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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Harold Gregory, Appellant.

Appeal From Aiken County
James R. Barber, Circuit Court Judge

Opinion No. 25972
Heard March 3, 2005 – Filed April 18, 2005

REVERSED AND REMANDED

William Joseph Sussman, of Augusta, for Appellant.

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

JUSTICE WALLER: This case was certified to this Court from the Court of Appeals pursuant to Rule 204(b), SCACR. Appellant, Harold Gregory, was convicted of two counts of committing a lewd act on a child and sentenced to concurrent twelve year terms of imprisonment. We reverse.

FACTS

Gregory was indicted for two counts of criminal sexual conduct with a minor in the second degree, two counts of committing a lewd act on a child, and one count of first-degree sexual exploitation of a minor. The acts allegedly committed by Gregory all involved his adopted daughter, Melissa.

Melissa was born on June 23, 1973. Gregory married her mother when she was 5 years old. According to Melissa's testimony at trial, when she was approximately 10 years old, Gregory began coming into her bedroom at night and molesting her. The molestation continued until she was approximately 13 years old, at which time Gregory adopted her, and ceased molesting her for a period of time. He began the molestation again which went on, off and on, until she was 28 years old. Gregory's defense at trial was that, although he and Melissa had engaged in inappropriate acts, they had all happened after she had turned 18.

The jury convicted Gregory of two counts of lewd act upon a child.

ISSUE

Although numerous issues are raised, the sole issue we need address is whether the trial court erred in refusing to grant a continuance and relieve Gregory's attorney due to the attorney's conflict of interest?

DISCUSSION

On the first day of trial, Gregory's defense attorney moved to be relieved as counsel and requested a continuance. He advised the court that he had begun representing Gregory in June 2002 and that, in January 2003, he began representing an Aiken County Assistant Solicitor in her divorce action. Defense counsel indicated he had had some negotiations with the solicitor concerning the charges against Gregory, and that Gregory was thereafter indicted for another charge (sexual exploitation of a minor). Counsel advised

Gregory of his representation of the assistant solicitor when it became apparent the case was going to trial.

The trial court inquired in what manner Gregory would be prejudiced by counsel's continued representation. Counsel's response was that Gregory's confidence in his ability was diminished, regardless of whether the solicitor was out of the case because Gregory believed they may have been "in cahoots." The court then indicated that the assistant solicitor would not participate in the trial, and the case would be prosecuted by another solicitor. The trial court ruled Gregory had not shown he was prejudiced, and that defense counsel had not done anything inappropriate. Accordingly, the motions to be relieved and for a continuance were denied.

Gregory asserts the trial court erred in denying counsel's motion to be relieved and in denying a continuance based upon counsel's conflict of interest. We agree.

"[A] motion to relieve counsel is addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." State v. Graddick, 345 S.C. 383, 385, 548 S.E.2d 210, 211 (2001) (citation omitted). An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001). The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction. See Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). However, a defendant need not demonstrate prejudice if there is an actual conflict of interest. Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001); Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984) *citing* Cuyler v. Sullivan, 446 U.S. 335, 348-350, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980).

In Duncan v. State, 281 S.C. at 438, 315 S.E.2d at 811 (1984), this Court set forth the following test to determine when an actual conflict of interest occurs:

> . . . when a defense attorney places himself in a situation inherently conducive to divided loyalties. . . . If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client. An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's.

citing Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir.1979).

The question in this case is whether defense counsel owed duties to a party whose interests were adverse to Gregory. Under this Court's holding in Duncan and the case cited therein, Zuck v. Alabama, we find that he did. In Zuck v. Alabama, the Fifth Circuit Court of Appeals held that where the law firm retained to represent the defendant in a murder trial also represented the state prosecutor in an unrelated civil trial, there was an actual conflict of interest, and the conflict rendered the trial fundamentally unfair. The court noted that "the basis of these decisions is our belief that the sixth amendment requires that **a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client. . . . This possibility is sufficient to constitute an actual conflict as a matter of law."** 588 F.2d at 440 (emphasis supplied). Similarly, in People v. Castro, 657 P.2d 932 (Colo. 1983), the Supreme Court of Colorado held a defense attorney's representation of the district attorney on criminal charges of overspending his office budget, while simultaneously representing the defendant on a criminal charge of murder, created a conflict of interest, notwithstanding the district attorney did not participate in the trial of the case. The Castro court stated, "[t]he District Attorney's office, for example, in order to avoid any appearance of favoritism, might well take an unusually hard line on plea bargaining to the disadvantage of the defendant. Defense counsel, in turn, might be reluctant to incur the disfavor of her other client, the district attorney, by pressing hard for the best possible plea bargain for the defendant. . . . What is critical, in our view, is the presence of a real and substantial conflict that placed the defense attorney in a situation

inherently conducive to and productive of divided loyalties." 657 P.2d at 945.[1]

In this case, we find Gregory's attorney had an actual conflict because he placed himself in a "situation inherently conducive to divided loyalties" by simultaneously representing Gregory and the assistant solicitor who was handling his criminal case. Given the actual conflict, Gregory is not required to demonstrate prejudice. Thomas, supra.

In light of our holding, we need not address the remaining issues raised by Gregory. The judgment below is reversed and the matter remanded for a new trial.

REVERSED AND REMANDED.

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

[1] The possibility that the ardor of counsel's defense was dampened by his representation of the solicitor is apparent from the record. Although Gregory raised numerous issues on appeal, the majority were not preserved for review because they were not objected to at trial. Further, the fact that another charge was brought against Gregory subsequent to counsel's negotiations with the solicitor lend credence to the suggestion that the solicitor's office may have taken an unusually hard line against Gregory, simply to avoid any appearance of favoritism.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jimmy Gary Gilchrist, Petitioner,

v.

State of South Carolina, Respondent.

Appeal from McCormick County
James R. Barber, III, Circuit Court Judge

ON WRIT OF CERTIORARI

Opinion No. 25973
Submitted March 16, 2005 – Filed April 25, 2005

AFFIRMED

Petitioner Jimmy Gary Gilchrist, *pro se*.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Elizabeth R. McMahon, all of Columbia, for respondent.

JUSTICE MOORE: Petitioner was indicted for murder and convicted of voluntary manslaughter for the fatal shooting of twenty-three-year-old Thomas Wideman. Petitioner admitted shooting Wideman but claimed self-defense. After his conviction was affirmed on appeal,[1] petitioner commenced this post-conviction relief (PCR) action. The PCR court denied relief. We granted a writ of certiorari to consider petitioner's allegations regarding ineffective assistance of appellate counsel. We affirm.

FACTS

The shooting occurred inside a dance club in McCormick County after a verbal confrontation in the parking lot. The State's witnesses testified Wideman was sitting in a parked vehicle talking with two of his sisters and a friend when petitioner approached and asked Wideman to move his car. When Wideman's sister responded, petitioner called her "ignorant." Wideman and petitioner then exchanged angry words. In the club, Wideman complained to his sister that petitioner was staring at him. As last call was announced, petitioner walked toward Wideman and shot him. When Wideman fell, petitioner shot him two more times. Wideman died shortly thereafter.

The State presented witnesses who testified they never saw Wideman with a gun on the night he was shot. However, defense witness Leroy Brown testified he saw Wideman in the club with a gun stuck down inside his pants immediately before the shooting. Derek Ridenhour testified that after the shooting, someone tried to hand him Wideman's gun for safekeeping but he refused to take it. Petitioner also testified he saw a gun in Wideman's hand during their verbal confrontation in the parking lot.

Petitioner further testified that before going back inside the club, he took his gun from his truck and put it in his pocket for "protection." In the club, petitioner and Wideman had another confrontation.

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[1] State v. Gilchrist, 342 S.C. 369, 536 S.E.2d 868 (2000).

According to petitioner, Wideman continued staring at him across the room. Wideman "pulled up his shirt and showed the gun" while pointing at the door.

When last call was announced, petitioner was concerned that "as soon as I went out that door [Wideman] could have did anything," so petitioner approached Wideman to tell him "he need to stop before somebody got hurt." Wideman jumped up from his seat and was going for his gun when petitioner shot him. Wideman was still reaching for his gun after he fell so petitioner continued shooting.

ISSUES

1. Was appellate counsel ineffective for failing to appeal the trial judge's refusal to give an appearances charge?

2. Was appellate counsel ineffective for failing to appeal the trial judge's refusal to charge immunity from retreat?

DISCUSSION

1. Appearances charge

At trial, counsel submitted a request to charge as follows:

DEFENDANT'S PROPOSED INSTRUCTION NO. 2

The test is not whether there was testimony of an intended attack but whether or not the defendant believed he was in imminent danger of death or serious bodily harm, and he is not required to show that such danger actually existed because he had a right to act upon such appearances as would cause a reasonable and prudent man of ordinary firmness and courage to entertain the same belief.

AUTHORITY:

State v. Jackson, 87 S.E.2d 681 (1955).

(emphasis added).

At the charge conference, the trial judge distributed his proposed charge which read:

> The defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or the defendant must have actually been in such imminent danger. . . . If the defense relates to a belief by a defendant that he was in such imminent danger, the circumstances must have been such that a reasonably prudent person of ordinary firmness and courage could have entertained the same belief.

The following colloquy then occurred between counsel and the bench:

> MR. MIMS: Your honor, I have Number Two, State versus Jackson, as the authority.
>
> THE COURT: All right. Well. . .
>
> MR. BAGGETT: I believe you had that covered on your point three on self-defense, your honor.
>
> THE COURT: Yes, sir, I think I had it covered. When the Supreme Court went back through and considered Davis . . . there is this addition about if the defendant was actually in danger or whether he believed he was in danger and I think I've covered those things in my charge.

Counsel said nothing further and did not object when the charge was given.

First, appellate counsel is not ineffective for failing to raise on appeal an issue that was not preserved for review. Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002). We find trial counsel's submission of the request to charge, without any further explanation of his point, was insufficient to preserve for review the trial court's failure to charge the specific language regarding "a right to act on appearances."

In State v. Johnson, 333 S.C. 62, 66, 508 S.E.2d 29, 31 (1998), we set out this preservation rule: "[W]here a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary to preserve the point on appeal, to renew the request at conclusion of the court's instructions." When given the opportunity, counsel must articulate a reason for the requested charge. Counsel need not object to the charge when given if the basis of the requested charge is clear from the record. It is not for the trial judge to study the requested charge and make an informed decision with no further input from counsel, especially in a situation such as this where there is only a subtle difference in the language of the judge's proposed charge and the language of the request.[2]

In any event, aside from the lack of preservation, we find appellate counsel was not ineffective for failing to raise this issue. A PCR applicant has the burden of proving appellate counsel's performance was deficient. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). Appellate counsel is not required to raise every nonfrivolous issue that is presented by the record. Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004).

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[2]In fact, in two early cases, we held a charge regarding the defendant's belief he was in danger, similar to the charge given here, covered the substance of an appearances charge. State v. McGee, 185 S.C. 184, 193 S.E. 303 (1937); State v. Scruggs, 94 S.C. 304, 77 S.E. 944 (1913). In recent cases, however, we have found such a charge does not cover an appearances charge. *Eg.*, State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); Battle v. State, 305 S.C. 460, 409 S.E.2d 400 (1991); State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989).

A defendant is entitled to an appearances charge where the claim of self-defense arises from a mistaken appearance of danger. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000). Here, petitioner introduced evidence Wideman was actually armed with a gun at the time of the shooting and trial counsel focused extensively on the corroborative evidence in closing. Counsel concluded his argument by stating:

> Now, to think that [Wideman] didn't have a gun would really stretch the imagination and it would really make you wonder about doubt. . . . [Petitioner] said he had a gun, besides all these other people who independently testified and independently gave statements that they saw a gun on [Wideman] and I submit he did have a gun.

Petitioner's claim of self-defense did not rely on a mistaken appearance of danger. The failure to give an appearances charge was therefore not reversible error and appellate counsel was not ineffective for failing to argue this issue on appeal. Accordingly, the PCR judge properly found appellate counsel was not ineffective.

2. Duty to retreat

Trial counsel requested the following charge which the trial judge refused to give:

> If a person is assaulted while in a club of which he is a member and without fault in bring[ing] on the difficulty, he is not bound to retreat in order to invoke the benefit of the doctrine of self-defense, but may stand his ground and repel the attack with as much force as is reasonably necessary.

Counsel's request was based on this Court's holding in State v. Marlowe, 120 S.C. 205, 112 S.E. 921 (1922), which involved a shooting at an Elk's Club. The defendant was a member of the club

and the victim was not. The Court held it was error to refuse to charge that "the law of retreat does not apply to a club member when attacked by another in the club rooms" because "[a] man is no more bound to allow himself to be run out of his rest room than his workshop." 112 S.E. at 922.

Here, the "club" in which the shooting occurred was a "dance club" which charged $5 for admission. There is no evidence petitioner was a "member" of this club. Accordingly, the trial judge did not err in refusing the charge and appellate counsel was not ineffective for failing to raise the issue on appeal.

In any event, we take this opportunity to overrule the analysis in State v. Marlowe elevating a "club" to the possessory status of a home or place of business. This expansion of the immunity-from-retreat doctrine is not good public policy, especially in the contemporary context of "private clubs."

CONCLUSION

We affirm petitioner's remaining issues pursuant to Rule 220(b), SCACR, and the following authority: Issue 1: Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002) (appellate counsel not ineffective for failing to raise an issue where no objection was preserved at trial); State v. Addison, 343 S.C. 290, 540 S.E.2d 449 (2000) (charge regarding State's burden to disprove self-defense should be given if requested but only for cases tried after the filing of this Court's opinion in State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998)); Issues 3 & 4: State v. Burton, 302 S.C. 494, 397 S.E.2d 90 (1990) (no error where charge given adequately covered substance of requested charge). The PCR court's denial of relief is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Brenda A. Guffey, Personal Representative of the Estate of James Fred Guffey, Appellant,

v.

Columbia/Colleton Regional Hospital, Inc., W.W. King, M.D., and David E. Meacher, M.D., P.A., Respondents.

Appeal from Colleton County
Perry M. Buckner, III, Circuit Court Judge

Opinion No. 25794
Heard November 18, 2004 – Filed April 25, 2005

AFFIRMED

John E. Parker and Bert G. Utsey, III, both of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., of Walterboro, for appellant.

C. Mitchell Brown, Zoe Sanders Nettles, and Elizabeth Herlong Campbell, all of Nelson Mullins Riley & Scarborough, of Columbia, for respondent Columbia/Colleton Regional Hospital, Inc.
Stephen L. Brown, John Hamilton Smith, and D. Jay Davis, Jr., of Young, Clement, Rivers & Tisdale, of

Charleston, for respondents W.W. King, M.D. and David E. Meacher, M.D., P.A.

ACTING CHIEF JUSTICE MOORE: Appellant commenced this wrongful death action as personal representative of her husband's estate alleging medical malpractice. She appeals a directed verdict and the exclusion of evidence. We affirm.

FACTS

James Guffey (Decedent) suffered cardiac arrest at age fifty on September 3, 1997, twenty-five hours after he was discharged from the emergency room at respondent Columbia/Colleton Regional Hospital (Hospital). Decedent had previously undergone two angioplasty surgeries in 1995 to treat unstable angina and subsequently was on medication, including nitroglycerin as needed for pain. He had a check-up every month with his cardiologist, Dr. Reeves.

Two years after his surgeries, on September 2, 1997, Decedent came home early from work complaining of a headache and indigestion. During the course of the evening, Decedent took three doses of nitroglycerin. Finally, at about 11:00 p.m., Decedent said he needed to go to the hospital because he "felt like he did the last time," referring to his 1995 cardiac episode. At Hospital's emergency room, Decedent was treated with nitroglycerin paste and discharged by Dr. William King.[1]

Decedent stayed in bed the next day still complaining of headache and indigestion. During the night, he suffered cardiac arrest. He was brain-dead by the time he arrived at the hospital and died several days later.

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[1]Dr. King was named as a defendant. The parties agreed before trial that the action would proceed solely against Hospital because Dr. King was acting as Hospital's agent. *See* Simmons v. Tuomey Reg. Med. Center, 341 S.C. 32, 533 S.E.2d 312 (2000) (hospital's liability for acts of doctor-agent).

Dr. King testified he had attempted to contact Decedent's cardiologist, Dr. Reeves, while Decedent was at the emergency room. The call was answered by Dr. Reeves's associate, Dr. Grayson. Dr. Grayson told Dr. King that it was reasonable to send Decedent home but to have him see Dr. Reeves in the morning. Dr. King told Decedent to return to the emergency room if he had pain during the night and if he had no pain, he should call Dr. Reeves's office in the morning for an appointment. Decedent did not seek further medical care before suffering cardiac arrest the next night.

Appellant's medical expert, Dr. Wood, testified that Decedent's symptoms indicated he had unstable, as opposed to stable angina, and therefore he should not have been discharged from the emergency room.[2] Dr. Wood testified that the pain caused by stable angina is relieved with nitroglycerin whereas the pain from unstable angina is not. Decedent's history taken at the emergency room indicated he had "relief of the chest pain but still had tightness in his chest." From this history, Dr. Wood concluded Decedent was suffering unstable angina. It was his opinion that Dr. King deviated from the standard of care in not admitting Decedent to the hospital.

Hospital's medical experts, on the other hand, testified Decedent's symptoms indicated he had stable angina because he did have pain relief from the nitroglycerin with only "residual tightness."

The jury returned a verdict for Hospital on the issue of Dr. King's negligence in failing to admit Decedent to the hospital.

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[2]According to medical testimony in the record, stable angina occurs when the coronary arteries become occluded over time and smaller arteries take over to aid in carrying blood to the heart muscle. In this instance, the patient feels pain only on exertion because the smaller arteries cannot handle the extra need for blood. The pain of stable angina improves with rest or with nitroglycerin. Unstable angina, on the other hand, occurs when an artery is suddenly occluded by a blood clot. The patient feels pain, or more frequent pain, even when resting. The pain is not relieved with nitroglycerin. A patient with unstable angina should be admitted to the hospital to prevent the clot from getting bigger. If the blockage becomes too large, the patient will suffer a heart attack.

ISSUES

1. Did the trial court err in granting a directed verdict regarding conflicting discharge instructions?

2. Did the trial court err in excluding evidence of conflicting discharge instructions?

DISCUSSION

1. Directed verdict

Appellant accompanied Decedent to the emergency room. On cross-examination, she denied Decedent was told at the time of his discharge to contact his cardiologist, Dr. Reeves, in the morning. On re-direct, counsel referred to a document entitled "Aftercare Instructions" which Decedent was given by Hospital's staff when he was discharged. The document states: "THESE ARE YOUR FOLLOW-UP INSTRUCTIONS! Call Dr. Hiott [Decedent's family doctor] in 2 days if not much better. Call sooner if worsening." This document was admitted into evidence.

At the close of appellant's case, Hospital moved for a directed verdict on the allegation that Hospital was negligent in giving these aftercare instructions which conflicted with Dr. King's instructions to contact the cardiologist in the morning. The trial judge found appellant had presented no evidence the discrepancy in instructions was the proximate cause of Decedent's death and granted the motion.[3]

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[3]Appellant makes a procedural argument that the trial judge should not direct a verdict on one specification of negligence if any other specification is supported by the evidence. The cases appellant cites do not stand for this proposition and we find it without merit. *Cf.* Young v. Charleston & W.C. Ry. Co., 229 S.C. 580, 93 S.E.2d 866 (1956) (where defendant moved for directed verdict to keep entire case from being submitted to jury, motion properly denied because evidence supported at least one specification of negligence).

A directed verdict should be granted where the evidence raises no issue for the jury as to the defendant's liability. Roberts v. Hunter, 310 S.C. 364, 426 S.E.2d 797 (1993). On review, we will affirm a directed verdict where there is no evidence on any one element of the alleged cause of action. First State Savings and Loan v. Phelps, 299 S.C. 441, 385 S.E.2d 821 (1989). In a medical malpractice action, the plaintiff must establish proximate cause as well as the negligence of the physician. Ellis v. Oliver, 323 S.C. 121, 473 S.E.2d 793 (1996).

There is no evidence Decedent relied on Hospital's aftercare instructions and for this reason did not call his cardiologist. Further, the record contains no expert testimony Decedent's death could have been prevented had he seen his cardiologist the next morning. *See* Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 393 S.E.2d 914 (1990) (expert testimony is required to establish proximate cause in a medical malpractice case if outside the common knowledge or experience of laypersons); Green v. Lilliewood, 272 S.C. 186, 249 S.E.2d 910 (1978) (medical malpractice plaintiff relying on expert testimony must introduce evidence that defendant's negligence most probably resulted in the injuries alleged). Because there is no evidence the conflicting discharge instructions proximately caused Decedent's death, the trial judge properly granted a directed verdict on this allegation of negligence.

2. Exclusion of evidence

Hospital moved to strike the "Aftercare Instructions," along with evidence of Hospital's internal policies regarding discharge instructions, after withdrawing comparative negligence as a defense. In light of counsel's assurance comparative negligence would not be argued to the jury, the trial judge found the contested evidence irrelevant and granted the motion to strike.[4]

[4]Further, the trial judge refused appellant's counter-motion that the discharge sheet with Dr. King's instructions also be struck. Dr. King's discharge instructions remained relevant since they indicated his treatment conformed to the standard of care.

We find no error. When the directed verdict on the issue of Hospital's negligence for conflicting instructions was properly granted, this evidence became irrelevant. Comparative negligence was not argued in closing nor submitted to the jury. Because there was no issue of Decedent's negligence that might be explained by an inference he followed these instructions, there was no prejudice from the exclusion of this evidence. The exclusion of evidence that is not relevant to some matter in issue cannot be prejudicial. *See* Otis Elevator, Inc. v. Hardin Const. Co. Group, Inc., 316 S.C. 292, 450 S.E.2d 41 (1994) (no error in the exclusion of evidence absent a showing of prejudice).

CONCLUSION

Appellant's remaining issues are without merit and we affirm pursuant to Rule 220(b), SCACR. *See* Issue 2: Green v. Lilliewood, 272 S.C. 186, 249 S.E.2d 910 (1978) (medical malpractice plaintiff relying on expert testimony must introduce evidence that defendant's negligence most probably resulted in the injuries alleged); Issue 4: Keaton ex rel. Foster v. Greenville Hosp. System, 334 S.C. 488, 514 S.E.2d 570 (1999) (jury charge correct if when read as whole, charge contains correct definition and adequately covers law); *see also* State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994) (jury instructions should be considered as whole, and if as whole they are free from error, any isolated portions which may be misleading do not constitute reversible error).

AFFIRMED.

WALLER, J., and Acting Justices Reginald I. Lloyd and R. Markley Dennis, Jr., concur. BURNETT, J., dissenting in a separate opinion.

JUSTICE BURNETT: I respectfully dissent. The trial court committed reversible error in granting a directed verdict on one of Appellant's central allegations of negligence and in excluding evidence related to that allegation.

This appeal offers a textbook example of an instance in which Appellant was erroneously prohibited from presenting crucial, admissible evidence and testimony to prove her case to the jury. The prejudicial error, in my opinion, is clear and unambiguous, and Appellant is entitled to a new trial.

Appellant raises two related issues:

I. Did the trial court err in granting a directed verdict against Appellant on the issue of whether Hospital was negligent in providing conflicting discharge instructions?

II. Did the trial court err in striking from evidence two exhibits relating to discharge instructions provided by Hospital and prohibiting testimony about those instructions?

STANDARD OF REVIEW

In ruling on a motion for directed verdict, the trial court must view the evidence and the inferences which reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. The trial court must deny the motion when either the evidence yields more than one inference or its inference is in doubt. Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). If the evidence is susceptible of more than one reasonable inference, the case must be submitted to the jury. Quesinberry v. Rouppasong, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998). When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or resolve conflicts in the testimony or evidence. Creech v. S.C. Wildlife and Marine Resources Dept., 328 S.C. 24, 491 S.E.2d 571 (1997). In essence, the appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in

denied knowing Decedent was told at the time of his discharge from the emergency room to contact his cardiologist in the morning.

At the close of Appellant's case, Hospital moved for a directed verdict on the allegation Hospital was negligent in giving conflicting discharge instructions. The trial judge granted the motion, ruling Appellant had not presented expert testimony the conflicting instructions were the proximate cause of Decedent's death.

This ruling constitutes reversible error. Appellant produced no explicit expert testimony Decedent's death was proximately caused by the failure to see his cardiologist the next morning. See e.g. Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990) (expert testimony is required to establish proximate cause in a medical malpractice case if outside the common knowledge or experience of laypersons); Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 254, 487 S.E.2d 596, 599 (1997) ("unless the subject is a matter of common knowledge, the plaintiff must use expert testimony to establish both the standard of care and the defendant's failure to conform to that standard"). I disagree with the majority's conclusion the record contains no expert testimony Decedent's death was proximately caused by the failure to see his cardiologist the next morning. I also disagree with the majority's conclusion the record contains no evidence Decedent relied on the conflicting aftercare instructions.

A plaintiff may present both expert testimony and circumstantial evidence of a physician's culpability, and the inquiry need only be whether there is sufficient competent evidence from which the jury may infer a causal connection between the physician's conduct and the injury. Green v. Lilliewood, 272 S.C. 186, 189-93, 249 S.E.2d 910, 912-13 (1978) (reversing grant of directed verdict for defendant physician where plaintiff relied on both expert testimony and circumstantial evidence which showed plaintiff's medical problems began soon after insertion of intrauterine device); Shelnitz v. Greenberg, 509 A.2d 1023, 1027 (Conn. 1986) (causation in medical malpractice case may be proven both by expert testimony, which usually is necessary to establish the standard of care, and circumstantial evidence); 1 Dan B. Dobbs, The Law of Torts § 173 (2001) (courts recognize juries must

be permitted to make causal judgments from ordinary experience without demanding an impossible degree of proof and "[e]ven scientific or medical causation might be proven by circumstantial evidence leading to an inference of causation"); Prosser & Keeton on the Law of Torts § 41 (5th ed. 1984) ("Circumstantial evidence, expert testimony, or common knowledge may provide a basis from which the causal sequence may be inferred.").

Appellant's expert, Wood, testified that had Decedent been admitted to the hospital rather than discharged, he "more than likely would have survived." Wood testified "people have heart attacks and get hospitalized for it all the time, and, you know, these are general statistics, but probably ninety percent of people that get hospitalized with heart attacks live." A reasonable inference which may be drawn from this testimony is if Decedent had seen his cardiologist the next morning as directed by King, he could have been admitted to the hospital where he most likely would have survived his heart attack.

The expert's testimony that the proximate cause of Decedent's death was the lack of hospitalization at the time of his cardiac arrest was sufficient to submit to the jury the issue of Hospital's negligence, regardless of whether the lack of hospitalization occurred on the night of his visit to the emergency room or the morning after. Therefore, liberally construing the evidence Decedent did not return to his cardiologist the next morning as directed by King, Hospital gave Decedent discharge instructions stating he should wait two days to see his family doctor, and expert testimony he most likely would have survived had he been hospitalized at the time of his heart attack, it is reasonably probable a verdict would have been rendered in Appellant's favor had the jury been allowed to consider negligence allegations relating to the conflicting discharge instructions.

In addition, the record contains circumstantial evidence Decedent relied on Hospital's written discharge instruction (call family doctor "in 2 days if not much better. Call sooner if worsening.") instead of King's verbal instruction (see cardiologist the next morning). Appellant testified Decedent stated on September 3 he did not need to return to the hospital because, although King had told Decedent he would have a "terrible headache" from the nitroglycerin, he expected to "be better in a day or two." Thus Decedent

told his wife he needed to give his condition a couple of days to improve – just like Hospital told him to do in its written discharge instructions. See e.g. Mahaffey v. Ahl, 264 S.C. 241, 247, 214 S.E.2d 119, 122 (1975) ("it is axiomatic in this State that issues of negligence and proximate cause may be resolved by direct or circumstantial evidence").

In pointing to circumstantial evidence surrounding Decedent's actions, I do not suggest expert testimony is not usually required to prove medical malpractice. I do conclude that expert testimony identifying the lack of hospitalization as a proximate cause of Decedent's death, combined with circumstantial evidence Decedent may have relied on discharge instructions in which he was not told to follow up promptly with a cardiologist who may have admitted him to the hospital before he suffered a fatal heart attack, are sufficient to create a jury question on whether Hospital and its admitted agent were negligent. See Green, 272 S.C. at 189-93, 249 S.E.2d at 912-13; Shelnitz, 509 A.2d at 1027.

II. EXCLUSION OF PLAINTIFF'S EXHIBITS PERTAINING TO DISCHARGE INSTRUCTIONS

Appellant contends the trial court committed prejudicial error in striking from evidence two exhibits relating to discharge instructions provided by Hospital and prohibiting testimony about those instructions. I agree.

The document titled "Aftercare Instructions," discussed above, was admitted in evidence by Appellant as Exhibit 18D. This document instructed Decedent to call his family doctor if he was not feeling better in two days. Appellant also offered Exhibit 22, which set forth Hospital's policies regarding discharge instructions. Based on its earlier, directed verdict ruling that Appellant had failed to present expert testimony the conflicting instructions proximately caused Decedent's death, the trial court prohibited Appellant from questioning Hospital's witnesses about the exhibits or the conflicting discharge instructions.

Hospital moved to strike Exhibits 18D and 22 after withdrawing its defense of comparative negligence before the case was submitted to the

jury. The trial court granted the motion, finding the exhibits were irrelevant because comparative negligence was no longer an issue.[5]

When evidence is erroneously excluded by the trial court, the appellate court usually engages in the following analysis to determine whether prejudice has occurred. First, the appellate court considers, *inter alia*, whether the error may be deemed harmless because equivalent or cumulative evidence or testimony was offered; the aggrieved party still managed to accomplish his primary objective, such as eliciting testimony about an issue or effectively cross-examining a witness; the jury's verdict or a proper court ruling rendered the wrongly excluded evidence moot because it was relevant to an issue that did not have to be reached; the aggrieved party failed to establish a claim or defense even when both the admitted and excluded evidence are considered; or the wrongly excluded evidence involved a generally known fact. Fields v. Regional Medical Center, Op. No. 25939 (S.C. Sup. Ct. filed February 14, 2005) (Shearouse Adv. Sh. No. 8 at 17, 27-29) (citing cases supporting each proposition).

Second, the appellate court considers whether, viewing a case as a whole, the wrongly excluded evidence or testimony was so crucial and important in proving the aggrieved party's claim or defense that its exclusion constitutes prejudicial error, *i.e.*, the aggrieved party demonstrates there is a reasonable probability the jury's verdict was influenced by the lack of the evidence. Id. (citing cases).

The testimony of Appellant's medical expert that the proximate cause of Decedent's death was the lack of hospitalization at the time of his

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[5] Further, the trial judge refused Appellant's counter-motion that the discharge sheet containing King's instructions also be struck if Exhibit 18D were struck. This ruling was correct. King's discharge instructions remained relevant because they indicated his treatment conformed to the required standard of care as established by his expert witnesses' testimony. The error was in not admitting the conflicting discharge instructions contained in Exhibit 18D, which constituted proof that Hospital and King's treatment did not conform to the required standard of care.

cardiac arrest was sufficient to submit to the jury the issue of Hospital's negligence, regardless of whether the lack of hospitalization occurred on the night of his visit to the emergency room or the morning after. Exhibit 18D was relevant and admissible because it contained the conflicting discharge instructions given to Decedent. See Rules 401 and 402, SCRE (relevant evidence generally is admissible).

Violation of a rule or regulation designed primarily for the safety of hospital patients will constitute negligence if the violation proximately results in the injury. Steeves v. U.S., 294 F. Supp. 446, 455 (D.S.C. 1968). Furthermore, relevant rules of a defendant hospital or company are admissible in evidence in a personal injury action regardless of whether rules were intended primarily for employee guidance, public safety, or both, because violation of such rules may constitute evidence of a breach of the duty of care and the proximate cause of injury. Tidwell v. Columbia Ry., Gas & Elec. Co., 109 S.C. 34, 95 S.E. 109 (1918); see also Caldwell v. K-Mart Corp., 306 S.C. 27, 31-32, 410 S.E.2d 21, 24 (Ct. App. 1991) (when defendant adopts internal policies or self-imposed rules and thereafter violates those policies or rules, jury may consider such violations as evidence of negligence if they proximately caused a plaintiff's damages). Thus, Exhibit 22, which listed Hospital's policies and procedures on discharge instructions, was relevant and admissible to establish and define the standard of care Hospital was required to meet with regard to discharge instructions.

King testified he was "stunned" and "very much surprised that [Decedent] had not seen his cardiologist the next day because I thought he was quite clear what he was to do." In light of expert testimony that King's instruction to see a cardiologist in the morning was appropriate, the implication that may be drawn from evidence heard by the jury is Decedent did not follow sound medical advice and, therefore, King should not be held responsible. In fact, Hospital's counsel argued in closing that Decedent knew from his cardiologist, Reeves, he needed to seek immediate medical attention if his pain was not relieved with nitroglycerin, yet he did not return to the hospital the following day. If the exhibits and testimony about the conflicting discharge instructions had been allowed, Appellant could have argued the instructions contained in Exhibit 18D were circumstantial evidence which

explained Decedent's failure to follow King's directions, as well as evidence of the negligence of Hospital and its agent.

In effect, Hospital gained an improper tactical advantage by withdrawing the issue of comparative negligence as a ground to exclude the conflicting discharge instructions – which left only the evidence that Decedent did not follow his doctor's orders. Hospital then implicitly asserted the defense of comparative negligence in closing arguments despite agreeing to abandon that defense.

Appellant did not present any equivalent or cumulative evidence about the conflicting discharge instructions; nor was Appellant able to accomplish her primary objective of demonstrating Hospital's alleged negligence on this ground through other testimony or evidence. Viewing the case as a whole, I conclude the wrongly excluded evidence and testimony was so crucial and important in proving Appellant's claim that its exclusion constitutes prejudicial error, *i.e.*, Appellant has demonstrated there is a reasonable probability the jury's verdict was influenced by the lack of the evidence.

I would reverse the jury's verdict and remand this matter for a new trial. The trial court committed reversible error in granting a directed verdict against Appellant on the issue of whether Hospital was negligent in providing conflicting discharge instructions. The trial court also committed reversible error in striking from evidence two exhibits relating to discharge instructions provided by Hospital and prohibiting testimony about the conflicting instructions.[6]

[6] I agree with the majority the trial court did not err in granting a directed verdict on Appellant's claim Hospital was negligent due to King's failure to obtain and record an adequate medical history (Appellant's Issue 2). Appellant's own medical expert, Wood, testified the history taken was adequate to conclude Decedent was suffering from unstable angina. The record contains no evidence the failure to obtain an adequate history caused a misdiagnosis of stable angina and most probably caused Decedent's death.

I also agree with the majority the trial court did not err in its jury instructions establishing a presumption Hospital met the standard of care (Appellant's Issue 4). When read as a whole, the charge properly informed the jury of the plaintiff's burden of proof and did not establish an erroneous presumption. See Keaton ex rel. Foster v. Greenville Hosp. System, 334 S.C. 488, 514 S.E.2d 570 (1999) (jury charge is correct if, when read as whole, it correctly defines and adequately covers the law).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Angle Vazquez, Appellant.

Appeal from Horry County
Paula H. Thomas, Circuit Court Judge

Opinion No. 25975
Heard March 3, 2005 – Filed April 25, 2005

AFFIRMED IN PART; VACATED IN PART

Acting Chief Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Jeffrey A. Jacobs, all of Columbia; and John Gregory Hembree, of Conway, for Respondent.

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hour. Appellant's girlfriend testified that Appellant returned home between 10 p.m. and 11 p.m. to replace the case on the shelf in the closet. Appellant then left.

At approximately 2 a.m. the next morning, a police officer saw Howard and Appellant run a stop sign in Lake City. The officer attempted to pull them over. Howard, who was driving, would not stop. Howard jumped from the car while it was still moving. While attempting to drive the car from the passenger seat, Appellant ran the car into a mobile home. When Appellant was arrested, he had $322.65 in his possession. While in custody, Appellant called his girlfriend to ask her to get rid of his clothes and asked if she found the money he left in her purse.

The day after the killings, Atkins and Robertson admitted to the police they actually saw Appellant and Howard rob the restaurant. This prompted the police to search Appellant's home. At his home, the police discovered a nine-millimeter round on the shelf in the bedroom closet. Later another box of nine-millimeter ammunition was found.

Further, the investigation led police to Kevin Cochran, who owned the case that Appellant stored in his closet. At some point before the police searched the house, Cochran came back to Appellant's house and retrieved the case, which contained a nine-millimeter semi-automatic pistol. Cochran gave the case to the police once he learned the weapon might have been used in the killings.

Ballistic analysis revealed that the bullets that killed Williams and Walker were fired from the nine-millimeter Cochran gave to the police. In addition, the ammunition in Appellant's closet was the same as the ammunition and shell casings at the crime scene.

After a jury trial, Appellant was convicted on all counts in the indictment. Appellant was sentenced to death, thirty years for each count of kidnapping, thirty years for armed robbery, and five years for conspiracy. This appeal followed and Appellant now raises the following issues for review:

I. Did the trial judge err in refusing to grant a mistrial following the solicitor's closing argument?

II. Did the trial judge err in failing to charge the jury with the statutory mitigators related to intoxication?

LAW / ANALYSIS

I. Closing Argument

Appellant argues that the trial judge erred in refusing to grant a mistrial following the solicitor's closing argument. We disagree.

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion. *State v. Beckham*, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). A mistrial should be ordered only when an incident is so grievous that prejudicial effect cannot be removed. *Id.* The test for granting a new trial based on an improper closing argument is whether the defendant was prejudiced to the extent that he was denied a fair trial. *State v. Brisbon*, 323 S.C. 324, 332, 474 S.E.2d 433, 438 (1996) (citing *State v. Durden*, 264 S.C. 86, 93, 212 S.E.2d 587, 591 (1975)). An instruction is deemed to have cured an error unless, on the facts of the particular case, it is probable that notwithstanding such instruction or withdrawal the accused was prejudiced. *State v. Johnson*, 334 S.C. 78, 89-90, 512 S.E.2d 795, 801 (1999).

In the present case, in his closing argument, the solicitor encouraged the jury to impose the death penalty because Appellant might escape and kill the witnesses on the state's witness list, which the solicitor referred to as a "hit list." Counsel for Appellant objected to the closing remarks that referred to a threat of escape and a "hit list."[3] As a result, the judge issued a curative

[3] The solicitor made other statements in his argument to the jury that referred to Appellant as a domestic terrorist. In addition, the solicitor made statements that drew a correlation between the events of September 11, 2001 and the events in the present case. However, these comments were not objected to. Further, Appellant in his statement to the jury made reference to

instruction that directed the jurors to disregard those comments and to be assured that no threat of escape or any "hit list" existed. The judge's instruction was as follows:

> First of all that is there was some argument in the closing by the Solicitor regarding an escape, and let me let you know that that is improper. There is no evidence of any escape nor is there any indication that this Defendant has ever attempted any escape while incarcerated. That is not for your consideration. Please also know that there's no indication that the prisons cannot hold this Defendant. So, any of that argument is not in the record and not for your consideration. Let me make that very clear.
>
> Also, there was some indication of a witness list being or possibly being used as a hit list. Again, this is improper. There is no evidence of any attempt by this Defendant to contact any witnesses, to threaten any witness, to do anything. So, it would be wrong for you and I'm directing you now to not consider and it would be proper for you not to consider. It would be wrong for you to consider any evidence of escape and anything in regard to any alleged hit list.

We find the curative instruction removed any prejudice because it made clear that the jury was not to consider the argument made by the solicitor related to escape and the existence of a "hit list." This instruction removed any prejudice that might have been suffered and afforded Appellant a fair trial.

Therefore, we hold that trial court did not err in refusing to grant a mistrial in light of the its curative instruction.

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viewing the juror list used in voir dire. The court in its curative instruction did not address the Appellant's viewing of this list. While we find the solicitor's closing comments to be troublesome, we find they are not preserved for review; however, this issue may be proper for review in post conviction relief.

II. Intoxication

Appellant argues the trial judge erred in failing to charge the jury with the statutory mitigators related to intoxication because Appellant presented evidence that he drank on the night of the murders.[4] We disagree.

The trial judge must submit for the jury's consideration any statutory mitigating circumstances supported by the evidence. S.C. Code Ann. § 16-3-20(C) (2003). The trial judge must make an initial determination of which statutory mitigating circumstances have evidentiary support and then allow the defendant to request any additional statutory mitigating circumstances supported in the record. *State v. Victor*, 300 S.C. 220, 224, 387 S.E.2d 248, 250 (1989). Absent a request by counsel to charge the mitigating circumstances, the issue is not preserved for review. *State v. Humphries*, 325 S.C. 28, 36, 479 S.E.2d 52, 57 (1996). However, when there is evidence that the defendant was intoxicated at the time of the crime, the trial judge is required to submit the mitigating circumstances in § 16-3-20(C)(b)(2), (6), and (7). *See State v. Stone*, 350 S.C. 442, 449, 567 S.E.2d 244, 248 (2002) (holding the judge is required to submit the mitigating circumstances if there is evidence of intoxication regardless of whether they are requested).

In the present case, the evidence before the court was that Appellant had drinks at a strip club before returning to the restaurant.[5] Appellant presented no evidence that he was intoxicated. The evidence indicated that Appellant may have had drinks, but this is not enough to warrant a charge to the jury for the mitigating factors outlined in §16-3-20(C)(b)(2), (6), and (7).

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[4] Specifically, Appellant contends the judge erred in not charging S.C. Code Ann. §16-3-20(C)(b)(2), (6), and (7) (2003).

[5] In addition, in his brief, counsel for Appellant refers to dialogue with Atkins about "getting some," and argues that this testimony suggests they were smoking marijuana. Counsel also refers to the observation of the weak handshake Atkins received as evidence that Appellant was intoxicated. However, this conversation is in reference to Mike Howard, not the Appellant. As a result, there is no evidence in the record that Appellant was intoxicated.

proportionality review, we search for similar cases in which the death sentence has been upheld. *Id*.; S.C. Code Ann. §16-3-25(E) (2003).

After reviewing the entire record, we conclude the death sentence was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of prior cases shows the death sentence in this case is proportionate to that in similar cases and is neither excessive nor disproportionate to the crime. *See State v. Wise*, 359 S.C. 14, 29, 596 S.E.2d 475, 482 (2004) (holding that the death penalty was warranted for defendant that returned to his former workplace and shot and killed former co-workers during the commission of a violent crime); *State v. Shuler*, 353 S.C. 176, 577 S.E.2d 438 (2003) (holding that the death penalty was warranted for defendant convicted of murders of former live-in lover, lover's thirteen year-old daughter, and lover's mother; aggravating circumstances included two or more persons were murdered pursuant to one scheme or course of conduct, and murder was committed during commission of burglary).

CONCLUSION

Based on the above reasoning, we **AFFIRM** the convictions and sentences for murder and two counts of kidnapping, and **VACATE** the sentences for the two counts of kidnapping with regard to the murder victims.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Walter L. Gay, d/b/a Sandlapper Tours, Appellant,

v.

The City of Beaufort, Respondent.

Appeal From Beaufort County
Curtis L. Coltrane, Special Circuit Court Judge

Opinion No. 3980
Submitted March1, 2005 – Filed April 18, 2005

AFFIRMED

Walter L. Gay, of St. Helena, Pro Se, for Appellant.

William B. Harvey, III, of Beaufort, for Respondent.

HEARN, C.J.: This is an appeal from the trial court's decision affirming the Beaufort City Council's revocation of Walter Gay's business license to conduct tours in the historic district of Beaufort. We affirm.[1]

FACTS

On August 5, 2002, the City of Beaufort granted Walter Gay, doing business as Sandlapper Trolleys, a business license for the purposes of conducting tours through Beaufort, including the historic district. Within the next few days, the city told Gay the license would be revoked because his tour vehicle was considered a "trolley" under Beaufort City Ordinance section 7-11002 and, therefore, could not be used in the historic district.

Gay wrote a letter to the city manager requesting that the city council reconsider revoking his license. Alternatively, he asked that the city ordinance prohibiting the use of trolleys in the historic district be changed. The city council referred the matter to the city manager and city attorney and further requested Beaufort's Tourist Management Advisory Commission ("Commission") to review the ordinance and give a recommendation.

In 2003, based on the Commission's recommendation that the vehicle was considered a "trolley" for purposes of the ordinance as well as statements by several of the individuals who created the ordinance, the city council voted to revoke Gay's license. Gay appealed to the circuit court, which affirmed the decision of the city council. This appeal followed.

STANDARD OF REVIEW

Where the city council of a municipality has acted after considering all of the facts, the court should not disturb the finding unless such action is arbitrary, unreasonable, or an obvious abuse of its discretion. Bob Jones Univ., Inc. v. City of Greenville, 243 S.C. 351, 360, 133 S.E.2d 843, 847

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

(1963). This court will not disturb on appeal such findings of the city council, concurred in by a circuit judge, unless they are without evidentiary support or against the clear preponderance of the evidence. Id. at 363, 133 S.E.2d at 848 (referring specifically to the findings of a master-in-equity, which affirmed the actions of a city council).

LAW/ANALYSIS

Gay claims the trial court erred in affirming Beaufort City Council's decision to revoke his license to conduct tours through the historic district because his tour vehicle is not a "theme vehicle," as defined by the city ordinance. We disagree.

The City of Beaufort Ordinance § 7-11003 provides that "[t]heme vehicles other than horse-drawn carriages . . . may not be utilized for touring purposes in the historic district." The ordinances further define "theme vehicle" in the following manner:

> A vehicle whose design, shape, form, color, signage, or accoutrements is intended to create a particular identity and to call special attention to that vehicle, such as a horse-drawn carriage, trolley, pedicab, snail vehicle, or articulated vehicle. Touring vehicles displaying commercial or institutional identification in a customary fashion shall not be considered theme vehicles.

Ordinance § 7-11002. (Emphasis added.)

Gay considered his tour vehicle a "trolley," as evidenced by his trade name "Sandlapper Trolleys" and the content of his letter to the city manager. In that letter Gay referred to his tour vehicle as a "trolley" numerous times. For example, he stated, "I admit that what I have looks similar to a trolley and it is called a trolley." He also argued that his "trolley is a clean vehicle" and "is an asset to any historic area." He also requested help from the city

manager in "finding a way to utilize [his] trolley in the historic tours of Beaufort." Finally, he asked the city council to consider amending the ordinance so his vehicle could be used in the historic district.

Additionally, the city manager and the city attorney determined, based on their evaluation of the tour vehicle and the ordinance, that the tour vehicle was a "theme vehicle" as defined by the city ordinance. "[B]ecause of the design and shape" of the tour vehicle, the Commission concluded that the tour vehicle was a trolley and, therefore, fit within Beaufort's definition of a theme vehicle.[2] At the city council meeting, a representative of the Commission stated, "an ordinance change would be necessary for [Gay] to operate" his tour vehicle in the historic district.

Lastly, the city council agreed that the tour vehicle was a bus. However, "because of its design it is considered a theme vehicle." Therefore, the findings of the Beaufort City Council, concurred with by the circuit court, are supported by the preponderance of the evidence.

For the reasons stated herein, the decision of the circuit court is

AFFIRMED.

KITTREDGE and WILLIAMS, JJ., concur.

[2] Any references to the Commission's recommendations or city council's decisions were extracted from the Beaufort City Council meeting minutes.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jane Doe, Claimant, Respondent,

v.

S.C. Department of Disabilities and Special Needs, Employer, and State Accident Fund, Carrier, Appellants.

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

Opinion No. 3981
Heard March 9, 2005 – Filed April 18, 2005

REVERSED

Cynthia B. Polk and Thomas McRoy Shelley, III, both of Columbia, for Appellants.

Edward L. Graham, of Florence, for Respondent.

HEARN, C.J.: The South Carolina Department of Disabilities and Special Needs (Department) and the State Accident Fund appeal the decision of the circuit court reversing the findings of the Appellate Panel of the South Carolina Workers' Compensation Commission (Full Commission) and awarding benefits to Jane Doe (Claimant) based on her mental injuries. We reverse.

FACTS

Claimant worked for the Department as a licensed practical nurse (LPN) for approximately eighteen years. She cared for individuals suffering from extreme mental retardation and cognitive disabilities such that they require institutional care. As an LPN, Claimant was responsible for the daily medical care of the patients in her unit.

In early 1997, the Department moved the individuals under Claimant's care into group homes because they were "higher functioning." As a result, patients who required more medical attention were moved into the unit where Claimant worked. Some of the new patients were more aggressive than Claimant's prior patients.

Claimant was injured in June of 1997 when a patient kicked her in the abdomen. She sought medical attention and was prescribed anti-inflammatory and pain medication. When she returned to her doctor, Dr. Paschal, for her recheck in August 1997, she complained about being depressed and having "a lot of crying spells." She was diagnosed with depression and prescribed Prozac. She returned to Dr. Paschal several times for her depression and was prescribed Serzone. Beginning August 17, 1997, Claimant took a leave of absence from the Department as a result of her stress.

Claimant returned to work full-time in February 1998. Shortly thereafter, a patient pushed a cart into her, causing Claimant to sprain her left

arm and knee. She was placed in a sling and knee immobilizer and given an anti-inflammatory and pain medication.

Claimant continued to see her doctors regarding her depression. Each time, she related her depression to the stress and environment at work. In August 1998, she accepted termination under a workforce reduction program.

After leaving the Department, Claimant continued to have severe depression, eating disorders, and other mental problems requiring both outpatient treatment and hospitalization. Throughout her treatment, Claimant complained of being depressed, not being able to sleep, and other psychological problems.

Claimant filed a Form 50, seeking workers' compensation benefits for the two physical injuries she sustained in June 1997 and February 1998. Additionally, she sought benefits for mental injury. Specifically, she alleged: "The unusual and extraordinary work conditions and/or the two physical injuries caused the Claimant to suffer disabling mental injury." The two physical injuries were admitted by the Department, and Claimant was paid seventy-eight dollars for her expenses. The Department denied the mental injury claims.

At the hearing, Claimant presented evidence of the change in the work environment at the Department beginning in the spring of 1997. She discussed her increased responsibilities and her increased exposure to aggressive patients. Testimony by other employees of the Department confirmed the work conditions.

Claimant indicated the physical injuries for which she sought compensation were but some of the physical assaults which occurred while working for the Department after the change in patients. Among other things, she testified she had feces smeared in her face by a patient. Claimant testified she was stressed and was very afraid of receiving further physical injuries. Testimony indicated that she could not transfer to another area of the Department because no other employees were willing to accept her shift.

The Department produced evidence that the change of patients was not an unexpected or unusual event. Additionally, the Department showed the number of patients under Claimant's care decreased as a result of the change. The evidence indicated Claimant was specifically trained to handle more aggressive patients, and it was not unusual for nurses who worked for the Department to be subjected to aggressive behavior.

The single commissioner found Claimant had failed to prove her mental injury was the result of unusual or extraordinary circumstances. He found the environment was one to be expected when dealing with the patients in the care of the Department. Additionally, the commissioner found no evidence that Claimant's physical injuries directly caused her stress and fears. Therefore, the commissioner found Claimant had failed to provide evidence that her mental injury was compensable. The Full Commission agreed and adopted the findings and conclusions of the single commissioner.

The circuit court reversed the order of the Full Commission. The circuit court found Claimant had presented substantial evidence of the unusual and extraordinary nature of her work environment. Additionally, the circuit court found the mental injury was accompanied by the physical injuries, and therefore the circuit court did not need to determine whether the work conditions were unusual and extraordinary. The circuit court specifically noted that physical injuries do not have to be the direct cause of the mental injury, but must be a cause and must accompany the mental injury. Finally, the circuit court awarded Claimant five hundred weeks of total and permanent disability compensation in the amount of $330.86 per week for her mental injury. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err by reversing the decision of the Full Commission and finding Claimant's mental injury was compensable as the result of unusual and extraordinary work conditions?

II. Did the circuit court err by reversing the decision of the Full Commission and finding Claimant's mental injury was compensable as the result of a mental injury accompanied by a physical injury?

III. Did the circuit court err by awarding Claimant total and permanent disability benefits instead of remanding for a determination by the Full Commission?

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). "In workers' compensation cases, the Full Commission is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." Id.

In an appeal from the commission, this court, as well as the circuit court, may not substitute its judgment for that of the commission as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2004). The appellate court can reverse or modify the Full Commission's decision only if the claimant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Id. "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." Shealy, 341 S.C. at 455, 535 S.E.2d at 442.

LAW/ANALYSIS

I. Mental-Mental

The Department contends the circuit court erred in reversing the determination by the Full Commission that Claimant's mental disability was not caused by "extraordinary and unusual" conditions in her employment. We agree.

A mental-mental injury is a purely mental injury resulting from emotional stimuli. Shealy, 341 S.C. at 455, 535 S.E.2d at 442. According to section 42-1-160 of the South Carolina Code (Supp. 2004):

> Stress arising out of and in the course of employment unaccompanied by physical injury and resulting in mental illness or injury is not a personal injury unless it is established that the stressful employment conditions causing the mental injury were extraordinary and unusual in comparison to the normal conditions of the employment.

The requirement of "unusual or extraordinary conditions in employment" for a claimant to recover for a mental-mental injury refers to conditions to the particular job in which the injury occurs, not to conditions of employment in general. Shealy, 341 at 456, 535 S.E.2d at 442. In order to recover workers' compensation benefits, Claimant must prove both: (1) that she was exposed to unusual and extraordinary conditions in her employment; and (2) that these unusual and extraordinary conditions were the proximate cause of her mental breakdown. Id. at 459, 535 S.E.2d at 444.

As the finder of fact, the Full Commission found the conditions of Claimant's employment were not extraordinary or unusual for her particular job. The Full Commission specifically found the movement of patients between facilities was not extraordinary, and the change in the level of care that Claimant had to provide her patients was not an extraordinary or unusual condition. The Full Commission found that being "subjected to aggressive

behavior by mentally-challenged patients is not an extraordinary and unusual condition of employment as a nurse at [the Department], as this occurs with some frequency and is the subject of specific training for [Department] employees." Finally, the Full Commission found:

> Based upon her work history and training, it was not unexpected that Claimant would be subjected to changes in the amount of medical care her patients required, that she would be subjected to loud and aggressive behavior by patients, that she would fear loud and aggressive behavior by patients, and that she would suffer minor physical injuries as a result of aggressive behavior by patients.

The findings of fact made by the Full Commission are supported by substantial evidence in the record.[1] Tenia Rae Allen, a supervisor of first shift nurses, testified that dealing with aggressive people was not an unusual situation and that nurses were injured even before the more aggressive patients came to Claimant's unit. A co-worker, Kim Willis, provided additional testimony to indicate the working conditions were not unusual. She stated: "There have always been times when we would have certain patients that were harder to deal with . . . . Most of the ones we have now have more medical needs, but there have always been times when it was hard to deal with, the whole 21 years I've been there." Willis also testified that as a nurse she expected changes in the types of patients she would be dealing with and felt it could get even worse than it was at the time Claimant left.

[1] We disagree with Claimant's argument that her mental injury was caused by an unlawful work environment. In support of this argument, Claimant points out that the Department did not abide by Department of Health and Environmental Control regulations. However, these regulations deal with contractual conditions the Department must meet to receive money from the federal government. See 42 CFR § 483.430(d)(1) & § 483.470(a)(1) (1997). While not following the regulations might result in the Department's loss of federal funding, violating the regulations does not create an "unlawful" work environment.

Finally, she testified that some physical confrontation with the patients is to be expected and that was why they had classes to train and "learn how to deal with that."

In addition to finding the condition of Claimant's work environment was not extraordinary and unusual, the Full Commission found she had prior and current non-work related stressors, which could impact her mental injury. The Full Commission found her hospitalizations for depression that occurred prior to her employment with the Department contributed to her current bout with depression. Additionally, at the time she was incurring the changes at work, she was also coping with her father's diagnosis of cancer and his subsequent death from the disease. Dr. Paschal and Dr. Lowe document these additional factors in the medical notes.

While the circuit court did a good job of detailing the evidence contrary to the findings of the Full Commission, it appears to have ignored the substantial evidence supporting the Full Commission's findings. Accordingly, we find the circuit court erred in making its own findings of fact and in reversing the decision of the Full Commission as it relates to Claimant's mental-mental claim.

II. Physical-Mental

The Department next contends the circuit court erred in reversing the Full Commission's finding that Claimant's mental claims were not caused by her physical injuries and, therefore, not compensable. We agree.

Both mental-mental injuries, in which the injury is brought on by the extraordinary and unusual conditions of the claimant's work, and physical-mental injuries, in which a physical injury induced the mental disability, are compensable. See Getsinger v. Owens-Corning Fiberglass Corp., 335 S.C. 77, 80-81, 515 S.E.2d 104, 105-06 (Ct. App. 1999). "Where . . . the mental injury is induced by physical injury, it is not necessary that it result from unusual or extraordinary conditions of employment." Estridge v. Joslyn Clark Controls, Inc., 325 S.C. 532, 538, 482 S.E.2d 577, 580 (Ct. App. 1997). A condition, which is induced by a physical injury, is thereby causally related

to that injury. Id. (defining cause as that which produces an effect); Black's Law Dictionary, 221 (6th ed. 1990) (defining cause as "to make to induce. . . .")). "[The mental injury] is a new symptom manifesting from the same harm to the body." Estridge, 325 at 538-39, 482 S.E.2d at 581.

Despite the circuit court's finding that a physical injury need not be the direct cause of a mental injury, nothing in section 42-1-160, which explains that certain mental injuries are compensable, removes the causation requirement from a physical-mental claim. Because there is no declaration in the statute altering the requirements for a physical-mental claim, the physical injury must still "induce" or "cause" the mental injury for the mental injury to be compensable. See Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 344, 47 S.E.2d 788, 791 (1948) ("It must be assumed that the Legislature was aware of the policy established by [decisions of the courts] when the legislation under consideration was enacted, and it is reasonable to suppose that if it was intended to change such policy, the Legislature would have expressly so declared . . . .").

In the case before us, there is substantial evidence in the record supporting the Full Commission's determination that the mental injury was not induced or caused by the minor physical injuries Claimant sustained. Claimant stated her fear, the change in work conditions, the loud noises, and the increased stress resulted in her mental injuries. The doctors' records indicate Claimant's issues were related to the stressors of her work and to her fear of assaults. Although Claimant feared assaults by patients, nothing in the record indicates this fear was directly caused by the injuries she suffered to her abdomen, knee, and arm. Furthermore, there was substantial evidence suggesting that other stressors in Claimant's life that were unrelated to work caused her mental injuries. Accordingly, we find the circuit court erred in reversing the decision of the Full Commission.

CONCLUSION

We find there was substantial evidence to support the Full Commission's findings that Claimant's mental claims did not result from extraordinary and unusual conditions of her employment. We hold any claim based upon a physical-mental injury must demonstrate that the physical injury caused or induced the mental injury and not that the mental injury was only temporally related. Therefore, we find there is substantial evidence to support the Full Commission's finding that her mental injury was not caused by the minor physical injuries she sustained. Accordingly, the decision of the circuit court is

REVERSED.[2]

KITTREDGE and WILLIAMS, JJ., concur.

[2] Because we find the decision of the circuit court should be reversed and the decision of the Full Commission reinstated, we need not address the Department's remaining issue that the circuit court erred in making findings of fact related to the nature of Claimant's disability and amount of compensation due Claimant.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John N. LoPresti and Janice LoPresti, Appellants,

v.

John Burry, Rabon Creek Watershed Conservation District of Fountain Inn, South Carolina, Everette H. Babb, Frederick E. Landrith, Landrith Surveying, Inc., and Greenville County, Defendants,

Of Whom John Burry and Rabon Creek Watershed Conservation District of Fountain Inn, South Carolina are, Respondents

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Appeal From Greenville County
Henry F. Floyd, Circuit Court Judge

Opinion No. 3982
Heard March 10, 2005 – Filed April 25, 2005

AFFIRMED

Michael Stephen Chambers, of Greenville, for Appellants.

Christopher R. Antley, John Robert Devlin, Jr. and W. Francis Marion, Jr., all of Greenville, for Respondents.

GOOLSBY, J.: John and Janice LoPresti appeal the grant of summary judgment to John Burry and the Rabon Creek Watershed Conservation District of Fountain Inn in their lawsuit arising from their purchase of a home encumbered by a flood easement. We affirm.

In the summer of 1976, Burry bought 172 acres of land, known as tract 34, in Greenville and Laurens counties. Several months later, in conjunction with a federal flood control project, Rabon Creek requested and received an easement from Burry for the construction of a dam on tract 34 and the impoundment of water to create Lake Beulah. Rabon Creek recorded the easement in both Greenville and Laurens counties.

In 1986, after the construction of the dam and lake, Burry subdivided the remaining property into lots, which he later sold to various individuals. As part of the process of preparing the lots for sale, Burry hired surveyor T.H. Walker to prepare a subdivision survey plat of the property, instructing him to survey and plat lots approximately one acre in size next to the lake.

After conducting the field surveys, Walker presented Burry with a plat that contained a dotted line labeled "Flood Plane" [sic] that ran across the numbered lots abutting the lake. The line represented the elevation of the spillway of the dam to be 718.5 feet. At Burry's instructions, Walker removed the line, and Burry recorded the altered plat without the "flood plane" line.

In 1990, Burry conveyed lot 12, one of the lakefront lots, to William V. and Tammy M. Easterday. The Easterdays constructed a home on the lot and located it within Rabon Creek's easement. In 1993, the Easterdays conveyed the home and lot to Marion Harrison. In 1994, the Harrisons conveyed the property to the LoPrestis.

It appears undisputed that, before and during the LoPrestis' purchase of their home, Rabon Creek did not actually perform the inspections required by an "Operation and Maintenance Agreement" that it entered into with the United States Department of Agriculture. Specifically, the agreement

required Rabon Creek to "prohibit the installation of any structure or facilities that will interfere with the operation or maintenance of the project measures." The inspections were actually performed by the Department of Agriculture. Moreover, although construction on the LoPrestis' home began in 1991, the inspection reports did not acknowledge this fact until 1994, when notations began to appear in the reports about houses located in the floodplain area. Even then, Rabon Creek took no action regarding this development.

Unusually heavy rainfall during January 1995 caused the lake to flood the LoPrestis' finished basement to a height of about fourteen inches. In August 1995, the remnants of Hurricane Jerry caused the lake level within the flood easement to rise and flood the Loprestis' home, completely engulfing their basement and coming to within four inches of the finished elevation of the second floor above the basement.

In 1996, the LoPrestis brought this action against Burry, Rabon Creek, and other defendants alleging various causes of action arising out of the damage to their property. The LoPrestis' lawsuit was later consolidated with three other similar cases.

In 1997, the trial court issued an order granting partial summary judgment as to the existence of the easement as initially executed and filed but denying summary judgment as to the scope, extent, and continuing validity of the easement and as to various affirmative defenses to Rabon Creek's right to enforce it. In 1998, following a consolidated bench trial on the remaining issues, the trial court issued an order ruling that the easement extended to the top of the dam elevation, but also that Rabon Creek was estopped from enforcing it against all parties except Burry.

On appeal, this court held the easement was clear and unambiguous and Rabon Creek had the right to flood the land surrounding the lake up to the top of the dam, that is, to an elevation of 724.5 feet.[1] This court further held the

[1] Binkley v. Rabon Creek Conservation Dist. of Fountain Inn, 348 S.C. 58, 68, 558 S.E.2d 902, 907 (Ct. App. 2001), cert. denied (Oct. 23, 2002).

LoPrestis and other aggrieved homeowners had at least constructive notice of the easement and, because of this notice, Rabon Creek could not be equitably estopped from enforcing it.[2]

Following the supreme court's denial of certiorari in the case on October 23, 2002, the case was returned to the trial court to complete proceedings consistent with this court's opinion. The remaining issues arise from the LoPrestis' claims against Burry for fraud, fraudulent concealment, negligent and reckless nondisclosure of land defects, breach of warranty, and violation of the South Carolina Unfair Trade Practices Act and the LoPrestis' negligence claim against Rabon Creek.

Both Burry and Rabon Creek moved for summary judgment. By order dated April 25, 2003, the trial court granted summary judgment to Burry and Rabon Creek on all the LoPrestis' causes of action, holding the determination by this court that the homeowners had unambiguous record notice of the presence and scope of the easement precluded any recovery against either Burry or Rabon Creek.[3]

1. The trial court dismissed the LoPrestis' claims against Burry for fraud, constructive fraud, negligent misrepresentation, fraudulent concealment, and negligence based on a finding that they were charged with constructive notice of the flood easement. The LoPrestis argue the trial court incorrectly determined they had no right to rely on the misrepresentation allegedly created by the alteration of the survey plat.

We find no error.

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[2] Id. at 72, 558 S.E.2d at 909.

[3] In the same order, the trial court denied summary judgment to Greenville County, holding a material issue of fact existed as to whether the conduct of the County in issuing a building permit fell within an exception to the South Carolina Tort Claims Act.

In our prior decision, we held the LoPrestis were charged with constructive notice of the easement because it was properly recorded in the homeowners' chain of title.[4] We noted in reaching this conclusion: "One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been mis[led]."[5]

The LoPrestis argue that removal of the dotted line depicting the floodplain from the recorded subdivision plat amounted to a misrepresentation on Burry's part. Relying on Reid v. Harbison Development Corp.[6] and Slack v. James,[7] the LoPrestis contend one who commits a fraud cannot defeat a claim for misrepresentation simply because the person defrauded is charged with notice under a recording statute. Based on this rationale, the LoPrestis assert the question of whether their reliance on the altered plat was reasonable presented an issue of material fact for a jury to determine.

We have found nothing in the record, however, to support the argument that the LoPrestis justifiably relied on the absence in the plat of dotted lines showing the floodplain.[8]

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[4] Binkley, 348 S.C. at 71, 558 S.E.2d at 908.

[5] Id. at 72, 558 S.E.2d at 909 (quoting S. Dev. Land & Golf Co. v. South Carolina Pub. Serv. Auth., 311 S.C. 29, 34, 426 S.E.2d 748, 751 (1993)).

[6] 285 S.C. 557, 330 S.E.2d 532 (Ct. App. 1985), aff'd in part and remanded on other grounds, 289 S.C. 319, 345 S.E.2d 492 (1986).

[7] 356 S.C. 479, 589 S.E.2d 772 (Ct. App. 2003), cert. granted (Oct. 6, 2004).

[8] See First State Sav. & Loan v. Phelps, 299 S.C. 441, 447, 385 S.E.2d 821, 824 (1989) (noting the hearer's reliance on the representation and the hearer's right to rely as required elements of a cause of action for fraud).

As this court held in Reid, "the true test of the hearer's right to rely on misrepresentations as to matters of record is whether or not he acted with reasonable prudence in so doing."[9] Furthermore, "[t]he law imputes to a purchaser of real estate notice of the recitals contained in the written instruments forming his chain of title and charges him with the duty of making such reasonable inquiry and investigation as is suggested by the recitals and references therein contained."[10]

The recorded plat purports only to give a general layout of the lots for the subdivision—both waterfront and non-waterfront. Moreover, the deed transferring the property in question to the LoPrestis makes reference to the plat only "for more [a] complete metes and bounds description"[11] and clearly qualifies the conveyance as "subject to any and all existing reservations, easements, rights-of-way, zoning ordinances and restrictions or protective covenants that may appear of record or on the premises." Finally, the record contains no evidence suggesting that the altered plat induced the LoPrestis not to make a complete review of the public records or request a detailed survey of the property before purchasing it.[12]

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[9] Reid, 285 S.C. at 561, 330 S.E.2d at 535 (quoting 37 C.J.S. Fraud § 34c at 281 (1943)).

[10] McDonald v. Welborn, 220 S.C. 10, 16, 66 S.E.2d 327, 330 (1951) (emphasis added) (citations omitted).

[11] Cf. Lancaster v. Smithco, Inc., 246 S.C. 464, 468-69, 144 S.E.2d 209, 211 (1965) ("The question as to the purpose and effect of a reference to a plat in a deed is ordinarily one as to the intention of the parties to be determined from the whole instrument and the circumstances surrounding its execution. . . . A plat . . . is not an index to encumbrances.").

[12] See Reid, 285 S.C. at 561, 330 S.E.2d at 534 (noting the doctrine of constructive notice is inapplicable especially "where the very representations relied on induced the hearer to refrain [from] an examination of the records, where the employment of an expert would have been required to deduce the

2. The LoPrestis argue the trial court erred in finding Rabon Creek was immune from negligence liability pursuant to the exceptions to the waiver of liability in sections 15-78-60(2), (4), (5), and (13) of the South Carolina Tort Claims Act.[13]

We find no reversible error.

Our review of the briefs shows that, although the LoPrestis presented a reasonably detailed argument regarding the applicability of section 15-78-60(5) to this case, they gave only conclusory statements about exceptions (2), (4), and (13) of the statute. Because section 15-78-60 absolves a governmental entity from liability if any one of the criteria enumerated in the statute is satisfied, it follows that, regardless of whether dismissal of the LoPrestis' action was warranted under section 15-78-60(5), we must accept the trial court's findings that the other exceptions cited in the appealed order exempt Rabon Creek from liability.[14]

3. We have considered the LoPrestis' remaining arguments regarding the substantive merits of their lawsuit: that a jury question exists as to

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truth from an examination of the records, where confidential relations existed, or where the defrauded party was inexperienced").

[13] S.C. Code Ann. § 15-78-60(2), (4) and (5) (2005).

[14] See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating an appellant was deemed to have abandoned an issue for which he failed to provide any argument or supporting authority); Biales v. Young, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) (holding the failure to challenge an alternative ground for a holding constitutes abandonment of the issue and precludes further review of that holding on appeal); R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (deeming an issue abandoned if the appellant's brief treats it in a conclusory manner).

whether Burry's alteration of the plat amounted to a "positive misrepresentation by conduct"; that the trial court erred in finding Burry was not required to disclose the easement and in holding their claim for fraudulent concealment was not actionable as a matter of law; that the trial court erred in granting summary judgment to Burry on their causes of action for negligent or reckless nondisclosure of land defects; that the trial court incorrectly found that Rabon Creek had no duty to prevent the construction of homes within its flood easement; and that the trial court erroneously held no fact issue existed as to whether the doctrine of comparative negligence barred their negligence claim against Rabon Creek. The fact that the LoPrestis had constructive notice of the easement and the absence of any special relationship between the LoPrestis and either Burry or Rabon Creek that would require disclosure of a matter of public record are dispositive of these arguments.[15]

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[15] See Lawson v. Citizens & S. Nat'l Bank of S.C., 259 S.C. 477, 485, 193 S.E.2d 124, 128 (1972) (stating a vendor of a residence must disclose to the purchaser material facts that are known only to the vendor and not available to the purchaser through diligent inquiry); State v. Parris, 353 S.C. 582, 593, 578 S.E.2d 736, 742 (Ct. App. 2003) (noting the relationship between the buyer and the seller in a property transaction is "ordinarily not fiduciary"), rev'd on other grounds, Op. No. 25965 (S.C. Sup. Ct. filed April 4, 2005) (Shearouse Adv. Sh. No. 15 at 78); Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 335, 574 S.E.2d 502, 510 (Ct. App. 2002) (stating that nondisclosure becomes fraudulent concealment only when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction and that such a duty arises only if there are indications that the relationship between the parties is fiduciary in nature); Restatement (Second) of Torts § 353(1)(a) (1965) (suggesting a seller of real property may be liable for negligent nondisclosure of defects in the land, but specifying as a condition precedent before liability can be imposed that "the vendee does not know or have reason to know of the condition or the risk involved"); 28 Am. Jur. 2d Estoppel and Waiver, § 100, at 524 (2000) ("Because of the doctrine of constructive notice, there is little duty, outside the avoidance of affirmative misleading acts, which is imposed upon the holder of an interest in property, where his or her interest in land is disclosed by the public record."), quoted in Binkley, 348 S.C. at 71, 558 S.E.2d at 910.

4. The LoPrestis also argue the trial court erred in finding their claims were barred by the equitable doctrine of laches. Having already affirmed the trial court's grant of summary judgment on all the LoPrestis' causes of action, we need not reach this issue.[16]

AFFIRMED.

HUFF and STILWELL, JJ., concur.

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[16] See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that if an appellate court's ruling on a particular issue is dispositive of an appeal, rulings on remaining issues are unnecessary).