceedings. Respondent filed exceptions, but the Full Panel adopted the Subpanel's report.

The authority to discipline attorneys and the manner in which discipline is given rests entirely with this Court. E.g., In re Long, 346 S.C. 110, 551 S.E.2d 586 (2001). The Court may make its own findings of fact and conclusions of law and is not bound by the Panel's recommendation. E.g., In re Larkin, 336 S.C. 366, 520 S.E.2d 804 (1999). The Court must administer the sanction it deems appropriate after a thorough review of the record. Id.

Respondent has admitted the above facts and clearly has committed numerous acts of misconduct. Specifically, we find respondent violated the following Rules of Professional Conduct, Rule 407, SCACR: (1) Rule 1.1 (failing to provide competent representation); (2) Rule 1.7 (conflict of interest in representing both himself and Wife in the 1998 divorce proceeding); (3) Rule 3.1 (presenting a claim that was not meritorious in the 1998 divorce proceeding); (4) Rule 3.3 (candor towards the tribunal, by making false statements of fact and law to the family court); (5) Rule 3.4 (fairness to opposing party); (6) Rule 4.1 (truthfulness in statements to others); and (7) Rule 8.4 (violating the rules of professional conduct; committing a criminal act, i.e., perjury, that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer; engaging in conduct involving moral turpitude; engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and engaging in conduct prejudicial to the administration of justice).

In addition, respondent violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or bring the courts or legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(6) (conduct violating the oath of office taken upon the admission to practice law in this State).

In mitigation, respondent asks the Court to recognize he was under the emotional stress of a divorce and acted solely out of concern for his children.

We conclude a six-month definite suspension is the appropriate sanction. See In re Diggs, 344 S.C. 397, 544 S.E.2d 628 (2001) (90-day suspension imposed on attorney who gave false statements under oath on his CLE compliance report); In re Blake, 343 S.C. 441, 539 S.E.2d 710 (2000) (four-month definite suspension imposed on attorney who made false representations to the family court as to why he needed a continuance for a client's hearing); In re Murphy, 336 S.C. 196, 519 S.E.2d 791 (1999) (nine-month definite suspension imposed where attorney, *inter alia*, made misrepresentations to the probate court while acting as co-personal representative of his aunt's estate).

Accordingly, we definitely suspend respondent for six months and order him to pay the costs of these disciplinary proceedings. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of the Rules for Lawyer Disciplinary Enforcement.

DEFINITE SUSPENSION.

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

The Supreme Court of South Carolina

In the Matter of Larry S. Drayton, Respondent.

ORDER

Petitioner has been charged with possession of crack cocaine in violation of S.C. Code Ann. § 44-53-375 (Supp. 2001). The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR, because he has been charged with a serious crime. The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that the petition is granted and respondent is suspended from the practice of law in this State until further order of this Court.

IT IS FURTHER ORDERED that Lee S. Bowers, Esquire, who was appointed to protect the interests of respondent's clients in April 2002, when respondent was suspended for ninety days, see In the Matter of Drayton, 349 S.C. 60, 562 S.E.2d 319 (2002), shall continue with his appointment and assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Bowers shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Bowers may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Lee S. Bowers, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Lee S. Bowers, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Bowers' office.

Mr. Bowers' appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

Jean H. Toal C. J.
FOR THE COURT

Columbia, South Carolina

November 1, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Esau Heyward,

Appellant,

v.

Samuel Christmas,

Respondent.

Appeal From Sumter County
L. Henry McKellar, Circuit Court Judge

Opinion No. 3562
Heard October 9, 2002 – Filed November 4, 2002

REVERSED AND REMANDED

Dwight Christopher Moore, of Sumter; John D. Delgado and Kathrine H. Hudgins, both of Columbia, for appellant.

John E. James, III and George C. James, Jr., both of Sumter; for respondent.

ANDERSON, J.: Esau Heyward brought a civil action against Samuel Christmas, a South Carolina Highway Patrol trooper, alleging causes of action for negligence, assault and battery, and violation of 42 U.S.C. § 1983 by using excessive force in arresting Heyward. The circuit court granted Christmas a directed verdict. Heyward appeals, arguing that (1) the circuit court erred in granting Christmas a directed verdict; and (2) the circuit court erred in finding Christmas was entitled to qualified immunity. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

On February 16, 1996, Heyward worked until 5:00 p.m., changed clothes, and then went to a bar called Scotty's Shop in Pinewood, South Carolina. Heyward drank a few beers and then asked Ronald Brunson to give him a ride home around 8:30 to 9:00 p.m. Brunson left Scotty's with Heyward, and sometime during the drive, shots were exchanged between Brunson and a Pinewood police officer. A high-speed chase ensued, and Christmas and Trooper Raffield, another highway patrol trooper, joined the chase. Brunson eventually stopped the car and surrendered to the police. Heyward remained in the car. With his gun drawn, Christmas instructed Heyward to get out of the car and raise his hands. Heyward did not comply. With his gun still drawn, Christmas went to the driver's side of the vehicle while the other two officers approached Heyward from the passenger side. From the driver's side door, Christmas reached over, grabbed Heyward, and dragged him from the car. As he was pulling Heyward from the vehicle, Christmas' drawn gun discharged and Heyward was shot in the right leg. The officers did not find a gun in Heyward's hands.

Heyward filed the underlying civil action against Christmas, alleging causes of action for negligence, assault and battery, and using excessive force in arresting Heyward in violation of 42 U.S.C. § 1983. Christmas moved for summary judgment on the negligence claim, and the circuit court granted it. Prior to trial, Heyward agreed to dismiss the assault and battery claim. The only issue to go to trial was whether

Christmas had used excessive force in arresting Heyward in violation of § 1983.

The first witness for Heyward was Christmas. Christmas admitted the sirens from the three police cars would have made any audible instructions to Heyward difficult to hear. Christmas testified that Heyward's empty hands came up when Christmas grabbed for him. Christmas stated that Heyward did not resist, but his weight of 120 pounds caused Christmas to stumble while pulling Heyward out of the car. Christmas was wearing gloves at the time, and when Heyward's weight shifted, Christmas maintained that he regripped the gun and the gun discharged. Christmas kept his gun drawn because his brand new holster had not been broken in, which made the holster stick and difficult to pull the gun out. Christmas acknowledged the normal procedure was for the officer to stay in a protective position while ordering occupants of a car to exit one at a time. Christmas affirmed that he did not intentionally shoot Heyward.

Heyward called Rick Johnson as an expert in the field of law enforcement. Johnson regarded Christmas' actions as unreasonable. Johnson contended that Christmas placed himself in jeopardy by approaching the vehicle immediately upon the stop before taking time to assess the situation. Johnson opined that Christmas placed the other officers' lives in jeopardy by approaching and entering the vehicle with his weapon drawn and by pulling Heyward across to the driver's seat with one hand when the other officers were standing outside the passenger door. According to Johnson, the more reasonable approach would have been to get in a protected position and use the police car's public announcement system to give verbal commands to the occupant of the car.

Heyward testified at trial regarding the shooting. According to Heyward, he paid Brunson five dollars to drive him home from the bar. As the two began traveling away from the bar, a police car pulled in behind them. Brunson began shooting at the police car, stating that the police were "messing with him." Heyward asked Brunson to let him out of the vehicle, but Brunson continued to drive. When the car

eventually stopped, Heyward asserted there was a lot of noise coming from the police sirens. Heyward claimed that he sat with his hands in his lap, still buckled in his seatbelt, after the car stopped because he panicked. Heyward heard an officer yell for him to "hold it," and to hold his hands up. Heyward professed he cooperated by putting his hands up and then recalled being pulled out of the driver's side of the car. The next thing he heard was the gun discharging. Heyward said that he never had the chance to unlatch his seatbelt prior to being hauled from the car.

After Heyward's presentation of evidence, Christmas moved for a directed verdict. The circuit court reserved the ruling until all the evidence had been presented.

Terry Proctor testified that he was on duty at the sheriff's office and was patrolling the road on the evening of the shooting when he heard the radio call around midnight that shots had been fired upon a Pinewood police officer in pursuit of a car.

Captain David E. Florence attested that he was on duty at the Sumter County Sheriff's Office when he heard the radio call regarding the shots fired on the Pinewood police officer. Florence went to the area to try to intercept the suspect vehicle. Florence pulled his vehicle in front of the suspect vehicle and forced Brunson to stop. Florence established that he and several other officers yelled at the occupants to put their hands in the air and exit the car. Although Brunson, the driver, exited the vehicle, the passenger did not show his hands or comply with any commands. Florence approached the passenger side of the car, and Lieutenant Bradford opened the passenger door to try to get Heyward out of the car. At that moment, Christmas went inside the car and grabbed Heyward from the driver's side.

Lieutenant Anthony Bradford asserted that after the vehicle was stopped, he walked over to the passenger side.

Christmas averred that when he approached the vehicle, the driver's side door was left open from the driver's exit. He believed he

had a better view of inside the car than anyone else and could see the suspect, Heyward, in the car.

Relying on Graham v. Connor, 490 U.S. 386 (1989), and Roy v. Inhabitants of City of Lewiston, 42 F.3d 691 (1st Cir. 1994), the circuit court granted the motion for a directed verdict on the § 1983 action, finding no Fourth Amendment violation based on the objective reasonableness standard and on qualified immunity. The court found the gun discharged accidentally, and thus the court would not consider the gun at all. The court based its decision on whether the actual seizure was unreasonable. The court found that it was not unreasonable under the circumstances for Christmas to pull Heyward out of the car by dragging him across the driver's seat. The circuit court held that it would not consider Christmas' deviation from his training in the directed verdict motion. Heyward appeals.

STANDARD OF REVIEW

When reviewing an order granting a directed verdict, the appellate court views the evidence and all reasonable inferences from the evidence in a light most favorable to the party against whom the directed verdict was granted. Carson v. Adgar, 326 S.C. 212, 216, 486 S.E.2d 3, 5 (1997); Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). If the evidence is susceptible of more than one reasonable inference, a jury issue is created and "the court may not grant a directed verdict." Hunley v. Gibson, 313 S.C. 350, 351, 437 S.E.2d 554, 555 (Ct. App. 1993).

ISSUES

I. Did the circuit court err in granting a directed verdict to Christmas on the ground that his conduct was objectively reasonable?

II. Did the circuit court err in granting a directed verdict on the ground that Christmas was entitled to qualified immunity?

LAW/ANALYSIS

I. OBJECTIVELY REASONABLE STANDARD

Heyward first argues the circuit court erred in granting a directed verdict based on the finding that Christmas' actions were "objectively reasonable." We agree.

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. U.S. Const. amend. IV. Congress enacted 42 U.S.C. § 1983 to allow citizens a private cause of action against state actors who deprive them of a constitutional right. Section 1983 provides:

> [Anyone] who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (1996).

Heyward argues he was entitled to redress under § 1983 because Christmas violated his Fourth Amendment rights by using unreasonable force in arresting him. "Because the Fourth Amendment provides an explicit textual source of constitutional protection against [excessive force], that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." Graham v. Connor, 490 U.S. 386, 395 (1989). Thus, a claim that a police officer has used excessive force during a seizure of a person must be evaluated under the Fourth Amendment's objective reasonableness standard. Graham, 490 U.S. at 388; Threlkeld v. White

Castle Systems, Inc., 201 F.Supp.2d 834, 840 (N.D.Ill. 2002). "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires careful balancing of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests'" against the countervailing governmental interests at stake." Graham, 490 U.S. at 396; accord Jackson v. City of Bremerton, 268 F.3d 646, 651 (9th Cir. 2001) (quoting Graham, 490 U.S. at 396). Although the Fourth Amendment recognizes that police have the right to use some force in making an arrest, courts must look to the totality of the circumstances and determine whether the use of force was "reasonable" from the perspective of a reasonable officer in the same situation. Graham, 490 U.S. at 396; Jensen v. City of Oxnard, 145 F.3d 1078, 1086 (9th Cir. 1998); Wicker v. City of Galveston, 944 F.Supp. 553, 558 (S.D.Tex. 1996). Factors to consider in determining reasonableness are "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396.

> [T]he question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. . . . An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

Id. at 397; accord Jensen, 145 F.3d at 1086; Anderson v. Branen, 17 F.3d 552, 559 (2nd Cir. 1994).

Because the intent of the officer is irrelevant in the overall analysis of whether the officer's actions were "objectively reasonable," whether a gun discharges accidentally is of no consequence. A court must instead determine whether the use of the gun was objectively reasonable in light of the surrounding circumstances. See Graham, 490

U.S. at 396 (court must consider whether police officer's use of force was reasonable under the circumstances); Brower v. County of Inyo, 489 U.S. 593, 598-99 (1989) (it is not practicable to conduct an inquiry into subjective intent; it is enough for a seizure that "a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result").

The circuit court in the underlying case relied heavily upon Roy v. Inhabitants of City of Lewiston, 42 F.3d 691 (1st Cir. 1994). In Roy, two police officers watched as a third officer attempted to serve the intoxicated Roy with a summons outside his home. Roy refused the summons, became angry, entered his home, and returned outside with two steak knives, which he swung about while advancing upon the officers. After unsuccessfully attempting to get Roy to drop the knives, Roy lunged at an officer who shot Roy twice. The First Circuit Court of Appeals upheld the district court's grant of summary judgment to the officer, finding that "in our view a jury could not find that his conduct was so deficient that no reasonable officer could have made the same choice as [the officer] – in circumstances that were assuredly 'tense, uncertain, and rapidly evolving. . . .'" Roy, 42 F.3d at 695 (quoting Graham, 490 U.S. at 397).

Roy is factually distinguishable from the present case. Whereas Roy was proceeding upon the officers while flailing about two steak knives, Christmas approached a motionless Heyward with his gun drawn from the driver's side of the vehicle. Although Heyward eventually raised his hands, Christmas continued to point his weapon at Heyward. Despite the fact that other officers were attempting to remove Heyward from the passenger side of the car, Christmas grabbed Heyward, who was still wearing a seatbelt, with one hand and lugged him across the seat of the car while still pointing his firearm with the other hand. Christmas, as a result, was also pointing the firearm at the other officers.

Applying the Graham factors to the present case, the original crime of shooting at a police officer was serious and the officers were not initially sure which suspect in the car was the shooter. However,

Heyward posed no immediate threat to the police officers when he was removed from the vehicle because he complied with the officers' requests to make his hands visible just prior to Christmas' seizure of him. Moreover, he was not actively resisting arrest or trying to flee.

Further, the circuit court erred by refusing to consider the other circumstances in determining whether Christmas' actions were objectively reasonable. The circuit court specifically refused to consider the use of the weapon in effectuating the seizure of Heyward because it found the resulting shot accidental. In addition, it does not appear the circuit court considered the other officers within the line of fire or Heyward's act of surrender by putting his hands up prior to Christmas' actions. An expert testified that Christmas' actions were not reasonable under the circumstances. Viewing the totality of the circumstances, there was some evidence that Christmas' actions could be considered objectively unreasonable. Thus, reviewing the evidence in this case in the light most favorable to Heyward, we find the evidence was capable of more than one interpretation and the circuit court erred in granting a directed verdict.

II. QUALIFIED IMMUNITY

Heyward argues the circuit court erred in directing a verdict for Christmas on the grounds that he was entitled to qualified immunity. We agree.

While § 1983 provides individuals with a method of seeking monetary compensation against state actors who deprive them of a constitutional right, state actors are given some protection. Government officials "performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Wilson v. Layne, 526 U.S. 603, 609 (1999) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); see also Todd v. Smith, 305 S.C. 227, 238, 407 S.E.2d 644, 650 (1991) (quoting

Harlow). "[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level. . . ." Saucier v. Katz, 533 U.S. 194, 200 (2001). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id. at 202 (citing Wilson, 526 U.S. at 615).

The Fourth Circuit Court of Appeals has summarized this test as follows:

> Ruling on a defense of qualified immunity therefore requires (1) identification of the specific right allegedly violated; (2) determining whether at the time of the alleged violation the right was clearly established; and (3) if so, then determining whether a reasonable person in the officer's position would have known that doing what he did would violate that right. The first two of these present pure questions of law for the courts. Harlow, 457 U.S. at 818, 102 S.Ct. at 2738. The third, which involves application of Harlow's objective test to the particular conduct at issue, may require factual determinations respecting disputed aspects of that conduct. Anderson v. Creighton, 483 U.S. 635, 646 n. 6, 107 S.Ct. 3034, 3042 n. 6 (1987).

Pritchett v. Alford, 973 F.2d 307, 312 (4th Cir. 1992).

At the end of the trial, the circuit court announced an inclination to grant Christmas a directed verdict based on "both the objective reasonable standards on the Fourth Amendment test and qualified immunity." However, throughout the directed verdict arguments with counsel, the circuit court only discussed the objective reasonable standard. The circuit court did not discuss why, based on the facts presented, it found Christmas was entitled to qualified immunity. It does not appear from the record that the circuit court performed a qualified immunity evaluation.

Nevertheless, it appears that Heyward presented evidence that would create a question of fact regarding qualified immunity. Heyward was entitled under the Fourth Amendment to be free from seizures effectuated by the use of excessive force. This right was clearly established at the time Christmas approached the motionless Heyward with his gun drawn. Finally, some evidence was presented that a reasonable officer would not have approached Heyward in the manner that Christmas did. The expert testimony at trial at least created a question of fact regarding the reasonableness of Christmas' actions. Because the circuit court failed to make a reasoned evaluation of whether Christmas was entitled to qualified immunity and Heyward presented evidence which could lead to more than one inference regarding Christmas' entitlement to qualified immunity, the circuit court erred in granting Christmas a directed verdict based on qualified immunity.

CONCLUSION

Based on the foregoing, the circuit court's grant of a directed verdict to Christmas is

REVERSED AND THE CASE IS REMANDED FOR TRIAL.

CONNOR and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Appellant,

v.

Victor Wyatt Missouri,

Respondent.

Appeal From Greenville County
H. Dean Hall, Circuit Court Judge

Opinion No. 3563
Heard October 8, 2002 – Filed November 12, 2002

REVERSED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Appellant.

Assistant Appellate Defender Tara S. Taggart, of Columbia, for Respondent.

ANDERSON, J.: The Circuit Court found Victor Wyatt Missouri had "standing" to challenge the drug evidence introduced against him based on a violation of the Fourth Amendment. The State appeals, arguing Missouri did not have "standing" to challenge the drug evidence. We reverse.

FACTS/PROCEDURAL BACKGROUND

In early 1995, Greenville detectives were investigating a crack cocaine ring. On February 3, 1995, the police obtained a warrant to search the apartment of Curtis Sibert for cocaine. When the police executed the search warrant, they found Missouri in the kitchen standing over a sink, facing a set of triple beam scales. The police discovered a quantity of cooked, crack cocaine inside the sink. Missouri was arrested and charged with trafficking in crack cocaine.

At trial, the lead detective admitted he lied in the affidavit issued in support of the search warrant. Further, according to Missouri, the affidavit omitted exculpatory information. The Circuit Court denied Missouri's motion to suppress the evidence obtained in the search. The Court of Appeals reversed the Circuit Court, ruling the omitted information was necessary for the magistrate's finding of probable cause. This Court remanded the matter for a hearing to determine whether Missouri had a reasonable expectation of privacy in the apartment. State v. Missouri, 97-UP-448 (S.C. Ct. App. filed September 15, 1997). The Supreme Court affirmed. State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999).

A hearing was held before the Circuit Court on remand to determine whether Missouri had a reasonable expectation of privacy in the apartment. Sibert, Missouri's best friend, testified that in 1994 and 1995, Missouri was an occasional overnight guest at Sibert's apartment "whenever [Missouri] got to arguing with his wife," whenever Sibert's wife would leave for the weekend, and whenever Missouri and Sibert

would sneak away to "go partying." Sibert stated that Missouri kept a change of clothing at Sibert's apartment so Missouri could "go partying" with Sibert without Missouri's "wife" finding out. Missouri would stay in Sibert's son's room whenever he spent the night.

On certain occasions, Sibert would give Missouri a key to the apartment. Sibert declared that Missouri had a key to the apartment at the time of Missouri's arrest. According to Sibert, Missouri went to the apartment as a friend, not as a business associate, when Sibert was not there. Sibert left Missouri in control of the apartment when he was gone, with the ability to let people come and go as Missouri saw fit. Because Sibert's wife was trying to "kick" her drug addiction, Sibert testified that he would not have left Missouri in his apartment the day the search warrant was executed if he had known Missouri intended to mix the drugs there.

Sibert admitted on cross-examination that he returned to his apartment at 1:00 a.m. the night before the search warrant was executed and Missouri was not staying there. He did not recall the exact date when Missouri last spent the night at his apartment. Sibert professed he was not in the drug business and that he had no idea what Missouri was planning to do in his apartment when he left Missouri there the day the search warrant was executed.

Sibert's wife testified Missouri had a key to the apartment, he left a change of clothing there, and he had control of the apartment when she and Sibert were gone.

At the hearing, Missouri stated he was close friends with Sibert and had known him for many years. He occasionally spent the night at Sibert's apartment. Missouri declared that he was free to come and go from Sibert's apartment and would sometimes use the key Sibert had given him. Although Missouri had his own residence a few miles from Sibert's apartment, Missouri would stay at the apartment whenever he was arguing with his fiancée or whenever he wanted to get out of the house. Missouri stayed in Sibert's son's room and he kept a change of clothes there. However, Missouri admitted that he did not spend the

night at Sibert's apartment the night before the search warrant was executed. Missouri denied that he and Sibert had a business relationship regarding drug trafficking.

The State presented the testimony of Detective Eric Cureton, the officer responsible for the false statements in the affidavit supporting the search warrant. Cureton was conducting surveillance on Sibert's apartment the day the warrant was executed. On that day, he observed Missouri enter the apartment between 2:30 and 3:00 p.m. and did not see any other person enter or exit the apartment. The search warrant was executed between 9:30 and 10:00 p.m., after Sibert called the confidential informant to inform him that it was time to "come and get it."

Cureton monitored Sibert and his wife purchasing baking soda at different locations around town earlier that day. Baking soda is used to aid in the cooking process, which turns cocaine into crack cocaine. Upon executing the warrant, Cureton discovered Missouri in the kitchen standing over several dishes of cooling crack cocaine. Sibert and his wife were sitting on the couch with the television on. The police examined Missouri's key chain. It held three keys: one to Missouri's residence, and two keys to two cars. The key chain did not contain a key to Sibert's apartment. In the kitchen, Cureton recovered a black bag belonging to Missouri and containing scales and packaging paper. No other items belonging to Missouri were found in the apartment.

On cross-examination, Cureton professed he was "confused" and an inexperienced police officer when he drafted the original affidavit in support of the search warrant. Cureton admitted he was not familiar with Missouri's clothes and did not know whether Missouri's clothes were in Sibert's apartment. Although Cureton checked the keys on Missouri's key ring, he returned the keys to Missouri after he was booked. Cureton was not aware of the friendship between Missouri and the Siberts.

Detective James Bradley testified that, upon executing the search warrant, he found Missouri in the kitchen with cooked crack cocaine. Bradley did not find any items in the apartment belonging to Missouri. When Missouri was searched, "some keys" were "taken off of him." The keys went to a van, another car, and Missouri's residence.

Missouri testified in reply regarding the keys. He stated he had more than three keys on his key chain.

The Circuit Court determined that Missouri and Sibert were close, long-time friends and Missouri visited Sibert frequently at Sibert's apartment. Missouri sometimes spent the night at Sibert's, but did not live with Sibert. The court found Missouri had access to the apartment, on some occasions had a key to the apartment, and was free to come and go as he pleased from the apartment. Further, the court noted the Siberts did not charge Missouri to stay at their apartment, he kept a change of clothes there, and Missouri used the apartment as a place to "'get away.'" The court specifically found Missouri did not spend the night at the apartment the evening prior to the execution of the search warrant. Finally, the court concluded that, on the day the search warrant was issued, the police began surveillance of the Siberts' apartment at 7:00 a.m.; Missouri arrived between 2:30 and 3:00 p.m.; the Siberts left Missouri at their apartment while they went shopping; the search warrant was executed between 9:30 and 10:00 p.m.; and the officers discovered Missouri in the kitchen with crack cocaine and the Siberts in another room.

Based on the factual findings, the Circuit Court held that Missouri had a legitimate expectation of privacy in the Siberts' apartment and he would therefore be able to challenge the search under the Fourth Amendment.[1]

[1] The court used the term "standing." The United States Supreme Court has indicated a preference for an evaluation of the substantive Fourth Amendment right. Accordingly, we will interchange this term for "standing" throughout this opinion.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973). This Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000).

Our Supreme Court articulated the proper standard of review in regard to a Fourth Amendment issue relating to search and seizure:

> As a threshold matter, we must determine the appropriate standard of review to apply in considering the trial court's ruling below. . . . The test for making this determination entails an inquiry into the totality of the circumstances. . . . .
>
> . . . .
>
> Therefore, we will review the trial court's ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling.

State v. Brockman, 339 S.C. 57, 65-66, 528 S.E.2d 661, 665-66 (2000). We find the Brockman standard of review is controlling.

LAW/ANALYSIS

The Fourth Amendment to the United States Constitution elucidates:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall

> issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The South Carolina Constitution provides similar protection against unlawful searches and seizures. See S.C. Const. art. I, § 10. Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. See Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001); State v. Austin, 306 S.C. 9, 409 S.E.2d 811 (Ct. App. 1991).

Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. See Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Thus, a person seeking to have evidence suppressed based upon a Fourth Amendment violation "must establish that his own Fourth Amendment rights were violated" by the search and seizure. State v. McKnight, 291 S.C. 110, 114-15, 352 S.E.2d 471, 473 (1987) (citing United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980)); see also Rakas, 439 U.S. at 138, 99 S.Ct. at 428, 58 L.Ed.2d at 398 ("'rights assured by the Fourth Amendment are personal rights, [which] . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure'").

It is not necessary for a defendant to be an owner of a property in order to claim Fourth Amendment rights. State v. Daniels, 252 S.C. 591, 167 S.E.2d 621 (1969). However, a defendant seeking to suppress evidence on Fourth Amendment grounds bears the burden of proving he had a reasonable expectation of privacy in the area searched or the item seized. United States v. Rusher, 966 F.2d 868 (4th Cir. 1992) (citing Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980)); McKnight, 291 S.C. at 115, 352 S.E.2d at 473. "A subjective expectation of privacy is legitimate if it is one that society is

prepared to recognize as reasonable." Minnesota v. Olson, 495 U.S. 91, 95-96, 110 S.Ct. 1684, 1687, 109 L.Ed.2d 85, 92 (1990) (internal quotations omitted).

In determining whether a particular defendant may challenge a search and seizure, the United States Supreme Court has indicated a preference for an analysis focusing on "the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." Rakas, 439 U.S. at 139, 99 S.Ct. at 428, 58 L.Ed.2d at 398; see also State v. Hiott, 276 S.C. 72, 76-77, 276 S.E.2d 163, 165 (1981) ("the United States Supreme Court has recently shifted away from a 'standing' approach to an inquiry focusing directly on the substantive issue of whether the claimant possessed a 'legitimate expectation of privacy' in the area searched.").

Whether a defendant has a reasonable expectation of privacy in a particular premises depends on the status of the defendant. The Fourth Amendment offers more protection to an overnight guest than to one who is merely a casual guest or conducting a business transaction. In Minnesota v. Olson, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990), police entered a residence, without a warrant, to apprehend an overnight guest who was a suspect in a murder and robbery. The Supreme Court found the defendant's status as an overnight guest alone was "enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." Olson, 495 U.S. at 96-97, 110 S.Ct. at 1688, 109 L.Ed.2d at 93.

By contrast, in Minnesota v. Carter, 525 U.S. 83, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998), two defendants were in the apartment of the lessee for the sole purpose of packaging cocaine. The two defendants paid the lessee of the apartment one-eighth of an ounce of cocaine for the two and one-half hours they used the apartment. There was no indication that the two defendants had a prior relationship with the lessee of the apartment. The Supreme Court held that, unlike the overnight guest in Olson, the two defendants in Carter had no reasonable expectation of privacy in the apartment because they were

guests "simply permitted on the premises" and were present solely for a business transaction. Carter, 525 U.S. at 91, 119 S.Ct. at 474, 142 L.Ed.2d at 381.

The facts in the present case are more akin to those found in Carter. Missouri clearly had a long relationship with Sibert and had periodically been an overnight guest in Sibert's apartment with the occasional use of a key to the apartment. When Missouri spent the night with Sibert, he was free to come and go as he pleased. However, Missouri was not an overnight guest the evening before the search warrant was executed. Moreover, he had only been present at Sibert's apartment for a few hours. Despite Missouri's testimony that he kept clothes in the apartment and that he had a key, neither his clothes nor a key was found. The major purpose of Missouri's presence was to cook cocaine into crack cocaine.

We find Missouri's occasional status as an overnight guest did not extend to this instance where he was merely a permittee on the premises. Further, as he was assisting Sibert with the manufacture of crack cocaine, Missouri's main purpose for being on the premises was for "business" reasons.

CONCLUSION

We hold Missouri had no reasonable expectation of privacy. Concomitantly, he did not have "standing" to assert a violation of the Fourth Amendment. We rule that, at the time the search warrant was executed, Missouri was merely a permitted guest conducting business, not an overnight guest entitled to Fourth Amendment protection. We **REVERSE** the Circuit Court's finding that Missouri had "standing" to assert a violation of the Fourth Amendment.

REVERSED.

STILWELL, J., concurs.

CONNOR, J., dissents in a separate opinion.

Connor, J. (dissenting): I respectfully dissent and would affirm the trial judge's ruling. I believe Missouri had a legitimate expectation of privacy in the Siberts' apartment.

As noted by the majority, the trial judge's ruling on this issue can only be reversed if there is clear error. If any evidence supports the ruling, it will be affirmed. State v. Brockman, 339 S.C. 57, 65-66, 528 S.E.2d 661, 665-66 (2000); State v. Williams, Op. No. 3550 (S.C. Ct. App. filed Sept. 9, 2002) (Shearouse Adv. Sh. No. 32 at 66).

The majority opinion outlines the numerous findings of fact made by the trial judge. After observing all of the witnesses, the trial judge found Missouri had a legitimate expectation of privacy in the premises searched.

The trial judge specifically found that Missouri and Curtis Sibert were "good friends" and had grown up together, and that Missouri frequently visited the Siberts' apartment, sometimes spending the night. Moreover, he found that Missouri on "some occasions" had a key to the apartment and kept a change of clothes there. He also found the Siberts did not charge Missouri to use the apartment.

However, the majority makes its own findings of fact, some contrary to those made by the trial judge. The majority characterizes Missouri's relationship with the Siberts as that of an "occasional" or "periodical" overnight guest. Furthermore, the majority finds "neither [Missouri's] clothes nor a key was found" in the apartment. It also states the main purpose of Missouri's presence at the apartment was for "business" reasons.

The United States Supreme Court, in Minnesota v. Olson, 495 U.S. 91 (1990), held an overnight guest had a reasonable expectation of privacy.[2]

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[2] In reaching this conclusion, the Court recognized the facts of Olson were similar to those in Jones v. United States, 362 U.S. 257 (1960).

On the other hand, in Minnesota v. Carter, 525 U.S. 83 (1998), the Court addressed "the issue of whether a person present in another's home for a 'purely commercial . . . transaction,' for only a 'relatively short period of time,' and having no 'previous relationship with' the householder, could claim the Fourth Amendment's protections." Morton v. United States, 734 A.2d 178, 180 (D.C. 1999) (quoting Carter, 525 U.S. at 91). The Court said such person did not have a reasonable expectation of privacy.

In Carter, the Court held there was nothing "similar to the overnight guest relationship in Olson to suggest a degree of acceptance into the household." Carter, 525 U.S. at 90. The Court further stated: "If we regard the overnight guest in Minnesota v. Olson as typifying those who may claim the protection of the Fourth Amendment in the

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Olson, 495 U.S. at 97. Jones is likewise instructive in the present case. The defendant in Jones sought to challenge a search warrant after being arrested in a friend's apartment. Jones testified that "the apartment belonged to a friend . . . who had given him the use of it, and a key, with which [Jones] had admitted himself on the day of the arrest." Jones v. United States, 362 U.S. 257, 259 (1960), overruled in part by United States v. Salvucci, 448 U.S. 83 (1980) (rejecting the "automatic standing" rule based on possession of seized goods established in Jones). Jones also testified he had clothing in the apartment, "that his home was elsewhere, that he paid nothing for the use of the apartment, that [his friend] had let him use it 'as a friend,' [and] that he had slept there 'maybe a night[.]'" Id. The Court ruled Jones could challenge the search because he was "legitimately on [the] premises." Although this particular standard has been repudiated, the Court stated it did "not question the conclusion in Jones that the defendant in that case suffered a violation of his personal Fourth Amendment rights if the search in question was unlawful." Rakas v. Illinois, 439 U.S. 128, 141 (1978). "Rakas thus recognized that, as an overnight guest, Jones was much more than just legitimately on the premises." Olson, 495 U.S. at 98. There is nothing in Jones to indicate the defendant was an overnight guest the evening before the search warrant was executed.

home of another, and one merely 'legitimately on the premises' as typifying those who may not do so, the present case is obviously somewhere in between." Carter, 525 U.S. at 91.[3]

I believe this case is more like Olson than Carter. In Carter there was "no suggestion that [the defendants] had a previous relationship with [the householder], or that there was any other purpose to their visit." Carter, 525 U.S. at 90. In this case Missouri and Sibert were good friends, and Missouri had visited the apartment on a frequent basis, sometimes spending the night. Missouri was free to come and go as he pleased and paid nothing to use the apartment. Missouri had a change of clothes at the apartment and on some occasions had a key. He used the apartment as a place to "get away" and as a place to "find comfort." On the day the warrant was executed, Missouri had been at the apartment for approximately seven hours. Additionally, when left alone at the apartment, Missouri could control who came and entered the apartment.

The trial judge's findings of fact support his ruling that Missouri had a legitimate expectation of privacy in the apartment. This ruling is clearly supported by the evidence. Therefore the trial judge should be affirmed.

[3] The Court in Carter also recognized the continuing validity of the factual "holding of Jones – that a search of the apartment violated the defendant's Fourth Amendment rights." Carter, 525 U.S. at 89-90.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Daisy Outdoor Advertising Company, Inc., Appellant,

v.

South Carolina Department of Transportation, Respondent.

Appeal From Greenville County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 3564
Submitted July 10, 2002 – Filed November 12, 2002

AFFIRMED

Robert D. Moseley, Jr., of Greenville; for Appellant.

Assistant Chief Counsel Barbara M. Wessinger, of Columbia; for Respondent.

HUFF, J.: Daisy Outdoor Advertising Company, Inc. (Daisy) appeals from the circuit court's affirmance of the Administrative Law Judge's (ALJ's) order upholding the South Carolina Department of Transportation's (SCDOT's) revocation of two permits for outdoor advertising signs. We affirm. [1]

FACT AND PROCEDURAL HISTORY

Daisy applied for permits for two outdoor advertising signs to be located along I-26 in Spartanburg County in November of 1998. As the signs were to be located in an area without zoning, Daisy was required to identify a qualifying business within 600 feet of the sign sites. The applications listed Quick Response Fire Systems as the qualifying business. On March 31, 1999, SCDOT informed Daisy that the applications had been approved.

In May of 1999, Quick Response ceased its operations at this location. By August of 1999, it had vacated the location, the power had been disconnected, and a "For Lease" sign had been placed in front of the building. In November of 1999, SCDOT informed Daisy that it was canceling the permits for the signs.

Daisy appealed to the ALJ. The ALJ found SCDOT had established by prima facie evidence that Quick Response's activities at the location were a sham as defined in 25A S.C. Code Ann. Regs. 63-342 (U) (Supp. 2001). He then found Daisy failed to overcome SCDOT's prima facie case that Quick Response was primarily situated at this location to qualify the sign site and failed to establish that there was any meaningful business conducted at Quick Response for the requisite one-year period after the approval of the applications. Daisy appealed to the circuit court, which affirmed the ALJ. This appeal followed.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

STANDARD OF REVIEW

The standard of review for a court reviewing the decision of an ALJ is set forth in S.C. Code Ann. § 1-23-610 (D) (Supp. 2001) of the Administrative Procedures Act (APA). The court may not substitute its judgment for that of the ALJ on questions of fact when those facts are supported by substantial evidence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support the ALJ's decision. Id. It exists when, if the case were presented to a jury, the court would refuse to direct a verdict because the evidence raises questions of fact for the jury. Id. Substantial evidence is more than a mere scintilla of evidence, but is something less than the weight of the evidence. Id. Furthermore, the possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports the ALJ's finding. Id.

DISCUSSION

Daisy argues the circuit court's order should be reversed because the ALJ erred in upholding SCDOT's revocation of the sign permits. We disagree.

In the Highway Advertising Control Act, the General Assembly acknowledged that outdoor advertising is "a business which must be allowed to exist and operate where other business and commercial activities are conducted and that a reasonable use of property for outdoor advertising to the traveling public is desirable." S.C. Code Ann. § 57-25-130 (Supp. 2001). However, the General Assembly also recognized that the erection and maintenance of outdoor advertising signs adjacent to the interstate and federal-aid primary systems must be regulated. Id. Thus, it granted SCDOT the authority to issue permits for the erection and maintenance of the signs

and to promulgate regulations governing the issuance of the permits. S.C. Code Ann. § 57-25-150(A) (Supp. 2001).

Generally, the Highway Advertising Control Act limits the placement of commercial outdoor advertising signs to zoned industrial areas, zoned commercial areas, unzoned commercial areas, or unzoned industrial areas. S.C. Code Ann. § 57-25-140(7) & (8) (Supp. 2001). An unzoned commercial or industrial area is defined as "the land occupied by the regularly used building, parking lot, and storage and processing area of a commercial, business, or industrial activity and land within six hundred feet of it on both sides of the highway." S.C. Code Ann. § 57-25-120 (4) (Supp. 2001). Such an area does not include an area occupied by "sham activities." 25A S.C. Code Ann. Regs. 63-342(FF)(4) (Supp. 2001). A sham activity is defined as:

> any activity that is seemingly a commercial or industrial activity but which was created primarily or exclusively to qualify an area as an unzoned commercial or industrial area and which does not conduct any meaningful business at the activity site. Failure of an activity to maintain the standards set forth under the definition of transient and temporary[2]

[2] Transient or temporary activities are defined as activities that do not have:

> (1) at least one employee attendant at the activity site, performing meaningful work and available to the public for at least thirty-six (36) hours per week on at least four (4) days per week for at least forty-eight (48) weeks per year;
>
> (2) electricity, telephone, running water, indoor restroom, permanent flooring other than dirt, gravel, sand, etc; adequate heating; and
>
> (3) the activity, or a major portion of it, conducted from a permanent building constructed principally of brick, concrete block, stone, concrete, metal, or wood or some combination of these materials or from a mobile home or trailer which the applicant can prove is considered part of the real estate and taxed accordingly.

25A S.C. Code Ann. Regs. 63-342(CC) (Supp. 2001).

> within one year after a sign permit was issued based on the activity qualifying the sign site as an unzoned commercial or industrial area shall be prima facie evidence that the activity was a sham.

25A S.C. Code Ann. Regs. 63-342(U) (Supp. 2001). If an activity is subsequently determined to be a sham activity, the sign permitted under this activity shall be illegal and must be removed at the sign owner's or landowner's expense. 25A S.C. Code Ann. Regs. 63-344(G) (Supp. 2001).

Daisy acknowledges in its brief that Quick Response ceased its operations less than one year after the permit approval, and thus, SCDOT established a prima facie case that Quick Response was a sham activity. Once a party establishes a prima facie case, the burden of proof shifts to the opposing party. Hadfield v. Gilchrist, 343 S.C. 88, 538 S.E.2d 268 (Ct. App. 2000). The ALJ found Daisy had failed to overcome SCDOT's prima facie case that Quick Response was a sham activity. We reject Daisy's contention that the ALJ improperly shifted the burden of proof to Daisy. Furthermore, we find substantial evidence in the record supports the ALJ's finding that Daisy failed to overcome SCDOT's prima facie case that Quick Response was primarily situated at this location to qualify the sign sites as an unzoned commercial area.

Pursuant to Regulation 63-342(U), Daisy had the burden of coming forward with evidence to show (1) Quick Response was not created primarily or exclusively to qualify the location for an outdoor advertising sign, and (2) it conducted meaningful activity at the site. Daisy asserts it met this burden by presenting evidence that Quick Response was a viable business conducting meaningful business for more than a year before the approval of the sign permits. The issue is not whether Quick Response was a legitimate business, but rather whether its activities at the site were created primarily or exclusively to qualify the site for placement of the signs.

Daisy, whose primary business is outdoor advertising, owns the buildings Quick Response occupied on the site. Daisy and Quick Response

entered into the lease on April 23, 1998. The terms of the lease were very favorable towards Quick Response. The rent was only $400.00 a month compared to $1,600.00 a month Quick Response paid at its former location. Daisy continued to pay the electric bills for the site until October 19, 1998, when the electricity was connected in Quick Response's name. Quick Response did not reimburse Daisy until eight months later for all of the bills it had paid from April to October.

There is no dispute that Quick Response conducted its normal business activities at the site from April of 1998 until May of 1999. However, Spartanburg County never issued a certificate of occupancy for the building on the site. Accordingly, no business could legally occupy the structure. SCDOT's Director of Outdoor Advertising testified that in addition to the closing of the business within one year of the permit, SCDOT considered the fact that Quick Response did not have a permit to occupy the building in determining that no meaningful business occurred at the location.

We next consider whether Quick Response conducted meaningful business at the location. The ALJ held, "[T]he issue is not whether the qualifying business was operational prior to the submittal of outdoor advertising permit applications to SCDOT but rather whether it 'maintained' meaningful operation after the permit was approved in order to provide evidence of a commercial area." Daisy asserts the ALJ improperly held that the time period for measuring whether a qualifying business is conducting meaningful business continues for a period of one year after approval of the permit. It asserts that the operative time in which the business must be evaluated is at the time of the application or during the initial investigation surrounding the issuance of the permits.

"Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998); see also Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997) (stating courts should consider not merely the language of the particular clause being construed, but the word and its meaning in

conjunction with the purpose of the whole statute and the policy of the law). "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Dunton v. South Carolina Bd. of Examiners in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987). Furthermore, an agency's interpretation of its own regulation deserves considerable deference. Leventis v. S.C. Dep't of Health & Envtl. Control, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000).

SCDOT considers the year following the issuance of the permit in determining whether meaningful activities occur at a qualifying business. In promulgating Regulation 63-342(U), SCDOT obviously intended for the entire one-year period following the issuance of the permit to be considered in its evaluation as the failure of the business to maintain the business for that year constitutes prima facie evidence that the activity is a sham. This interpretation is consistent with the Highway Advertising Control Act's requirement that outdoor advertising signs be limited to unzoned areas of commercial activity. It furthers the purpose of the act, which, in part, is to prevent distraction of operators of motor vehicles, promote the safety, convenience, and enjoyment of travel on highways within this State, and preserve and enhance the natural scenic beauty and aesthetic features of highways and adjacent areas. S.C. Code Ann. § 57-25-150 (Supp. 2001). SCDOT's Director of Outdoor Advertising explained that if SCDOT did not effectively regulate the activities it permitted as commercial activities, the Federal Highway Administration could penalize the state by withholding up to ten percent of the state's federal highway funds. Accordingly, we find no error in the ALJ's interpretation of the regulation.

Considering the record as a whole and the purpose of the Act and regulations, we find substantial evidence supports the ALJ's determination that Daisy did not establish Quick Response conducted meaningful business at the location. Thus, we hold the ALJ did not err in ruling that Quick Response was a sham activity under the Highway Advertising Control Act, requiring cancellation of the outdoor advertising permits and removal of the sign structures.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ronald E. Clark, Sr., individually and as Personal Representative of the Estate of Amy Danielle Clark,	Respondent,
v.	
South Carolina Department of Public Safety and Charles Clyde Johnson,	Defendants,
Of whom South Carolina Department of Public Safety is the	Appellant.

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

Opinion No. 3565
Heard September 10, 2002 – Filed November 12, 2002

AFFIRMED

Andrew F. Lindemann and William H. Davidson, II, both of Columbia; for Appellant.

Sammy Diamaduros, of Union; Suzanne E. Coe, of Atlanta; for Respondent.

GOOLSBY, J.: This case arises out of the death of a motorist who was struck and killed by a suspect fleeing from a high-speed police pursuit. Ronald Clark, as personal representative of the estate of his daughter, Amy Clark, sued the South Carolina Department of Public Safety (the Department) and Charles Clyde Johnson, the suspect, after Amy was fatally injured when Johnson crossed the center line and struck her vehicle. Clark alleged the Department's employees failed to properly supervise the pursuit and to terminate it before the fatal accident. The jury returned a verdict for Clark against both the Department and Johnson. The Department appeals. We affirm.

FACTS

In the early morning hours of April 5, 1997, state trooper Greg Bradley of the South Carolina Highway Patrol observed a van driven by Johnson traveling 57 m.p.h. in an area with a posted speed limit of 45 m.p.h. Johnson, who was under the influence of drugs and alcohol, was driving erratically and not using his turn signals. Bradley activated his blue lights and siren and attempted to stop the van, but Johnson refused to stop. Bradley called in the van's license plate number to dispatchers and advised he was commencing pursuit.

Johnson made several turns, disregarded a stop sign, and eventually stopped in a gravel parking lot. As Bradley exited his vehicle and approached the back of the van, Johnson suddenly put the van into reverse and tried to run over him. Johnson hurriedly drove off, throwing gravel into the air. Bradley advised the dispatchers that he had almost been hit, and he resumed the pursuit. Bradley saw Johnson run off the left side of the road and spin around while traveling at a high rate of speed. Bradley radioed that he believed Johnson was going to wreck the vehicle.

Trooper Thomas Justice joined the pursuit and attempted to slow the van down by pulling in front of it. Johnson went around him by driving into

the opposing lane of traffic. It was approximately 1:30 a.m. and there was no traffic at that time. Bradley continued following Johnson, and Justice fell into position behind Bradley. As the secondary officer involved in the pursuit, Justice took over most of the radio communications so Bradley could focus on the pursuit.

Around the time Justice joined the pursuit, dispatchers notified the troopers that the van had been reported stolen. Bradley observed light traffic as they drove through a straight portion of the road. Bradley attempted to pass Johnson on the left and get in front of the van in order to slow it down, but Johnson tried to run him off the road. As they approached an intersection, Johnson ran a red light and almost "T-boned," or broadsided, another car. The troopers slowed down to safely clear the intersection. The troopers traveled at speeds of 80 and 85 m.p.h. in their attempt to catch Johnson.

As Johnson proceeded toward the North Carolina border, then only five or six miles away, he came upon a pickup truck. Johnson tried to pass the truck on the right using the emergency lane, but the truck also pulled to the right. Johnson immediately jerked the van to the left, crossed the center line, and crashed head-on into a vehicle driven by Amy Clark. The van became airborne before crashing into some nearby woods and catching on fire. The troopers' cars did not make contact with the other vehicles. The entire chase occurred over an area of approximately eight miles and lasted from six to eight minutes.

Amy died at the scene. [1]

Sergeant John Vaughn was the district supervisor on call that night. Vaughn called in and inquired whether a supervisor was needed when he

[1] Johnson pled guilty in September 1997 to charges of felony DUI causing death, failure to stop for a blue light resulting in death, felony DUI causing great bodily injury, assault with intent to kill, and possession of a stolen vehicle. It was stipulated at trial that Johnson registered a .244 on a blood alcohol test and also tested positive for marijuana and cocaine.

heard Bradley tell the dispatchers he was initiating a pursuit. Vaughn could not recall, however, whether he had actually monitored any portion of the pursuit. Trooper Lonnie Plyler, the supervisor for the second shift,[2] did not monitor the pursuit because he was handling the administration of a breathalyzer examination. Plyler was unaware who the third-shift supervisor was for that evening, but Plyler did go to the scene of the accident after Justice radioed for a supervisor.

Clark brought this action under the South Carolina Tort Claims Act against the Department and Johnson for the death of his daughter. Johnson went into default and was unable to contest his liability. At trial, the jury returned a verdict for Clark for $3.75 million in total damages against both Johnson and the Department on his wrongful death claim. The jury apportioned 80 per cent fault to Johnson and 20 per cent to the Department, resulting in a verdict against Johnson for $3.0 million and against the Department for $750,000. The trial court reduced the verdict against the Department to $250,000 in accordance with the limit imposed by the Tort Claims Act.[3]

Although it is not clear from the transcript, at some point the jury submitted a note regarding its verdict, which reads as follows:

> The Vehicle [and] Foot Pursuit Policy of SCDPS [the Department] dictates supervision of all pursuits. During this pursuit no supervisors were present or notified until after the pursuit was ended. It is our decision that this designates gross neglect on the behalf of SCDPS.

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[2] The accident occurred during the third shift.

[3] The Tort Claims Act was subsequently amended to increase the limitation on liability to $300,000 per person because of loss arising from a single occurrence. See S.C. Code Ann. § 15-78-120(a)(1) (Supp. 2001).

The Department thereafter moved for JNOV, new trial absolute, and new trial nisi remittitur. The trial court denied the motions. The Department appeals.

LAW/ANALYSIS

I. Denial of DV and JNOV Motions

The Department first contends Clark was unable to sustain his burden of proof regarding its liability for Amy's death. Specifically, the Department argues the trial court erred in denying its motions for a directed verdict and for JNOV because Clark failed to demonstrate Bradley was grossly negligent in initiating, continuing, or failing to terminate the pursuit of Johnson. The Department also asserts the jury's note constituted a special verdict indicating the jury did not find the trooper was grossly negligent, and there could be no "derivative" or "cumulative" liability by the supervisor in the absence of gross negligence by the trooper. The Department argues it is, therefore, entitled to judgment as a matter of law.

The Tort Claims Act renders state agencies and governmental entities "liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations" and exemptions contained within the Act.[4]

In addition to the Tort Claims Act, section 56-5-760 of the South Carolina Code addresses the civil liability of operators of authorized emergency vehicles. This statute authorizes police officers using a vehicle equipped with a siren and flashing light to exceed the maximum speed limit and to disregard certain traffic regulations during a police pursuit.[5] The statute further provides, however, that these provisions "do not relieve the

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[4] S.C. Code Ann. § 15-78-40 (Supp. 2001).

[5] S.C. Code Ann. § 56-5-760(A)-(C) (1991).

driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons."[6]

At trial, the parties agreed the applicable standard for liability in this case was gross negligence, and the trial court charged the jury that it was to determine whether the defendants' gross negligence proximately caused injury to the plaintiff.[7] Because no issue is raised on appeal regarding the

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[6] Id. § 56-5-760(D).

[7] Section 56-5-760(D) imposes upon emergency vehicle operators "the duty to drive with due regard for the safety of all persons." Id. (emphasis added). Prior to its amendment in 1990, however, the former version stated its provisions "shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others." S.C. Code Ann. § 56-5-760(d) (Supp. 1989) (emphasis added); see Act No. 149, § 3, 1990 S.C. Acts 312. Case law interpreting this former version applied a "reckless conduct" standard. See, e.g., Jones v. Way, 278 S.C. 295, 294 S.E.2d 432 (1982). We note that, in stating a gross negligence standard applied, trial counsel referred to the statute's language regarding reckless conduct, but the 1990 amendment deleted the reference to reckless acts. Upon reviewing the statute, the trial court opined whether it reduced the burden from gross negligence to ordinary negligence, but no issue was pursued by counsel in this regard. There is some divergence among the jurisdictions as to whether "the duty to drive with due regard for the safety of all persons" imposes an ordinary negligence standard, a reckless conduct standard, or something in between. See, e.g., City of Amarillo v. Martin, 971 S.W.2d 426, 428-30 (Tex. 1998) (interpreting a Texas statute, similar to South Carolina's pre-1990 version, which stated drivers of emergency vehicles had a duty to exercise "due regard for the safety of all persons" but were not exempted from liability for "the consequences of [their] reckless disregard for the safety of others" and holding it imposed liability only for the reckless operation of an emergency vehicle, rather than for mere negligence). We further note the jury was not

standard for culpability, it becomes the law of the case and we will, therefore, apply the gross negligence standard agreed to by the parties.[8]

Gross negligence has been defined a number of ways. Our supreme court recently stated "[g]ross negligence is the intentional, conscious failure to do something which is incumbent upon one to do or the doing of a thing intentionally that one ought not to do."[9] "It is the failure to exercise even the slightest care."[10] It has also been defined as "the absence of care that is necessary under the circumstances."[11]

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charged on any immunity provision under the Tort Claims Act containing a gross negligence standard.

[8] See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (holding an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); cf. Kolster v. City of El Paso, 972 S.W.2d 58 (Tex. 1998) (observing the trial court erroneously determined that ordinary negligence, rather than recklessness, was the proper standard under a Texas statute addressing the liability of emergency vehicle operators for accidents where the statute provided drivers were not exempted for "reckless" conduct; the appellate court stated it would, nevertheless, apply a simple negligence standard on appeal because that was the standard submitted to the jury and the City did not preserve any issue as to the proper standard of culpability).

[9] Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 331, 566 S.E.2d 536, 544 (2002) (quoting Richardson v. Hambright, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988)).

[10] Id. at 331-32, 566 S.E.2d at 544 (citing Hollins v. Richland County Sch. Dist. One, 310 S.C. 486, 427 S.E.2d 654 (1993)).

[11] Hicks v. McCandlish, 221 S.C. 410, 415, 70 S.E.2d 629, 631 (1952).

The existence of gross negligence is ordinarily a mixed question of both law and fact.[12] "When the evidence supports but one reasonable inference, it is solely a question of law for the court[;] otherwise it is an issue best resolved by the jury."[13]

"In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt."[14] "The trial court can only be reversed by this Court when there is no evidence to support the ruling below."[15]

As noted above, the jury submitted a statement at trial regarding its verdict. The statement suggested the jury found the Department grossly negligent because of the failure of supervisors to monitor the pursuit and the failure to call it off. In its brief, the Department argues the statement served the same purpose as a special verdict. The Department also argues the trial court erred in denying its motions for a directed verdict and JNOV because the allegations regarding the lack of supervision only gave rise to "derivative" or "cumulative" liability and do not independently support the jury's verdict in the absence of gross negligence by the trooper.

We hold, however, the note did not transform the verdict into a special verdict and there was evidence to warrant submission of the question of the Department's liability to the jury. The statement does not exclude a finding

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[12] Faile, 350 S.C. at 332, 566 S.E.2d at 545.

[13] Id.

[14] Strange v. South Carolina Dep't of Highways & Pub. Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994).

[15] Id. at 430, 445 S.E.2d at 440; see also Creech v. South Carolina Wildlife & Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997).

of gross negligence on the part of Bradley and does not constitute part of the verdict. The transcript indicates the trial court made no mention of the note in publishing the verdict, nor did it otherwise treat the note as part of the verdict. As such, we find the note was not a special verdict that limited the ground for the jury's finding to the acts and omissions of the Department's supervisors.

Moreover, although the Department attempts to base its lack of liability solely on the actions of the trooper, the issue in this case is whether there was any evidence of gross negligence by the Department, through the acts and omissions of its employees, which consists of both the troopers and the supervisors. We agree with the trial court that the liability of the supervisors referred to in this case is distinguishable from cases alleging vicarious liability on the part of a supervisor. Rather, there were two sets of duties involved. First, the trooper, as the pursuing officer, had a "duty to drive with due regard for the safety of all persons."[16] Clark's expert in high-speed police chases, Samuel Killman, testified the standard for a pursuing trooper is that he must continue to evaluate the need to apprehend the suspect versus the danger of the pursuit to the public's safety and try to balance those competing concerns. Secondly, Killman testified the supervisors at the Department had an independent duty to monitor the acts of the troopers and take any actions deemed appropriate, including termination of the chase. He based this duty on both the Department's own internal policy and on general standards of conduct recognized by law enforcement agencies, primarily the latter.

The evidence in the light most favorable to Clark shows Killman testified the pursuit should have been called off after it was obvious Johnson was willing to do whatever it took to get away. Killman stated that, after Johnson attempted to run Bradley off the road and then almost "T-boned" a car at an intersection, Bradley should have called off the pursuit in the interest of public safety. At the time of the fatal crash, Johnson was only five or six miles from the North Carolina border, at which point South Carolina authorities would have had to terminate the pursuit anyway. The heightened

[16] S.C. Code Ann. § 56-5-760.

dangerousness of the pursuit is particularly evidenced by the fact that Bradley himself admittedly notified dispatchers at one point that he believed a crash was imminent.[17] Although Killman indicated it was an "error in judgment" not to call off the pursuit, we believe the foregoing is some evidence from which a jury could determine Bradley should have called off the pursuit and was grossly negligent in failing to do so. Also, Killman testified that, in accordance with general police standards, a supervisor should always monitor a pursuit and provide an independent assessment of its continued viability. There was no evidence a supervisor did this.

We hold the question of whether the troopers and the supervisors at the Department performed their respective duties or whether there was an "absence of care that is necessary under the circumstances"[18] was a matter singularly for the jury to consider as the trier of fact.

II. Immunity Under Section 15-78-60(5) for Discretionary Acts

The Department next asserts Bradley's conduct was subject to absolute discretionary immunity under section 15-78-60(5) of the Tort Claims Act. This section provides a governmental entity is not liable for a loss resulting from:

> the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee . . . .[19]

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[17] Bradley testified that, at one point in the chase when Johnson's "speed was so high that [the van] traveled off the left side of the roadway" and spun around in the opposing lane, he "called into communications that he had ten fifty or I felt like he was going to wreck the vehicle."

[18] Hicks, 221 S.C. at 415, 70 S.E.2d at 631.

[19] S.C. Code Ann. § 15-78-60(5) (Supp. 2001).

"The burden of establishing a limitation upon liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense."[20]

"To establish discretionary immunity, the governmental entity must prove that the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice."[21] "Furthermore, 'the governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them.'"[22] "This standard is inherently factual."[23]

On appeal from the denial of a directed verdict motion, this court should review the evidence in the light most favorable to Clark to see if the evidence yields more than one reasonable inference and the trial court properly submitted the case to the jury.[24] That is, we would consider whether there was an issue of fact as to whether (1) the Department's employees actually weighed competing considerations and made a conscious choice to

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[20] Niver v. South Carolina Dep't of Highways & Pub. Transp., 302 S.C. 461, 463, 395 S.E.2d 728, 730 (Ct. App. 1990); accord Foster v. South Carolina Dep't of Highways & Pub. Transp., 306 S.C. 519, 413 S.E.2d 31 (1992).

[21] Pike v. South Carolina Dep't of Transp., 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000).

[22] Id. (citation omitted).

[23] Id. at 232, 540 S.E.2d at 91.

[24] See Strange, 314 S.C. at 429-30, 445 S.E.2d at 440.

continue the pursuit, and (2) whether the Department established that, in weighing these alternatives, it applied accepted professional standards.[25]

Clark presented the testimony of his expert in high-speed chases, Samuel Killman, that the Department's employees did not properly balance the competing considerations of capturing a fleeing suspect versus maintaining the public's safety and that they disregarded appropriate standards in failing to terminate the pursuit. The Department attempted to rebut this evidence with Bradley's testimony that he did weigh these competing concerns. This created a question of fact that could not be resolved by the trial court. Accordingly, we hold the trial court properly denied the Department's motions for judgment as a matter of law on the ground of discretionary immunity.

Moreover, we question whether the discretionary immunity provision is applicable to this case in any event. Some jurisdictions determine whether an act is discretionary by considering if it can best be described as planning or operational.[26] In this case, we believe the function of the Department's employees in carrying out a general pursuit policy is operational in nature and is not the type of discretionary act contemplated in the Tort Claims Act. The fact that the employees had to make decisions or exercise some judgment

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[25] See Pike, 343 S.C. at 232, 540 S.E.2d at 91.

[26] See 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability § 78 (2001) ("[D]ecisions involving the assessment of competing priorities, weighing of budgetary considerations, or allocation of scarce resources are generally considered planning activities and are subject to [discretionary] immunity. . . . However, the fact that a governmental function involves an element of choice or judgment, or requires the ability to make responsible decisions, does not automatically bring that activity within the discretionary function exemption. Instead, the function must entail planning or policy decisions. This approach to determining the presence of a discretionary function as opposed to a ministerial one is most often characterized as the planning/operational distinction.").

in their activities is not determinative.[27] To read the exception that broadly would encompass virtually all traffic stops made by the Department's

[27] See Brown v. City of Pinellas Park, 557 So. 2d 161 (Fla. Dist. Ct. App. 1990) (holding, in wrongful death action alleging the defendants negligently conducted a high-speed chase, during which the fleeing suspect broadsided the plaintiffs' car, causing the deaths of their two daughters, that the acts of the officers in continuing the high-speed pursuit were operational, not discretionary; the court noted this suit concerned how the governmental policies of enforcing traffic laws and pursuing violators were actually implemented and, though some measure of discretion might be involved, this was not the type of planning or discretionary function that needed to be insulated from suit); Tice v. Cramer, 627 A.2d 1090, 1101 (N.J. 1993) (limiting discretionary immunity to discretion exercised at the highest levels of government in matters of policy and planning, the court stating an "officer's conduct, comprised of the decision whether to pursue, how to pursue, and whether to continue to pursue, is . . . infinitely distant from high-level policy or planning decisions," and "to label this kind of determination by a public employee 'discretionary,' and therefore immune, would end all public employee liability, or practically all, for hardly any acts or omissions are not subject to some judgment or discretion"); Lowrimore v. Dimmitt, 707 P.2d 1027, 1030 (Or. 1990) (Discretionary "immunity will apply to decisions involving the making of policy, but not to routine decisions made by employees in the course of their day-to-day activities, even though the decision involves a choice among two or more courses of action. A traffic officer's decision to pursue a vehicle . . ., though discretionary in the sense that it involves the exercise of judgment and choice by the officer, is not one that qualifies its maker to immunity . . . [as it] does not create any departmental policy and was not made by a person 'with governmental discretion.' Although the decision to pursue may have been made pursuant to a county departmental policy, the decision itself is not a policy judgment . . . .") (citation omitted).

employees, as they all involve some degree of decision-making, but they are not the type of discretionary act envisioned under the Tort Claims Act.[28]

III. Immunity Under Section 15-78-60(4) for the Failure to Enforce Written Policies

The Department next alleges it was entitled to absolute immunity as a matter of law under section 15-78-60(4) of the Tort Claims Act. In the alternative, the Department argues it is entitled to a new trial because the court allegedly refused to charge this immunity provision after Clark's counsel raised purported violations of the Department's Pursuit Policy during closing argument.

Section 15-78-60(4) provides a governmental entity is not liable for losses resulting from the

> adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation or written policies . . . .[29]

In 1996, the Department adopted the South Carolina Department of Public Safety Policy Directive, Vehicle and Foot Pursuit Policy, which addresses the duties of troopers and their supervisors. The Pursuit Policy

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[28] We note there is a divergence of authority in this area, and some jurisdictions have held the decision to continue a police pursuit is entitled to some form of discretionary immunity. See, e.g., Estate of Cavanaugh v. Andrade, 550 N.W.2d 103, 114 (Wis. 1996) (holding an officer's decision to initiate or continue a high-speed chase was a discretionary act that was entitled to immunity, but noting that an officer may still be deemed negligent "for failing to physically operate his or her vehicle with due regard for the safety of others").

[29] S.C. Code Ann. § 15-78-60(4) (Supp. 2001).

requires a supervisor to monitor all pursuits and states in relevant part: "The supervisor will continuously evaluate pursuit and will order termination of the pursuit when it appears to constitute an unreasonable risk."

Citing section 15-78-60(4), the Department asserts it is immune from liability for failing to enforce any written policy, in this case, the Pursuit Policy's guideline that a supervisor monitor all pursuits.

In denying the Department's directed verdict motion at the end of the plaintiff's case, the trial court found the Department was not entitled to absolute immunity under section 15-78-60(4) for the failure to enforce any law or written policy, stating, "I don't think it was a policy violation. I think it was a violation of the standard of care that they are supposed to provide to the public."

We hold the trial court properly refused to grant the Department judgment as a matter of law because the actions of the Department do not fall within the parameters of section 15-78-60(4). As noted by Clark, the Pursuit Policy was merely a statement of generally accepted law enforcement guidelines. This broad provision is not the kind of written policy that should be afforded the protection of absolute immunity under the Tort Claims Act.[30]

The duty of the supervisor to monitor the pursuit was testified to as the standard of care without reference to the policy adopted by the Department. The Department asserted, and Clark expressly agreed, that this internal policy did not equate to a legal standard of care for the Department's supervisors. The policy mirrors the accepted standard of care for supervisors during a pursuit. The mere fact that the Department enacted a policy does not protect it from having to meet a standard of care that exists whether the policy was

[30] See, e.g., Wortman v. Spartanburg, 310 S.C. 1, 3, 425 S.E.2d 18, 19 (1992) ("When interpreting a statute, the Court's primary function is to ascertain the intention of the legislature. The words used in the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.").

enacted or not. The underlying action is not brought as a violation of the Department's policy, but as a violation of the recognized duty of care that supervisors owe during the monitoring of a high-speed pursuit.

To the extent the Department appears to challenge the trial court's failure to charge the jury on this immunity provision, we find this issue is not preserved. In the order denying the Department's post-trial motions, the trial court specifically noted that the Department never objected to its failure to charge section 15-78-60(4).[31]

IV. Jury Instruction Regarding Standard of Care

The Department next contends the trial court erred in failing to charge the jury on the legal duty or standard of care owed by law enforcement officers with respect to police pursuits. The Department asserts the trial court instead permitted the jury to determine the standard of care to be applied based upon the testimony of expert witnesses. We do not read the court's charge that way.

The trial court's charge did not allow the jury to determine the law. Rather, the court charged the jury on general principles of negligence law. Further, the Department did not clearly and specifically request a jury instruction regarding the existence and nature of any alleged duty by its supervisors to monitor all police pursuits. Thus, we find no reversible error in this regard.[32]

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[31] Issues raised on directed verdict are preserved even if no issue is preserved as to the jury instructions. See Thomasko v. Poole, 349 S.C. 7, 561 S.E.2d 597 (2002).

[32] See generally Morris v. Barrineau, 269 S.C. 84, 236 S.E.2d 409 (1977) (holding the judge's general charge on negligence, considered as a whole, adequately covered the principles of law applicable to the facts of the case); Joyner v. Atl. Coast Line R.R., 91 S.C. 104, 110, 74 S.E. 825, 827 (1912) (finding no error in the trial judge's instructions where "[a]n examination of the judge's charge as a whole will show that he fully charged the jury as to

V. New Trial Absolute

The Department asserts it is entitled to a new trial absolute because the verdict is excessive and shockingly disproportionate to the damages sustained so as to indicate that the jury acted out of passion, caprice, prejudice, or other improper considerations.

A motion for new trial nisi remittitur asks the trial court in its discretion to reduce the verdict because it is "merely excessive," although not motivated by considerations such as passion, caprice, or prejudice.[33] In contrast, if the amount of the verdict is "grossly excessive," so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute, rather than a new trial nisi remittitur.[34]

The jury's determination of damages is entitled to substantial deference.[35] The denial of a new trial motion is within the discretion of the

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the law applicable to the case and left the facts to them"); Rochester v. Bull, 78 S.C. 249, 252, 58 S.E. 766, 767 (1907) ("The court certainly stated correct propositions of law. True they were general principles, but, if the defendant wished anything more specific, he should have requested it."); Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000) ("When reviewing a jury charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial.").

[33] See O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993); Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999).

[34] Hunter, 335 S.C. at 105, 515 S.E.2d at 268.

[35] Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993); Brabham v. S. Asphalt Haulers, Inc., 223 S.C. 421, 76 S.E.2d 301 (1953).

trial court and, absent an abuse of discretion, it will not be reversed on appeal.[36]

Section 15-51-20 provides a wrongful death action may be brought for the benefit of the statutory beneficiaries, in this case, the parents.[37] "Damages recoverable for wrongful death are the damages sustained by the statutory beneficiaries resulting from the death of the decedent, including pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, and loss of society and companionship."[38]

The jury awarded Clark a verdict of $3.75 million in total damages against Johnson and the Department on his wrongful death claim. The jury apportioned 80 per cent fault to Johnson and 20 per cent fault to the Department, resulting in verdicts against Johnson for $3.0 million and against the Department for $750,000. The trial court reduced the verdict against the Department to $250,000 as required by the Tort Claims Act.

In Lucht v. Youngblood,[39] our supreme court observed that losses to parents for the untimely death of a child "are intangibles, the value of which cannot be determined by any fixed yardstick."[40] The "loss to the beneficiaries must be estimated by the jury in the exercise of their sound judgment under all the facts and circumstances of the case."[41]

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[36] Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996).

[37] S.C. Code Ann. § 15-51-20 (Supp. 2001).

[38] Ballard v. Ballard, 314 S.C. 40, 41-42, 443 S.E.2d 802, 802 (1994).

[39] 266 S.C. 127, 221 S.E.2d 854 (1976).

[40] Id. at 137, 221 S.E.2d at 859.

[41] Id.

In Knoke v. South Carolina Department of Parks, Recreation and Tourism,[42] the court concluded a wrongful death verdict of $3.0 million for the death of a twelve-year-old child was not an excessive verdict. The court stated: "Although there was no evidence of pecuniary loss introduced at trial, both parents testified to their grief, shock, and sense of loss. In the absence of pecuniary loss, the $3,000,000 verdict was to compensate Jeremy's parents for these intangible damages which, as previously noted by this Court, cannot be determined by any fixed measure."[43]

Given the nature of the loss endured by Clark, and the necessarily nonpecuniary elements involved, we are not persuaded the verdict was the result of passion or other improper motive, nor is it so excessive as to shock the conscience. Consequently, we hold the trial court did not abuse its discretion in declining to grant a new trial.[44]

VI. More Detailed Order

The Department finally alleges "[t]he trial court erred in refusing to issue an order setting forth in reasonable detail the legal analysis supporting its denial of [its] post-trial motions."

Citing Bowen v. Lee Process Systems Co.,[45] the Department states it is "rais[ing] this issue in the event this Court finds that it cannot properly

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[42] 324 S.C. 136, 478 S.E.2d 256 (1996).

[43] Id. at 142, 478 S.E.2d at 258-59.

[44] Cf., e.g., Scott v. Porter, 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000) (stating South Carolina law provides a presumption of nonpecuniary damages and there is no mathematical formula for calculating a parent's loss, and concluding a wrongful death verdict of $1.5 million for the death of a nineteen-month-old child was not grossly excessive).

[45] 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2000).

review the denial of the post-trial motions without knowing the trial court's reasoning for its rulings."

In Bowen, the trial court granted summary judgment to the defendants, but failed to state on which of several asserted grounds it was relying. We vacated the grant of summary judgment and remanded the case to the trial court to enter an order identifying the material facts it found undisputed and the grounds for its decision as they were not discernable on appeal.

We conclude Bowen is distinguishable from the current appeal. The trial court's order denying the Department's post-trial motions is sufficient as the court's reasoning for the denial can be determined from the record on appeal. Further, there is no blanket requirement that the trial court set forth a separate explanation on all of its rulings on post-trial motions.[46]

Accordingly, the judgment is

AFFIRMED.

HOWARD AND SHULER, JJ., concur.

[46] See, e.g., Bailey v. Segars, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001) (holding a form order stating only that the appellant's post-trial motions for JNOV and new trial were denied was, together with the record of the proceedings, adequate to enable appellate review), cert. granted on other grounds, (Jan. 10, 2002).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Dilando D. Maybank, Appellant.

Appeal From Horry County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 3566
Heard October 10, 2002 – Filed November 12, 2002

AFFIRMED

Assistant Appellate Defender Eleanor Duffy Cleary, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor John Gregory Hembree, of Conway, for respondent.

HOWARD, J.: Dilando D. Maybank appeals his convictions for possession of crack cocaine, possession of cocaine, resisting arrest, and assaulting a police officer while resisting arrest. He argues the trial court erred in failing to suppress evidence obtained pursuant to a warrantless search of his motel room because the police went to his room as a result of an invalid traffic stop of his vehicle. We affirm.

FACTS/PROCEDURAL HISTORY

In August 1999, Detective Christopher Arakas observed a vehicle with a temporary license tag being driven along Highway 501 in Myrtle Beach. Based solely on the presence of the temporary tag, Arakas stopped the vehicle and spoke with the driver, an unlicensed fourteen-year-old male ("the youth"). As a result of this conversation, Arakas discovered Maybank was the owner of the vehicle and had allowed the youth to drive it. Intending to charge Maybank with allowing a fourteen year old to drive his vehicle, Arakas and Officer Joliff drove the youth to the motel where Maybank was staying.

The youth knocked on the motel room door, Maybank answered "yeah?", and the youth opened the door. Arakas and Joliff saw Maybank and a woman lying in bed and marijuana lying on a table. The officers identified themselves as police and told Maybank they wished to come in and speak with him about letting the youth drive his vehicle. Maybank gave the officers permission to enter.

As Maybank stood up from the bed, he grabbed something off the nightstand. Arakas asked Maybank if the officers could see what he had picked up. Maybank opened his hand revealing a tissue-wrapped, plastic bag containing crack cocaine.

After the officers told Maybank he was under arrest, he shoved Joliff aside and ran through the motel room doorway attempting to escape. As the two officers tried to apprehend him, Maybank engaged in several brief fights with each of them. Maybank was eventually captured by backup officers,

arrested, and later indicted for trafficking crack cocaine, possession of cocaine, and two counts of assaulting a police officer while resisting arrest.

Prior to trial, Maybank moved to suppress the illegal drugs found in the motel room. He argued because the officers would not have discovered the drugs but for the initial stop of his vehicle, the drugs should be suppressed. The State argued the drugs should be admitted into evidence because Maybank had no standing to challenge the stop, and in the alternative, a sufficient break existed in the causal connection between the improper stop and the discovery of the drugs.

Based on testimony presented at the suppression hearing, the trial court determined the initial stop of Maybank's vehicle was invalid,[1] but found the improper stop did not infect the subsequent discovery of the illegal drugs in Maybank's motel room. Furthermore, the trial court determined Maybank consented to the officers' request to enter his room. Thus, the trial court denied Maybank's motion to suppress, and the jury convicted Maybank of possession of crack cocaine, possession of powder cocaine, resisting arrest, and assaulting a police officer while resisting arrest. Maybank appeals.

LAW/ANALYSIS

I. Initial Traffic Stop

Maybank asserts the initial traffic stop of his vehicle violated his Fourth Amendment rights even though he was not present during the stop. Therefore, he argues the trial court erred in failing to suppress drugs found in his motel room as a result of information obtained during that stop. We disagree.

[1] Neither party to this appeal challenges the trial court's determination that the initial stop of Maybank's vehicle was invalid. See State v. Butler, 343 S.C. 198, 202-03, 539 S.E.2d 414, 416 (Ct. App. 2000) (holding the presence of a temporary tag on a vehicle is insufficient to provide reasonable suspicion to perform a traffic stop).

Initially, we note, both Maybank and the State incorrectly couch their arguments in terms of whether Maybank has standing to assert the officers' conduct violated his reasonable expectation of privacy in his vehicle. However, the boundaries of the Fourth Amendment are not "defined exclusively by rights of privacy."[2] Soldal v. Cook County, 506 U.S. 56, 65-66 (1992).

The question before this Court is neither whether Maybank has standing, nor whether his reasonable expectation of privacy was violated. Rather, we must evaluate the substantive issue[3] of whether Maybank suffered a meaningful interference with a sufficient possessory interest in his vehicle.

A. Meaningful Interference

"A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property."

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[2] If our decision rested on whether Maybank's reasonable expectation of privacy was violated, the analysis would end by stating that because Maybank allowed his vehicle to be driven in plain view on a public street, the officers' conduct did not implicate Fourth Amendment protections. See Payton v. New York, 445 U.S. 573, 586-87 (1980) (holding when officers are in a public place, not protected by the Fourth Amendment, information gained as a result of their presence does not implicate a defendant's reasonable expectation of privacy under the Fourth Amendment); Katz v. United States, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.").

[3] See Rakas v. Illinois, 439 U.S. 128, 139 (1978) (holding courts must base their analysis on "the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing"); cf. State v. Hiott, 276 S.C. 72, 76-77, 276 S.E.2d 163, 165 (1981) ("[T]he United States Supreme Court has recently shifted away from a 'standing' approach to an inquiry focusing directly on the substantive issue of whether the claimant possessed 'a legitimate expectation of privacy' in the area searched.").

United States v. Jacobsen, 466 U.S. 109, 133 (1984). For Fourth Amendment purposes, the traffic stop of a vehicle is a seizure. See State v. Nelson, 336 S.C. 186, 192-93, 519 S.E.2d 786, 789 (1999). In addition, the "[t]emporary detention of individuals during the stop of an automobile . . . constitutes [a] 'seizure' of persons within the meaning of [the] Fourth Amendment." Whren v. United States, 517 U.S. 806, 809-10 (1996). Therefore, when the officers stopped Maybank's vehicle, they clearly interfered with some individual's possessory interest in that vehicle.

B. Sufficient Possessory Interest

Meaningful interference with an individual's possessory interest is only the first step in the analysis. For Maybank's argument to have merit, this Court must find the officers' traffic stop interfered with *his* possessory interest in that vehicle. We hold it did not.

In United States v. Powell, 929 F.2d 1190, 1191 (7th Cir. 1991), police officers stopped a truck traveling along a public highway because the driver failed to use a blinker when entering the flow of traffic. The driver informed the officer the truck belonged to Powell, who had hired the driver to deliver the truck to him. A subsequent search of the camper shell attached to the truck revealed several bundles of marijuana. Id. The driver assisted law enforcement officials by leading them to Powell. The police arrested Powell on drug charges. At Powell's subsequent trial, he attempted to suppress the drugs discovered as a result of the traffic stop. Id. at 1192.

The Seventh Circuit Court of Appeals determined the initial stop of the truck was invalid. Id. at 1993-94. However, the court went on to evaluate whether the police violated Powell's Fourth Amendment rights by unlawfully seizing the truck. Id. at 1194-96. The court reasoned the interests implicated by a vehicle stop are a motorist's right to be free from random, unauthorized seizures and to avoid the considerable anxiety these stops create. The court noted further "[b]oth these interests are personal to the driver and passengers in the car stopped." Id. at 1195. The court ruled the "personal nature of the interests implicated by a vehicle stop persuade us that a vehicle owner who is

not in his car at the time it is stopped [cannot normally] . . . object to the stop." Id.

Thus, although Powell owned the vehicle, the court determined ownership alone was insufficient to substantiate the argument that the officers' brief seizure of his vehicle meaningfully interfered with his possessory interest in that vehicle. Therefore, the court held his Fourth Amendment rights were not violated. Id. at 1196.

Similar to the defendant's assertion in Powell, Maybank argues the initial stop of his vehicle violated his Fourth Amendment rights even though he was not present during the stop. However, we find the Seventh Circuit's decision in Powell persuasive in both its reasoning and result. We hold Maybank's ownership of the vehicle, without more, does not substantiate the argument he retained a sufficient possessory interest to object to the temporary seizure of his vehicle during a traffic stop. Cf. Rawlings v. Kentucky, 448 U.S. 98, 106 (1980) (holding mere ownership of property seized as a result of an unlawful search is insufficient to permit defendant to assert a Fourth Amendment violation); Alderman v. United States, 394 U.S. 165, 171-72 (1969) ("[The] suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.").

Moreover, because Fourth Amendment rights are personal rights, Maybank cannot vicariously assert any claims the youth may have that the officers violated his Fourth Amendment rights by stopping the vehicle without reasonable suspicion to believe a crime had been or was being committed. See Alderman, 394 U.S. at 174 (holding Fourth Amendment rights are "personal rights which, like some other constitutional rights, may not be vicariously asserted"); Simmons v. United States, 390 U.S. 377, 389 (1968) (holding "rights assured by the Fourth Amendment are personal rights, [which] . . . may be enforced by exclusion of evidence only at the

instance of one whose own protection was infringed by the search and seizure").[4]

II. Consent to Enter Motel Room

Maybank next asserts the officers did not obtain consent to enter his motel room. We disagree.

When contested by contradicting testimony, consent is an issue of credibility to be determined by the trial court. State v. Dorce, 320 S.C. 480, 482, 465 S.E.2d 772, 773 (Ct. App. 1995). Furthermore, this Court is bound by the trial court's factual findings unless they lack evidentiary support or are clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); see also State v. Cutter, 261 S.C. 140, 147, 199 S.E.2d 61, 65 (1973) (holding the appellate court sits to review errors of law in criminal cases).

During the hearing on Maybank's motion to suppress, the trial court heard testimony from two police officers alleging Maybank consented to their entry. The trial court also heard testimony from Maybank alleging he did not consent to the officers' entry. After hearing all the testimony, and weighing the credibility of the witnesses, the trial court found Maybank consented to the officers' request to enter his motel room. Because the trial court's ruling is supported by sufficient evidence in the record, we find no error.

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[4] Because we hold Maybank may not assert a substantive violation of his Fourth Amendment rights occurred, we need not address whether a sufficient break existed in the causal connection between the invalid stop and the discovery of the drugs to warrant their admission into evidence. See State v. Greene, 330 S.C. 551, 560, 499 S.E.2d 817, 821 (Ct. App. 1997) (holding to determine whether consent is tainted by a preceding unlawful seizure the court must consider "the temporal proximity between the police illegality and the consent to search; the presence of intervening circumstances; and the purpose and flagrancy of the misconduct").

III. Resisting Arrest

Maybank next asserts he was permitted to resist the officers' attempt to arrest him because the arrest was unlawful. We disagree.

To determine whether Maybank could have lawfully resisted arrest, this Court must consider

> whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing [Maybank] had committed or was committing an offense.

Beck v. Ohio, 379 U.S. 89, 91 (1964); see also State v. Robinson, 335 S.C. 620, 634, 518 S.E.2d 269, 276 (Ct. App. 1999) ("Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officers [sic] disposal."). The trial court determined the officers had probable cause to arrest Maybank. Given the totality of the circumstances surrounding his arrest, we agree.

When the officers looked into Maybank's motel room, they observed marijuana lying in plain view on a table. Furthermore, when Maybank opened his hand, the officers saw crack cocaine. Therefore, at the moment the arrest was made, the officers had probable cause to believe Maybank "had committed or was committing an offense."[5] See Beck, 379 U.S. at 91.

[5] See S.C. Code Ann. §§ 44-53-190(d)(10) & 44-53-370(c), (d)(2) (2002) (stating it is unlawful for a person to possess marijuana); S.C. Code Ann. § 44-53-375 (2002) (stating it is unlawful for a person to possess crack cocaine).

Because the basis for Maybank's arrest was lawful, Maybank was not permitted to resist.[6]

CONCLUSION

For the foregoing reasons, we hold the trial court properly denied Maybank's motion to suppress. Therefore, Maybank's convictions for possession of crack cocaine, possession of cocaine, resisting arrest, and assaulting a police officer while resisting arrest are

AFFIRMED.

HEARN, C.J., and GOOLSBY, J., concur.

[6] See S.C. Code Ann. § 16-9-320(A), (B) (Supp. 2001) (stating it is unlawful for a person to resist a lawful arrest performed by a law enforcement officer).