The Supreme Court of South Carolina

O R D E R

The South Carolina Bar and Commission on Continuing Legal Education and Specialization have furnished the attached lists of lawyers who were administratively suspended from the practice of law on January 31, 2005, under Rule 419(b), SCACR, and remain suspended as of April 1, 2005. Pursuant to Rule 419(e), SCACR, these lawyers are hereby suspended from the practice of law by this Court. They shall, within twenty (20) days of the date of this order, surrender their certificates to practice law in this State to the Clerk of this Court.

Any petition for reinstatement must be made in the manner specified by Rule 419(f), SCACR. If a lawyer suspended by this order does not seek reinstatement within three (3) years of the date this order, the lawyer's membership in the South Carolina Bar shall be terminated and the lawyer's name will be removed from the roll of attorneys in this State. Rule

419(g), SCACR.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

April 12, 2005

ATTORNEYS SUSPENDED FOR NON-PAYMENT OF 2005 LICENSE FEES
AS OF APRIL 1, 2005

Susanna Quinn AufDerMaur
Kraft Foods Switzerland
Bellerivestrasse 203
Zurich, Switzerland 8032

Gerald J. Bertinot
University of Louisiana
P.O. Box 40794
Lafayette, LA 70504

David Scott Bowers
Live Oak Capital Advisors, Inc
1811 Oak St., Ste. 4
Myrtle Beach, SC 29577

Tiffany Erin-Lorry Bryan
Brent Adams & Assoc.
1917 Bragg St., Ste. 6
Sanford, NC 27331

Stacy Linette Bye
CobraGuard, Inc.
8527 Bluejacket St.
Lenexa, KS 66214-1656

Amy Spector Corrigan
22941 Piney Wood Cir.
California, MD 20619

Christopher Stephen Danielsen
7 N. Calvert St., Apt. 506
Baltimore, MD 21202

Joanmarie Ilaria Davoli
Notre Dame Law School
725 Howard St.
South Bend, IN 46617

Lisa Gregory Echols
18 Fish Haul Rd.
Columbia, SC 29209

Helena E. Flickinger
535 N. Michigan #2205
Chicago, IL 60611

Christopher P. Getty
Law Offices of Patrick Caffey, PA
604 Humbolt St.
Manhattan, KS 66502

Scott Richard Gorelick
Gorelick Law, PC
6000 Fairview Rd., Ste. 1415
Charlotte, NC 28210

Phillip M. Grier
2020 Pennsylvania Ave., NW # 266
Washington, DC 20006-1811

Eric Kristofer Johnson
5616 San Felipe
Houston, TX 77056

J. Keith Jones
Shaw Pittman, L.L.P.
2300 N St., NW
Washington, DC 20037-1128

Connie M. Judge
7257 Linden Tree Lane
Springfield, VA 22152

David Manuel Luna
19220 New Hampshire Ave.
Brinklow, MD 20862

Jamelle Thompson Magee
3604 NE 95th St.
Kansas, MO 64156

Andrea Leigh Malone
204 Sugar Lake Ct.
Greer, SC 29650-3352

John P. Mann

P.O. Box 10437
Greenville, SC 29603

William Thomas Maynard
147 Mills Ave.
Spartanburg, SC 29302

Lynn Marie Mizell
57 1/2 Legare St.
Charleston, SC 29401

Troy Andre' Peters
25th District Attorney's Office
201 N. Greene St.
Morganton, NC 28655

Victoria Twilford Roach
Victoria T. Roach, PC
P.O. Box 120
Wildwood, NJ 08260

Alan Brian Rogers
304 N. Congress St.
York, SC 29745

Caroline Allen Smith
PSC 477 Box 1030
FPO AP, 96306

Barbara Hankins Taylor
366 Beechwood Dr.
Greer, SC 29651

Wanda Blanche Taylor
3 Hickorywood Square
Durham, NC 27713

Clifford Charles Thomas III
Pinkerton Services Group
13950 Ballantyne Corporate Place
Ste. 300
Charlotte, NC 28277-2712

Rodman Collins Tullis
3000 S. Church St. Ext.
Spartanburg, SC 29306

Pamela Ann Wilkins
1096 Beaconsfield Ave., Apt. 15
Grosse Point Park, MI 48230

William A. Wood
11720 Hardy
Overland Park, KS 66210

SUSPENSIONS-
COMMISSION ON CLE AND SPECIALIZATION
2004 REPORT OF COMPLIANCE
AS OF APRIL 1, 2005

John A. Beam, III
PO Box 280240
Nashville, TN 37228

Barry W. Bellino
PMB 3037
PO Box 2430
Pensacola, FL 32513
(INTERIM SUSPENSION BY COURT)

Dane A. Bonecutter
160 Olde Farm Road
Lexington, SC 29072

Allen H. Brill
132 Vinge Road
Prosperity, SC 29127

Henry H. Cabaniss
317 Seewee Circle
Mt. Pleasant, SC 29464
(INTERIM SUSPENSION BY COURT)

Peng C. Chan
150 S. Los Robles Ave., Ste 440
Pasadena, CA 91101

Damon Cook
101 Meeting St., Ste 400
Charleston, SC 29401
(INTERIM SUSPENSION BY COURT)

Susan A. Cross
1012 W. Pierce St., Ste E
Carlsbad, NM 88220

Cheryl W. Davis
PO Box 3265
Harrisburg, PA 17105

Helena E. Flickinger
535 N. Michigan Ave., #2205
Chicago, IL 60611

Robert L. Gailliard
PO Box 20307
Charleston, SC 29413
(INDEFINITE SUSPENSION BY COURT)

Brian K. Greenwood
1311 Ocean Park Blvd., Ste 3
Santa Monica, CA 90405

Rosalyn K. Grigsby
PO Box 8778
Columbia, SC 29202
(INTERIM SUSPENSION BY COURT)

H. Ray Ham
PO Box 6354
West Columbia, SC 29171
(INTERIM SUSPENSION BY COURT)

Karl P. Jacobsen
PO Box 327
Columbia, SC 29202
(INTERIM SUSPENSION BY COURT)

Connie M. Judge
7257 Linden Tree Lane
Springfield, VA 22152

Jeffrey A. Kolender
14729 Myer Terrace
Rockville, MD 20853

Andrea L. Malone
204 Sugar Lake Court
Greer, SC 29650

Cletus K. Okpalaeke
5939 Two Notch Road
Columbia, SC 29203
(INTERIM SUSPENSION BY COURT)

Kenneth T. Palmer
PO Box 48
Lakehurst, NJ 08733

Alan B. Rogers
PO Drawer 11583
Rock Hill, SC 29731

Herbert S. Rosenblum
PO Box 58
Alexandria, VA 22313

Thomas E. Ruffin
PO Box 1737
Murrells Inlet, SC 29576
(INTERIM SUSPENSION BY COURT)

John C. Saydlowski
100 N. Tryon St., Ste 4700
Charlotte, NC 28202

Caroline A. Smith
PSC 477, Box 1030
FPO, AP 96306

Teri L. Stone
1429 Saratoga Lane
Aldeo, TX 76008
(SUSPENDED BY BAR)

Todd A. Strich
1215 Byron Rd.
Charleston, SC 29407
(INTERIM SUSPENSION BY COURT)

Tara A. Thompson
445 Folly Road
Charleston, SC 29412
(INTERIM SUSPENSION BY COURT)

Rodman C. Tullis
3000 S. Church St., Ext.
Spartanburg, SC 29306

Margaret L. Webster
1104 Williams Street
Baltimore, MD 21230

Chayah Yisrael
PO Box 1204
Hampton, GA 30228

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

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

N O T I C E

IN THE MATTER OF ARTHUR T. MEEDER, PETITIONER

Arthur T. Meeder, who was definitely suspended from the practice of law for a period of eleven (11) months, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, May 20, 2005, beginning at 2:00 p.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

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

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

Columbia, South Carolina
April 15, 2005

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

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

N O T I C E

IN THE MATTER OF ROBERT LEE NEWTON, JR., PETITIONER

Robert Lee Newton, Jr., who was definitely suspended from the practice of law for a period of one (1) year, retroactive to September 25, 2003, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, May 20, 2005, beginning at 1:00 p.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

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

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

Columbia, South Carolina

April 15, 2005

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2004-UP-319-Bennett v. State of S. C. et al.	Pending
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Chris Robertson, Plaintiff,

v.

Bumper Man Franchising Company, Inc. and Bumper Man, Inc., Defendants.

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR SOUTH CAROLINA
Matthew J. Perry, United States District Judge

Opinion No. 25971
Heard March 15, 2005 – Filed April 18, 2005

Certified Questions Answered

Clinch Heyward Belser, Jr. and Michael J. Polk, both of Columbia, for Plaintiff.

Natalma M. McKnew and Thomas Warren Epting, both of Greenville, for Defendants.

J**USTICE PLEICONES:** Pursuant to Rule 228, SCACR, we accepted two questions certified by United States District Judge Matthew J. Perry:

1) Does the South Carolina Business Opportunity Sales Act (the Act) S.C. Code Ann. §§ 39-57-10 *et seq.* apply to a contract between a business located in Texas and a Texas resident, and performed in Texas and Washington?

2) Does the answer to question 1 change if the individual later moves to South Carolina and signs a new contract with a related entity to be performed in South Carolina?

We answer both questions "No."

FACTS[1]

In 2000, plaintiff entered a business agreement with Bumper Man, Inc. (BMI). This agreement, entered into in Texas, licensed plaintiff to practice the Bumper Man method of repairing automobile bumpers within a territory in San Antonio (Texas Agreement). BMI's licensing fee was $15,000: Plaintiff paid $10,000 and secured the remaining $5,000 with a promissory note.

The Texas Agreement provided, among other things, that plaintiff would be offered a franchise for no additional cost at some point in the future. About four months after entering the Texas Agreement, plaintiff moved to Seattle. He operated his business there pursuant to the Texas Agreement. The Texas Agreement had required plaintiff to pay a $2,000 relocation fee if he moved from San Antonio. Further, that agreement required him to pay the remainder of the BMI licensing fee if he relocated. In February 2001, a new entity, Bumper Man Franchising, Inc. (BMFI), prepared and sent plaintiff a Franchise Offer Circular.[2] On the same day

[1] We restrict our discussion to the facts recited in the certification order.

[2] This circular is required by the FTC Franchise Disclosure Rule, 16 CFR §§ 436 *et seq.*

that plaintiff received the Franchise Offer Circular, plaintiff signed a new promissory note in favor of BMFI for $12,000.[3]

In July 2001, plaintiff moved to South Carolina. Once here, he signed a franchise agreement with BMFI and began operating as a Bumper Man Franchise (South Carolina Agreement). In August 2002, plaintiff and BMFI had a falling out, and this litigation followed.

The parties acknowledge that the Texas licensing agreement with BMI was performed exclusively in Texas and Washington State, while the South Carolina franchise agreement with BMFI was entered into and performed here.

ISSUES

A. Does the South Carolina Business Opportunity Sales Act (the Act) S.C. Code Ann. §§ 39-57-10 *et seq.* apply to a contract between a business located in Texas and a Texas resident, and performed in Texas and Washington?

B. Does the answer to question 1 change if the individual later moves to South Carolina and signs a new contract with a related entity to be performed in South Carolina?

ANALYSIS

A. Applicability of the Act to the Texas Agreement

The first question asks whether the Act applies to the Texas Agreement, entered into in that state and wholly performed outside South Carolina. It is unnecessary to conduct any in-depth analysis in order to conclude that the answer to this question is "no." E.g., Ex parte First

[3] The $12,000 represents the $2,000 relocation fee and $10,000 licensing fee due BMI under the Texas Agreement.

Pennsylvania Banking and Trust Co., 247 S.C. 506, 148 S.E.2d 373 (1966) (state statutes have no extraterritorial effect).[4]

B. Does the Act apply to the Texas Agreement by virtue of the subsequent contract entered into by plaintiff and BMFI in South Carolina?

We answer this question 'No.' There is nothing in this record to suggest that the parties to the Texas Agreement contemplated that the plaintiff would relocate to South Carolina and that the anticipated franchise offer would be made and performed here. We hold that the subsequent South Carolina Agreement between plaintiff and BMFI does not cause the Act to relate back and apply to the Texas Agreement between plaintiff and BMI.

We note further that the Act applies to the start-up of a business. S.C. Code Ann. § 39-57-20 (Supp. 2004). The application, if any, of the Act to the South Carolina Agreement between plaintiff and BMFI is not before the Court. We emphasize that our answers are restricted to the narrow questions certified.

CONCLUSION

We answer both certified questions

'No.'

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

[4] Plaintiff cites numerous cases in brief for the proposition that a state statute regulating business practices applies where the state has a significant connection with the transaction. Here, South Carolina has **no** relationship with the BMI licensing agreement executed in Texas and wholly performed in that state and in the State of Washington.

The Supreme Court of South Carolina

In re: Amendment to Rule 404(c)(5), SCACR,
Admission Pro Hac Vice.

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rule 404(c)(5), SCACR, regarding information required to be included in an application for admission *pro hac vice*, by deleting the word "other". This amendment will require an attorney seeking to be admitted *pro hac vice* to include in the application whether the attorney has been notified of a complaint pending before the Commission on Lawyer Conduct in this State as well as any other state. Rule 404(c)(5), as amended, states the following:

> **(c) Application for Admission.** An attorney desiring to appear *pro hac vice* shall file with the court in which the matter is pending, prior to making an appearance, an Application for Admission Pro Hac Vice which contains the following information:
>
> ...
>
> (5) whether the applicant has been formally notified of any complaints pending before a disciplinary agency in any jurisdiction and, if

so, provide a detailed description of the nature and status of any pending disciplinary complaints;

This amendment shall become effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

April 14, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Karl Wallace, Appellant.

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

Opinion No. 3971
Heard November 17, 2004 – Filed March 28, 2005

REVERSED

C. Rauch Wise, of Greenwood, and Everett P. Godfrey, Jr., of Greenville, for Appellant

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

HEARN, C.J.: Karl Wallace was convicted of second-degree criminal sexual conduct (CSC) with a minor. He argues the trial court erred by admitting the testimony of the victim's sister regarding an alleged prior act of criminal sexual conduct with a minor under the common scheme or plan exception to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and Rule 404(b), SCRE. We reverse and remand for a new trial.

FACTS

Wallace was accused of criminal sexual conduct with his stepdaughter. At the time of trial, Wallace had been married to the victim's mother for approximately ten years. At trial, the victim testified she was about twelve years old when Wallace first told her to come to his room and go into the bathroom to take off all of her clothes. She said he would look at her and then touch her on her chest. After he touched her, he would tell her "don't tell anyone 'cause they're not going to believe you anyway." When asked how many times this happened, the victim answered "once, like every other month or so one time." This pattern continued through the seventh and eighth grades.

Although the incidents allegedly continued over a number of years, this charge involved an act on May 8, 2001, when the victim was in the ninth grade. According to the victim, Wallace called the victim into his bedroom to talk after her mother had been taken into police custody on an unrelated matter. After asking the victim why she was sitting with her legs closed and whether she thought he was going to do something to her, Wallace pushed her back on the bed. The victim stated that Wallace "sat on top of me and like between my legs and we were just sitting there." Wallace asked her, "do you want me to be myself or be like a dog," to which she responded, "to be hisself [sic]." Wallace then removed her pajama bottoms and her underwear, forced open her legs, and started "to push his hands up [her] privates." As he continued, the victim started to scream. Wallace put a pillow over her face and told her to be quiet or he would hit her. She testified that when Wallace heard her little brother coming down the hall, he told her to go into the bathroom and get dressed. After her brother left the room,

Wallace forced her back on the bed, got on top of her, and took her pants off again. After sitting and looking at her, he told her to go get her things and leave.

A few days later, the victim's older sister came to the school to see the victim and to find out what was going on at home. The victim told her sister that Wallace had been "messing with" her. As a result of that conversation, someone from the Department of Social Services visited the victim at school. The victim subsequently filed a police report.

At trial, the State attempted to present evidence of an alleged sexual assault against the sister as proof of Wallace's guilt. Prior to the start of trial, the State moved to allow the testimony of the sister, proffering the following argument:

> It's the State's position that her testimony would be that she was also sexually abused by this defendant that [sic] the abuse started at approximately the same age with both of the victims, that being the seventh grade, roughly, for both of them, between twelve and thirteen years old; that they were both the defendant's stepdaughters; that they were both living in the home with the defendant, as opposed to visiting on weekends and the abuse happening then; that the method of the abuse essentially started the same way, it started with fondling of the breasts, is [sic] where it began; and that it would occur in the home, . . . it occurred in the bedroom; and it occurred when the mother was not home, ...

The State concluded by stating that the sister suffered more extensive abuse. Specifically, she was subjected to sexual intercourse and oral sex. The State asserted it "would be willing to offer to limit testimony, if you see fit, as to just the particulars that were similar." When questioned by the trial court, the State said the sister specifically did not want to bring charges against Wallace. Defense counsel argued the testimony of the sister, as to the alleged

prior bad act, did not fit any exception to Lyle and would be grossly prejudicial to Wallace.

The trial court ordered an in camera examination of the sister. She testified that when she was in the sixth or seventh grade Wallace would come into her room to rub her back because he was trying to get her to lose weight. He then would touch her breasts, kiss her, and perform oral sex. When she was in the eighth grade, the family moved from Louisiana to South Carolina. The sister testified Wallace would call her into his bedroom and perform oral sex, digital penetration, and sexual intercourse. She testified she told her mother about the incidents on two separate occasions. The sister testified the sexual assaults continued until she moved out of the family home during her second semester in college.

After hearing the testimony and arguments, the trial court found the testimony to be clear and convincing and ruled this evidence was admissible under the common scheme or plan exception to Lyle. Concluding the probative value outweighed the prejudicial effect, the trial court allowed the evidence to be presented to the jury but limited the testimony of the sister "only to the extent and only to the acts which occurred to the victim in this prosecution, and not to go beyond that, which will limit the prejudicial effect of this testimony coming in." A jury found Wallace guilty of second-degree CSC with a minor, and he was sentenced to eight years confinement.

STANDARD OF REVIEW

On review of criminal cases, an appellate court is limited to determining whether the trial judge abused his discretion. See State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). An abuse of discretion occurs when the conclusions of the circuit court either lack evidentiary support or are controlled by an error of law. State v. Bryant, 356 S.C. 485, 489-90, 589 S.E.2d 775, 777 (Ct. App. 2003). "Concerning the admission of evidence, the trial judge's determination will be sustained absent error and resulting prejudice." State v. Robinson, 360 S.C. 187, 192, 600 S.E.2d 100, 102 (Ct. App. 2004) (citation omitted).

LAW/ANALYSIS

Wallace argues the trial court improperly admitted the testimony of the victim's sister as to alleged criminal sexual assaults under the common scheme or plan exception of Rule 404(b), SCRE and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). We agree.

Evidence of prior bad acts is inadmissible to prove the specific crime charged unless the evidence tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish proof of the other; or (5) identity of the person charged with the present crime. Lyle, 125 S.C. at 416, 118 S.E. at 807; Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

A prior bad act must first be established by clear and convincing evidence to be admissible. State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003). This court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). When considering whether there is clear and convincing evidence, this court is bound by the trial court's findings unless they are clearly erroneous. Tutton, 354 S.C. at 325, 580 S.E.2d at 189; State v. Weaverling, 337 S.C. 460, 468, 523 S.E.2d 787, 791 (Ct. App. 1999) (stating if a prior bad act is not the subject of a conviction, proof must be by clear and convincing evidence).

Here, Wallace does not argue the quantum of proof did not rise to the clear and convincing level. Instead, he argues the trial judge misapprehended the nature of the common scheme or plan exception as articulated in Lyle. Wallace urges us to review the underlying facts of Lyle in order to fully understand the common scheme or plan exception.

In Lyle, the defendant was charged with issuing a forged check in Aiken, South Carolina on January 12, 1922. 125 S.C. at 411, 118 S.E. at 805. The State introduced evidence that the defendant had committed similar crimes in Aiken on that same date, as well as similar crimes in Griffin, Georgia on January 3, 1922; Athens, Georgia on December 30, 1921; and LaGrange, Georgia on November 23, 1921. Id. at 413-14, 118 S.E. at 806. The allegation was the same in all the crimes: the defendant entered the bank, opened an account with a forged check using a false name, and received cash back from his deposit. The South Carolina Supreme Court held that the evidence regarding the similar crime committed in Aiken on the same date as the crime charged was admissible to establish identity because the evidence helped to refute the alibi defense of the defendant. Id. at 418, 118 S.E. at 808. As to the similar crimes committed on other dates in other locations, however, the Supreme Court found the evidence inadmissible. The court stated:

> Whether such crime was committed as part of a common plan or system was wholly immaterial, unless proof of such system would serve to identify the defendant as the perpetrator of the particular crime charged or was necessary to establish the element of criminal intent. Proof of a common plan or system, therefore, in this connection is merely an evidential means to the end of proving identity or guilty intent, and involves the establishment of such a visible connection between the extraneous crimes and the crime charged as will make evidence of one logically tend to prove the other as charged. *If, as we have seen, no such connection was shown to exist between the separate Georgia offenses and the Aiken crime as would constitute them practically "a continuous transaction" or as would otherwise render this evidence relevant to prove identity, and if, as we have held, the evidence was not competent on the question of intent, it follows that it was not admissible merely to show plan or system.*

Id. at 427, 118 S.E. at 811 (emphasis added) (citations omitted). This notion of the *connection* which must be established between similar crimes in order to allow admission of evidence of one of the crimes in the trial of the other had been previously articulated in two New York cases, People v. Molineux, 61 N.E. 286 (N.Y. 1901) and People v. Romano, 82 N.Y.S. 749 (N.Y. App. Div. 1903), relied on by the court in Lyle.

In Molineux, the defendant was accused of murder by sending poison contained in a bottle of Bromo Seltzer[1] through the mail to the director of the Knickerbocker Athletic Club. 61 N.E. at 287. The director, Harry Cornish, believing the silver "Tiffany's" bottle holder containing the bottle of Bromo Seltzer to be a Christmas gift, took it to his home. Thereafter, a member of his household, Katharine Adams, took some of the bottle's contents to relieve a headache and died. At trial, the State sought to introduce into evidence that the defendant was responsible for the previous death of Henry Barnet, who died at the Knickerbocker Athletic Club after taking a dose of a powder he had received in the mail the month before Cornish received his bottle. Id. at 289. Both powders were in fact cyanide of mercury, a rare and deadly poison. The evidence of the prior crime was admitted in the trial court. The Court of Appeals of New York reversed, and in a very thorough-going opinion, clearly articulated the limited nature of the common scheme or plan exception to the general rule which proscribes the admission of evidence of other crimes to prove the crime charged. The New York Court stated:

> It sometimes happens that two or more crimes are committed by the same person in pursuance of a single design, or under circumstances which render it impossible to prove one without proving all. To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there

[1] Bromo Seltzer is a brand of drug used to treat stomach upset and headache. See http://www.drugs.com/cons/Bromo_Seltzer.html (last visited Feb. 11, 2005).

> must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both.

Id. at 299.

In Romano, the defendant was charged with robbing his victim by throwing snuff into his face. 82 N.Y.S. at 749. At trial, the State sought to introduce evidence that the defendant had committed another robbery at the same location upon another person by using the same method. Although the trial court admitted the evidence finding the two crimes remarkably similar, the appellate court reversed. The New York Court of Appeals stated:

> There is always more or less of similarity between the commission of independent crimes of this class, and in many instances features that are common to one are found in the other; and yet it has never been supposed that, where there was separation as to time and no connection established beyond that of place and similarity, the first crime was admissible to establish any of the elements which constituted the other.

Id. at 750.

Wallace argues that in admitting the sister's testimony, the trial judge impermissibly broadened the meaning of the common scheme or plan exception enunciated in Lyle, to include mere similar acts. According to Wallace, the trial judge erroneously assumed that a broader application of the exception was warranted because this case involved criminal sexual conduct with a minor. However, the appellate courts of this state have refused to recognize a specific exception to the inadmissibility of prior bad act evidence in criminal sexual conduct cases. See State v. Nelson, 331 S.C. 1, 14 n.16,

admission of the sister's testimony enhanced the credibility of the victim and was provided as substantive prove of the victim's allegations. Without the sister's testimony, we cannot say that the evidence against Wallace was conclusively established such that a guilty verdict was the only rational result. See Tutton, 354 S.C. at 334, 580 S.E.2d at 194 (stating that in conducting an harmless analysis, the appellate court must review the other evidence admitted at trial in order to determine "whether the defendant's guilt is conclusively established by competent evidence such that no other rational conclusion could be reached by the jury").

CONCLUSION

Accordingly, we reverse Wallace's conviction and remand for a new trial.

REVERSED AND REMANDED.

GOOLSBY and WILLIAMS, JJ., concur.

trial judge sentenced White to six five-year terms, three of them to run consecutively and three of them to run concurrently. White appeals, asserting error in the trial judge's failure to order a medical examination to determine her competency. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

White was indicted after she wrote a series of threatening letters to a probation officer and a detention center officer. On March 5, 2004, White appeared before the circuit court and pled guilty on six indictments charging her with threatening a public official. During the plea hearing, the trial court asked White if she had been treated for any mental or emotional disability, and White indicated that she had been treated for mental problems. White's attorney then explained White had been admitted to a psychiatric institution at least six times and that she had "a myriad of diagnoses which Dr. Morgan [would] elaborate on over the history of her life." Counsel further indicated White had a history of bipolar disorder, depression, and post-traumatic stress disorder, and that she was currently taking the medication "Tegretol." The court noted White had not been sent for an evaluation so they were not holding a Blair[2] hearing, but questioned whether the Tegretol would prevent White from being able to understand what they were doing at the plea hearing. The following colloquy then occurred:

> [Defense Counsel]: No, Sir, not from my impressions and discussing the facts with her regarding the case, she had no difficulty understanding what she is facing or relaying to me what she actually did with respect to these charges.
>
> [Court]: Well, as an attorney and having, you have very wisely gotten Dr. Morgan involved in this, but in your analysis of this matter have you ruled out any mental

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

[2] State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

> defenses? Have you considered and/or . . . ruled out any mental defenses such as McNaughton or guilty but mentally ill?
>
> [Defense Counsel]: In my opinion, your honor, they do not apply in this situation.

After the solicitor placed the factual basis for White's plea on the record, White's attorney argued in mitigation that White was born with a condition that caused a shunt to be placed in her head and the shunt was "still there today." He again noted for the court that White had a history of mental health problems. Counsel then presented Dr. Morgan, who had examined White and was given White's mental health and neurological records.

Dr. Morgan stated that White was born with water on the brain and that she had a shunt put in at several months of age to shunt the water from the brain. She was followed by a neurosurgeon until July 1998, at which time it was discovered that part of the apparatus was embedded in the brain, but that it seemed to be working okay and "they decided not to do anything to it at that time." White failed to follow up with the neurosurgeon and Dr. Morgan was concerned because of the fact that White had begun to complain of headaches, which could be an indication of pressure building in the brain. He stated, "So I think there is some physical basis that may account for some of the behavior that we're observing here although it has not really been worked out very carefully." Dr. Morgan also noted White had been in the Department of Mental Health on six different occasions and had been diagnosed with depression, bipolar disorder, alcohol and drug problems and post traumatic stress disorder. He then concluded as follows:

> In a situation like this you naturally wonder about the question you raised guilty by mentally ill, whether she can control her behavior, that maybe she couldn't and that sounds like what I am saying, but if you look at the behavior here and the letters and the context in which she explains those, there is a deliberateness about them, a sort

behavior, he found White's actions to be a deliberate and calculated plan to perpetuate a situation she found comfortable. He then opined the guilty but mentally ill defense did not fit White's situation. White's attorney then informed the court he had previously sent White for a mental health evaluation when he represented White on a prior charge of threatening a public official, for which she was incarcerated at the time of the plea hearing.

Based on the record before us, we cannot find a clear abuse of discretion in the trial judge's failure to order a competency examination for White. See State v. Burgess, 356 S.C. 572, 575-76, 590 S.E.2d 42, 44 (Ct. App. 2003) (holding appellate court would not second guess trial judge's denial of motion for psychiatric examination where defendant had not previously been adjudicated incompetent to stand trial, trial judge found defendant's demeanor during proceeding appeared appropriate, and the record showed defendant understood the proceedings, roles of participants and charges against her); State v. Bradley, 343 S.C. 461, 462-64, 539 S.E.2d 720, 721-22 (Ct. App. 2000) (finding, in light of evaluation of Department of Mental Health doctor concluding Bradley was not mentally retarded and functioned in a range of average intelligence, and that most of Bradley's answers were purposely vague, involving "some skill . . . to do . . . consistently," trial judge's failure to direct further examination to determine Bradley's competency did not constitute an abuse of discretion); State v. Drayton, 270 S.C. 582, 584, 243 S.E.2d 458, 459 (1978) (wherein Supreme Court held trial judge's failure to sua sponte order examination of defendant to determine competency did not violate § 44-23-410 nor deprive defendant of due process where trial judge had before him the order of the previous presiding judge finding, about two and one-half months earlier, that defendant was at that time fit to stand trial, while contending that defendant was not competent to stand trial, his counsel clearly refused to demand a further competency hearing, and record failed to show additional facts warranting further examination of defendant).

AFFIRMED.

GOOLSBY and STILWELL, JJ., concur.

John H. Tiller and Elizabeth Applegate Dieck, both of Charleston, for Respondent.

BEATTY, J.: Christine McCune brought an action for negligence and strict liability against the Myrtle Beach Indoor Shooting Range (the Range) for injuries sustained while she was participating in a paintball game.[1] McCune appeals from the trial court's grant of summary judgment to the Range. We affirm.

FACTS

The Range offers paintball games and allows participants to rent protective equipment, including face masks, provided by the Range. McCune participated in a paintball match with her husband and friends. She utilized a mask provided by the Range. Prior to being allowed to participate, McCune signed a general waiver. The waiver released the Range from liability from all known or unknown dangers for any reason with the exception of gross negligence on the part of the Range.

During her play, the mask was loose and ill fitting. She attempted to have the mask tightened or replaced on several occasions and an employee of the Range attempted to properly fit the mask for McCune. While playing in a match, McCune caught the mask on the branch of a tree. The tree was obscured from her field of vision by the top of the mask. The mask was raised off her face because it was loose, and provided no protection against an incoming paintball pellet. The pellet struck McCune in the eye, rendering her legally blind in the eye.

McCune brought suit, alleging causes of action for negligence and strict liability based on the failure of the mask to properly be fitted and protect her

[1] Brass Eagle, Inc., was also named in the action as the manufacturer of the mask McCune alleged was defective or in poor operating condition. McCune and Brass Eagle settled the suit and Brass Eagle is not a party to this appeal.

DISCUSSION

McCune maintains the trial court erred in granting summary judgment to the Range on the basis of the exculpatory language in the release of liability signed by McCune. McCune asserts she did not anticipate the harm that was inflicted or the manner in which it occurred. Additionally, she contends the failure of the equipment was unexpected and she could not have voluntarily assumed such a risk. We disagree.

As an initial matter, we must determine whether this is a case involving express assumption or implied assumption of the risk. Express assumption of the risk sounds in contract and occurs when the parties agree beforehand, "either in writing or orally, that the plaintiff will relieve the defendant of his or her legal duty toward the plaintiff." Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 79-80, 508 S.E.2d 565, 569-70 (1998).

"Express assumption of risk is contrasted with implied assumption of risk which arises when the plaintiff implicitly, rather than expressly, assumes known risks. As noted above, implied assumption of risk is characterized as either primary or secondary." Id. at 80-81, 508 S.E.2d at 570. "[P]rimary implied assumption of risk is but another way of stating the conclusion that a plaintiff has failed to establish a prima facie case [of negligence] by failing to establish that a duty exists." Id. at 81, 508 S.E.2d at 570 (quoting Perez v. McConkey, 872 S.W.2d 897, 902 (Tenn. 1994)). "Secondary implied assumption of risk, on the other hand, arises when the plaintiff knowingly encounters a risk created by the defendant's negligence." Id. at 82, 508 S.E.2d at 571.

In the instant case, we are confronted with a defense based upon McCune's express assumption of the risk. She signed a release from liability prior to participating in the paintball match. As acknowledged by Davenport, the courts of South Carolina have analyzed express assumption of the risk cases in terms of exculpatory contracts. Id. at 80, 508 S.E.2d at 570.

> which is the result of gross negligence and/or wanton misconduct.
>
> . . .
>
> I HAVE READ THIS RELEASE OF LIABILITY AND ASSUMPTION OF RISK AGREEMENT, FULLY UNDERSTANDING ITS TERMS, UNDERSTAND THAT I HAVE GIVEN UP SUBSTANTIAL RIGHTS BY SIGNING IT, AND SIGN IT FREELY AND VOLUNTARILY WITHOUT ANY INDUCEMENT.

The agreement is then signed by McCune and dated the date of the incident.

The above agreement is sufficient to limit the liability of the Range to McCune. The agreement was voluntarily signed and specifically stated: (1) she assumed the risks, whether known or unknown; and (2) she released the Range from liability, even from injuries sustained because of the Range's own negligence. It is clear McCune voluntarily entered into the release in exchange for being allowed to participate in the paintball match.

Additionally, she expressly assumed the risk for all known and unknown risks while participating and cannot now complain because she did not fully appreciate the exact risk she faced. "Except where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character." Restatement (Second) of Torts § 496D (1965) (emphasis added).

We find the release entered into by the parties does not contravene public policy. In Huckaby, the plaintiff signed a waiver similar to the one above, which was required before he could participate in a sanctioned automobile race. He maintained his injuries were caused by the speedway's faulty installation and maintenance of a guardrail. Huckaby, 276 S.C. at 630, 281 S.E.2d at 223. As was found in Huckaby, participation in a paintball

the driver and the owner of the wrecker of liability on the ground it was overly broad and, thus, in contravention of public policy. Because the contract "did not clearly inform Fisher he would be waiving all claims due to the [driver's and vehicle owner's negligence], we held the driver and the vehicle owner could not be released from liability "based on the broad 'catch-all' phrase." Id. at 298, 584 S.E.2d at 153.

In contrast, the release in the case at bar is neither ambiguous nor overbroad. In fact, McCune in her deposition characterized the release as a "standard waiver." Although our research reveals no South Carolina case that deals specifically with a release for paintball, other jurisdictions have found similarly worded releases to be unambiguous. See Taylor v. Hesser, 991 P.2d 35, 38 (Okla. Civ. App. 1998) (affirming grant of summary judgment to operators of paintball facility and shooter where plaintiff, who was injured during the paintball game, signed a release prior to participating); Kaltenbach v. Splatball, Inc., No. C7-99-235, 1999 WL 690191, at *2 (Minn. Ct. App. 1999) (finding paintball participant was precluded from recovering against owner of a paintball facility for injuries where participant signed a release of owner's liability).

We would also note that unlike the release in Fisher, the release signed by McCune did not preclude recovery for a cause of action involving gross negligence.[2] Thus, this opinion should not be construed as creating an indefensible position for all injuries sustained during inherently dangerous recreational activities. Cf. Adams v. Roark, 686 S.W.2d 73, 75-76 (Tenn.

[2] Neither in her brief nor at oral argument did McCune assert that the Range's actions constituted gross negligence. Instead, she acknowledged at oral argument that the Range operated with at least slight care by attempting to properly adjust the mask to McCune. See Clyburn v. Sumter County Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994)("Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do."); Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 331-32, 566 S.E.2d 536, 544 (2002) (stating gross negligence "is the failure to exercise even the slightest care").

1985) (recognizing, in an action to recover for injuries sustained by a motorcyclist at a drag way, that an agreement to contract against liability for gross negligence is unenforceable); Murphy v. N. Am. River Runners, Inc., 412 S.E.2d 504, 510 (W.Va. 1991) (stating, in an action to recover for injuries sustained during a whitewater rafting accident, "a general clause in a pre-injury exculpatory agreement or anticipatory release purporting to exempt a defendant from all liability for any future loss or damage will not be construed to include the loss or damage resulting from the defendant's intentional or reckless misconduct or gross negligence, unless the circumstances clearly indicate that such was the plaintiff's intention").

Accordingly, we hold the trial court properly determined the release signed by McCune was sufficient to release the Range from all liability in this incident. Therefore, the decision of the trial court is

AFFIRMED.[3]

ANDERSON and SHORT, JJ., concur.

[3] As we have affirmed the court's decision based upon its analysis of the exculpatory contract, we need not determine whether McCune's claim would also be barred because her negligence was greater than that of the Range.

FACTS

The facts in the case are not disputed. Joyner owned property adjacent to a hotel in Greenville, South Carolina. He leased the property in 1971 to the Watkins, owners of the hotel, for use as an additional parking lot. The lease was for a period of forty years, limited rent to $750 per month, and provided that the lease was binding upon the Watkins' "respective heirs, executors, administrators, successors and assigns." The lease was amended in 1983, assigned to a subsequent owner of the hotel in 1995, and further assigned to a new owner, Stewart Mac Investments, LLC, in 1999. All of the assignments of the lease agreement were recorded with the deed to the hotel property. Stewart Mac Investments stopped paying rent in September 1999.

Stewart Mac Investments defaulted on the mortgage for the hotel with GHALP, and a foreclosure action was instituted in June 2000. The order granting the foreclosure noted that the property was "[t]ogether with all right, title and interest of the Mortgagor in and to that certain Lease executed by and between C. Dan Joyner, Lessor, and Robert L. Watkins and Tamara A. Watkins, Lessees . . . ." GHALP purchased the hotel property, and the description of the property in the master's deed included the above-quoted language that the property included the right to or interest in the lease with Joyner.[2] The master's deed also provided that the hotel property was purchased subject to a first mortgage with BB&T bank. GHALP, however, never signed a lease assignment or lease agreement with Joyner. GHALP never paid rent, or Stewart Mac Investments' arrears, to Joyner.

Joyner brought an action against GHALP for breach of the lease agreement, breach of the implied covenant of good faith and fair dealing, and for a declaratory judgment. Joyner sought the unpaid rent, the arrearages allegedly assumed when GHALP obtained the property from Stewart Mac Investments, punitive damages for bad faith, and costs and attorney's fees.

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[2] The master later determined that this language meant that GHALP took the property "subject to" the lease agreement. This finding is unappealed.

citing treatises to the effect that: "'In the absence of a special agreement to assume the mortgage or words in the grant importing in some form that he assumes the payment of it, the purchaser is not personally liable for it.'" Id. at 138, 118 S.E. at 191 (quoting 1 Jones Mtg. (6th Ed.), 750).

The fact that GHALP bought the property subject to the lease is not disputed. The only question is whether GHALP may be bound by that language in the lease and be held personally liable. Although the majority opinion in Allgood appears to have implied an assumption of the debt by the purchaser, the present situation is clearly different from the one in Allgood. In Allgood the mortgage encumbered the purchased property and the purchaser deducted the mortgage balance from the purchase price. The lease in question was not an encumbrance on the hotel property that GHALP purchased; the lease involved an adjacent parcel.

The lease was a contract between the Watkins and Joyner, and later, between Joyner and subsequent owners who agreed to accept assignment of the lease. The lease provided that it would be effective upon the lessee's heirs and assigns. However, GHALP did not expressly or impliedly assume the lease. GHALP did not assume the lease by merely accepting the property subject to the contract between Joyner and the Watkins' assignees. "One who accepts a conveyance subject to a lien or claim does not assume by such acceptance the obligation to discharge the lien or satisfy the claim." 77 Am.Jur.2d Vendor and Purchaser § 406 (1997); see County of Albany v. Albany County Indus. Dev. Agency, 218 A.D.2d 435, 437 (N.Y. App. Div. 1996) (noting the well-settled rule that one who accepts a conveyance "subject to" a lien or claim does not assume by such acceptance the obligation to discharge the lien or satisfy the claim). Absent an indication from GHALP that it agreed to be bound to the lease with Joyner, such as signing an assignment or exercising the duties and rights under the lease, GHALP has no legal obligation to Joyner. Without a contract between the parties, expressed or implied, the relationship of landlord and tenant cannot exist. Stewart-Jones Co. v. Shehan, 127 S.C. 451, 457, 121 S.E 374, 376 (1924).

Even viewing the evidence in the light most favorable to Joyner, nothing indicates GHALP separately agreed to be bound by the lease when it purchased the hotel property. Accordingly, the master-in-equity's order granting summary judgment to GHALP is

AFFIRMED.

ANDERSON, and SHORT, JJ., concur.

STILWELL, J.: In this action for conversion, the jury returned a verdict in favor of Don Mackela in the amount of $13,320.23 plus interest in actual damages and $50,000 in punitive damages against Automotive Finance Corporation (AFC). AFC appeals. We affirm.[1]

FACTS

In September 2001, Mackela owned a 1999 Dodge Grand Caravan. Mackela sought to purchase a second vehicle from James Bentley, d/b/a Lyman Auto Sales. Bentley allowed Mackela to park the Dodge on Bentley's used car lot and agreed to assist Mackela in the sale of the vehicle. Mackela retained title to the Dodge.

Bentley unlocked and showed the Dodge to potential buyers, but was not authorized to negotiate its sale. Although Bentley assumed he would receive some compensation if he sold the Dodge, Mackela and Bentley had no agreement regarding a price or a commission for Bentley. Mackela periodically checked on the vehicle from September 2001 to January 2002 and never noticed any stickers or other papers indicating Bentley was advertising the car.

AFC financed Bentley's purchases of new vehicles as the floor planner of Lyman Auto Sales. As part of the note, guaranty, and security agreement between Bentley and AFC, Bentley granted AFC a security interest in "[a]ll now owned or hereafter acquired inventory." Bentley defaulted on the AFC note. AFC served a warrant of attachment on Bentley and attached forty-two vehicles from Bentley's lot, including Mackela's Dodge. Mackela filed this action against AFC and James Bentley, d/b/a Lyman Auto Sales, alleging conversion and seeking actual and punitive damages.

At trial, Mackela testified he called AFC to retrieve the Dodge after the attachment. When Mackela explained his ownership, the AFC representative said AFC took the Dodge because "it was there." The representative further

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

told Mackela that AFC would not return the Dodge unless Mackela "paid for it." Mackela explained: "I'm already paying for it." The representative replied: "Well, you're going to have to pay for it again if you want to take it. We won't give you a release." When the finance company that held Mackela's note on the Dodge learned of the attachment, it refused further payments by Mackela and ultimately a judgment was entered against Mackela for approximately $13,000.

Bentley testified at trial that only fifty percent of the vehicles taken by AFC were Lyman Auto Sales inventory. The remaining vehicles, like Mackela's Dodge, were not owned by Lyman Auto Sales. Bentley explained that he attempted "on several occasions" to retrieve the vehicles from AFC but AFC refused to return the vehicles and the owners were forced to "get them back through different court orders."

AFC moved for a directed verdict on the ground that AFC was acting within its legal rights as to its collateral when it took control of Mackela's vehicle. The trial court denied AFC's motion. The jury returned a verdict in favor of Bentley and against AFC. The jury awarded Mackela actual damages of $13,320.23 plus interest and $50,000 in punitive damages.[2] The trial court denied AFC's post-trial motion for new trial or judgment notwithstanding the verdict. AFC appeals.

LAW/ANALYSIS

On appeal from the denial of a motion for directed verdict, the appellate court may reverse only if no evidence supports the circuit court's ruling. Steinke v. South Carolina Dep't of Labor, Licensing, & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). Credibility issues and conflicts in testimony are for the jury. Garrett v. Locke, 309 S.C. 94, 99, 419 S.E.2d 842, 845 (Ct. App. 1992).

[2] On the Form 4 Order, the award is stated as $13,325.23. However, the trial court's written order calculating the total award including interest cites the award as $13,320.23.

damages. AFC admitted at trial that at the time it executed the writ of attachment, none of the vehicles on Bentley's lot were listed in the floor plan agreement. AFC ultimately returned numerous of the vehicles seized. The actions of AFC deprived Mackela of the use of his vehicle for eighteen months. AFC had other suits filed against it alleging similar conduct. The punitive damages award is just over three times the actual damages and is less than the $80,000 AFC claimed due from its account with Bentley.

We find the trial court expressly considered the Gamble factors in its review of the punitive damages award and made appropriate findings of fact as to each factor.

CONCLUSION

Accordingly, the order on appeal is

AFFIRMED.

GOOLSBY and HUFF, JJ., concur.

Steven M. Krause and Daniel L. Draisen, both of Anderson, for Appellants.

David L. Moore, Jr., of Greenville, for Respondents.

HEARN, C.J.: This appeal stems from a tort action Becky Todd Smith brought against Tracy Lee Moore pursuant to a car accident between the two parties. United Services Automobile Association (USAA), the insurance carrier for Becky Todd Smith and Barry Smith, moved to be dismissed from the case, arguing that Becky Todd Smith, who was listed as an "operator" on the declarations page but was not the named insured, could not stack underinsured motorist (UIM) coverage. The trial court granted USAA's motion. We affirm.

FACTS

The automobile accident that prompted this litigation occurred in September of 2000 in Oconee County. A vehicle owned by Ola A. Moore and operated by Tracey Lee Moore turned left in front of a vehicle operated by Becky Todd Smith. The Smiths brought an action against the Moores for injuries and damages resulting from the accident.

Tracey Lee Moore's liability is undisputed. Her vehicle was insured by Farm Bureau Mutual Insurance Company, which tendered the liability limits on its policy and is not a subject of this appeal.[1] The vehicle Becky Todd Smith was driving was insured by USAA under a policy issued to Betty Gillispie Washnok, who owned the vehicle. Smith was driving the vehicle with Washnok's permission.

Washnok treated Smith as if she were her daughter and served as her guardian, though it is unclear whether a legal adoption ever took place. At the time of the accident, however, Smith no longer resided with Washnok.

[1] Litigation remains pending on the issue of excess liability coverage available to the Moores in a separate declaratory judgment action.

Washnok owned two vehicles, both of which were insured through USAA. Although Washnok was the named insured, Smith was listed as an "operator." The term "operator" is not defined in the policy.

Because Smith was driving the vehicle with Washnok's permission, she was entitled to UIM coverage as a permissive user. USAA paid one level of UIM benefits under a covenant not to execute. Smith's injuries were extensive, however, and the damages she incurred exceeded the first level of UIM benefits. Thus, Smith sought to stack UIM coverage from Washnok's other vehicle.

USAA moved to be dismissed from the case, arguing that Smith was not a Class I insured, and therefore was not entitled to stack UIM coverage. After a hearing, the trial court granted USAA's motion. This appeal followed.

STANDARD OF REVIEW

Rule 41(b), SCRCP, allows a defendant to move for dismissal in cases tried without a jury on the ground that "upon the facts and the law the plaintiff has shown no right to relief." See Silvester v. Spring Valley Country Club, 344 S.C. 280, 284, 543 S.E.2d 563, 565 (Ct. App. 2001). Because a dismissal under these circumstances has the same effect as summary judgment, the standard for summary judgment applies. Id. at 284-85, 543 S.E.2d at 566.

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." Id. at 285, 543 S.E.2d at 566. In ruling on a motion for summary judgment, this court must view all evidence in the light most favorable to the non-moving party. Id.

LAW/ANALYSIS

At issue in this case is whether an insured who is listed on the policy as an "operator" can stack UIM coverage. In South Carolina, only Class I insureds can stack coverage. Concrete Servs., Inc. v. U.S. Fid. & Guar. Co., 331 S.C. 506, 509, 498 S.E.2d 865, 866 (1998). Class I insureds include the named insured and his or her spouse and relatives residing in the same household. Id. Class II insureds are those using the insured vehicle with permission of the named insured and guests. Id.

Smith was not the named insured or the named insured's spouse; nor does she does qualify as a resident relative. Although the pleadings refer to Smith as Washnok's adopted daughter, it is undisputed that Smith did not reside in the same household as Washnok at the time of the accident.

The Smiths' argument is essentially that USAA's inclusion of Smith as an "operator" on the declarations page of the policy created an ambiguity as to whether she was a named insured and such an ambiguity should be resolved in favor of coverage. No cases in South Carolina have addressed this question to date.

Courts in some states have found in favor of coverage in similar situations. The leading case is Lehrhoff v. Aetna Cas. & Sur. Co., 638 A.2d 889 (N.J. Super. Ct. App. Div. 1994). In Lehrhoff, the court found that the insured was entitled to uninsured motorist coverage because of his inclusion on the declarations page as a driver of the insured vehicle. Id. at 892. Rhode Island followed suit, concluding that "the listing of drivers' names on the declarations page, without more, gives rise to an ambiguity in respect to whether such drivers are in fact covered under the terms of a policy." Mallane v. Holyoke Mut. Ins. Co., 658 A.2d 18, 20 (R.I. 1995).

These cases, however, relied on the doctrine of reasonable expectations. See Lehrhoff, 638 A.2d at 892 ("[W]e are . . . convinced that reasonable expectations of coverage raised by the declaration page cannot be contradicted by the policy's boilerplate . . . ."); Mallane, 658 A.2d at 21 (quoting the above language from Lehrhoff in reliance). The doctrine of

reasonable expectations, which is essentially that the objectively reasonable expectations of insureds as to coverage will be honored even though a careful review of the terms of the policy would have shown otherwise, has been rejected in South Carolina. Allstate Ins. Co. v. Mangum, 299 S.C. 226, 231-32, 383 S.E.2d 464, 466-67 (Ct. App. 1989). Moreover, the Mallane court recognized that its holding was a minority position. Mallane, 658 A.2d at 21.

Additionally, neither Lehrhoff nor Mallane dealt with stacking. The issue in both cases was whether boilerplate provisions in the policy could be used to defeat uninsured motorist coverage provided under the policy. Lehrhoff, 638 A.2d at 889, 892; Mallane, 658 A.2d at 20. In the case sub judice, USAA has already paid the UIM coverage for the car involved in the accident, and the issue is whether Smith is entitled to additional UIM coverage from Washnok's second car.

The majority view is that listing a driver on the declarations page of an insurance policy does not make that person a named insured. In Georgia Farm Bureau Mut. Ins. Co. v. Wilkerson, 549 S.E.2d 740 (Ga. Ct. App. 2001), the Georgia Court of Appeals held that although neither "named insured" nor "driver" were defined in the insurance policy, the policy was not ambiguous. Id. at 742. Therefore, the person listed as a driver in the insurance policy was not allowed to stack coverage. Likewise, the North Carolina Court of Appeals has held that "driver" and "named insured" are not synonymous because such a construction would expand the term "named insured" beyond its common sense meaning. Nationwide Mut. Ins. Co. v. Williams, 472 S.E.2d 220, 222 (N.C. App. 1996). The court went on to hold that a "driver" was not a Class I insured. Id. Other courts have agreed. See Millspaugh v. Ross, 645 N.E.2d 14 (Ind. Ct. App. 1994) (holding that being named a "principal driver" does not create an ambiguity and does not transform one into a named insured); Kitmirides v. Middlesex Mut. Assurance Co., 783 A.2d 1079 (Conn. App. Ct. 2001) (rejecting Lehrhoff and Mallane and finding no ambiguity, and ultimately holding that a listed driver is not a named insured); Fed. Kemper Ins. Co. v. Schneider, 474 A.2d 224 (Md. Ct. Spec. App. 1984) (holding that adding a driver to a policy does not make him a named insured); see also 7 Couch on Insurance § 110:1 ("[O]ne listed in the policy, but only in the status of a driver of a vehicle, is not a

named insured despite the fact that such person's name was physically in the policy.").

Furthermore, even though "operator" is not defined in the policy, the policy is not ambiguous. Where a term is not defined in a policy, it is to be "defined according to the usual understanding of the term's significance to the ordinary person." Mfrs. and Merchants Mut. Ins. Co. v. Harvey, 330 S.C. 152, 158, 498 S.E.2d 222, 225 (Ct. App. 1998). The term "operator" has been construed somewhat more expansively than "driver" in this state, but has not been contemplated to extend beyond mere use of the vehicle. State v. Graves, 269 S.C. 356, 237 S.E.2d 584 (1977) (explaining that the term "operator" is broader than the term "driver" because it includes acts such as starting the engine or "manipulating the mechanical or electrical agencies of a vehicle"). In addition, the policy defines "you" and "your" as "the 'named insured' shown in the declarations." The only person listed in the "Named Insured" box on the declarations page was Washnok. Thus, we see no ambiguity.

We therefore adopt the majority view and hold that listing an individual as an operator on the declarations page of an insurance policy does not make that individual a named insured. Because Smith was not the named insured (or the named insured's spouse or resident relative), but was only using the vehicle with Washnok's permission, she is a Class II insured, and as such, she is not entitled to stack coverage.

Based on the foregoing, the order of the trial judge is hereby

AFFIRMED.

GOOLSBY and WILLIAMS, JJ., concur.

HEARN, C.J.: Kenneth Roach appeals from his convictions for multiple drug offenses, arguing the trial court erred (1) by admitting hearsay in violation of the Confrontation Clause and (2) by admitting an in-court identification, which was based on a single photograph lineup, without making a determination as to the reliability of the identification. We affirm.

FACTS

On May 17, 2001, police were involved in a narcotics investigation and went to Roach's home to execute a search warrant for possession and distribution of crack cocaine. Prior to executing the warrant, a confidential informant, who had prior drug charges himself, agreed to assist the police. He testified that with twenty dollars the police had given him, he went to Roach's home and purchased drugs directly from Roach.

Officers had Roach's home under surveillance at the time of the confidential informant's purchase. When the officers approached the door of Roach's home to execute the warrant, they found it had been barricaded. The officers knocked, and after receiving no response, they removed the door and entered the home. The officers observed several people inside, including Roach, who ran into the bathroom and flushed the toilet. Officers recovered crack cocaine from a plastic bag in the bathroom sink.

In March 2002, Roach was indicted by the York County grand jury for one count of possession of crack cocaine with intent to distribute, one count of possession of crack cocaine with intent to distribute within the proximity of a public school, two counts of distribution of crack cocaine, and one count of distribution within the proximity of a public school. Roach was convicted on all charges and sentenced to an aggregate term of thirty years in prison. This appeal followed.

"The Sixth Amendment guarantees a criminal defendant the right 'to be confronted with the witnesses against him.'" State v. Dinkins, 339 S.C. 597, 601, 529 S.E.2d 557, 559 (Ct. App. 2000) (quoting U.S. Const. amend. VI). The right of confrontation is essential to a fair trial because it promotes reliability and insures that convictions will not result from testimony of individuals who cannot be challenged at trial. Id. Although the confrontation clause is not identical to the hearsay rule, when the State offers hearsay evidence in a criminal case, the accused's Sixth Amendment right to confront accusers is directly implicated. See Idaho v. Wright, 497 U.S. 805 (1990); Charleston County Dep't of Soc. Servs. v. Father et al., 317 S.C. 283, 454 S.E.2d 307 (1995).

While the law requires confrontation with adverse witnesses, several exceptions have been recognized. See Danny R. Collins, South Carolina Evidence § 16.11 (2d ed. 2000). Traditionally, "[c]onfrontation [was] not always required in particular proceedings that serve[d] limited functions, for well-recognized hearsay exceptions, or for evidence that [had] other significant indicia of reliability." Id. In its most recent analysis of the Confrontation Clause, the United States Supreme Court modified the long-standing exemption for evidence bearing adequate "indicia of reliability." Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). In Crawford, the Supreme Court established a new rule which bars out-of-court statements by a witness *that are testimonial in nature* unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. Id. at ___, 124 S.Ct. at 1374. However, where the out-of-court statement is not testimonial in nature, the "indicia of reliability" test remains. Id.[1]

[1] The Supreme Court declined to "spell out a comprehensive definition of 'testimonial,'" but noted that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Crawford, 541 U.S. ___, 124 S.Ct. at 1367. For a comprehensive review of testimonial and non-testimonial hearsay, see State v. Staten, Op. No. 3955 (S.C. Ct. App. filed March 7, 2005 Shearouse Adv. Sh. No. 12 at 22).

"Hearsay is an out of court statement, offered in court to prove the truth of the matter asserted." State v. Townsend, 321 S.C. 55, 467 S.E.2d 138 (Ct. App. 1996). A "statement" as defined by Rule 801(a), SCRE, includes "nonverbal conduct of a person, if it is intended by the person as an assertion." See also id., 321 S.C. at 59, 467 S.E.2d at 141 (finding the gesture of pointing to be an assertion).

In this case, the officer testified about individuals "offering" him money in exchange for drugs. While the officer did not specifically testify as to what these individuals said to him, if anything, he did testify that the individuals communicated to him, in some way, their desire to purchase drugs. The State offered this evidence to prove that Roach was running a "crack house" that people visited with the intent to purchase drugs. Thus, the officer's testimony regarding the transaction, even if it was communicated nonverbally, falls under the definition of hearsay as it was an out-of-court statement, offered in court to prove the truth of the matter asserted. The out-of-court statements were not testimonial in nature because they were made by individuals who had no idea they were actually attempting to buy drugs from a police officer. See State v. Staten, Op. No. 3955 (S.C. Ct. App. filed March 7, 2005 Shearouse Adv. Sh. No. 12 at 31) (explaining that in other jurisdictions, statements made to acquaintances without an intention for use at trial have consistently been labeled as non-testimonial). As non-testimonial hearsay statements, they would be admissible if they fell within a well-recognized hearsay exception or bore other significant indicia of reliability, which they do not. Accordingly, the trial court erred in allowing the testimony into evidence.

However, "violation of the confrontation clause is not *per se* reversible but is subject to a harmless error analysis." State v. Clark, 315 S.C. 478, 481, 445 S.E.2d 633, 634 (1994). "An error is harmless when it 'could not reasonably have affected the result of the trial.'" State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

In this case, a confidential informant testified that he had purchased drugs from Roach immediately prior to the officers' execution of their search

> with that, but he certainly has the ability based on his previous purchases and contact with [Roach] or the person he identified as [Roach] and the person he identified as the person from whom he purchased. I find that his in court identification will be allowed.

After making that finding, the trial judge went on to explain:

> I'll certainly charge the jury that they are to take into consideration whatever factors they need to in regard to determining whether or not that is a reliable [identification]. [T]hat's not what the court is deciding, I'm not deciding whether it's reliable, I'm deciding whether it's admissible.

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188, 198-99 (1972). First, the trial judge must ascertain whether the identification process was unduly suggestive. State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000). Next, the trial judge must decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id. "Single person show-ups are disfavored because they are suggestive by their nature." State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999). "However, an identification may be reliable under the totality of the circumstances even when a suggestive procedure has been used." State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (Ct. App. 2000).

Roach argues the trial judge's ruling should be reversed because the judge explicitly refused to evaluate the reliability of the identification. We disagree. As is clear from the trial judge's ruling excerpted above, he considered the reliability of the identification and found there was no substantial risk for misidentification. Although he went on to say, "I'm not deciding whether it's reliable, I'm deciding whether it's admissible," this statement must be taken in context. This statement was made as the trial judge explained how he would charge the jury. Ultimately, it was the jury's

responsibility, as the sole arbiter of the facts, to determine whether the in-court identification was credible. Thus, the trial judge was merely explaining that despite the identification's admissibility, it would be in the jury's hands to determine whether to rely on the identification when determining Roach's guilt. We thus find no error.

Accordingly, Roach's convictions are

AFFIRMED.

KITTREDGE and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nataliya Holler, **Respondent,**

v.

William Holler, **Appellant.**

Appeal From York County
Robert E. Guess, Family Court Judge

Opinion No. 3979
Heard April 4, 2005 – Filed April 18, 2005

AFFIRMED

William Holler, of Rock Hill, Pro Se, for Appellant.

David Bradley Jordan, of Rock Hill and Harold A. Oberman, of Charleston, for Respondent.

ANDERSON, J.: William Holler (Husband) appeals from the family court's determination that a premarital agreement signed by Nataliya[1] Holler (Wife) is not enforceable. We affirm.

[1] Wife is referred to in the record as both Nataliya and Natasha.

FACTUAL/PROCEDURAL BACKGROUND

Wife is originally from Ukraine. She was educated in Ukraine and taught college students in that country. English is not Wife's first language. After seeing Husband's picture in "a feminine magazine," Wife wrote a letter to him in English and included her phone number. Thereafter, Husband and Wife talked on the phone for "[a]bout a year." Their conversations were in English. During this time, Husband visited Wife in Ukraine.

On September 5, 1997, Wife traveled to the United States to marry Husband. At the time of her arrival, Wife's English was "really poor." Husband disputed Wife's inability to speak English, claiming she spoke "[v]ery well." Upon completing an English course, Wife received a certificate from Central Piedmont College in May of 1998.

In October or early November 1997, Wife became pregnant with Husband's child. Wife's visa was scheduled to expire on December 4, 1997, and she would have to return to Ukraine unless she married Husband. Wife came to the United States without money and relied upon Husband to provide support.

Wife admitted that, while she was still in Ukraine, Husband told her about the premarital agreement. However, Wife believed she "needed to sign some papers under the law of South Carolina before we g[o]t married." Wife claimed: "[Husband] faxed me some documents for American Embassy, and one page was he told me that we need—when you get to United States we have to sign that agreement before we get married because this is under [the] law of South Carolina." Husband delivered the premarital agreement to Wife sometime before the marriage. Husband first stated he faxed it to her five or six months before she arrived in the United States. Husband maintained he handed her a copy to sign within a week after she arrived. Yet, Wife declared Husband gave her a copy of the premarital agreement only two weeks before she signed it.

Prior to signing the premarital agreement, Wife attempted to translate a portion of the agreement from English into Russian, but was unable to

complete the translation. "Because it was too hard," Wife became frustrated with the translation and quit. Wife had eleven pages of translation before she determined the effort was futile. Wife professed the agreement "had specific language which [she did not] understand even in Russian." Wife never retained counsel because she had no money to pay someone to review the agreement.

Wife signed the agreement on November 25, 1997. The parties were married on December 1, 1997, merely three days before Wife's visa was set to expire.

Husband and Wife separated on February 13, 2000. Wife brought this action seeking a divorce, custody of the parties' child, child support, equitable distribution of marital property, and alimony. Husband answered and counterclaimed. Subsequently, he filed a motion to dismiss the claims for alimony and equitable distribution asserting the premarital agreement controlled. After a hearing, the family court denied the motion to dismiss. The court ruled the premarital agreement was invalid and unenforceable because it was signed under duress and was unconscionable.

STANDARD OF REVIEW

In appeals from the family court, this court may find facts in accordance with its own view of the preponderance of the evidence. Dearybury v. Dearybury, 351 S.C. 278, 569 S.E.2d 367 (2002); Lanier v. Lanier, Op. No. 3966 (S.C. Ct. App. filed March 21, 2005) (Shearouse Adv. Sh. No. 14 at 74); Moghaddassi v. Moghaddassi, Op. No. 3932 (S.C. Ct. App. filed January 31, 2005) (Shearouse Adv. Sh. No. 6 at 48). However, this broad scope of review does not require us to disregard the family court's findings. Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002); Badeaux v. Davis, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999). Nor must we ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Lacke v. Lacke, 362 S.C. 302, 608 S.E.2d 147 (Ct. App. 2005); Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999);

> incompetent to contract with the exercise of his or her free will power, or as the condition of mind produced by an improper external pressure destroying free agency so as to cause the victim to act or contract without use of his or her own volition, or as unlawful constraint whereby a person is forced to do some act against his or her will.

17A C.J.S. Contracts § 175 (1999) (footnotes omitted).

The central question with respect to whether a contract was executed under duress is whether, considering all the surrounding circumstances, one party to the transaction was prevented from exercising his free will by threats or the wrongful conduct of another. 17A Am. Jur. 2d Contracts § 218 (2004). Freedom of will is essential to the validity of an agreement. Id. A party claiming "duress" can prevail if he shows that he has been the victim of a wrongful or unlawful act or threat of a kind that deprives the victim of unfettered will, with the result that he was compelled to make a disproportionate exchange of values. Id.

In order to establish that a contract was procured through duress, three things must be proved: (1) coercion; (2) putting a person in such fear that he is bereft of the quality of mind essential to the making of a contract; and (3) that the contract was thereby obtained as a result of this state of mind. In re Nightingale's Estate, 182 S.C. 527, 189 S.E. 890 (1937). The fear which makes it impossible for a person to exercise his own free will is not so much to be tested by the means employed to accomplish the act, as by the state of mind produced by the means invoked. Id.; Willms Trucking Co., 314 S.C. at 179, 442 S.E.2d at 202. If one of the parties to an agreement is in a position to dictate its terms to such an extent as to substitute his will for the will of the other party thereto, it is not a mutual, voluntary agreement, but becomes an agreement emanating entirely from his own mind. In re Nightingale's Estate, 182 S.C. at 547, 189 S.E at 898; Willms Trucking Co., 314 S.C. at 179, 442 S.E.2d at 202. If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim. Willms Trucking Co., 314 S.C. at 179, 442 S.E.2d at 202. Whether or not duress exists in a particular case is a

question of fact to be determined according to the circumstances of each case, such as the age, sex, and capacity of the party influenced. Id.; see also Santee Portland Cement Corp. v. Mid-State Redi-Mix Concrete Co., 273 S.C. 784, 260 S.E.2d 178 (1979) (stating whether or not duress was present is a question ordinarily determined on a case by case basis).

Duress is viewed with a subjective test which looks at the individual characteristics of the person allegedly influenced, and duress does not occur if the victim has a reasonable alternative to succumbing and fails to take advantage of it. Blejski v. Blejski, 325 S.C. 491, 480 S.E.2d 462 (Ct. App. 1997) (citing Restatement (Second) of Contracts § 175 cmt. b & c (1981)). Duress is a defense to an otherwise valid contract. 17A Am. Jur. 2d Contracts § 218. Duress renders a contract voidable at the option of the oppressed party. Santee Portland Cement Corp., 273 S.C. at 784, 260 S.E.2d at 178.

Assumptively concluding Wife was allowed the opportunity to view the premarital agreement three months in advance, the evidence in the record indicates: (1) Wife did not understand the contents of the agreement; (2) she did not freely enter into the agreement; (3) she attempted to translate the agreement into Russian in order to better comprehend the document; (4) she became frustrated as she was unable to complete a satisfactory translation; and (5) her notes indicate there are several words for which she could not find a translation, including "undivided," "equitable," and "pro rata." Consequently, Wife could not understand the agreement.

Additionally, Husband was aware of the deadline with respect to Wife's visa. According to his own testimony, Husband made it perfectly clear to Wife that she must sign the agreement if she wanted to be married prior to the expiration of her visa. Wife was in the United States with no means to support herself. She relied solely and completely on Husband for support. Wife had no money of her own with which to retain and consult an attorney or a translator. Whether a party obtained independent legal advice is a significant consideration in evaluating whether an antenuptial agreement was voluntarily and understandingly made. See 41 C.J.S. Husband and Wife § 62 (1991). The family court found if Wife was not able to marry, then she

ample evidence in the record demonstrating the premarital agreement was unconscionable and, therefore, unenforceable.

CONCLUSION

The family court possessed jurisdiction to determine whether the premarital agreement was valid and enforceable. Further, the family court did not err in finding: (1) Wife signed the agreement under duress; and (2) the agreement was unconscionable and unenforceable. Accordingly, the decision of the family court is

AFFIRMED.

BEATTY and SHORT, JJ., concur.