Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6623

M E D I A R E L E A S E

June 24, 2019

The Judicial Merit Selection Commission is accepting applications for the judicial offices listed below:

The term of office currently held by the Honorable George C. Buck James Jr., Justice of the Supreme Court, Seat 5, will expire July 31, 2020.

The term of office currently held by the Honorable Stephanie Pendarvis McDonald, Judge of the Court of Appeals, Seat 7, will expire June 30, 2020.

The term of office currently held by the Honorable Alison Renee Lee, Judge of the Circuit Court, At-Large, Seat 11, will expire June 30, 2020.

The term of office currently held by the Honorable Thomas A. Russo, Judge of the Circuit Court, At-Large, Seat 12, will expire June 30, 2020.

A vacancy will exist in the office currently held by the Honorable Larry B. Hyman Jr., Judge of the Circuit Court, At-Large, Seat 13, upon his retirement on or before June 30, 2020. The successor will serve a new term of that office, which expires June 30, 2026.

A vacancy will exist in the office currently held by the Honorable Gordon B. Jenkinson, Judge of the Family Court, Third Judicial Circuit, Seat 3, upon his retirement on or before December 31, 2020. The successor will serve the remainder of the unexpired term, which expires June 30, 2025.

The term of office currently held by the Honorable Michael S. Holt, Judge of the Family Court, Fourth Judicial Circuit, Seat 3, will expire June 30, 2020.

A vacancy exists in the office formerly held by the Honorable Dorothy Mobley Jones, Judge of the Family Court, Fifth Judicial Circuit, Seat 1, upon her retirement on November 30, 2018. The successor will serve the remainder of the unexpired term, which expires June 30, 2022.

The term of office currently held by the Honorable Debra A. Matthews, Judge of the Family Court, Sixth Judicial Circuit, Seat 2, will expire June 30, 2020.

A vacancy will exist in the office currently held by the Honorable Jocelyn B. Cate, Judge of the Family Court, Ninth Judicial Circuit, Seat 5, upon her retirement on or before June 30, 2020. The successor will serve a new term of that office, which expires June 30, 2026.

A vacancy will exist in the office currently held by the Honorable Tommy B. Edwards, Judge of the Family Court, Tenth Judicial Circuit, Seat 3, upon his retirement on or before June 30, 2019. The successor will serve a new term of that office, which expires June 30, 2025.

The term of office currently held by the Honorable Tarita A. Dunbar, Judge of the Family Court, Thirteenth Judicial Circuit, Seat 5, will expire June 30, 2020.

A vacancy will exist in the office currently held by the Honorable Peter L. Fuge, Judge of the Family Court, Fourteenth Judicial Circuit, Seat 2, upon his retirement on or before December 31, 2019. The successor will serve a new term of that office, which expires June 30, 2022.

The term of office currently held by the Honorable Ronald R. Norton, Judge of the Family Court, Fifteenth Judicial Circuit, Seat 3, will expire June 30, 2020.

A vacancy will exist in the office currently held by the Honorable Kelly Pope-Black, Judge of the Family Court, At-Large, Seat 1. The successor will serve the remainder of the unexpired term, which expires June 30, 2025.

The term of office currently held by the Honorable Harold W. "Bill" Funderburk Jr., Judge of the Administrative Law Court, Seat 3, will expire June 30, 2020.

The term of office currently held by the Honorable Deborah Brooks Durden, Judge of the Administrative Law Court, Seat 4, will expire June 30, 2020.

The term of office currently held by the Honorable Dale E. Van Slambrook, Master-inEquity, Berkely County, will expire November 7, 2020.

In order to receive application materials, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions should be directed to the Judicial Merit Selection Commission as follows:

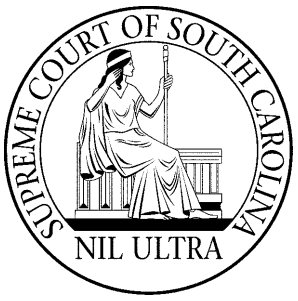
Erin B. Crawford, Chief Counsel Post
Office Box 142
Columbia, South Carolina 29202
ErinCrawford@scsenate.gov
(803) 212-6689

or

Lindi Putnam, JMSC Administrative Assistant, at (803) 212-6623 or
LindiPutnam@scsenate.gov.

The Commission will not accept applications after 12:00 Noon on Wednesday, July 24, 2019.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the Commission website at
http://www.scstatehouse.gov/JudicialMeritPage/JMSCMainPage.php.



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 26
June 26, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Care and Treatment of Kenneth Campbell, Petitioner.

Appellate Case No. 2016-001566

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Lancaster County
R. Knox McMahon, Circuit Court Judge

Opinion No. 27898
Heard March 29, 2018 – Filed June 26, 2019

REVERSED AND REMANDED

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia, for Respondent.

CHIEF JUSTICE BEATTY: A Lancaster County jury found Kenneth Campbell met the statutory definition of a sexually violent predator (SVP) under South Carolina's SVP Act, S.C. Code Ann. §§ 44-48-10 to -170 (2018). Campbell appealed, and the court of appeals affirmed. *In re Care & Treatment of Campbell*, Op. No. 2016-UP-198 (S.C. Ct. App. filed May 11, 2016). On certiorari, Campbell

contends the court of appeals erred in affirming his civil commitment because the State inappropriately impeached the credibility of Campbell's expert witness by introducing evidence of a recent arrest warrant for an unrelated sex offender whom the expert had opined was unlikely to reoffend. We find the admission of testimony about a mere arrest warrant of an unrelated individual in a collateral matter unduly prejudiced Campbell and, therefore, reverse and remand for a new commitment proceeding.

I. Factual / Procedural History

The State referred Campbell to the SVP program due to his four alleged sexual assaults of three minor children with whom Campbell slept in the same house. For two of the assaults, the four-year-old victims recanted, and the State either dropped the charges or declined to press charges. For the remaining two assaults, one of which was committed while Campbell was out on bond for the other, Campbell entered an *Alford*[1] plea to criminal sexual conduct with a minor in the first degree (CSCM-1st) and pled no contest to committing a lewd act on a child under the age of sixteen. He received an aggregate sentence of twenty years' imprisonment, suspended upon the service of twelve years' imprisonment and three years' probation.

Prior to Campbell's release, the State filed a petition pursuant to the SVP Act seeking Campbell's civil commitment for long-term control, care, and treatment. *See* S.C. Code Ann. § 44-48-30(1) (defining an SVP as "a person who: (a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment"). The trial court made a determination of probable cause and appointed Dr. Marie Gehle to perform a psychiatric evaluation of Campbell. Dr. Gehle diagnosed Campbell with pedophilia but opined he was not at a high risk to reoffend. The State then obtained an independent evaluation from Dr. Ana Gomez.

At the jury trial, Dr. Gomez testified on behalf of the State and was qualified as an expert in psychiatry and forensic psychiatry. Dr. Gomez stated that after interviewing Campbell, conducting seven different psychiatric tests that accounted for various risk factors for reoffending, and examining the pertinent records in his

[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

file, she diagnosed him with pedophilic disorder, non-exclusive, indicating he was attracted to children of both sexes. She explained pedophilic disorder cannot be cured but can be managed through appropriate strategies and intervention.

Dr. Gomez testified Campbell's proposed strategies to avoid reoffending—including finding religion and "walking away" from children any time he was around them—were wholly unrealistic. Additionally, Dr. Gomez expressed concern over Campbell's refusal to seek sex offender treatment while incarcerated, which is in itself a significant risk factor for reoffending. Dr. Gomez testified Campbell's pedophilic disorder caused him serious difficulty in controlling his behavior, and his lewd act offense—committed while out on bond for the CSCM-1st offense—indicated his difficulty in controlling his behavior was ongoing.

As a result, Dr. Gomez opined Campbell was extremely likely to reoffend if he was not civilly committed. Further, Dr. Gomez testified the potential risk Campbell posed to future child victims was more imminent because, after his release, Campbell planned to live with his sister, and her grandchildren and great-grandchildren would frequently be sleeping in the same house as Campbell, as had his previous victims. In conclusion, Dr. Gomez testified it was her medical opinion Campbell met the criteria for designation as an SVP and he was in need of long-term control, care, and treatment at a secure facility.

Dr. Gehle then testified on behalf of Campbell and was qualified as an expert in forensic psychiatry. Dr. Gehle stated that after performing a similar interview and review of Campbell's file, she had also diagnosed him with pedophilic disorder, non-exclusive type. Dr. Gehle explained that in coming to her diagnosis, she had used only one of the seven psychiatric tests performed by Dr. Gomez. However, on that test, both doctors scored Campbell in the low- to moderate-risk group for reoffending, which equated to a rate of reoffending of 15.8% in the next five years and 24.3% in the next ten years, approximately the average rate for reoffending for all sex offenders.

Dr. Gehle testified that although she agreed with much of Dr. Gomez's testimony and diagnosis, she disagreed Campbell was likely to reoffend. Dr. Gehle stated not every person convicted of a sex offense posed a high risk to the public upon his or her release, and Campbell's lack of prison referrals or disciplinary problems showed his ability to control his behavior on a day-to-day basis. Dr. Gehle also testified she was less concerned than Dr. Gomez about Campbell living with his sister and young children upon his release because it was unclear to her whether the

children would actually spend the night or merely visit while other adult family members were present. Dr. Gehle then opined that, were Campbell to be released, there were safeguards in place to protect the public, such as placing him on the sex offender registry and monitoring him while on probation, including through the use of a GPS anklet. Ultimately, Dr. Gehle concluded that while Campbell suffered from a mental abnormality, there was insufficient evidence to believe Campbell's abnormality made him likely to reoffend, and he therefore did not meet the criteria for designation as an SVP.

On cross-examination, the State questioned Dr. Gehle's exclusive reliance on the results of the single psychiatric test, particularly when Dr. Gomez had testified the test did not account for all of the risk factors associated with sexually reoffending, nor was the test intended by its creators as a stand-alone assessment. Furthermore, at the State's prompting, Dr. Gehle conceded Campbell had "meaningful risk factors" for reoffending, including a dysfunctional coping style, a resistance to rules and supervision, and a refusal to receive mental health treatment unless it was court-ordered. Finally, Dr. Gehle testified Campbell did not have an "ideal relapse prevention plan" due to his failure to receive sex offender treatment and his post-release "access to children" who would sleep in the same house as Campbell, similar to his prior victims. However, Dr. Gehle stated she gave Campbell credit for claiming he would "walk away" from children and not be around them in "that way."

On re-direct examination, Campbell attempted to rehabilitate Dr. Gehle's methodology for evaluating SVPs, emphasizing Dr. Gehle's vast experience in evaluating SVPs and having her reiterate her opinion that Campbell was unlikely to reoffend.

On re-cross examination, the State's attorney asked if Dr. Gehle had ever wrongly opined an SVP candidate was unlikely to reoffend, to which Dr. Gehle responded she did not know. The State's questioning then focused on Dr. Gehle's pre-commitment evaluation of an unrelated sex offender, Michael Thomas. In doing so, the State's attorney handed Dr. Gehle her report on Thomas and requested Dr. Gehle read the portion of the report aloud where she had opined Thomas was unlikely to reoffend and, therefore, should not be civilly committed as an SVP. The State's attorney next handed Dr. Gehle an arrest warrant for Thomas dated approximately six months before Campbell's commitment proceeding and requested Dr. Gehle read portions of the arrest warrant into the record. The arrest warrant stated Thomas was wanted for rape, and his DNA was a match for that of the alleged

rapist. The State emphasized Thomas had reoffended within two years of his evaluation by Dr. Gehle and the resultant failure to commit Thomas as an SVP, stating that due to Dr. Gehle's error in opining Thomas should be released from custody, "another woman ha[d] been raped."

During closing arguments, the State's attorney concluded her remarks by reminding the jury that Dr. Gehle had been wrong before in opining other sex offenders were unlikely to reoffend, and that if Dr. Gomez was correct and Dr. Gehle was wrong again, Campbell was going to "get out and . . . hurt another kid." Hammering that point home, she stated:

> So I leave you with this: You have a person who on more than one occasion [] has sexually assaulted children. He takes no accountability [for] what he's done and he hasn't had sex offender treatment and he's refused it when it has been offered. He's going to go live in a house where people are going to allow him to be around children. You heard the testimony. What do you think is going to happen?

At the conclusion of the hearing, the jury found beyond a reasonable doubt that Campbell met the statutory definition of an SVP, and the trial court ordered Campbell's civil commitment. The court of appeals affirmed Campbell's commitment in an unpublished opinion.

II. Standard of Review

In general, the admission or exclusion of evidence is a matter left to the sound discretion of the trial court, whose ruling will not be reversed on appeal absent an abuse of that discretion. *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012). Likewise, the scope of cross-examination is largely within the trial court's discretion. *Bunch v. Charleston & W.C. Ry. Co.*, 91 S.C. 139, 142, 74 S.E. 363, 364 (1912). "An appellate court will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion." *Yoho v. Thompson*, 345 S.C. 361, 365, 548 S.E.2d 584, 585 (2001).

"An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "To warrant reversal based on the admission or exclusion of evidence, the appellant must

prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *State v. Commander*, 396 S.C. 254, 263, 721 S.E.2d 413, 418 (2011); *State v. Colf*, 337 S.C. 622, 625, 525 S.E.2d 246, 247–48 (2000) ("The scope of cross-examination is within the discretion of the trial judge, whose decision will not be reversed on appeal absent a showing of prejudice.").

III. Discussion

Campbell argues the court of appeals erred in affirming the trial court's decision to allow the State to cross-examine Dr. Gehle about Thomas's arrest warrant because the arrest warrant was irrelevant to the ultimate issue in the case, i.e., whether Campbell was an SVP. Campbell additionally contends the admission of testimony about Thomas's arrest warrant was more prejudicial than probative, encouraging the jury to make its decision based on fear of Campbell rather than whether he met the statutory criteria to be declared an SVP. While we find the arrest warrant fell within the broad scope of relevant evidence, we agree that, under these facts, the arrest warrant was more prejudicial than probative.

A. Relevance

Relevant evidence is that evidence having any tendency to make the existence of any fact of consequence to the ultimate determination of the action more or less probable than it would otherwise be without the evidence. Rule 401, SCRE. Considerable latitude and discretion must be allowed the trial court in determining the relevance and admissibility of impeachment evidence. *State v. Williams*, 263 S.C. 290, 302, 210 S.E.2d 298, 304 (1974). As a result, "'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.'" *State v. Jones*, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001) (citation omitted); *see also* Rule 611(b), SCRE ("A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.").

Here, Thomas's arrest warrant was a collateral matter because it could not have been presented during the State's case-in-chief to prove Campbell was an SVP. *See State v. Bailey*, 279 S.C. 437, 439–40, 308 S.E.2d 795, 797 (1983) (citations omitted) (holding evidence that the defendant's father and brother attempted to procure perjured testimony was improperly admitted because it could not have been presented as part of the State's case-in-chief and, as a result, was collateral to the

defendant's guilt or innocence). However, given the "considerable latitude" with which we must review the trial court's relevance determination, we find Thomas's arrest warrant was in fact relevant to assist the jury in determining the weight to afford Dr. Gehle's testimony, and specifically her opinion as to whether Campbell was likely to reoffend. *See, e.g.*, Rule 611(b), SCRE (stating a witness may be cross-examined as to any matter related to any relevant issue, including credibility); *Jones*, 343 S.C. at 570, 541 S.E.2d at 817 (holding any evidence that shows the accuracy, truthfulness, or sincerity of a witness may be admissible to help the factfinder determine the witness's credibility). As a result, the State was permitted to ask Dr. Gehle whether she was aware if she had ever erred in her SVP evaluations, and whether she was aware of a specific error.[2]

B. Unfair Prejudice

Even when relevant, evidence may be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) (citing *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)). The determination of prejudice must be based on the entire record and will generally turn on the facts of each case. *State v. Stokes*, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009).

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[2] We note that had Dr. Gehle denied ever being wrong in her SVP evaluations, the State would have been bound by her answer and could not have introduced physical copies of Thomas's arrest warrant or called a witness to testify Thomas had subsequently been arrested for another sex offense. *See State v. DuBose*, 288 S.C. 226, 231, 341 S.E.2d 785, 788 (1986) (per curiam) (holding where a witness denies an act involving a matter collateral to a party's case-in-chief, the inquiring party is not permitted to introduce evidence in contradiction or impeachment). Similarly, had Dr. Gehle denied ever being wrong, the State could not have skirted the rules and indirectly introduced information from the arrest warrant by having Dr. Gehle read the warrant aloud because, of course, introducing testimony is the functional equivalent of introducing evidence. *Cf. State v. Starnes*, 388 S.C. 590, 599, 698 S.E.2d 604, 609 (2010) (stating testimony is evidence).

Prior to conviction, a defendant is presumed innocent in the eyes of the law. *See State v. Posey*, 269 S.C. 500, 503, 238 S.E.2d 176, 177 (1977) (declaring such a statement "elementary"). Thus, a mere arrest warrant in no way proved Thomas in fact committed the offense for which he was arrested and, standing alone, could only have a minimal impact on Dr. Gehle's credibility. Accordingly, while it was relevant that Dr. Gehle may have opined in error that Thomas was unlikely to reoffend, Thomas's arrest warrant had very low probative value as to whether Campbell was an SVP.

In contrast, the manner in which the State used the arrest warrant was highly prejudicial to Campbell. The State grossly mischaracterized the results of Dr. Gehle's evaluations of Thomas and Campbell. As Drs. Gomez and Gehle both testified, the results of the common psychological test they performed on Campbell indicated he was in the low- to moderate-risk group. Individuals in that group have a rate of reoffending of 15.8% in the next five years and 24.3% in the next ten years, a rate which is consistent for that of all sex offenders. Therefore, by concluding neither Thomas nor Campbell met the statutory criteria to be classified as an SVP, Dr. Gehle did not guarantee either man would *never* reoffend. Rather, Dr. Gehle concluded the men were *unlikely* to reoffend. However, the State asserted otherwise in its cross-examination and closing argument, stating that, based on an *arrest warrant alone*, Dr. Gehle had been "wrong" in her evaluation of Thomas; that as a result, "another woman ha[d] been raped;" and that Campbell was likewise bound to "hurt another kid."

Moreover, the State exacerbated the prejudicial effect of the arrest warrant during its closing argument. Specifically, the State emphasized that on multiple occasions, Campbell had assaulted children sleeping in the same house as him, refused to accept responsibility for his actions, declined to receive sex offender treatment while imprisoned, and was planning to live in a house in which minor children would regularly sleep. The State's attorney then asserted, "You heard the testimony. What do you think is going to happen?"[3] This rhetorical question—the last statement the jury heard prior to its deliberations—was a naked attempt by the State to appeal to the jurors' emotions and cloud their ability to impartially weigh

[3] Generally, this statement is not problematic. However, in the context of this case, this innocuous statement magnified the unfair prejudice caused by the State's improper use of Thompson's arrest warrant to attack the credibility of Campbell's expert witness.

the evidence. *See Tappeiner v. State*, 416 S.C. 239, 254 n.8, 785 S.E.2d 471, 478 n.8 (2016) (finding an emotional plea to jurors that an accused rapist was a bad actor and could not be trusted to watch the jurors' own family members had a strong prejudicial impact on jurors' impartiality in part because "the emotional plea was the very last thing the jury heard before beginning its deliberations . . . [and therefore] was likely at the forefront of the jurors' minds when beginning their discussions"); *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004) (holding the State must tailor its closing arguments so as not to appeal to the personal biases of the jury or arouse the jurors' passions or prejudices).

Weighing the minimal probative value of Thomas's arrest warrant against the prejudice resulting from the State's mischaracterization of the import of the warrant, we hold the admission of the warrant unfairly prejudiced Campbell because it had an undue tendency to suggest a decision on an improper basis, namely fear he would reoffend and harm another child. *See Wilson*, 345 S.C. at 7, 545 S.E.2d at 830 (citing *Alexander*, 303 S.C. at 382, 401 S.E.2d at 149) (stating evidence is unduly prejudicial if it suggests a decision on an emotional basis, rather than a factual one). Additionally, we find the error was not harmless because the case against Campbell amounted to a "battle of the experts," in which Dr. Gomez opined Campbell presented an imminent danger to the community, and Dr. Gehle opined Campbell was unlikely to reoffend. As such, we find the improper denigration of Dr. Gehle's credibility was reasonably likely to have affected the outcome of the trial. *Cf. Tappeiner*, 416 S.C. at 253–54, 785 S.E.2d at 478–79 (finding the State's improper vouching for the victim's credibility and its emotional appeal that the defendant was a bad actor who could not be trusted to watch the jurors' own family members was not harmless error because the case was "entirely dependent on a credibility determination between the prosecution's witnesses and the defense's witness," and therefore, it was "likely the emotional plea, particularly in conjunction with the solicitor's improper vouching for Victim's credibility, swayed the jurors' view of the facts and resolution of the contradictions in the witnesses' testimonies").

IV. Conclusion

The decision of the court of appeals upholding Campbell's SVP status and his involuntary commitment is reversed and remanded for a new commitment proceeding.

REVERSED AND REMANDED.

KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Fabian Lamichael R. Green, Appellant.

Appellate Case No. 2017-001332

Appeal From Laurens County
Donald B. Hocker, Circuit Court Judge

Opinion No. 5659
Submitted March 5, 2019 – Filed June 26, 2019

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General W. Jeffrey Young, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General Samuel Marion Bailey, all of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, all for Respondent.

HILL, J.: Convicted by a jury of murder and desecration of human remains, Fabian Lamichael R. Green appeals, challenging the trial court's admission of a series of direct messages from the victim's Facebook account into evidence and the denial of his motion for a mistrial due to a bailiff's comments to a juror. Because we conclude

the Facebook messages were properly authenticated and the bailiff's misconduct did not affect the impartiality of the jury, we affirm.

I.

On the late afternoon of May 8, 2016, seventeen-year-old Edwin Diaz Charinos (Victim) left his parents' home driving a Ford Mustang and never returned. After his family filed a missing persons report, police reviewed direct messages Victim's father—who had his son's password—discovered on Victim's Facebook page. The messages were exchanged on May 7 and the afternoon of May 8 and appeared to be between Victim and a user named "Ruby Rina." Among other things, the messages revealed Ruby Rina invited Victim to her home at 108 Queens Circle in Laurens on the afternoon of May 8 for a sexual rendezvous. After reviewing the messages, officers visited 108 Queens Circle and looked for Victim's car to no avail.

On May 26, a landscaper disposing of hedge clippings in woods off Taylor Road in Clinton discovered a Ford Mustang with its doors open and what appeared to be burned human remains beside it. The landscaper called 911 and responding officers processed the scene. Investigators also returned to 108 Queens Circle, where they encountered Green and Karina Galarza, Green's sometime girlfriend. Based on discussions with Galarza, investigators obtained arrest warrants for her and Green. A search of the residence revealed blood stains and other physical evidence. Davian Holman, Green's cousin, was also identified as a suspect. He was later apprehended after being found by police asleep under Galarza's bed at the Queens Circle residence. Green, Galarza, and Holman were all charged with Victim's murder.

At Green's trial, expert evidence demonstrated the remains found in the woods matched Victim's DNA. Forensic testing conducted on a blood stain taken from 108 Queens Circle determined the odds were one in thirty-eight quadrillion that the blood belonged to someone other than Victim. The State also introduced a piece of bedding found where Victim's remains were located that appeared to be identical to bedding collected from Galarza's home.

Holman testified Galarza's Facebook name was "Ruby Rina." He stated the morning of May 8, 2016, he was at Galarza's home at 108 Queens Circle with Green and Galarza. Holman explained Green and Galarza were laughing while texting, but he could not see the screens of the cell phones and did not know who they were messaging. Later that afternoon, Victim arrived at Galarza's home. When Victim tried to leave, Holman witnessed Galarza push Victim towards her sister's room. Green then emerged from the sister's room and struck Victim several times in the

head with a hammer. Green told Holman to help him move Victim's body, which had been wrapped in bedding, into the backseat of Victim's Mustang. They drove Victim's car to the location off Taylor Road where Victim's remains were found. Holman stated Green removed Victim's body and a bucket with lighter fluid from the car. Holman testified he walked away from the car while Green sprayed the lighter fluid, so he did not see what happened to Victim's body, but he smelled smoke.

An acquaintance of Green's who lived in Clinton testified Green and Holman walked up to his house around 9:00 or 10:00 p.m. on the night of May 8, 2016. The acquaintance stated Green was carrying a bucket and looking for lighter fluid or alcohol. An autopsy found Victim's death was caused by blunt force trauma to the head, resulting from seven blows to the head with a flat, circular object consistent with the head of a hammer.

Over Green's hearsay and authentication objections, the trial court admitted printouts of the Facebook messages into evidence. The State also presented a letter Green wrote while in jail awaiting trial. In the letter, Green admitted he and "his girl" used Facebook messages to lure Victim to Galarza's home where Green hit him in the head with a hammer. Green testified the letter was false, and he had written it to intimidate inmates who had been bullying him.

After the jury deliberated for close to four hours, the trial court was alerted to questionable contact between a bailiff and a juror. While the trial court conferred with counsel about the contact, the jury reached a verdict. The trial court received the verdict in open court and sent the jury back to the jury room. The trial court then brought each juror out separately for individual questioning on the record. All denied any improper conversation with the bailiff. Bailiff Johnny Bolt testified a juror had asked him what would happen in the event of a deadlock, and he responded the judge would likely give them an *Allen*[1] charge and ask if they could stay later.

Green moved for a mistrial, asserting the bailiff's comments improperly influenced the jury. The trial court denied Green's motion and sentenced him to forty-five years' imprisonment on the murder charge and ten years' imprisonment on the desecration of human remains charge.

[1] *Allen v. United States*, 164 U.S. 492 (1896).

II.

We first take up Green's challenge to the admission of the Facebook messages. Green does not appeal the trial court's ruling that the messages were co-conspirator statements and, therefore, not hearsay. Instead, he zeroes in on the trial court's ruling that the messages were properly authenticated, claiming there was not enough proof to support such a finding. We review evidentiary rulings to see whether the trial court abused its discretion, meaning the ruling was based on an error of law or lacked evidence to support it. *See State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 57–58 (2011).

A. The Requirement of Authentication

All evidence must be authenticated. *State v. Brown*, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018); 2 McCormick On Evid. § 221 (7th ed. 2016) ("[I]n all jurisdictions the requirement of authentication applies to all tangible and demonstrative exhibits."). Authentication is a subspecies of relevance, for something that cannot be connected to the case carries no probative force. The trial judge acts as the authentication gatekeeper, and a party may open the gate by laying a foundation from which a reasonable juror could find the evidence is what the party claims. Rule 901(a), SCRE ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). The authentication standard is not high, *Deep Keel, LLC v. Atlantic Private Equity Group., LLC*, 413 S.C. 58, 64–65, 773 S.E.2d 607, 610 (Ct. App. 2015), and a party need not rule out any possibility the evidence is not authentic. In the realm of authentication, the law, like science, is content with probabilities.

The court decides whether a reasonable jury could find the evidence authentic; therefore, the proponent need only make "a prima facie showing that the 'true author' is who the proponent claims it to be." *United States v. Davis*, 918 F.3d 397, 402 (4th Cir. 2019). Once the trial court determines the prima facie showing has been met, the evidence is admitted, and the jury decides whether to accept the evidence as genuine and, if so, what weight it carries. Rule 104(b), SCRE; *see United States v. Branch*, 970 F.2d 1368, 1370–72 (4th Cir. 1992); 5 Weinstein et al., *Weinstein's Federal Evidence* § 901.02[3] (2d ed. 2019).

Green argues the State's authentication showing fell short. He points to the potential that social media can be manipulated and the ease with which a hacker could access another's account or create a fictitious account. Green notes neither the sender nor

the recipient of the messages corroborated they were authentic, and there was evidence both accounts were not secure.

Social media messages and other content may appear to pose unique authentication problems, but these problems dissolve against the framework of Rule 901, SCRE. Social media messages and content are writings, and evidence law has always viewed the authorship of writings with a skeptical eye. *See* 2 McCormick On Evidence § 221 (evidence law does not assume authorship of a writing, "[i]nstead it adopts the position that the purported signature or recital of authorship on the face of a writing is not sufficient proof of authenticity to secure the admission of the writing into evidence").

The requirement of authentication cannot be met by merely offering the writing on its own. *See Williams v. Milling-Nelson Motors, Inc.*, 209 S.C. 407, 410, 40 S.E.2d 633, 634 (1946). Something more must be set forth connecting the writing to the person the proponent claims the author to be. Rule 901, SCRE, does not care what form the writing takes, be it a letter, a telegram, a postcard, a fax, an email, a text, graffiti, a billboard, or a Facebook message. All that matters is whether it can be authenticated, for the rule was put in place to deter fraud. 2 McCormick On Evidence § 221. The vulnerability of the written word to fraud did not begin with the arrival of the internet, for history has shown a quill pen can forge as easily as a keystroke, letterhead stationery can be stolen or manipulated, documents can be tricked up, and telegrams can be sent by posers. Viewed against this history, the argument that social media should bear a heavier authentication burden because such a "modern" medium is particularly vulnerable to fraudsters may be seen for what it is: old wine in a new bottle.

B. Rule 901(b)(1), SCRE: Authentication by Personal Knowledge

Rule 901(b), SCRE, lists ten non-exclusive methods of authentication. The first method is the easiest and most direct way to authenticate a writing: having someone with personal knowledge about the writing testify the matter is what it is claimed to be. Rule 901(b)(1), SCRE. This method may be accomplished by testimony from a person who sent or received the writing. Because it is the easiest method, it is also uncommon, for the sender and the recipient are often unavailable, as here. One who witnessed the creation or signing of the writing also has the personal knowledge Rule 901(b)(1), SCRE, demands. We cannot say Holman's observation of Green and Galarza texting, without more, meets Rule 901(b)(1), SCRE.

C. Rule 901(b)(4), SCRE: Authentication by Circumstantial Evidence of Distinctive Characteristics

Most writings meet the authenticity test through Rule 901(b)(4), SCRE, which enables authentication to be proven by: "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Courts lag behind technology for good reason. As society adapts to the digital age, courts are growing more comfortable with using circumstantial evidence to authenticate social media content. 2 McCormick On Evidence § 227; 5 Mueller & Kirkpatrick, Federal Evidence § 9.9 (4th ed. 2018) (noting most common way to authenticate social media is by evidence of distinctive characteristics); *see also* Grimm, et al., *Authentication of Social Media Evidence*, 36 Am. J. Trial Advoc. 433, 469 (2013) (Rule 901(b)(4) is "one of the most successful methods used to authenticate all evidence, including social media evidence").

Rule 901(b)(4), SCRE, meshes with prior South Carolina law, which has long endorsed authentication by circumstantial proof. *See Kershaw Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 398, 396 S.E.2d 369, 373–74 (1990). As our supreme court explained in *State v. Hightower*, 221 S.C. 91, 105, 69 S.E.2d 363, 370 (1952):

> Like any other material fact, the genuineness of a letter may be established by circumstantial evidence if its tenor, subject-matter, and the parties between whom it purports to have passed make it fairly fit into an approved course of conduct, and manifests the probability that the subject-matter of its contents was known only to the apparent writer and the person to whom it was written . . . .

See also Singleton v. Bremar, 16 S.C.L. 201, 210 (Harp. 1824) (letter authenticated by reference to unique facts relating to writer "and her situation"). A writing may also be authenticated if it is made in reply to an earlier communication from a source known to be genuine. *See Kershaw Cty. Bd. of Educ.*, 302 S.C. at 398, 396 S.E.2d at 373–74; *Leesville Mfg. Co. v. Morgan Wood & Iron Works*, 75 S.C. 342, 344, 55 S.E. 768, 768–69 (1906); *see also* 7 Wigmore et al., *Evidence in Trials at Common Law* § 2153 at 753 (Chadbourn rev. ed. 1978). This has been termed the "reply letter doctrine"—though today it might be better called the "reply email[2] doctrine."

[2] Although the "e" in "email" is an abbreviation for "electronic," seasoned lawyers (and many surprised litigants) would agree with the interpretation attributed to

We find the content of the messages was distinctive enough that a reasonable jury could find Galarza wrote them. Numerous facts link the Facebook messages to Galarza and, consequently, Green: the use of the screen name "Ruby Rina," which Holman testified was Galarza's; reference to "Julissa" on the messages, which testimony showed was Galarza's sister's name; Ruby Rina's invitation to her home, which she stated was at 108 Queens Circle; Victim's reference to Ruby Rina as "Karina," Galarza's real first name; comments throughout the messages about Ruby Rina's erstwhile boyfriend that were consistent with her relationship with Green; the timing of the messages; and the tragic fact that Victim disappeared shortly after Ruby Rina invited him to 108 Queens Circle, where his blood was later discovered. Taken together, these circumstances serve as sufficient authentication to meet the low bar Rule 901(b)(4), SCRE, sets. *See United States v. Siddiqui*, 235 F.3d 1318, 1322–23 (11th Cir. 2000) (emails authenticated by circumstantial evidence related to content, including reference to defendant's nickname and facts known only to limited group); *see generally* Grimm et. al*., Authenticating Digital Evidence*, 69 Baylor L. Rev. 1 (2017).

We recognize some cases may require more technical methods to authenticate social media. Some courts have held, for example, that tracking a defendant's Facebook page and account to his email address by internet protocol (IP) evidence can satisfy authentication. *United States v. Hassan*, 742 F.3d 104, 133–34 (4th Cir. 2014); *see also United States v. Recio*, 884 F.3d 230, 236–37 (4th Cir. 2018) (Facebook messages authenticated by a certificate from a Facebook records custodian that record containing the message was made at or near the time it was transmitted, the user name on the account was defendant's, the email address included defendant's name, and over 100 pictures posted to the account depicted defendant, including one wishing the defendant happy birthday). We understand social media could also be authenticated by evidence related to hash values and metadata. *See Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 547–49 (D. Md. 2007). We express no opinion on these methods of proof.

We are aware of the debates over the "Maryland Rule" and the "Texas Rule" concerning social media authentication, *see, e.g., State v. Eleck*, 23 A.3d 818, 821–25 (Conn. App. Ct. 2011), but these labels seem to complicate the simple concept embodied in Rule 901, SCRE, and by which writings have long been authenticated. *See United States v. Farrad*, 895 F.3d 859, 879–80 (6th Cir. 2018) (treating social

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former San Francisco Mayor Willie L. Brown that the "e" in "email" stands for "evidence."

media evidence like any other documentary evidence for purposes of authentication "fits with common sense: it is not at all clear . . . why our rules of evidence would treat electronic photos that police stumble across on Facebook one way and physical photos that police stumble across . . . on a sidewalk a different way"); *United States v. Browne*, 834 F.3d 403, 412 (3rd Cir. 2016) ("We hold today that it is no less proper to consider a wide range of evidence for the authentication of social media records than it is for more traditional documentary evidence."); *Parker v. State*, 85 A.3d 682 (Del. 2014) (same); *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012) (same); *Com. v. Purdy*, 945 N.E.2d 372 (Mass. 2011); *United States v. Barnes*, 803 F.3d 209, 217–18 (5th Cir. 2015) (Facebook messages authenticated by witness who saw defendant using Facebook, and recognized his account and writing style).

We do not downplay the fraud risk surrounding social media. The internet flattened the speed of and access to the flow of written information; documents that once sat in dusty file cabinets crammed into office corners now float in the "cloud," making them susceptible to a wider range of mischief. We are persuaded the risk is one Rule 901, SCRE, contemplates and can contain. Lawyers can always argue case-specific facts bearing on this risk and attempt to convince the jury the writing is not genuine.

III.

A. Bailiff Misconduct

We next address whether the trial court abused its discretion in refusing to grant a mistrial due to the bailiff's comments. Our federal and state constitutions guarantee a criminal defendant the right to a trial by an impartial jury. U.S. Const. amend. VI; S.C. Const. art. I, §§ 3, 14. The right can be infringed when a third party makes improper contact with the jury, for the right is meaningful only if the jury remains free from outside influence, including exposure to evidence or information that has not been introduced during the trial. *Turner v. Louisiana*, 379 U.S. 466, 471–72 (1965). Wayward bailiffs can improperly influence jurors by exposing them to the very things they are supposed to guard the jury against. *See Parker v. Gladden*, 385 U.S. 363, 364–65 (1966) (Sixth Amendment violated when jurors overheard bailiff describe defendant as a "wicked fellow" who "was guilty" and if there was anything wrong with a guilty verdict, "the Supreme Court will correct it").

In the event the trial court learns of an allegedly improper contact with a juror, the procedure of *Remmer v. United States* must be followed:

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial

> about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer v. United States, 347 U.S. 227, 229 (1954). The scope and currency of the *Remmer* presumption has split the federal circuits, but it "remains [a]live and well in the Fourth Circuit," *United States v. Lawson*, 677 F.3d 629, 642 (4th Cir. 2012), and therefore controls our approach to the Sixth Amendment issue Green raises. *See Barnes v. Joyner*, 751 F.3d 229 (4th Cir. 2014) (Section 2254 habeas action; holding North Carolina state post-conviction court contravened clearly established federal law by failing to follow *Remmer*'s rebuttable presumption approach and requirement that hearing be held on juror misconduct claim). When there is evidence of a substantive communication by a third party with a juror, the *Remmer* presumption applies, shifting the burden to the State to prove there is no reasonable possibility the improper communication influenced the verdict. *Lawson*, 677 F.3d at 642.

Mindful the bailiff's "official character . . . carries great weight with a jury," *Parker*, 385 U.S. at 365, we find the comments here triggered *Remmer*. Green claims the comments irreparably tainted the jury because the bailiff in effect delivered a defective *Allen* charge outside the courtroom, which coerced the jury into agreeing to a verdict to avoid forced deliberations.

While *Remmer* requires us to presume the bailiff's blunder prejudiced Green, we conclude the State overthrew the presumption by proving there was no reasonable possibility the comments influenced the verdict. We reach this conclusion for several reasons, paying the deference we owe to the trial court's superior position to gauge credibility in the juror misconduct context. *McGill Bros. v. Seaboard Air Line Ry.*, 75 S.C. 177, 180, 55 S.E. 216, 217 (1906). First, the trial court found no evidence the comment was communicated to anyone but the foreperson. *State v. Kelly*, 331 S.C. 132, 141–42, 502 S.E.2d 99, 104 (1998) (holding number of jurors exposed to improper communication relevant to determining whether misconduct influenced jury). Second, there is no evidence the jury was ever deadlocked or even having difficulty reaching a verdict. Third, the bailiff's comments, while astonishingly inappropriate, did not reference facts about the case and cannot be

reasonably spun as an *Allen* charge; the bailiff emphasized the *court* might give them an *Allen* charge (there is no evidence the bailiff knew or conveyed what the charge included) in the event of a deadlock, and the *court* might "see if you can stay later," which suggested an invitation rather than a coercive command. Fourth, none of the jurors testified there was any communication with the bailiff, other than about incidental administrative matters. The trial judge took this to mean not even the foreperson perceived the bailiff's remark as worthy of attention or remembrance. Fifth, all of the jurors testified there was no extraneous influence on their verdict.[3]

This is a far cry from *State v. Cameron*, which found a bailiff's misleading response to a juror's question about sentencing options compromised the jury's impartiality because it left the impression that their verdict could not affect the trial court's sentencing discretion. 311 S.C. 204, 208, 428 S.E.2d 10, 12 (Ct. App. 1993). And it is different still from the bailiff's corruptive caution to the jury in *Blake by Adams v. Spartanburg Gen. Hosp.*, that the trial judge "did not like a hung jury, and that a hung jury places an extra burden on taxpayers." 307 S.C. 14, 16, 413 S.E.2d 816, 817 (1992). *See also Ward v. Hall*, 592 F.3d 1144, 1175–82 (11th Cir. 2010) (right to impartial jury violated by bailiff's comments to sentencing jury that life without parole sentence was not an option in death penalty case).

We commend the trial court's deft handling of this issue. Because the evidence excludes any reasonable possibility that the bailiff's misconduct influenced the jury's impartiality or its verdict, the trial court did not abuse its discretion in denying Green's mistrial motion. *Kelly*, 331 S.C. at 141–42, 502 S.E.2d at 104.

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[3] Not before us is the issue of how far a trial court can go in questioning jurors post-verdict without crossing the bounds of Rule 606(b), SCRE. Some courts have ruled such questioning may only explore the existence and nature of the outside contact, and may not delve into its effect on the jury. *See, e.g., Haugh v. Jones & Laughlin Steel Corp*., 949 F.2d 914, 918 (7th Cir. 1991); *Stockton v. Virginia*, 852 F.2d 740, 744 (4th Cir. 1988); *Cf. Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (discussing Fed. R. Evid. 606 and history of rule against impeachment of verdicts and creating exception where juror expresses racial bias against criminal defendant).

Accordingly, Green's convictions are

AFFIRMED.[4]

WILLIAMS and GEATHERS, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Otis Nero, Appellant,

v.

South Carolina Department of Transportation, Employer,

AND

State Accident Fund, Carrier, Respondents.

Appellate Case No. 2015-001277

Appeal From The Workers' Compensation Commission

Opinion No. 5660
Submitted May 3, 2018 – Filed June 26, 2019

REVERSED

Stephen J. Wukela, of Wukela Law Firm, of Florence, for Appellant.

John Gabriel Coggiola, of Willson, Jones, Carter & Baxley, P.A., of Columbia, for Respondent.

MCDONALD, J.: Otis Nero lost consciousness and fell to the ground in the presence of his two immediate supervisors while working on a South Carolina Department of Transportation (SCDOT) road crew. Nero argues the Appellate Panel of the Workers' Compensation Commission erred in reversing the Single

Commissioner's findings that (1) SCDOT received adequate notice of his workplace accident and (2) Nero demonstrated reasonable excuse for—and SCDOT was not prejudiced by—Nero's late formal notice. Upon our prior review of Nero's arguments, we considered the question of timely notice as a jurisdictional issue and applied a de novo standard of review in reversing the Appellate Panel decision. *Nero v. S.C. Dep't of Transp.*, 420 S.C. 523, 804 S.E.2d 269 (Ct. App. 2017). Our supreme court granted SCDOT's petition for a writ of certiorari and reversed, reiterating that "timely notice under section 42-15-20 is not a jurisdictional determination, and must be reviewed under the substantial evidence standard." *Nero v. S.C. Dep't of Transp.*, 422 S.C. 424, 812 S.E.2d 735 (2018). We now reverse the Appellate Panel because the substantial evidence in the record does not support its findings that Nero failed to provide SCDOT with adequate notice of his workplace injury or that SCDOT was prejudiced by Nero's late formal notice.

Facts and Procedural History

On June 20, 2012, Nero was working on a SCDOT road crew supervised by lead man Benjamin Durant and supervisor Danny Bostick. Nero's work, along with that of four or five other members of the crew, involved pulling a thirty-foot-long two-by-four "squeegee board" to level freshly poured concrete. At some point during the day, Bostick pulled Nero off the squeegee board temporarily because Nero appeared overheated. After a break, Nero returned to pulling the squeegee board.

At approximately 3:00 p.m., after finishing the day's work and cleaning up, the crew, including Nero, Durant, and Bostick, were talking and joking near the supervisor's truck when Nero lost consciousness and fell to the ground. Nero regained consciousness, stood up, told his supervisors he was fine, and drove home. Once home, Nero passed out again in his driveway. His wife immediately took him to the hospital where he was admitted, diagnosed with cervical stenosis, and treated by a neurosurgeon.

While at the emergency room, Nero filled out a "History and Physical Report" stating in part, "I passed out talking to my boss." Nero was initially seen by his primary care physician, Dr. Robert Richey. After a series of tests, Dr. Richey determined Nero had cervical stenosis and referred Nero to a neurosurgeon, Dr. William Naso, who performed a fusion surgery.

On July 9, 2012, prior to his surgery, Nero provided the employer's human resources department with his "SCDOT Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)" paperwork. Nero did not specifically mention a neck "popping" incident with the squeegee board in this submission, but did report that he required neck surgery. Under the section designated "approximate date condition commenced," Nero wrote, "several years—neck and syncope."

On January 6, 2014, Nero filed a request for a hearing, alleging he suffered injuries to his neck and shoulders while pulling the squeegee board on June 20, 2012. The single commissioner found Nero's claim compensable as an injury by accident that aggravated a preexisting cervical disc condition in Nero's neck. The single commissioner further determined Nero had a "reasonable excuse" for not formally reporting his work injury because (1) his lead man and supervisor were present and knew of pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury, (2) the lead man and supervisor followed up with Nero, and (3) SCDOT was aware Nero did not return to work after the June 20, 2012 incident. Further, SCDOT was notified Nero was hospitalized and ultimately had neck surgery. Finally, the single commissioner found SCDOT was not prejudiced by the late formal reporting of the injury.

SCDOT appealed to the Appellate Panel. The Appellate Panel reversed the single commissioner, finding that although Nero's two immediate supervisors witnessed him collapse, Nero never reported that an incident with the squeegee board involved a "snap" in his shoulders and neck. The Appellate Panel further found Nero's excuse for not formally reporting was not reasonable and SCDOT was prejudiced because Nero's late reporting deprived it of the opportunity to investigate the incident and whether Nero's work aggravated any preexisting cervical stenosis.

Standard of Review

The Administrative Procedures Act (APA) establishes the standard for our review of Appellate Panel decisions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, this court may reverse or modify the decision of the Appellate Panel when the substantial rights of the appellant 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." *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010); *see also* S.C. Code Ann. § 1-23-380(5)(d)–(e) (Supp. 2016). "The Appellate Panel is the ultimate fact finder in workers' compensation cases, and if its findings are supported by substantial evidence, it is not within our province to reverse those findings." *Mungo v. Rental Unif. Serv. of Florence, Inc.*, 383 S.C. 270, 279, 678 S.E.2d 825, 829–30 (Ct. App. 2009). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (quoting *S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (2005)).

Law and Analysis

I. Adequate Notice

Nero argues the Appellate Panel erred when it found SCDOT did not receive adequate notice under section 42-15-20(A) of the South Carolina Code (2015). We agree.

Section 42-15-20 sets forth the requirement that an employee provide timely notice of an accident to an employer, stating, in pertinent part:

> (A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to the giving of such notice, unless it can be shown that the employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.

> (B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby.

"Section 42-15-20 requires that every injured employee or his representative give the employer notice of a job-related accident within ninety days after its occurrence." *Bass v. Isochem*, 365 S.C. 454, 472, 617 S.E.2d 369, 379 (Ct. App. 2005); *see also McCraw v. Mary Black Hosp.*, 350 S.C. 229, 237, 565 S.E.2d 286, 290 (2002) ("Pursuant to S.C. Code Ann. § 42-15-20 (1985), notice to the employer must be given within 90 days after the occurrence of the accident upon which the employee is basing her claim."). "Generally, the injury is not compensable unless notice is given within ninety days." *Bass*, 365 S.C. at 473, 617 S.E.2d at 379. "The burden is upon the claimant to show compliance with the notice provisions of section 42-15-20." *Id.*; *Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 127, 623 S.E.2d 860, 863 (Ct. App. 2005) ("The claimant bears the burden of proving compliance with these notice requirements.").

"Section 42-15-20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability." *Hanks v. Blair Mills, Inc.*, 286 S.C. 378, 381, 335 S.E.2d 91, 93 (Ct. App. 1985). Satisfaction of the notice provision should be liberally construed in favor of claimants. *Mintz v. Fiske-Carter Constr. Co.*, 218 S.C. 409, 414, 63 S.E.2d 50, 52 (1951); *Etheredge v. Monsanto Co.*, 349 S.C. 451, 458, 562 S.E.2d 679, 683 (Ct. App. 2002). In *Etheredge*, this court concluded "notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim." 349 S.C. at 459, 562 S.E.2d at 683; *contra Sanders v. Richardson*, 251 S.C. 325, 328, 162 S.E.2d 257, 258 (1968) (explaining that just because an employer has knowledge of the fact that an employee becomes ill while at work "does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted in a compensable injury").

We agree with SCDOT that Nero never formally reported the mechanics of his injury to his employer. However, the undisputed evidence in the record demonstrated SCDOT had adequate notice within the statutory requirement. On the day of the incident, Bostick became concerned about Nero and temporarily pulled him off of the squeegee board work.[1] Later that day, as the crew was cooling down and preparing to leave the job site, Nero lost consciousness and fell to the ground. Durant and Bostick both witnessed this. Both men called Nero while he was in the hospital, and both were aware he needed to have neck surgery. Both were aware that Nero did not return to work at SCDOT following his surgery, and Nero filled out the necessary leave paperwork through SCDOT's human resources department.

Significantly, the undisputed documentary evidence in the record further established notice. As early as July 13, 2012, SCDOT received written notification from Nero's family doctor, Richey, that Nero had been out of work since the date of his collapse and needed neck surgery. In July and August 2012, SCDOT received correspondence from Florence Neurosurgery and Spine confirming Dr. Naso was treating Nero for cervical radiculopathy. SCDOT corresponded with the medical provider in November 2012 regarding whether Nero would be able to return to work. There is simply no support in the record for the Appellate Panel's finding that SCDOT lacked knowledge of Nero's workplace injury—or of the cervical problems for which he was being treated—for purposes of section 42-15-20(A).

SCDOT argues Nero omitted several crucial facts contrary to his argument that a reasonably conscientious manager should have been aware of a potential compensation claim. First, "and most importantly," SCDOT points to the "SCDOT Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)" form (Exhibit 1), signed by Nero and Dr. Richey and delivered to the human resources department in July 2012.[2] Exhibit 1 states the

[1] Bostick explained in his deposition that although Nero never made any complaints to him about his ability to pull the squeegee board, he was concerned for Nero due to both the summer heat and Nero's age.

[2] Bostick testified that had he been aware of the contents of Exhibit 1, he would have further investigated the accident. Nero received this form with his

approximate date Nero's condition commenced was "several years—neck and syncope."[3] SCDOT contends Nero never actually reported an "injury," despite his conversations with both Bostick and Durant while hospitalized. SCDOT further remarks on the medical evidence in the record, however, the medical opinions it references address causation, not notice.[4]

At his deposition, Nero testified the injury to his upper back and shoulders was a result of pulling the squeegee over a concrete pad.

> Q: And tell me what happened during that process of you pulling the squeegee board?

"paperwork from Human Resources," Dr. Richey completed a portion of the FMLA form, and it was returned to SCDOT.

[3] However, SCDOT's own Question 4 and Nero's response provide additional context: "4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such relevant facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment): Have to have neck surgery." Nero's beginning date for the period of incapacity was listed as June 20, 2012 (the day he collapsed at the job site). As for Nero's possible return to work date, Dr. Richey noted on the form "For now he is out - after surgery we can estimate this 7/12/12."

[4] It appears the Appellate Panel conflated the concept of notice with the evidentiary concept of an injured worker's proof of his claim. Still, we recognize that some of the evidence SCDOT submits in support of its argument that SCDOT lacked notice of the mechanism of Nero's injury may be relevant to both notice and causation. For example, in the medical history questionnaire Nero prepared and signed for Dr. Naso, Nero left blank this line: "Complaint Related to an Injury? _____ Workman's Compensation? _____." And Dr. Naso initially commented, "I do not think his syncope is related to cervical spine pathology." But Dr. Richey testified Nero's preexisting cervical spine condition was aggravated by his pulling of the squeegee board and that this, along with Nero's work in the heat, caused the syncope.

> A: I got a pain in between pulling the squeegee board when they take someone off it that put more stress in there, due to whoever is left on the squeegee has got less to help pull it.
>
> Q: Yes Sir.
>
> A: But you also still got to keep going [be]cause if you don't keep going—you're going to blotch up. So I was doing that, I felt like a pressing like a, you know, snap back there between my shoulder and my neck. . . .
>
> Q: Okay. Now did you tell him, "Hey Mr. Bostick, I—I think I've hurt my neck just now"?
>
> A: No, I didn't tell him that.
>
> Q: Okay, when he took you off, what did you do?
>
> A: I just step out of the way, got off to see—out of the cement, took a little break, and then I went right back.

Nero further testified that while he was pulling the squeegee, he felt "like a bone snapped or something snapped—or popped." Nero spoke with Bostick and Durant while he was in the hospital but did not tell them he felt "a snap[ping], crackling, and popping sensation" in his neck. Nero testified he told Bostick, "I think he asked me what . . . was wrong. I said I am in the hospital. I said ever since I fell out, I said, I've been here ever since."

Supervisor Bostick's deposition testimony is more illustrative of SCDOT's notice. With regard to Nero's "Family Medical Leave Act" form completed in part by Dr. Richey, Nero's counsel asked:

> Q: You haven't ever seen [the SCDOT FMLA leave form], but you would agree with me that by July of 2012—this document is dated July the 9th of 2012, I think—yeah, July the 9th. By July the 9th, DOT was

aware that Mr. Nero had been out of work since June the 20th and that he had to have neck surgery?

A: Would I have known that?

Q: No. No. I'm asking if you agree with me that the Department of Transportation knew that.

A: I don't know, because I don't know what paperwork he passed on to get to that point.

Q: Fair enough.
Well, I got this document from the Department of Transportation.

A: Right.

Q: So - -

A: But I wouldn't have known.

Q: I'm—well, you know. I'm not asking what you knew. I'm asking whether you would agree with me that, given this document, the Department of Transportation would have known that.

[Objection to the form].

Q: Go ahead and answer.

A: That they would have known something then?

Q: Yeah.

A: I guess they would have start[ed] doing their investigation.

> Q: Okay. Do you know whether they did start doing an investigation at that point?
>
> A: No, I don't. Like I said, the only—the only thing we ever heard of this is whenever that initial call was made, and whoever they talked to, I wouldn't [know] all that. The only thing I knew, Greg, my boss, called me in and asked me about the situation.

Bostick testified that he provided a written statement over a year prior to his March 2014 deposition in response to a call from his own supervisor. Bostick elaborated, "The only time I ever wrote anything, when they—we—it was brought to our attention that he called the department to say he got hurt on the job, so then that's when our safety guy—district safety guys started investigating what's going on, trying to find out was this eligible that happened, when it happened, whatever." Although Bostick's written statement is undated, a file notation of 2012-4525 appears at the top of the document.

Nero's situation is a far cry from that of the auto body paint technician who reported to his employer that he was "pretty sore" and "must have hurt [himself]" in *Hartzell v. Palmetto Collision, LLC*, 415 S.C. 617, 620, 785 S.E.2d 194, 195 (2016). The *Hartzell* petitioner did not seek immediately seek medical care, and he ended his employment approximately one month after this conversation because "business was slow." *Id.* at 620, 785 S.E.2d at 196. Over one year later, Hartzell filed a claim alleging a partial permanent injury to his back. *Id.* Although both the single commissioner and the Workers' Compensation Commission determined Hartzell "reported his work-related injury to Employer within the requisite time" as required by 42-14-20, this court reversed the Commission's notice finding. *Id.* at 621, 785 S.E.2d at 196.

Our supreme court reversed the court of appeals' finding of a notice failure in *Hartzell*, explaining, "[w]hile reasonable minds could have reached a different conclusion based on the record, we must not engage in fact-finding that would disregard the Commission's factual finding on these issues." *Id.* at 623, 785 S.E.2d at 197. There, the employer, while not denying a conversation with the employee may have occurred, testified it did not "ring a bell." *Id.* at 620, 785 S.E.2d at 196. In *Hartzell*, the substantial evidence of notice was this forgotten conversation—with no seeking of immediate medical care or correspondence between the treating

physicians and employer prior to the claimant's filing of a Form 50. *Id.* at 623, 785 S.E.2d at 197.

Conversely, here, as the single commissioner's order explained, the "evidence of the record reveals that the employer was aware that the Claimant was in the hospital and that he was being treated by a neurosurgeon for cervical radiculopathy. (See Plaintiff's Exhibits 1-5). In fact, the employer wrote the neurosurgeon for his views as to the Claimant's work ability in November, 2012. (Plaintiff's Exhibit 5)." In sum, the substantial evidence in this record simply does not support the Appellate Panel's finding that SCDOT lacked adequate notice of Nero's workplace injury under section 42-15-20(A). *See Etheredge*, 349 S.C. at 459, 562 S.E.2d at 683 (concluding "notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim").

II. Reasonable Excuse

Nero next contends the Appellate Panel erred in finding he failed to establish a "reasonable excuse" for the formal notice deficiency and that SCDOT was prejudiced by this lack of notice. We agree.

Section 42-15-20(B) provides in relevant part that "no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby." Once reasonable excuse has been established, it is the employer's burden to demonstrate prejudice from the absence of formal notice. *Lizee*, 367 S.C. at 129–30, 623 S.E.2d at 864. However, "lack of prejudice does not justify compensation unless the requirement of reasonable excuse is also satisfied." *Gray v. Laurens Mill*, 231 S.C. 488, 492, 99 S.E.2d 36, 38 (1957). When determining whether prejudice exists, the Appellate Panel should be cognizant that the notice requirement protects the employer by enabling it to "investigate the facts and question witnesses while their memories are unfaded, and . . . to furnish medical care [to] the employee in order to minimize the disability and consequent liability upon the employer." *Mintz*, 218 S.C. at 414, 63 S.E.2d at 52.

Here, Nero's reason for not formally reporting his workplace incident was that his supervisors were present when he lost consciousness and he was hospitalized the same day of the incident. Further, as the single commissioner recognized, Nero's lead man, Durant, testified he never reported the incident to his own supervisor, Bostick, because Bostick was "right there."

> Q: I'm looking at [these] instructions you guys got about injuries on the job. As the lead man, do you get to choose—you have some discretion in choosing what injuries to report and what injuries not to report?
>
> A: Do we get—no. I don't care if it's—if it—whatever it is, it is, if it's small or whatever else.
>
> Q: I mean, a guy hurts his thumb, you've got to report it?
>
> A: If you hurt your thumb and you feel like you need medical attention, you need to go report it.
>
> . . . .
>
> Q: But do you have any responsibility as the lead man to report injuries?
>
> A: Do I have any? Yes, if it happens right here with me, I have a responsibility to report it.
>
> Q: What if I say, look here, lead man, it's just my thumb. Don't worry about it. I don't want to report it.
>
> A: Well—
>
> Q: Can you say, no, we're not going to tell the supervisor?
>
> A: No, I am not going to do that because there's too much that [can] come back and bite you.

> Q: All right. Well, let me ask you, when [Nero] passed out that day, did you tell your supervisor about it?
>
> A: He was right there.
>
> . . . .
>
> Q: Safe to say, after that day, when you knew that Nero had passed out, you felt like that it had been reported wherever it needed to be reported on the count of the fact that your supervisor was standing right there?
>
> A: Well, not only that, I mean, being real, it probably done got back to whoever it need[ed] to get back to when he was out of work.[5]

In reversing the single commissioner's finding that Nero provided a "reasonable excuse" for not formally reporting his work injury, the Appellate Panel found:

> Although Claimant's supervisors witnessed Claimant's syncope episode, Claimant never reported the alleged accident from pulling the squeegee board, which was the basis of his claim. Claimant was given several opportunities to report his work accident and even submitted FMLA paperwork . . . indicating that his problem lasted for several years instead of requesting workers' compensation.

Although Nero failed to give SCDOT formal notice, his excuse was reasonable because his supervisors were both present at the time of his injury and were aware of his treatment. SCDOT was aware Nero never returned to work following the June 2012 episode and knew of his hospitalization and need for neck surgery well within the ninety-day notice window. Within a few weeks of Nero's collapse,

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[5] And we know, based on Bostick's own deposition testimony as to when he provided his statement to SCDOT, that "the district safety guys" and Bostick's own supervisor were investigating Nero's incident and injury at least a year prior to Nero's filing of the Form 50 on January 6, 2014.

SCDOT was aware of Nero's treatment by a qualified neurosurgeon, that he was having neck surgery, and that he would be unable to return to work. At some point long before Nero filed his Form 50, SCDOT was conducting its own investigation as to Nero's injury at the job site. Thus, the employer suffered no prejudice to either its ability to investigate or furnish medical care in order to minimize Nero's disability and its own liability. As the substantial evidence in the record does not support the contrary conclusions of the Appellate Panel, we reverse.

Conclusion

Based on the foregoing analysis, we reverse the decision of the Appellate Panel and reinstate the order of the single commissioner.

REVERSED.

LOCKEMY, C.J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Palmetto Construction Group, LLC, Respondent,

v.

Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward, Appellants.

Appellate Case No. 2016-002308

Appeal From Charleston County
Mikell R. Scarborough, Master in Equity

Opinion No. 5661
Heard April 2, 2019 – Filed June 26, 2019

APPEAL DISMISSED

A. Bright Ariail, of Law Office of A. Bright Ariail, LLC, of Charleston, for Appellants.

Andrew K. Epting, Jr. and Jaan Gunnar Rannik, both of Andrew K. Epting, Jr., LLC, of Charleston, and Michelle Nicole Endemann, of Clarkson, Walsh & Coulter, P.A., of Mt. Pleasant, for Respondent.

LOCKEMY, C.J.: Restoration Specialists, LLC (Restoration) and its owners, Ruben Mark Ward and Lynnette Pennington Ward (collectively Appellants), appeal a master-in-equity's order denying their motion for relief from an entry of

default and motion to stay and compel arbitration. We dismiss the appeal as interlocutory.

FACTS

In 2011, Restoration, a Georgia company, and Palmetto Construction Group LLC, (PCG), a South Carolina LLC, entered into an agreement to work together on multiple construction projects. In 2012, the Veteran's Administration (the VA) awarded Restoration a contract to serve as the general contractor on the completion of a parking garage at the VA facility in Augusta, Georgia (the VA Project) for $1.8 million. On September 10, 2014, Restoration and PCG entered into a subcontract agreement under which Restoration would act as the general contractor and would be responsible for hiring the other subcontractors. The subcontract provided that PCG would perform the concrete work and act in a supervisory capacity. The subcontract stated Restoration would pay PCG for the subcontract work. The subcontract also contained a provision requiring mandatory mediation or in the alternative, binding arbitration, of claims arising out of the subcontract.

PCG claims in addition to the subcontract, Mark Ward asked PCG for help in obtaining a bond from PCG's surety to cover the VA Project. Restoration and PCG entered into a surety bond agreement with Hanover Insurance Company to provide a surety bond for the VA Project. Hanover required PCG, Restoration, and their respective principals and their spouses to sign an indemnity agreement requiring them to indemnify Hanover for any claims made on the bond. As the VA Project neared completion, several subcontractors filed claims under the bond asserting they did not receive payment. PCG claims Hanover paid $1,425,144.00 to subcontractors in accordance with the bond.

On February 12, 2016, PCG filed a summons and complaint against Appellants. PCG alleged breach of contract against Restoration for failure to pay amounts owed under the subcontract. In addition, PCG alleged actual and constructive fraud and negligent misrepresentation against the Appellants. On the same day, PCG filed a motion to stay and compel arbitration as provided in the subcontract agreement.

PCG personally served the summons and complaint as well as the motion to compel on Appellants on March 14, 2016. After Appellants did not answer, PCG filed an affidavit of default on April 18, 2016, and withdrew its motion to stay and compel arbitration. The circuit court granted PCG's motion for entry of default and

referred the case to the master-in-equity for final judgment against Appellants on April 20, 2016.

On June 5, 2016, the day before the damages hearing, Appellants filed a motion for a continuance and a motion to be relieved from default. At the damages hearing before the master, Appellants submitted an affidavit from Mark Ward to support their motion to be relieved from the entry of default. The master granted Appellants' motion for a continuance and held the motion for relief from default in abeyance. On July 11, 2016, Appellants filed a motion to stay and compel arbitration. At a hearing on July 14, 2016, the master found Appellants in default and declined to address Appellants' motion to stay and compel arbitration because of their default status. The master issued an order on the same day denying Appellants' request for relief from default, ordering a damages hearing on October 4, 2016, and denying Appellants' motion to stay and compel arbitration "as [Appellants are] in [d]efault." Appellants filed a Rule 59(e), SCRCP, motion to alter or amend on July 27, 2016. Appellants asked the master to schedule a hearing on this motion prior to the damages hearing. However, the master decided to keep the damages hearing on October 4, 2016, and scheduled a hearing on the Rule 59(e) motion for October 11, 2016.

On September 30, 2016, Appellants served a notice of appeal on PCG and notified the master of their appeal of the master's July 14, 2016 order, but did not file the notice with this court until November 18, 2016. In the meantime, the master held a third hearing on October 4, 2016. The master allowed PCG to proffer evidence on damages and Appellants to argue their Rule 59(e) motion. On October 28, 2016, the master issued an order denying Appellants' Rule 59(e) motion. In his order, the master states: "After a review of the file and memoranda submitted by counsel, the court finds as follows: 1) [Appellants'] Motion to Amend is respectfully DENIED, insomuch as [Appellants] have not shown good cause to lift the default; and 2) the affirmative defense of arbitration has been waived and [Appellants'] Motion to Stay and Compel filed July 11, 216 was not properly made."

Appellants appeal both the master's July 14, 2016 order and the October 28, 2016 order denying their Rule 59(e) motion.

LAW/ANALYSIS

A. Appealablity

The denial of a motion to set aside a default judgment is immediately appealable as it is a final judgment on the merits. *See Ateyeh v. United of Omaha Life Ins. Co.*, 293 S.C. 436, 437, 361 S.E.2d 340, 340 (Ct. App. 1987). However, the denial of a motion to set aside an entry of default is not appealable until after final judgment. *Thynes v. Lloyd*, 294 S.C. 152, 154, 363 S.E.2d 122, 123 (Ct. App. 1987). Appellants appeal from a motion to set aside an entry of default. Furthermore, the parties have not participated in a damages hearing and the master has not entered a default judgment against Appellants. Accordingly, both the master's July 14, 2016 order and October 28, 2016 order are interlocutory and not immediately appealable.

Appellants argue that because the master's order also denied their motion to stay and compel arbitration, the entire order is appealable. In his July 14, 2016 order, the master concluded Appellants' "motion to stay and compel arbitration is denied as [Restoration] is in [d]efault." Section 15-48-200 of the South Carolina Code (2005) provides an appeal may be taken from "[a]n order denying an application to compel arbitration." Appellants cite *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001), for the proposition that "an order that is not directly appealable will be considered if there is an appealable issue before the court." Accordingly, Appellants assert that although the master's order denying them relief from an entry of default is not appealable, it became appealable when coupled with the denial of their motion to compel arbitration. However, given the procedural posture of this case, we do not find an appealable issue before this court.

Appellants failed to answer PCG's complaint in time. Accordingly, Appellants' default status is not in question. "By defaulting, a defendant forfeits his right to answer or otherwise plead to the complaint. In essence, the defaulting defendant has conceded liability." *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978) (citations omitted) (internal quotations omitted). Other than damages, the issues the parties would have decided through arbitration are settled leaving little to arbitrate. Granting a motion to compel arbitration after an entry of default would allow the party seeking arbitration to revisit liability after it has been determined. As Appellants emphasize in their brief, "'The policy of the United States and this State is to favor arbitration of disputes.'" *Tritech Elec., Inc.*

v. Frank M. Hall & Co., 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000) (quoting *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135,136 (1995)). However, if we allow the reexamination of liability after default, we are defeating the purpose of arbitration: "to achieve streamlined proceedings and expeditious results." *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (citations omitted) (internal quotations omitted).

Our supreme court analyzed the legal status of defaulting parties in *Roche v. Young Bros., of Florence*, 332 S.C. 75, 504 S.E.2d 311 (1998). In that case, the supreme court determined a defaulting party's consent was not required to refer the case to a special referee. The supreme court explained:

> Young Brothers clearly defaulted by failing to answer Roche's complaint within the prescribed time. Young Brothers' status as a defaulting party was not vitiated simply because it later chose to challenge the default judgment rendered against it.

Id. at 82-83, 504 S.E.2d at 315. Similarly, Appellants' default should not be excused because they chose to file a claim for arbitration when they found themselves in default. If we were to allow such, then any defaulting party would simply file a motion to compel arbitration to remove their default status. Therefore, the master correctly found Appellants' motion to stay and compel arbitration was not proper due to Appellants' default status. Appellants cannot bootstrap the master's denial of their motion for relief from default to the master's refusal to consider Appellants' request for arbitration in order to create an appealable issue.

B. Waiver

In addition, we find Appellants waived their right to arbitration. "It is generally held that the right to enforce an arbitration clause may be waived." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration. There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Id.* at 665, 521 S.E.2d at 753 (citations omitted) (internal quotations omitted).

While not specifically addressing the issue at hand, in *Wham v. Shearson Lehman Brothers, Inc.*, 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989), the defendants sought to set aside an entry of default or in the alternative, to stay the proceedings and compel arbitration. *Id.* We determined the master did not use the "good cause" standard, but rather applied an "excusable neglect" standard to determine whether he should grant relief and thus, we remanded the case on the issue of the entry of default. *Id.* at 465, 381 S.E.2d at 501. Concerning the motion to stay and compel arbitration, we stated:

> Because we vacate the order denying the motion by Shearson Lehman for relief from the entry of default and remand the issue raised by the motion, we need not address the master's denial of its alternative motion to stay the proceedings and compel arbitration. *See, however, Miller v. British America Assurance Co.*, 238 S.C. 94, 119 S.E.2d 527 (1961) (referring to an arbitration agreement set up in the answer as a "special defense"); 5 Am.Jur.2d *Arbitration and Award* § 51 at 556–57 (1962) (one's right to arbitrate given by contract may be waived by failing to raise the right in an answer).

Id. at 466, 381 S.E.2d at 502.

Other jurisdictions have found arbitration waived when a defaulting party seeks to compel it. In *Tri-State Delta Chemicals, Inc. v. Crow*, 61 S.W.3d 172, 173 (Ark. 2001), the Supreme Court of Arkansas considered whether a defendant's default on a suit filed in circuit court effectively waives any right to compel arbitration. Similar to our case, the trial court did not consider the defendant's motion to compel arbitration because it determined the defendant was in default. *Id*. at 173. The Supreme Court of Arkansas initially determined because the issue of damages had not been decided, the default judgment was not a final decision and accordingly, was not appealable. *Id*. at 174. Further, the court stated, "While we agree that, generally, a denial of a motion to compel arbitration is an immediately appealable order, we do not believe that an interlocutory appeal will lie under the circumstances of this case." *Id.* Instead, the court determined the defendant "waived any right it may have had to compel arbitration when it failed to timely assert arbitration as a defense to the suit." *Id*. The court cited to a New York trial court decision finding:

> Though arbitration clauses are generally enforceable, they cannot be used to bypass the statutory provisions requiring that pleadings be answered or to thwart a proper motion for a default judgment. The Defendant effectively waived its right to enforce the arbitration clause when it failed to answer or appear in response to the summons and complaint under circumstances where there was no reasonable excuse for such default.

Id. (quoting *Charming Shoppes, Inc. v. Overland Constr., Inc.*, 717 N.Y.S.2d 860 (N.Y. Sup. Ct. 2000)). Determining the plaintiffs properly served the defendant and the defendant failed to timely assert its right to arbitrate, the Supreme Court of Arkansas opined the defendant waived this right. *Id.* "The right to seek arbitration is a defense to civil litigation. Like any other defense, it may be waived by failing to timely assert it under the rules of civil procedure." *Id.* at 175.

Other jurisdictions have made similar determinations. *See Interconex, Inc. v. Ugarov*, 224 S.W.3d 523, 535–36 (Tex. Ct. App. 2007) (finding Interconex waived any right to arbitration that it may have had when it failed to file a timely answer); *LaFrance Architect v. Point Five Dev. S. Burlington*, *LLC*, 91 A.3d 364, 372 (Vt. 2013) ("The presumption in favor of arbitration, however, must be viewed within the context of its underlying purpose: to provide speedy, cost-effective resolution of disputes. To allow a party to 'cry arbitration' in order to undo the consequences of its own errors would turn the rationale of arbitration on its head."); *Woodruff v. Spence*, 883 P.2d 936, 938 (Wash. Ct. App. 1994), *as amended* (Jan. 30, 1995) ("Whether Mr. Spence knowingly waived his right to arbitration depends on whether he had notice of the action against him prior to entry of the default judgment."); *State ex rel. Barden & Robeson Corp. v. Hill*, 539 S.E.2d 106, 112 (W. Va. 2000) ("In this case, unless it is able to show good cause for its default, Robeson has waived its right to assert arbitration as an affirmative defense against continued litigation in the circuit court.").

PCG properly served Appellants with notice of its claims. Appellants failed to timely answer or respond to those claims. Thus, Appellants effectively waived their right to assert enforcement of the arbitration provision.

CONCLUSION

We find the master's July 14, 2016 and October 28, 2016 orders are not appealable. Moreover, because Appellants were in default, they waived their right to assert arbitration as a defense. Accordingly, Appellants' appeal is

DISMISSED.

SHORT and MCDONALD, JJ., concur.