OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 44

November 21, 2006
Daniel E. Shearouse, Clerk
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Brigina Dicks-Woolridge, Respondent.

Opinion No. 26228
Heard October 17, 2006 – Filed November 20, 2006

DISBARRED

Henry B. Richardson, Jr., Disciplinary Counsel, and Barbara M. Seymour, Senior Assistant Disciplinary Counsel; both of Columbia, for Office of Disciplinary Counsel.

Brigina Dicks-Woolridge, of Florence, *pro se*.

PER CURIAM: In this attorney disciplinary matter, the Commission on Lawyer Conduct filed formal charges against respondent.[1] A hearing before the sub-panel, which respondent did not attend, was held regarding the charges. The sub-panel recommended respondent be disbarred from the practice of law. The full panel adopted the sub-panel's report and recommendations.

[1]Respondent was placed on interim suspension in March 2003.

FACTS

The essential nature of the charges against respondent involve failing to act diligently for or communicate with her clients, failing to maintain unearned fees and to keep client funds in a trust account, using funds in the trust account for her own benefit, and failing to cooperate with Disciplinary Counsel in the investigation of these matters.

The Jackson Matter

On December 14, 2001, respondent conducted the closing on the sale of a house owned by Jackson and his former wife. The settlement statement respondent prepared did not accurately reflect the actual transaction. Further, respondent withheld $30,913.87 from the closing to pay off the mortgage; however, she did not immediately pay it off. Thereafter, respondent's trust account balance fell below the amount required to pay off the mortgage, and the amount was not restored until January 31, 2002. At that time, she paid off the mortgage. Respondent failed to produce sufficient records during the disciplinary investigation to determine the source of the deposit that restored the balance.

Although respondent paid Jackson's mortgage on January 31, 2002, she did not file the deed and completed mortgage until January 2003, almost a year after the closing. The payment of the mortgage and recording fees left a ledger balance of $892.00, which reflects the amount still owed to Jackson and his former wife. Review of the bank statements indicated the balance in the trust account dropped below the ledger balance twice.

The panel found there is clear and convincing evidence respondent failed to act with diligence in this matter in violation of Rule 1.3 of Rule 407, SCACR, failed to keep safe her clients' funds in violation of Rule 1.15 of Rule 407, SCACR, failed to maintain accurate or sufficient financial records in violation of Rule 417, SCACR, and that respondent engaged in a criminal act in willfully spending the

funds inadvertently wired into her trust account in violation of Rule 8.4(b) and (d), of Rule 407, SCACR.

The panel further found respondent failed to cooperate in the investigation of this matter. Respondent twice failed to appear to give a statement pursuant to Rule 19(c)(4) of Rule 413, RLDE. Following her interim suspension, respondent ultimately appeared for a Rule 19(c)(4) statement and produced some records at that time. However, she did not fully comply with the subpoena and did not appear for the conclusion of her statement even though she requested the opportunity to return and provide additional information. Accordingly, the panel found respondent failed to cooperate in this matter in violation of Rule 8.1.

The Grant Matter

Respondent represented Grant regarding her claims arising from a June 2000 auto accident. During the representation, Grant moved away and her mother became respondent's contact. Respondent obtained a $7,000 settlement in January 2002. The mother testified she received a check for her daughter's portion of the settlement but did not receive an accounting of the remaining funds. The fee agreement obligated respondent to pay medical providers from the settlement proceeds. However, these medical bills were not promptly paid at the time of the settlement. The mother testified that both she and her daughter made a number of unsuccessful attempts to communicate with respondent about the unpaid bills. According to the file produced by respondent, the bills were not all paid until May 2002, after she received notice of the grievance.

Respondent testified in her Rule 19(c)(4) appearance that the check she issued to Grant was inadvertently written from her operating account. Instead of moving the amount of Grant's share from the trust account to the operating account to correct the error, respondent chose to leave those funds in the trust account and give herself a "credit" that she subsequently used to pay bankruptcy filing fees for various clients. She kept no ledger or other accounting of those payments.

The review of respondent's trust account records revealed that she issued two trust account checks payable to herself for fees in Grant's case prior to receipt and deposit of the settlement check. The trust account records show no other deposit of funds that would entitle respondent to these two payments. According to the fee agreement, respondent was only entitled to one-third of the recovery. Respondent did not provide an explanation for the dates or amounts of the checks to herself.

The panel found there is clear and convincing evidence respondent failed to diligently disburse the settlement proceeds in violation of Rules 1.3 and 4.4, of Rule 407, SCACR; failed to adequately communicate with Grant and her mother in violation of Rule 1.4; misappropriated $4,622.21 from her trust account when she negotiated checks payable to herself prior to deposit of funds in the account, in violation of Rules 1.15, 8.4(b), and 8.4(e); and failed to maintain the financial records related to this transaction as required by Rule 417, SCACR.[2]

The panel further found respondent failed to cooperate in the investigation of this matter. She appeared pursuant to Rule 19(c)(4) and produced her client file, but was unable to produce adequate financial records to show that all of the funds received on Grant's behalf were appropriately disbursed. Respondent was given fifteen days to produce those documents. She failed to do so and she failed to appear at the conclusion of her Rule 19(c)(4) appearance. The Panel found there is clear and convincing evidence respondent failed to cooperate in violation of Rule 8.1.

The Graham Matter

Respondent was appointed to represent Graham in a post-conviction relief matter in June 1999. At the PCR hearing, the judge

[2]In her Rule 19(c)(4) appearance, respondent admitted she was not in compliance with Rule 417.

indicated he was going to deny the application and instructed the Attorney General's office to prepare an order. There was a fire in respondent's office in May 2001. As a result of the fire, respondent's computers were destroyed and several client files were lost or damaged. Graham's original client file was lost in the fire and respondent did not take any steps to reconstruct that file. She also failed to create a new file for maintenance and management of documents generated and received in Graham's case.

Respondent admitted she did not take any action on Graham's behalf following the PCR hearing. She received a proposed order from opposing counsel in December 2001, but she did not send Graham a copy or determine the order was actually filed. Respondent did not comply with Graham's requests for copies of documents from his file, nor did she have any communication with him following the PCR hearing. She did not advise him of his right to appeal.

The panel found respondent's lack of cooperation, her failure to respond to the Notice of Full Investigation, and her misrepresentations to the panel in her Answer in this matter all violated Rule 8.1, of Rule 407, SCACR. The panel also found there is clear and convincing evidence that respondent violated Rules 1.1, 1.2, and 1.3 by failing to maintain a client file for Graham, failing to take any action on his behalf following his PCR hearing, and failing to advise him of his right to appeal. The panel stated that the lack of attention to Graham's legal matter amounts to conduct prejudicial to the administration of justice in violation of Rule 8.4(e). The panel further found respondent failed to adequately communicate with Graham in violation of Rule 1.4 and improperly withdrew from representing him in violation of Rule 1.16.

The Allen Matter

At the hearing, Allen testified she paid respondent a $500 retainer to represent her in contempt proceedings she filed in connection with a child custody case. From December 2002 to April 2003, Allen made numerous unsuccessful attempts to reach respondent by phone at her

office and at home. Respondent did not correspond with Allen about her case and missed an appointment with her.

In March 2003, respondent was placed on interim suspension. She did not produce Allen's client file to the attorney appointed to protect her clients' interests upon her suspension. Allen's file was not located, but the attorney was able to reconstruct it from loose mail located in respondent's office and from materials received from opposing counsel. From the panel's review of the file it appeared respondent did not take any action on Allen's behalf other than an initial letter to opposing counsel proposing a settlement and a letter to the judge on the same date requesting a continuance.

In her Answer, respondent asserts she found Allen's client file in her office and that the attorney to protect client interests failed to properly perform his duties as trustee. However, the panel noted respondent had failed to produce the file she claims to have located to Disciplinary Counsel. The panel stated, given that fact, and because respondent did not appear at the hearing to present evidence to support her assertions in that regard, the matter would be resolved in favor of the attorney to protect client interests and the panel concluded that either no file was maintained for Allen or that respondent failed to turn it over to the attorney upon her interim suspension.

The panel found there is clear and convincing evidence that respondent failed to adequately communicate with Allen about her domestic matter; failed to provide even minimally competent or diligent representation of Allen; and failed to earn the fee she was paid. Accordingly, the panel found respondent violated Rules 1.1, 1.2, 1.3, 1.4, and 1.5, of Rule 407, SCACR.

The McRaye Matter

McRaye paid respondent $600 for a divorce. McRaye testified respondent repeatedly put off the hearing and failed to diligently pursue his case. He was unable to acquire information from respondent about the status of his case despite calls and visits to her office. Ultimately,

McRaye fired respondent and hired someone else. McRaye had to pay his new attorney additional funds to complete tasks respondent had not done or redo tasks he was unable to confirm because respondent did not timely deliver his client file.

The panel found respondent failed to competently and diligently represent McRaye in violation of Rules 1.1, 1.2, and 1.3, of Rule 407, SCACR. The panel found she failed to adequately communicate with McRaye and his subsequent attorney in violation of Rules 1.4 and 1.16. Finally, the panel found she violated Rule 1.5 by failing to earn the fee she charged in the case and by not refunding that fee.

The Matson Matter

Matson retained respondent to represent her in a bankruptcy matter. Matson paid $600 toward a $1,175 retainer on February 2, 1999. Respondent did not deposit this fee into her trust account. Although Matson's fee payment had not been deposited in her trust account, respondent wrote a trust account check to the bankruptcy court for the $175 filing fee on February 5, 1999, and a second check for $175 for a subsequent filing on March 12, 1999.

The panel found there is clear and convincing evidence respondent failed to deposit Matson's $600 payment into her trust account. The panel noted it was unclear whether this payment was for attorney's fees or costs. In either case, respondent was required to hold the funds in trust. The panel found the $350 used to pay filing fees for Matson was money held on behalf of one or more other clients. Based on these findings, the panel found respondent violated Rule 1.15 in this matter.

The Trust Account Matter

The panel's review of respondent's Rule 19(c)(4) testimony revealed numerous violations of the trust accounting requirements. Since opening her solo practice, respondent failed to conduct monthly reconciliations of her trust account. The panel found respondent did

not reconcile the balance in her account, but simply compared her bank statements to her files or personal recollection of deposits. Even that review by respondent was done sporadically.

Respondent stated that prior to the fire in her office in May 2001, she maintained an accounting journal and client ledgers. After her financial records were lost or destroyed as a result of the fire, respondent did not attempt to reconstruct those records. She acknowledged that, at the time of the fire, her trust account contained money being held for clients, yet she did not make any attempt to determine who had how much on deposit.[3]

From the date of the office fire until the date of respondent's interim suspension, respondent did not maintain client ledgers or an accounting journal concerning transactions that occurred after the fire. Additionally, she did not reconcile her trust account for that time period.

In her Answer, respondent states that in June 2001, she noticed excess money in her trust account. She did not know where the funds came from, but stated "they could not have come at a better time," given the fire in her law office. At that time, she began to use the money "as needed." In December, respondent was notified by a lender that the source of the money was an inadvertent wire transfer into her trust account. The lender demanded the return of the funds. Respondent confirmed the balance in her trust account was sufficient to return the money to the lender. She then returned the money without regard to whose money it actually was. Respondent claimed she replaced some of the client funds used to repay the lender with the proceeds of a loan on her house; however, she did not produce any document to confirm this.

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[3]Respondent stated she recreated ledgers for a five or six month period at the request of the Attorney to Assist; however, because she did not produce those records, the panel found her statement lacked credibility.

In October 2001, respondent received an insurance check in the amount of $21,672.54 for damages sustained in her office fire. She deposited this check into her trust account. Thereafter, respondent issued two checks to herself, two checks to a remodeling company, and several checks to various payees for furniture and office equipment. The notations on these checks reference respondent's insurance proceeds. On June 3, 2002, respondent wrote a third trust account check to herself with a reference to her insurance claim with no corresponding deposit. Review of the bank statements revealed that, during that same period, respondent deposited no other checks from her insurance company and no other deposits that correspond to the payments respondent made to herself. On June 12, 2002, respondent deposited an additional check from her insurance company in the amount of $1,636.30. Respondent's total deposits of fire insurance claim proceeds into the trust account were $23,308.84 and her total disbursements referencing those proceeds were $39,202.47.

In her response to the Notice of Full Investigation in this matter, respondent stated she had considered whether depositing the insurance proceeds into her trust account was commingling. She concluded it was not as she was "essentially handling an insurance matter for" herself and she was "representing" herself. The panel found this statement does not explain why she chose to deposit some of the insurance checks into her trust account and some into her operating account. The panel also found that her statement does not explain why she did not keep a record of those funds or why she wrote checks from the trust account in excess of the deposits. The panel stated it was unable to ask for an explanation because respondent did not appear at the hearing.

The panel found there is clear and convincing evidence respondent failed to comply with the requirements of Rule 417, SCACR, prior to the fire in her office. The panel found respondent had violated Rule 1.15, of Rule 407, SCACR, and Rule 417 by failing to reconstruct even minimal documentation to determine whose funds she had in her trust account at the time of the fire. The panel stated that, giving due consideration to the extreme difficulties respondent likely

encountered following her office fire, they found the fact she made absolutely no attempt to maintain even minimally sufficient records of post-fire transactions for nearly two years to be misconduct rising to the level of blatant indifference to Rule 417. In addition, the panel found respondent commingled her own funds with client funds when she deposited the insurance proceeds into her trust account. The panel further found the issuance of checks in excess of those deposits amounted to misappropriation of $15,893.66. The panel found that conduct violated Rules 8.4(b) and 8.4(d).

The panel considered mitigating and aggravating circumstances before determining the appropriate punishment to recommend for respondent. As mitigating circumstances, the panel considered respondent's office fire, her reputation as an attorney, and the fact that she did not have any prior disciplinary history.

As aggravating circumstances, the panel considered (1) respondent's pattern of misconduct in failing to diligently pursue her clients' legal matters, failing to communicate with her clients, and failing to maintain unearned fees and to safekeep client funds in the trust account; (2) her lack of full cooperation in the disciplinary investigation; (3) her experience as an Attorney to Assist charged with investigating allegations of attorney misconduct; (4) the egregiousness of respondent's conduct in using funds in her trust account for her own benefit; and (5) her failure to appear at the hearing.

The panel concluded that clear and convincing evidence warranted disbarment plus the costs of these proceedings. In addition, the panel recommended the Court require respondent to make the following payments in restitution: $446 to Jesse A. Jackson; $446 to Dedra Jackson; $500 to Michelle Allen; and $600 to Mingo McRaye. The panel also recommended respondent be required to pay to the Lawyers' Fund for Client Protection: $350 for the unknown client funds used for Matson's filing fees; $15,893.66 for the unknown client funds respondent used for fire losses and paid to herself; $2,288.88 for the funds paid to herself above the fee amount in the Grant matter; and any amount paid out by the Lawyers' Fund following respondent's

interim suspension. The panel noted respondent should receive credit for the amount that was paid to the Lawyers' Fund which represented the funds remaining in her trust account at the time of her interim suspension.

DISCUSSION

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

Given the facts of this case and taking into consideration discipline rendered in similar cases, the Panel's recommendation of disbarment is appropriate. *See, e.g.*, *In re* Chandler, 356 S.C. 288, 588 S.E.2d 610 (2003) (disbarment where attorney failed to cooperate with disciplinary counsel and appear at his hearing; failed to communicate with and act with due diligence for his clients; caused significant financial losses to his clients and former law partner; misappropriated funds; and engaged in misconduct involving dishonesty, deceit, and misrepresentation); *In re* Strickland, 354 S.C. 169, 580 S.E.2d 126 (2003) (disbarment where attorney failed to maintain integrity of trust account and operating account, misappropriated funds, and made certain misrepresentations to disciplinary counsel).

Accordingly, we find respondent's misconduct warrants disbarment. The disbarment shall be retroactive to the date of respondent's interim suspension. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing she has complied with Rule 30 of Rule 413, SCACR, and shall also surrender her Certificate of Admission to the Practice of Law to the Clerk of Court. Respondent is required to pay restitution to presently known and/or subsequently identified clients and other persons and entities who have incurred losses as a result of respondent's misconduct in connection with this matter. Moreover,

respondent is required to reimburse the Lawyers' Fund for Client Protection for any claims paid as a result of her misconduct in connection with this matter. Respondent will be given credit for the amount that was paid to the Lawyers' Fund which represented the funds remaining in her trust account at the time of her interim suspension. Respondent shall not apply for readmission until all restitution has been paid. Further, within thirty (30) days of the date of this opinion, Respondent must pay the costs associated with these proceedings.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent

v.

Christopher F. Davis, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Aiken County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 26229
Heard October 18, 2006 – Filed November 20, 2006

VACATED IN PART; REVERSED; AND REMANDED

Chief Attorney Joseph L. Savitz, III, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, of Columbia, and Solicitor Barbara R. Morgan, of Aiken, for Respondent.

JUSTICE WALLER: We granted petitioner's request for a writ of certiorari to review the Court of Appeals' decision in State v. Davis, 364 S.C. 364, 613 S.E.2d 760 (Ct. App. 2005). We vacate in part, reverse, and remand for a new trial.

FACTS

A jury convicted petitioner, Christopher F. Davis, of murder and armed robbery. The victim was Paul Williams ("Paul"). On direct appeal, petitioner argued that the trial court erred by allowing Shawn Hicks, the State's key witness, to testify to statements made by Greg Hill. The Court of Appeals affirmed, finding that: (1) the statements made by Hill were non-testimonial in nature, and therefore, pursuant to Crawford v. Washington, 541 U.S. 36 (2004), there was no Confrontation Clause violation; (2) the statements fit within the excited utterance exception of the hearsay rule; and (3) even if erroneously admitted, any error was harmless.

In the early morning hours of April 18, 2000, Hicks was selling crack cocaine near Paul's house in Aiken. Hicks testified that he heard petitioner, Reggie Stevens, and Paul arguing. Hicks then heard a gunshot and saw three individuals running through the victim's backyard. Hicks identified Stevens as one of the men because he stumbled and fell, but Hicks could not identify the other two. After hearing the gunshot, Hicks sold $70 worth of crack to Stevens and Hill. Hicks stated he normally sold drugs to Stevens, but that $70 was an unusually large purchase. Hicks testified that he believed Stevens and Hill then went to a nearby abandoned house to smoke the crack and returned shortly thereafter with petitioner.[1] Petitioner had a shotgun in a black bag and a bag of coins. According to Hicks, petitioner bought about $30 worth of crack from Hicks with the coins.

Additionally, Hicks testified that petitioner offered to sell him the shotgun. The following colloquy occurred at trial:

[1] Hicks estimated his times during his testimony. He stated that he saw petitioner "about 5 to 10 minutes" after the gunshot. Therefore, according to Hicks, in five or ten minutes, he sold Stevens and Hill crack, they left to smoke the crack, and then returned with petitioner.

Q. What, if anything, did anybody say to you to prevent you from buying [the shotgun]?
A. Well, he told me not to purchase the shotgun.

Q. Who told you?

A. Greg Hill.

Although petitioner objected to the admission of Hill's statement through Hicks on the ground he could not cross-examine Hill, the trial court ruled the statement admissible as a statement by a co-conspirator. Later in his direct examination, Hicks again testified to Hill's statement, as follows:

Q. [W]hat did Greg Hill tell you that night...?

A. [Petitioner] and Reggie [Stevens] went in the house.

Q. All right. Did he say anything about Paul being shot or anything?

A. Yeah. That's why he told me not to get the shotgun.

Q. Because?

A. Paul had been shot with it.

Hicks first told police about this incident when he was in jail at the Aiken County Detention Center on unrelated charges of strong armed robbery and drug distribution. Petitioner and Hill were also in the detention center while Hicks was there. Hicks testified that he and petitioner would write notes to each other while in jail. The State admitted a note signed and dated by petitioner, but written in Hicks' handwriting. Hicks read the note to the jury as follows:

> Hey Chris the night that ya'll [sic] came and tried to sell me the shotgun, ya'll was [sic] coming from Paul's house and what I need to know from you who was the trigger man? I know it wasn't Greg from what he told me that night, so it had to be you or Reggie. You got the gun and Greg told you and Reggie who the one who went in the house, so who pulled the trigger? If Reggie did it you should write Reggie's name or if you did it, just sign your name at the bottom and I'll help you out by writing that letter. Just write what you want me to tell them.

The letter is signed "Christopher Davis" and dated "3-15-01."[2]

Hicks' brother, Raymond "Ike" Hicks, also testified. Like his brother, Ike was out selling drugs the night of the shooting. Ike stated that he heard "a little arguing and stuff" from Paul's house and then a gunshot. "A few minutes later, about 10, 15 – no, it was about 5 or 10 minutes later," he saw a few people running from Paul's house. About 10 to 20 minutes after the gunshot, Ike saw Stevens and Hill, and also saw petitioner talking to his brother. Ike saw that petitioner had a gun in a bag and was asking Hicks if he wanted to buy it. Ike further stated that Stevens had "change and money" and bought about $100 of crack cocaine from him in the time after Ike heard the gunshot.

Marcus White testified that petitioner came to his house late one night with a gun asking if he could keep it at White's house. White gave petitioner "some Clorox because he said he bought it from [Stevens] and he didn't want his prints on it." White further stated that petitioner then "took the gun in the back and hid it." He never saw petitioner come back and get the gun.

Another State witness, Calvin Marcel Patten, testified that he was "[h]anging out, selling dope" on the night Paul was killed. Patten stated that he heard a gunshot between one and two a.m. and saw three people run from behind Paul's house. According to Patten, Stevens tripped over the fence

[2] The State presented a handwriting expert who examined the note and opined that the signature and 3-15-01 were both in petitioner's handwriting.

while running from the house. About 15 to 30 minutes after Patten heard the gunshot, he saw petitioner.

On cross-examination, Patten also testified that he spoke and exchanged notes with petitioner while they were both in jail. In one written exchange, when asked by petitioner if he had been promised anything, Patten replied that he was not promised anything, "but was told that I could help myself with the case by helping them with" petitioner.[3] From the same note, Patten read the following:

> "Yes, I talked to Shawn Hicks. Some of the things he wanted me to say on the stand when we were scheduled to come to court, I couldn't say because it was a lie and I didn't see [petitioner] with a gun. Some of the things he wanted me to say was that I seen [petitioner] come through the fence and also he wanted me [to] say that I seen [petitioner] with a gun and that he shot Paul."

Patten further testified that he saw Stevens with a pocket full of change, but he did not see a shotgun that night.

In Paul's house, the police found the butt of a shotgun that had been wrapped in black electrical tape. Coins were on the floor. In front of Paul's house, a footprint was found in the dirt and a plaster cast was made by police; later in the investigation, the shoe print was matched to Stevens' Nike tennis shoes.

At some point, petitioner, Stevens and Hill were all arrested for Paul's murder.[4] Stevens told police he sold petitioner the shotgun. Petitioner eventually admitted to police that he had bought the gun from Stevens, but he had thrown if off the side of a cliff. The police, however, did not find the gun.

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[3] After reading this part of the note, Patten explained as follows: "So basically I was told that the cases pending against me was [sic] not to worry about it because I was helping them."

[4] Petitioner was not tried with either of his co-defendants.

In his own defense, petitioner testified to the following. On the night of the crime, he could not remember exactly where he was; he told the jury he was "about 19, a teenager, just having fun and all" and that he sold drugs at night. He bought the gun from Stevens although he could not remember exactly when. Petitioner stated that he gave Stevens $20 worth of crack for the gun which had a broken stock. Petitioner decided the gun was not worth much, so he left it on the grass. However, after the police told him they believed the gun had been used to murder Paul, petitioner saw Stevens who, according to petitioner, now wanted the gun back. Petitioner testified that he thought Stevens "done did [sic] something" with the gun related to the murder, so petitioner wanted to get rid of the gun. He threw the gun in the back of White's house; then he wiped the gun down with Clorox and "threw it off the cliff."

Petitioner further testified that while he and Hicks were in jail, Hicks had promised petitioner that he (Hicks) would write a statement telling authorities that police had forced him to falsely accuse petitioner. Petitioner explained that he signed his name to a blank piece of paper and only later discovered that the "confession" had been written in pencil above his signature. Petitioner denied killing Paul.

Byron Mathis, who was in jail with petitioner, testified that he remembered Hicks and petitioner exchanging notes in jail. Mathis stated that he saw petitioner sign a blank piece of paper and slid it back to Hicks. Mathis testified he told petitioner "he was a fool" to sign a blank piece of paper.

The jury convicted petitioner, and the trial court sentenced him to life without parole for murder, and 30 years consecutive for the armed robbery.[5] The Court of Appeals affirmed. Davis, supra.

[5] Petitioner was also convicted of possession of a weapon during the commission of a violent offense, but the trial court imposed no sentence for this third offense.

ISSUE

Did the Court of Appeals err in affirming the trial court's admission of the hearsay statement made by Hill?

DISCUSSION

Petitioner argues the statement made by Hill to Hicks that the shotgun had been used to murder Paul was erroneously admitted hearsay. Petitioner further contends the error was not harmless. We agree.

Non-Testimonial Statement

In its opinion below, the Court of Appeals devoted an extended discussion to the United States Supreme Court's 2004 decision in Crawford v. Washington. The Court of Appeals explored the Crawford decision in depth including a discussion of scholarly articles written in the wake of Crawford. In addition, the Court of Appeals analyzed **numerous** cases analyzing the impact of Crawford on such statements as those made: (1) during 911 calls, (2) during police investigations, (3) by children, and (4) to family, friends, or acquaintances. State v. Davis, 364 S.C. at 373-401, 613 S.E.2d at 765-80. Ultimately, the Court of Appeals determined that Hill's statement to Hicks was non-testimonial, and therefore the rule of Crawford did not apply. Given the fact that Hill's statement to Hicks clearly was made outside of an investigatory or judicial context, we agree the statement is non-testimonial. However, because the overwhelming majority of the Court of Appeals' Crawford discussion does not relate to the precise issue in the instant case, we vacate that portion of the opinion.

Excited Utterance Exception to Hearsay Rule

The Court of Appeals analyzed the hearsay issue pursuant to the rule of Ohio v. Roberts, 448 U.S. 56 (1980). This rule allows admission of a hearsay statement if it falls within a "firmly rooted hearsay exception." Noting that the State conceded the trial court had erred by admitting the statement as a

statement by a co-conspirator,[6] the Court of Appeals nevertheless agreed with the State's argument that the admission of Hill's statement should be upheld under the excited utterance exception.[7] Davis, 364 S.C. at 402, 613 S.E.2d at 780. Petitioner maintains this was error, and we agree.

An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" and may be admitted at trial as an exception to the hearsay rule. Rule 803(2), SCRE. The rationale underlying the excited utterance exception is that "the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999).

A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception. Id. Nonetheless, "the burden of establishing the facts which qualify a statement as an excited utterance rests with the proponent of the evidence." 31A C.J.S. *Evidence* § 359 (1996); accord Mariano v. State, 933 So.2d 111, 118 (Fla. Dist. Ct. App. 2006); Jarvis v. Commonwealth, 960 S.W.2d 466 (Ky. 1998); State v. Kemp, 919 S.W.2d 278, 280 (Mo. Ct. App. 1996) ("The party offering the statement as an exception to the rule against hearsay has the burden of making a sufficient showing of spontaneity to render the statement admissible."). Finally, statements which are not based on firsthand information, such as where the declarant was not an actual witness to the event, are not admissible under the excited utterance exception to the hearsay rule. State v. Hill, 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998).

As applied to the instant case, we find there simply is insufficient evidence that Hill's statement is an excited utterance. The Court of Appeals

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[6] See Rule 801(d)(2)(E) (a statement is not hearsay if it is admitted against a party and was made by a coconspirator of the party during the course and in furtherance of the conspiracy). Although petitioner, Stevens, and Hill were all indicted for Paul's murder, there was no allegation or evidence of a conspiracy.

[7] The Court of Appeals addressed this argument pursuant to Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal).

relied heavily on the fact that "murder is certainly a startling event." Davis, 364 SC at 404, 613 S.E.2d at 781. In our opinion, however, relying on the fact that there was a murder, or that the statement was about the weapon used to commit the murder, is inadequate to establish excited utterance.

In Dennis, also a murder case, we found a hearsay statement properly admitted as an excited utterance. There, the State elicited the following testimony:

> Q. When you saw -- I'm going to call him Moses Otis Dennis -- when you saw Moses Otis Dennis, that was real shortly after the shooting, wasn't it?
>
> A. Yes, sir.
>
> Q. You all were still all excited and everything, weren't you?
>
> A. Yes, sir.
>
> Q. And [Otis] told you that his brother had shot [the victim] because [the victim] had taken a swing at his brother?
>
> A. Uh huh.
>
> Q. He said that, didn't he?
>
> A. Yes, sir.

337 S.C. at 283, 523 S.E.2d at 176-77. This Court characterized Otis's statement as an excited utterance explaining that Otis, a co-defendant, "allegedly had just seen his brother shoot an unarmed man, abruptly ending a fistfight. [The witness] testified Otis made the statement to him when he saw Otis one to two minutes after the shooting, tucking a gun beneath his shirt as he walked between apartment buildings." Id. at 284, 523 S.E.2d at 177. Therefore, we held that the statement fell within a firmly rooted exception to

the hearsay rule and did not violate the Confrontation Clause. Id. at 288, 523 S.E.2d at 179.

Although the instant case is somewhat similar to the facts in Dennis, the cases are distinguishable. First, no evidence was elicited by the State that Hill was still under the stress or excitement of Paul's shooting. Therefore, the State did not meet its burden of establishing a foundation for the excited utterance. See Mariano v. State, supra; Jarvis v. Commonwealth, supra; State v. Kemp, supra; see also 31A C.J.S. *Evidence* § 359 (1996) ("the burden of establishing the facts which qualify a statement as an excited utterance rests with the proponent of the evidence").

Second, the evidence in the record does not support the conclusion that Hill witnessed the shooting. According to Hicks, Hill stated that Stevens and petitioner had gone into Paul's house. No one testified that Hill was in the house at the time of the shooting, and Hill's statement about the gun being used to shoot Paul does not establish he witnessed the murder.[8] Because there is no evidence Hill actually saw Paul get shot, Hill's statement is not admissible under the excited utterance exception to the hearsay rule.[9] State v. Hill, supra.

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[8] In contrast, the Court of Appeals found the evidence supported "the inference" that Hill was present at the murder scene and had **firsthand** knowledge the shotgun had been used to kill Paul. Davis, 364 S.C. at 405, 613 S.E.2d at 782. The Court of Appeals' analysis, however, does not take into account Hicks' specific testimony that Hill said only Stevens and petitioner went into the house. The "jailhouse confession" note also reinforces that Hill told Hicks only Stevens and petitioner went into Paul's house. We therefore reject the Court of Appeals' conclusion that the evidence supports the inference Hill witnessed the shooting.

[9] Furthermore, because there is insufficient evidence Hill witnessed the shooting, the State's alternate argument that his statement was properly admitted under the present sense impression exception is without merit. See Rule 803(1), SCRE (defining present sense impression as a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.").

Consequently, we hold Hill's statement does not fall within the excited utterance exception to the rule against hearsay. Accordingly, we reverse the Court of Appeals' ruling the statement was admissible.

Harmless Error

The Court of Appeals also concluded that any error was harmless. Petitioner argues, however, that because of the abysmal credibility of Hicks, the admission of Hill's statement through Hicks could not be harmless. In addition, petitioner points out that another State witness, Patten, testified that Hicks had asked him to testify falsely against petitioner. Given the highly circumstantial nature of the State's case, as well as the credibility problems of all the main witnesses, we agree with petitioner that the error was not harmless.[10]

A violation of a defendant's Sixth Amendment right to confront the witness is not *per se* reversible error; instead, this Court must determine whether the error was harmless beyond a reasonable doubt. State v. Graham, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994); see also State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985) (erroneous admission of hearsay evidence subject to harmless error analysis). Moreover, whether an error is harmless depends on the particular circumstances of the case. State v. Mitchell, 286 S.C. at 573, 336 S.E.2d at 151. Error is only harmless "when it 'could not reasonably have affected the result of the trial.'" Id. (citation omitted).

[10] We note the State contends certiorari was improvidently granted because petitioner failed to **separately** challenge the Court of Appeals' harmless error analysis. We disagree. Petitioner maintained in the petition for rehearing to the Court of Appeals, as well as in the petition for a writ of certiorari, that the error by the trial court was not harmless. The argument is also made in petitioner's brief to this Court. The Appellate Court Rule regarding certiorari to the Court of Appeals states that "[a] question presented will be deemed to include every subsidiary question fairly comprised therein." Rule 226(d)(2), SCACR. Because petitioner specifically raised a question regarding the admission of hearsay, a harmless error argument is "a subsidiary question fairly comprised" within that issue.

We find the hearsay evidence admitted in the instant case almost certainly affected the result of the trial and therefore could not be harmless. Hill's statement to Hicks was a crucial piece of evidence linking petitioner both to the scene of the crime and the murder weapon. The scant physical evidence in this case includes a shoeprint which connected Stevens – not petitioner – to the scene. Stevens was also the only person witnesses positively identified running from the scene. Moreover, there are significant credibility problems with the fact witnesses (including petitioner). All were involved with crack cocaine on the night in question and did not initially give informative statements to the authorities. Often, cooperation with police on this investigation came only after several witnesses had been jailed on other charges and were facing prison time themselves. In sum, because the hearsay statement was made by petitioner's co-defendant, the case involved mostly circumstantial evidence, and the dismal credibility of many of the witnesses, we hold the erroneous admission of Hill's statement through Hicks was not harmless.

Accordingly, we reverse the Court of Appeals' finding of harmless error and remand to the trial court for a new trial.

CONCLUSION

In sum, we vacate the portion of the Court of Appeals' opinion discussing Crawford v. Washington. See State v. Davis, 364 S.C. at 373-401, 613 S.E.2d at 765-80. Additionally, we reverse the ruling that Hill's statement to Hicks was admissible as an excited utterance exception to the hearsay rule. We also reverse the finding that any error by the trial court admitting the statement was harmless. The Court of Appeals' decision is therefore

VACATED IN PART; REVERSED; AND REMANDED.

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

The Supreme Court of South Carolina

In the Matter of O. Doyle Martin, Respondent.

ORDER

On or about October 10, 2006, respondent was indicted in the United States District Court for the District of South Carolina on thirty (30) counts of mail fraud in violation of 18 U.S.C.A. § 1341 (2000). The Office of Disciplinary Counsel (ODC) has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR.

The petition is granted. Pursuant to Rule 17, RLDE, respondent is suspended from the practice of law in this State until further order of the Court.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT
Pleicones, J., not participating

Columbia, South Carolina
November 8, 2006

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

George Franklin Sosbee, Jr., Appellant.

Appeal From Pickens County
Edward W. Miller, Circuit Court Judge

Opinion No. 4177
Submitted October 1, 2006 – Filed November 13, 2006

AFFIRMED

Assistant Appellate Defender Tara S. Taggart, of Columbia; 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

Norman Mark Rapoport, all of Columbia; and Solicitor Robert M. Ariail, of Greenville; for Respondent.

BEATTY, J.: George Franklin Sosbee, Jr., was convicted of assault with intent to commit criminal sexual conduct with a minor in the first degree and committing a lewd act upon a child. He was sentenced to life without the possibility of parole and fifteen years imprisonment, respectively. He appeals, arguing the trial court erred in: (1) sentencing him to life without the possibility of parole; and (2) allowing the State to amend an indictment where it changed the nature of the offense. We affirm.[1]

FACTS

In 2003, Sosbee lived with the grandmother of an eight-year-old girl (the victim). In September or October of that year, the victim told her mother and another female adult that a few months prior, Sosbee touched her in her private parts with his hand and tongue and threatened to put her grandparents and aunts in jail if she told anyone. The victim was examined by a physician, but there were no signs of injury. Sosbee was charged with committing a lewd act on a minor and criminal sexual conduct with a minor, first degree. Because Sosbee had a prior conviction for criminal sexual conduct, second degree, the State served notice that it intended to seek a sentence of life without the possibility of parole.

At trial, the victim testified Sosbee touched her on her privates with his hand and tongue. On cross-examination, the victim also stated that all of the touching occurred while she was clothed. At the end of the State's case, Sosbee moved for a directed verdict as to both charges, arguing there was no evidence of penetration and any alleged touching could not meet the statutory definition of sexual battery because the victim was wearing clothing and there was no skin-to-skin contact. The State moved to amend the criminal sexual conduct with a minor indictment to assault with intent to commit

[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

criminal sexual conduct with a minor, first degree. Sosbee objected to the proposed amendment, and the parties discussed the matter in chambers. The court granted the amendment, and Sosbee noted his objection for the record. Sosbee was convicted of assault with intent to commit criminal sexual conduct with a minor, first degree, and committing a lewd act upon a minor.

During sentencing, the State informed the court that Sosbee had a 1993 conviction for criminal sexual conduct, second degree, and a "DUI record in 1983, and a criminal domestic violence record in 1995." Sosbee objected, arguing the prior criminal sexual conduct conviction should not be used to enhance his sentence to life imprisonment without the possibility of parole because it was an uncounseled guilty plea. The court sentenced Sosbee to life imprisonment without the possibility of parole. He appeals.

LAW/ANALYSIS

I. Sentencing

Sosbee argues the trial court erred in sentencing him to life imprisonment without the possibility of parole because assault with intent to commit criminal sexual conduct with a minor was not a "most serious" offense that would qualify him for the sentence under the "two strikes" statute. He also argues that the prior conviction should not have been used for sentence enhancement because it was the result of an uncounseled conviction. We disagree.

A. Most Serious Offense

Sosbee initially argues the trial court erred in sentencing him to life without the possibility of parole because, although criminal sexual conduct with minors in any degree is a "most serious" offense in section 17-25-45(C)(1), **assault with intent** to commit criminal sexual conduct with a

minor, first degree, is not specifically enumerated in the statute. Thus, he argues, it is not a "most serious" offense.[2]

Sosbee's argument lacks merit. Section 17-25-45 clearly designates criminal sexual conduct with a minor as a "most serious" offense. Section 17-25-45 also designates any "attempt, for any offense enumerated in this item" as a most serious offense. S.C. Code Ann. § 17-25-45(C)(1) (Supp. 2005). An assault with intent to commit criminal sexual conduct with a minor in the first degree is more aptly designated as an "attempt" to commit criminal sexual conduct with a minor. See State v. LaCoste, 347 S.C. 153, 165-66, 553 S.E.2d 464, 471 (Ct. App. 2001) ("Assault is an **attempted** battery or an 'unlawful **attempt** or offer to commit a violent injury upon another person, coupled with the present ability to complete the attempt or offer by a battery.'" (emphasis added) (quoting State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000))); see also 6 Am. Jur. 2d Assault & Battery § 1 (1999) (defining assault as the "intentional **attempt** by a person, by force or violence, to do an injury to the person of another, or as any **attempt** to commit a battery, or any threatening gesture showing in itself or by words accompanying it an immediate intention, coupled with a present ability, to commit a battery"); Black's Law Dictionary 109; 123 (7th ed. 1999)(defining assault as an "**attempt** to commit battery, requiring the specific intent to cause physical injury;" and defining attempt as "an overt act that is done with the intent to commit a crime but that falls short of completing the crime").

Moreover, in construing these related statutes together, it is clear that the legislature intended this offense to be considered a "most serious" offense. State v. Gordon, 356 S.C. 143, 152-53, 588 S.E.2d 105, 110 (2003)

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[2] A person must be sentenced to life imprisonment without the possibility of parole when convicted of a most serious crime and the person has one or more prior convictions for a most serious crime, or when convicted of a serious crime and the person has two or more convictions for a serious crime. S.C. Code Ann. § 17-25-45(A), (B) (2003 & Supp. 2005). Included in the list of "most serious" offenses is criminal sexual conduct, criminal sexual conduct with minors, and assault with intent to commit criminal sexual conduct, first and second degree. S.C. Code Ann. § 17-25-45(C)(1) (Supp. 2005).

("In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect . . . if possible we will construe a statute so as to escape an absurd result and carry the legislative intention into effect"). Criminal sexual conduct with a minor is defined in South Carolina Code section 16-3-655.[3] Section 16-3-655 specifically designates the prohibited conduct as **criminal sexual conduct in the first degree or criminal sexual conduct in the second degree**. Both of these are listed as most serious offenses in section 17-25-45. As previously stated, section 17-25-45 also

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[3] §16-3-655 Criminal sexual conduct with minors.

(A) A person is guilty of **criminal sexual conduct in the first degree** if:
(1) the actor engages in sexual battery with the victim who is less than eleven years of age; or
(2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).

Upon conviction, the actor must be punished by imprisonment for not less than ten years nor more than thirty years, no part of which may be suspended or probation granted.

(B) A person is guilty of **criminal sexual conduct in the second degree** if the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age.

(C) A person is guilty of **criminal sexual conduct in the second degree** if the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim.

S.C. Code Ann. § 16-3-655 (Supp. 2005) (emphasis added).

designates any attempt to commit these offenses as most serious. See State v. Morgan, 352 S.C. 359, 367, 574 S.E.2d 203, 207 (Ct. App. 2002) (noting that where the terms of a statute are clear, the court must apply the plain meaning of those terms, and that the statute should receive a "practical, reasonable, and fair interpretation consonant with purpose, design, and policy of lawmakers"); see also State v. Brock, 335 S.C. 267, 271, 516 S.E.2d 212, 214 (Ct. App. 1999) (citing sections 16-3-655 and 16-3-656 to define first-degree assault with intent to commit criminal sexual conduct with a minor). Accordingly, we find no error in designating assault with intent to commit criminal sexual conduct with a minor as a "most serious" offense.

B. Uncounseled Plea

Sosbee next argues the trial court erred in sentencing him to life without the possibility of parole because the prior sentence used to enhance his sentence was the result of an uncounseled guilty plea.

The use of an uncounseled conviction resulting in a sentence of imprisonment to enhance the punishment in a subsequent conviction violates the Sixth and Fourteenth Amendments to the United States Constitution. Nichols v. United States, 511 U.S. 738, 746-47 (1994). However, an uncounseled conviction that does not result in actual imprisonment may be used to enhance a subsequent conviction. Id. at 748-49; State v. Wickenhauser, 309 S.C. 377, 380, 423 S.E.2d 344, 346 (1992) (holding that the use of the defendant's prior, uncounseled DUI conviction was properly used to enhance his punishment in a subsequent offense where the prior sentence was suspended upon the service of probation and he was not incarcerated); State v. Chance, 304 S.C. 406, 407-08, 405 S.E.2d 375, 376 (1991) (noting that the trial court could enhance the defendant's DUI conviction with a prior uncounseled guilty plea where the defendant was not actually incarcerated). It is the defendant's burden to prove by a preponderance of the evidence that a prior conviction is constitutionally defective or invalid when objecting to the use of the prior conviction to enhance punishment of a subsequent conviction. State v. Payne, 332 S.C. 266, 269, 504 S.E.2d 335, 336 (Ct. App. 1998).

Sosbee testified at his pre-trial competency hearing that he had a prior conviction for "another sexual thing, but it was with an older woman." Sosbee stated he pleaded guilty to it because he did not know what was going on, he did not have a lawyer, and the State offered him three years probation. Sosbee stated he completed his probationary term. At the sentencing hearing in the present case, Sosbee's attorney objected to the use of this prior sexual assault conviction because it was the result of an uncounseled plea. The trial court denied the motion.

We find no merit to Sosbee's allegations that his prior uncounseled conviction should not have been used for sentence enhancement. Sosbee did not present any evidence that he was actually incarcerated for the prior, uncounseled conviction. The only evidence before the trial court was Sosbee's own testimony that he served only a probationary sentence. Because Sosbee failed to meet his burden of proving the use of his prior, uncounseled plea was unconstitutional and because the record indicates that the prior conviction did not result in imprisonment, we find no error with the trial court's use of the prior conviction for sentence enhancement.

II. Amendment of the Indictment

Sosbee asserts the trial court only ordered the indictment for criminal sexual conduct with a minor, first degree, to be amended to assault with intent to commit criminal sexual conduct with a minor, first degree, pursuant to sections 16-3-655(1) and 16-3-656. Because Sosbee's sentencing sheet erroneously indicated that he was charged with assault with intent to commit criminal sexual conduct, first degree, in violation of section 16-3-656 with a CDR code of 0253, and because the heading inaccurately lists a violation of section 16-3-652 (criminal sexual conduct in the first degree) with a CDR code of 160, Sosbee argues the trial court erred in allowing the amendment of the indictment because it amounted to a "bait and switch." We disagree.

"Amendments to an indictment are permissible if: (1) they do not change the nature of the offense; (2) the charge is a lesser included offense of the crime charged in the indictment; or (3) the defendant waives presentment to the grand jury and pleads guilty." State v. Means, 367 S.C. 374, 385-86,

626 S.E.2d 348, 355 (2006); S.C. Code Ann. § 17-19-100 (2003) (providing that the trial court may amend the indictment if there is a defect in the indictment or a variance in the charged offense and the proof, as long as the amendment does not change the nature of the offense charged).

Sosbee asserts the "erroneous" listing on his sentencing sheet of the criminal sexual conduct offenses that pertain to adults, instead of the offenses that pertain to minors, changed the nature of the offense charged and was an impermissible amendment.[4] However, it is undisputed that the court ordered the indictment to be amended to assault with intent to commit criminal sexual conduct **with a minor**, first degree. The court charged the jury on the law of assault with intent to commit criminal sexual conduct with a minor, and the jury found Sosbee guilty of assault with intent to commit criminal sexual conduct with a minor. During sentencing, the court specifically indicated Sosbee was being sentenced to life without the possibility of parole for the conviction of assault with intent to commit criminal sexual conduct with a minor, first degree.

Sosbee does not allege that the amendment itself changed the nature of the offense charged. Sosbee's only complaint is with the "erroneous" listing of charges and CDR codes on the sentencing sheet. We agree with the State that the charges and CDR codes listed on the sentencing sheet were scrivener's errors. The sentencing sheet is not part of the indictment and does not affect the nature of the offense charged.

CONCLUSION

Assault with intent to commit criminal sexual conduct with a minor, like any "attempt" crime listed in section 17-25-45, is a "most serious"

[4] Sosbee does not challenge the trial court's order amending the indictment from criminal sexual conduct with a minor, first degree, to assault with intent to commit criminal sexual conduct with a minor. Thus, the amendment is the law of the case. State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (holding that an unchallenged ruling, right or wrong, is the law of the case).

offense as defined by statute. Sosbee's prior uncounseled plea resulted in no jail time, so it was appropriate for the trial court to consider the conviction to enhance his punishment to life without the possibility of parole. Finally, we find the erroneous listing of charges and CDR codes on Sosbee's sentencing sheet was a scrivener's error.

Accordingly, the convictions and sentences of Sosbee are

AFFIRMED.

GOOLSBY and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

O. Grady Query, Appellant,

v.

Carmen Burgess and State of South Carolina, Respondents.

Appeal From Charleston County
Mikell R. Scarborough, Master-In-Equity

Opinion No. 4178
Submitted October 1, 2006 – Filed November 13, 2006

AFFIRMED

Kerry W. Koon and Philip A. Middleton, of Charleston, for Appellant.

Assistant Deputy Attorney General J. Emory Smith, of Columbia; Ben A. Hagood, Jr., of Mt. Pleasant, for Respondents.

KITTREDGE, J.: This is an action to determine title to real property. Appellant O. Grady Query brought a declaratory judgment action against respondents Carmen Burgess and the State of South Carolina seeking to establish ownership over certain marshlands abutting his Folly Beach property. The master found Query did not own the marshlands. The master concluded the State owned the marshlands based on the "public trust doctrine." Query appeals, and we affirm.[1]

I.

Burgess, a Folly Beach property owner, asked Query, a fellow Folly Beach property owner, for permission to build a dock across certain marshlands abutting Query's property so Burgess could access the Folly River. When Query refused, Burgess sought a permit from the Office of Coastal Resource Management to build a dock across the marshlands. In response, Query brought a declaratory judgment action against Burgess and the State[2] seeking to establish title over the marshlands. At trial, Query claimed ownership of the marshlands because the State specifically granted the marshlands to one of his predecessors in title.

Query introduced a 1696 and 1786 grant (with accompanying plat), which he argued showed the State's intent to grant one of his predecessors in title ownership of the marshlands. Burgess and the State asserted Query's evidence failed to rebut the presumption the State held the marshlands in fee simple for the benefit of the public. The master agreed with Burgess and the

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

[2] "Any person claiming an interest in tidelands . . . may institute an action against [the State] for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State." S.C. Code Ann. § 48-39-220(A) (Supp. 2005).

State and found the State held title to the marshlands in fee simple. Query appealed this finding.

II.

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "To make this determination we look to the main purpose of the action as determined by the complaint." Estate of Revis v. Revis, 326 S.C. 470, 476, 484 S.E.2d 112, 115 (Ct. App. 1997). Where, as here, the main purpose of the complaint concerns the determination of title to real property, it is an action at law. Lowcountry Open Land Trust v. State, 347 S.C. 96, 101, 552 S.E.2d 778, 781 (Ct. App. 2001) (citing Wigfall v. Fobbs, 295 S.C. 59, 60, 367 S.E.2d 156, 157 (1988) ("The determination of title to real property is a legal issue.")). In an action at law, "we will affirm the master's factual findings if there is any evidence in the record which reasonably supports them." Id. at 101-02, 552 S.E.2d at 781.

III.

Query argues the 1786 grant and accompanying plat evince the State's intent to grant Query's predecessor in title ownership over the marshlands.

"[T]he State holds presumptive title to land below the high water mark." McQueen v. S.C. Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003). When property is bounded by a tidal navigable waterway[3] "the boundary line is the high water mark, in the absence of more specific language showing that it was intended to go below high water mark, and the portion between high and low water mark remains in the State in trust for the benefit of the public." State v. Hardee, 259 S.C. 535, 539, 193 S.E.2d 497, 499 (1972). "The State may, however, grant private individuals an

[3] Query concedes the Folly River is a tidal navigable waterway.

ownership interest in tidelands." Lowcountry, 347 S.C. at 102, 552 S.E.2d at 781. To establish ownership of tidelands or marshlands, a claimant must show (1) the claimant's predecessors in title possessed a valid grant, and (2) the grant's language was sufficient to convey title to land below the high water mark. Id. at 103, 552 S.E.2d at 782. "A deed or grant by [the State] is construed strictly in favor of the State and general public and against the grantee." Hardee, 259 S.C. at 539, 193 S.E.2d at 499.

The 1786 grant on which Query relies provides:

> We have granted, and by these Presents do grant unto the said Martha Samways, her Heirs and Assigns, a Plantation or Tract of Land containing one thousand nine hundred [and] forty Acres being the Surplus contained in a Grant for the Folly Islands heretofore Granted to William Rivers on the [ninth] of September 1696 for seven hundred acres or thereabouts but upon a Resurvey found to contain within the lines of the same two thousand Six hundred and Forty having such Shape, Form and Marks, as are represented by a Plat hereunto annexed, together with all Woods, Trees, Waters, Water-courses, Profits, Commodities, Appurtenances, and Hereditaments, whatsoever thereunto belonging, To have and to hold the said Tract of one Thousand nine hundred [and] forty Acres of Land, and all and singular other the Premises hereby granted unto the said Martha Samways her Heirs and Assigns for ever . . . .

The accompanying plat includes the following surveyor's note:

> I have caused to be admeasured [and] resurveyed unto Martha Samways . . . an Island situate in the district of Charleston Granted to Wm. Rivers the [ninth] Sept. 1696 – for the Folly Islands for seven

> hundred acres or thereabouts, but upon the said resurvey found to contain within the lines of the same two thousand six hundred [and] forty acres – nineteen hundred [and] forty acres thereof being surplus, [and] hath such Form, Marks, Buttings [and] Boundings as the above Plat represents.

The plat roughly delineates Folly Island. The plat contains the bare bones of a survey and is neither precise nor detailed.

The master examined the 1786 grant and accompanying plat and found they lacked the requisite specificity to indicate the State's intent to grant the marshlands to one of Query's predecessors in title. The master noted the absence of terms consonant with granting property below the high water mark, such as "marsh," "marshland," "high-water mark," or "low-water mark." Based on these factual findings, the master reasonably determined the 1786 grant and accompanying plat did not demonstrate the State's intent to grant title to the marshlands. The master thus found the plat was not sufficiently detailed to rebut the State's presumption of title to land below the high water mark. See Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 398, 252 S.E.2d 133, 136 (1979) (holding that an exceptionally detailed and mathematically precise plat can rebut the State's presumption of title to marshes). Because there is evidence to support the master's findings, his order is

AFFIRMED.[4]

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

[4] In light of this disposition, we need not address Query's remaining issue.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lea Ann Wilkinson (surviving spouse) for Scott R. Wilkinson (deceased employee), Respondent,

v.

Palmetto State Transp. Co., Employer, and Canal Insurance Co., Carrier, Appellants.

Appeal From Pickens County
John C. Few, Circuit Court Judge

Opinion No. 4179
Submitted October 1, 2006 – Filed November 20, 2006

AFFIRMED

Duke K. McCall, Jr., of Greenville, for Appellants.

Kathryn Williams, of Greenville, for Respondent.

WILLIAMS, J.: Palmetto State Transportation Company and its carrier, Canal Insurance Company (jointly referred to as Palmetto), appeal a circuit court order affirming the Workers' Compensation Commission's (Commission) award of benefits to Scott Wilkinson's dependents. Palmetto argues the trial court erred in affirming the Commission's: (1) finding that an employer/employee relationship existed between Palmetto and Scott; (2) denial of a motion to include additional evidence; (3) finding that an occupational disability policy purchased by Scott is a collateral source; (4) denial of a motion to join Zurich American Insurance Company (Zurich), the provider of Scott's occupational disability policy, as a party defendant; and (5) denying the testimony of Gary Smith, Palmetto's expert. We affirm.

FACTS

On May 16, 2002, while driving a transfer truck, Scott Wilkinson was involved in a fatal accident in Virginia.

Scott's spouse, Lea Ann Wilkinson, contends that during the time of the accident, Scott was an employee of Palmetto. As such, she and the couple's son are entitled to death benefits from Palmetto's workers' compensation carrier under the Workers' Compensation Act. Palmetto argues that at the time of his death, Scott was an independent contractor and not an employee; therefore, Lea Ann is not entitled to receive benefits from Palmetto. To support this argument, Palmetto contends in 1998, Scott was hired as an employee, but in May 1999 and again in 2000, the parties signed a contract in which Scott was named as an independent contractor and Palmetto as the carrier.

Palmetto further avers that even if this Court were to find an employer/employee relationship existed, Palmetto's liability should be offset by any benefits paid to Lea Ann by the occupational disability policy Scott purchased from Zurich. Lea Ann argues this policy is wholly a collateral source; therefore, Palmetto is not entitled to receive any credit from payments made by Zurich.

On February 27, 2004, the Commissioner found an employer/employee relationship existed between Scott and Palmetto at the time of his death, and Lea Ann and the couple's child were entitled to receive death benefits under Palmetto's workers' compensation policy. In addition, the Commissioner held that Scott's occupational disability policy constituted a collateral source. Thus, Palmetto was not entitled to receive credit for benefits paid from that policy, nor could Palmetto receive benefits directly from that policy.

Prior to this ruling, Palmetto filed a motion to add Zurich as an additional party referencing the occupational disability policy purchased by Scott. In addition, Palmetto filed a motion to include additional evidence. The Commissioner denied both motions.

Consequently, Palmetto appealed to the Full Commission, asserting that the Commissioner erred in denying these motions. On September 28, 2004, the Commission's Appellate Panel affirmed and adopted the Commissioner's order. On September 25, 2005, Palmetto appealed to the circuit court, which affirmed the Commission. Palmetto now appeals to this Court.

STANDARD OF REVIEW

The Administrative Procedures Act applies to appeals from decisions of the Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). In an appeal from the Commission, neither this Court nor the circuit court may substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error of law. Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002).

"Any review of the [C]ommission's factual findings is governed by the substantial evidence standard." Lockridge v. Santens of Am., Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001). Accordingly, we limit review to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law. Corbin, 351 S.C. at 617, 571 S.E.2d at 95.

"Substantial evidence is evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the full commission reached." Lockridge, 344 S.C. at 515, 544 S.E.2d at 844. "The 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" Lee v. Harborside Café, 350 S.C. 74, 78, 564 S.E.2d 354, 356 (Ct. App. 2002) (quoting Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)).

However, if any factual issue before the Commission involves a jurisdictional question, this Court is not bound by the Commission's findings of fact; but it can take its own view of the preponderance of the evidence on that issue. Wilson v. Georgetown County, 316 S.C. 92, 94, 447 S.E.2d 841, 842 (1994).

LAW/ANALYSIS

A. Employer/employee relationship

Palmetto initially argues the trial court and the Commission erred in concluding that an employer/employee relationship existed between Palmetto and Scott. We disagree.

Unless an employment relationship existed between the parties at the time of the alleged injury, an award cannot be granted. Alewine v. Tobin Quarries, 206 S.C. 103, 109, 33 S.E.2d 81, 83 (1945). Whether such a relationship exists is a jurisdictional question; therefore, this Court can take its own view of the preponderance of the evidence. S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995). However, doubts of jurisdiction are to be resolved in favor of inclusion rather than exclusion. Horton v. Baruch, 217 S.C. 48, 56, 59 S.E.2d 545, 548 (1950).

Palmetto places great weight on the agreement the parties signed in May 1999 and again in 2000, in which Scott was named as an independent contractor and Palmetto as the carrier. However, Palmetto forgets neither the

descriptions of relationships as set forth in the parties' contract, nor the language in the contract declaring the parties to be that of independent contractor/carrier is binding on this Court. Kilgore Group Inc. v. S.C. Employment Sec. Comm'n, 313 S.C. 65, 69, 437 S.E.2d 48, 50 (1993). Rather, the determination of whether the worker is an employee or independent contractor is a fact-specific matter resolved by applying certain established principles. Nelson v. Yellow Cab Co., 349 S.C. 589, 594 564 S.E.2d 110, 112-13 (2002).

The test to determine whether a claimant is an employee or an independent contractor is if "the alleged employer has the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment." S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 547, 459 S.E.2d 302, 303 (1995) (internal quotes omitted). Four factors determine the right of control.

They are: (1) direct evidence of right to or exercise of control, (2) method of payment, (3) furnishing of equipment, and (4) right to fire. Tharpe v. G.E. Moore Co., 254 S.C. 196, 200, 174 S.E.2d 397, 399 (1970). The presence of any one of the factors is sufficient proof of an employer/employee relationship; on the other hand, the absence of any one of the factors is at most mild influential evidence of contractorship. Dawkins v. Jordan, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000).

In analyzing these factors, the Court recognizes that the Workers' Compensation Act favors the inclusion of employers and employees and not their exclusion. Horton, 217 S.C. at 56, 59 S.E.2d at 548. With this introduction in mind, we now turn our attention to these four factors.

The first factor is whether direct evidence exists of the right to, or the actual exercise of, control. If an alleged employer has the right to control and sets out the manner in which the work is to be accomplished, this is direct evidence of an employer/employee relationship. Young v. Warr, 252 S.C. 179, 189-90, 165 S.E.2d 797, 802 (1969). Palmetto contends it lacked control over Scott because Scott could refuse loads and consequently worked on his own schedule. We find this argument to be without merit.

Palmetto exercised its control over Scott by requiring Scott to exclusively carry its loads. When Scott carried a load for Palmetto, he was instructed on when and where to pick up the load as well as how and when to deliver the load. Moreover, Palmetto required Scott to apply the company logo to his truck. This is sufficient evidence to prove that Palmetto not only had the right to control Scott but exercised this control. See Nelson v. Yellow Cab Co., 349 S.C. 589, 597-98, 564 S.E.2d 110, 114 (2002) (Cab company had the right of control even when the cab driver could work as little as he wanted, drove the cab in any part of the city he chose, and could set his own schedule.).

The second factor for consideration is the method of payment; this factor indicates a lack of an employer/employee relationship. Like other employed drivers, Palmetto paid Scott by the mile. However, unlike other employed drivers, Scott's rate per mile was higher, and Palmetto made no deductions for either social security or income taxes. Moreover, unlike other employed drivers, Scott had to pay various expenses such as fuel costs, service fees, and toll fees. These facts indicate that Scott was not paid like other employed drivers.

The third factor is whether Palmetto furnished Scott's equipment; this factor indicates that Scott was an employee. Although Scott purchased his own tractor, Palmetto supplied the trailer. In addition, Palmetto prohibited Scott from using the tractor to carry loads for any other company. Moreover, Scott drove a truck bearing the Palmetto logo.

Like all of Palmetto's drivers, Palmetto required Scott to carry a global positioning system (GPS) in his truck. Palmetto's safety and maintenance director, Dennis Mersereau, testified that by employing this system, Palmetto would be able to determine Scott's location anytime. These facts show that Palmetto supplied equipment to Scott.

The final factor is Palmetto's right to fire, which indicates that Scott was not an independent contractor. The unconditional power to terminate the alleged employer/employee relationship, without liability, is consistent with

an employer/employee relationship. Tharpe v. G.E. Moore Co., 254 S.C. 196, 201, 174 S.E.2d 397, 399 (1970). There were many circumstances in which Palmetto could fire Scott.

For example, Mr. Mersereau testified Scott was required to work exclusively for Palmetto, and if he were to transport loads for another company, he would be terminated. Mr. Mersereau also testified that even though Scott could refuse loads, if he refused too many, Scott would be terminated. Palmetto could end the relationship if it did not approve of the manner in which Scott performed his work. Additionally, Scott, like any other employee, could terminate his position with Palmetto at will.

Keeping in mind the Workers' Compensation Act favors the inclusion of employers and employees and not their exclusion, and the presence of any one of the factors is sufficient proof of an employer/employee relationship, we hold an employer/employee relationship existed between Scott and Palmetto.

B. Motion to include additional evidence

Palmetto next argues the Commission and the trial court erred by not allowing Palmetto to supplement the record with additional evidence. We disagree.

For additional evidence to be introduced, the moving party must establish that the additional evidence sought to be introduced "was not known to the moving party at the time of the first hearing, [or] by reasonable diligence the new evidence could not have been secured, and the discovery of the new evidence is being brought to attention of the Commission immediately upon its discovery." 23A S.C. Code Ann. Regs. 67-707 (Supp. 2005). Additionally, the admission or exclusion of evidence is within the sound discretion of the Commission. Holcombe v. Dan River Mills/Woodside Div., 286 S.C. 223, 225-26, 333 S.E.2d 338, 340 (Ct. App. 1985).

By motion, Palmetto sought to introduce into the record its own additional business records and an affidavit from Mr. Mersereau.

Although the hearing in this matter occurred during August 2003, the business records were created during or before May 2002. Thus, the records were in existence prior to the hearing and could have been discovered prior to the hearing with due diligence. Likewise, Mr. Mersereau's affidavit is exclusively based on evidence that existed prior to the hearing and that could have been discovered and submitted prior to the hearing with due diligence.

Additionally, the records sought to be admitted were subpoenaed by the claimant during June 2002, and Palmetto failed to produce the records claiming that they did not exist. Based on Palmetto's failure the trial court concluded that allowing the untimely inclusion of the records would prejudice the claimant. We agree.

C. Occupational disability policy

Palmetto next argues the Commission and the trial court erred in holding Scott's occupational disability policy was a collateral source. We disagree.

Palmetto argues it should receive credit for any payments made to Lea Ann by the occupational disability policy Scott purchased through Zurich. Lea Ann argues the Zurich policy is a wholly collateral source; therefore, Palmetto should not be able to receive credit for payments made by Zurich.

The collateral source rule states that compensation from an independent source will not reduce the payment for which another party is liable to the injured party. Atkinson v. Orkin Extermination Co., Inc., 361 S.C. 156, 172, 604 S.E.2d 385, 393 (2004). Unfortunately, an exhaustive search of South Carolina law has failed to yield an answer to whether an occupational disability policy would be considered a collateral source. However, North Carolina courts have addressed this issue. Our courts give great weight to North Carolina's decisions in workers' compensation cases because South Carolina adopted large portions of North Carolina's workers' compensation

legislation. Munn v. Nucor Steel, Div. of Nucor Corp., 336 S.C. 28, 31, 518 S.E.2d 289, 290 (Ct. App. 1999); See Anderson v. Baptist Med. Ctr. Center, 343 S.C. 487, 496-97, 541 S.E.2d 526, 530 (2001).

North Carolina courts have ruled that an employer is entitled to receive credit only for any payments made by the *employer* to the injured employee which were not payable when made. Jenkins v. Piedmont Aviation Servs., 557 S.E.2d 104, 108-109 (N.C. App. 2001) (emphasis added). This credit is inapplicable to all other payments the employee may receive from outside sources. Id.

It is undisputed that Scott paid all of the premiums for the Zurich policy, and Palmetto did not contribute in any way to the premiums. Therefore, Palmetto should not receive any credit for payments made by Zurich.

Additionally, it flies in the face of equity to grant Palmetto a windfall benefit by allowing it to take credit against any sums Lea Ann received from other sources. This is especially true in light of the fact that Scott paid all the premiums, and Palmetto contributed in no way to the Zurich policy.

For these reasons, we hold that Palmetto is not entitled to receive credit for any payments made by Zurich.

D. Motion to join Zurich

Palmetto next contends the Commission and the trial court erred in not allowing it to add Zurich as a party defendant. Palmetto argues two alternative grounds for this contention. First, the Zurich policy was a workers' compensation policy, and second, Zurich would reimburse Palmetto for any benefits Palmetto paid. We disagree.

The Zurich policy states: "This Policy is not intended to provide coverage for Workers' Compensation benefits." As noted above, the Zurich policy was an outside source. As such, Palmetto is not entitled to receive any reimbursement for payments made by Zurich.

In support of its second contention, Palmetto places great weight on a clause in Zurich's policy, which would allow Palmetto to receive benefits from Zurich if Palmetto is determined liable for workers' compensation benefits[1]. However, this clause has no binding effect on this Court.

The parties are free to contract as they wish, but this freedom is not absolute. Statutory provisions that are applicable to a contract become part of that contract. Boyd v. State Farm Mut. Auto. Ins. Co., 260 S.C. 316, 319, 195 S.E.2d 706, 707 (1973). If a contract provision contravenes an applicable statute, that provision is invalid, and the statute prevails. Id.

Under the Workers' Compensation Act, an agreement between an employee and employer for the employee to pay any portion of premiums for benefits required by the Workers' Compensation Act is invalid. See S.C. Code Ann. § 42-5-200 (1976). Additionally, no contract between an employee and employer or an employee and a third party can operate to relieve the obligations created under the Workers' Compensation Act. See S.C. Code Ann. § 42-1-610 (1976).

As already established, Scott was an employee of Palmetto at the time of his death, and any credit received by Palmetto from the Zurich policy, for which Scott alone paid the premiums would have the effect of replacing the workers' compensation benefits Palmetto is required to pay under the Workers' Compensation Act. Permitting Palmetto to recover these payments would be contrary to South Carolina law, and any provision of the Zurich policy that would allow such payment would violate the Workers' Compensation Act and therefore would be void.

[1] The clause states: "If a Covered person is determined by a court of law . . . to be covered under workers' compensation for a Covered Loss, any benefits for which the Covered person is eligible are payable to the person who was determined to be the Covered Person's employer. . . ."

The Zurich policy has no bearing on the workers' compensation claims asserted by Scott's dependents. As such, it is unnecessary to add Zurich as a party defendant because it has no interest in the matter.

E. Testimony of Gary Smith, Palmetto's expert

Palmetto's final argument is that the Commission and the trial court erred in not allowing the testimony of Gary Smith. We disagree.

Palmetto sought to introduce Smith's testimony to show the construction, purpose, and effect of the Zurich policy. Specifically, through Smith, Palmetto wished to show that if Palmetto is liable for workers' compensation benefits, the Zurich policy would reimburse Palmetto.

Smith's testimony was unnecessary because the Zurich policy has no effect on the workers' compensation benefits sought, and the policy provides no credit or benefits to Palmetto. Thus, the trial court did not err in excluding Smith's testimony.

CONCLUSION

Accordingly, the circuit court's decision is

AFFIRMED.[2]

GOOLSBY and BEATTY, JJ., concur.

[2] We decide this case without oral arguments pursuant to Rule 215, SCACR.