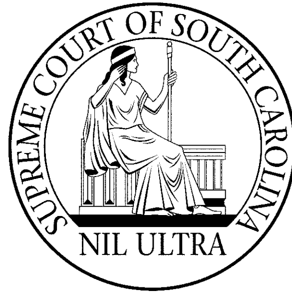

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 1
January 5, 2022
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Palmetto Wildlife Extractors, LLC and Patrick Charping, Respondents,

v.

Justin Ludy and First Community Bank Corporation d/b/a First Community Bank, Defendants,

of whom Justin Ludy is the Appellant.

Appellate Case No. 2018-001536

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 5886
Heard May 4, 2021 – Filed January 5, 2022

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Wesley D. Few, of Wesley D. Few, LLC, of Greenville, for Appellant.

Margaret Nicole Fox and James Mixon Griffin, both of Griffin - Davis, of Columbia, for Respondents.

KONDUROS, J.: In this dispute between members of a limited-liability company, Justin Ludy appeals the circuit court's denial of his motion to compel arbitration of

certain claims. Ludy argues the parties' Operating Agreement provided "any dispute" about arbitrability would be decided in arbitration. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

On April 6, 2012, Ludy formed Palmetto Wildlife Extractors, LLC (the LLC). Patrick Charping became a member of the LLC in 2014 in exchange for a capital contribution of $49,000. On October 13, 2014, Charping and Ludy executed an amended Operating Agreement (the Agreement) for the LLC. The Agreement stated each member owned a 50% financial interest, which the Agreement defined as "a Member's rights to share in profits and losses, a Member's rights to receive distributions[,] and a Member's Capital Interest." Ludy maintained a 51% "Governance Interest," which was defined as "all a Member's rights as a Member in the Company, other than financial rights." Additionally, the Agreement provided:

> 12.14. Arbitration. Any controversy or claim arising out of or related to this Agreement or the breach thereof, shall be settled, except as may otherwise be provided herein, by binding arbitration in accordance with [sections 15-48-10 to -240 of the South Carolina Code] and the arbitration award may be entered as a final judgment in any court having jurisdiction thereon. Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding.

The Agreement also stated:

> The LLC shall be dissolved only upon the occurrence of one of the following "Dissolution Events":
>
> 11.1.1. The affirmative vote of all of the Members owning a Governance Interest;
>
> 11.1.2. Any event occurs that makes it unlawful for all or substantially all of the business of the LLC to be

continued, but any cure of illegality within ninety (90) days after notice to the LLC of the event is effective retroactively to the date of the event for purposes of this section;

11.1.3. On application by a Member or a dissociated Member, upon entry of a judicial decree as provided by Section 33-44-801(5) of the Act;[1] or

11.1.4. The filing by the Secretary of State of a certificate administratively dissolving the LLC pursuant to Section 33-44-810 of the Act.

Disagreements arose between Ludy and Charping over various financial matters. As a result, Charping and Ludy amended the Agreement in October 2015 to set their salaries and to prohibit Ludy from withdrawing money for personal use unless Charping agreed to the withdrawal. However, according to Charping, he and Ludy continued to have similar issues as before.

On April 25, 2017, Ludy filed a complaint (the Lexington Suit) against Charping in the Lexington County Court of Common Pleas, seeking various remedies stemming from the Act, including the judicial expulsion and dissociation of Charping from the LLC.

Charping and the LLC (collectively, Respondents) filed a complaint against Ludy and First Community Bank Corporation (the Bank) in the Richland County Court of Common Pleas on May 10, 2017. That complaint alleged causes of action including breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, civil conspiracy, and defamation. Additionally, Respondents sought the appointment of a receiver pursuant to section 33-44-803(a), an accounting, and judicial dissolution of the LLC pursuant to section 33-44-801 on one or more of the following grounds:

a. another member has engaged in conduct relating to the company's business that makes it not reasonably

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[1] The Act refers to the Uniform Limited Liability Company Act of 1996, S.C. Code Ann. §§ 33-44-101 to -1208 (2006).

practicable to carry on the company's business with that member;

b. it is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement; and

c. the member in control of the company has acted, is acting, or will continue to act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to Plaintiff Charping.

Respondents' complaint alleged Ludy had taken over $126,000 more than Charping had taken from the LLC's financial accounts since 2015. They asserted Ludy used the LLC's bank accounts as his own personal accounts—writing checks and withdrawing funds to pay for expenses unrelated to the business. They contended that even after the Agreement was amended, Ludy continued using the business account for personal use, withdrawing approximately $19,347.39 for personal expenses in 2016 and $3,729.76 in personal expenses during the first quarter of 2017. Respondents asserted Ludy withdrew $57,944.92 for tax payments in 2016, whereas Charping only withdrew $24,197.62—a difference of $33,747.30. They alleged that when Charping would withdraw funds to reduce "the imbalance in the capital accounts, Ludy would become very agitated, upset[,] and confrontational." They asserted Ludy began restricting Charping's access to monitor the expenses incurred by the LLC. Charping stated in an affidavit that on March 31, 2017, Ludy limited Charping's access to financial information and customer data within the LLC's financial software, which prevented him from writing estimates while working and updating financial information on large projects.

Additionally, Respondents asserted that in April 2017, Charping withdrew $32,000 for taxes after verifying the amount with the LLC's tax accountant. Thereafter, Respondents contended "Ludy snapped, accused Charping of theft, and blocked Charping's access to [the LLC's] accounting software and social media sites. They also alleged Ludy and the Bank removed Charping from the LLC's bank account, preventing him from accessing any funds or viewing any account information. Further, they contended Ludy failed to make loan payments the LLC owed that Charping had personally guaranteed, which harmed Charping's credit and exposed

him to personal liability. Charping asserted in his affidavit that Ludy's failure to make some of these payments also negatively impacted the credit history of the LLC.

Following the filing of Respondents' complaint in Richland County, Ludy dismissed the Lexington Suit pursuant to Rule 41(a), SCRCP. On June 6, 2017, Ludy filed a motion to dismiss or stay and compel arbitration. The motion stated Ludy sought "an order dismissing this case and compelling arbitration" and "dismissing or staying this action and compelling arbitration of this dispute." On June 29, 2017, Charping moved the court pursuant to section 15-65-10 of the South Carolina Code[2] for an order appointing a receiver for the LLC. On July 14, 2017, Ludy filed an answer and counterclaim against Charping, reasserting the claims originally raised in the Lexington Suit along with others. Ludy counterclaimed for (1) breach of fiduciary duty; (2) breach of contract; (3) breach of contract accompanied by a fraudulent act; (4) the imposition of a constructive trust; (5) breach of the duty of loyalty; (6) breach of the duty of good faith and fair dealing; (7) injunctive relief under Rule 65, SCRCP; and (8) judicial expulsion and dissociation. The pleading stated Ludy was filing it "out of an abundance of caution in view of and subject to the pending motion to dismiss and compel arbitration." On July 28, 2017, Respondents moved for the case to be assigned to the business court program. On December 27, 2017, Charping filed a response in opposition to Ludy's motion to compel arbitration. Charping argued the plain language of the arbitration clause illustrated it was not applicable to the statutory claims for judicial dissolution, appointment of a receiver, and an accounting. He also asserted Ludy had waived his right to demand arbitration of the claims by first suing Charping in the Lexington County circuit court.

The circuit court heard the motion to compel arbitration on March 1, 2018. Ultimately, the court granted in part and denied in part Ludy's motion to compel arbitration. The circuit court first found Ludy did not waive the right to arbitrate. The court noted, "In an abundance of caution, Defendant Ludy filed an Answer and Counterclaim on July 14, 2017 and noted in the pleading that the Court must decide his Motion to Dismiss or Stay and Compel Arbitration." The court also

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[2] Section 15-65-10 provides, "A receiver may be appointed by a judge of the circuit court, either in or out of court" in a variety of situations. S.C. Code Ann. § 15-65-10 (2005).

determined some of the causes of action raised in Respondents' complaint were subject to arbitration and some were not.

The circuit court found Respondents' claim one, a derivative claim for breach of fiduciary duty, and claim two, a derivative claim for aiding and abetting breach of fiduciary duty, were subject to arbitration.[3] The court found Respondents' claims three, civil conspiracy; four, defamation; and five, requesting the appointment of a receiver, an accounting, and judicial dissolution; were not subject to arbitration. It determined the claims for civil conspiracy and defamation were tort claims that did not implicate the Agreement and were not subject to arbitration. The court also found Section 11.1.3 of the Agreement states a court must enter a judicial decree dissolving the company pursuant to section 33-44-801 of the South Carolina Code. The court determined Respondents' claim requesting the appointment of a receiver, an accounting, and judicial dissolution was not subject to arbitration as the Agreement specifically requires a finding by a court. The court stayed causes of action three, four, and five, while causes of action one and two proceeded to arbitration.[4]

On June 30, 2018, Ludy filed a motion to reconsider, arguing the circuit court's order did not address the relatedness of Respondents' three claims that the circuit court did not compel to arbitration—claims three, four, and five. Ludy maintained these claims related to the parties' relationship as former members in the LLC. Ludy also argued the order failed to address the portion of the Agreement that stated the members agreed that any disputes regarding arbitration would be submitted to the arbitrators. He additionally asserted that splitting the claims between arbitration and the courts would create confusion amongst the parties, noting if one of the parties were to seek to amend a pleading to add claims, any such claims would also be the subject of a dispute between the parties as to whether or not they should submitted to arbitration or be litigated in court. Ludy requested the circuit court "issue a new or amended order sending all claims (and counterclaims) in the case to arbitration." The circuit court denied the motion by a form order filed July 23, 2018. This appeal followed.

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[3] Respondents did not appeal the court's findings that Ludy did not waive the right to arbitration or that claims one and two were subject to arbitration.
[4] The circuit court also noted the Bank would follow the parties to arbitration.

STANDARD OF REVIEW

Unless the parties otherwise provide, "[t]he question of the arbitrability of a claim is an issue for judicial determination." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "Determinations of arbitrability are subject to de novo review," but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings. *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002).

LAW/ANALYSIS

Ludy argues the circuit court erred by not addressing the fact that the Agreement required issues related to the arbitrability of claims be decided by the arbitrator. He contends the Agreement expressly provided "[a]ny dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding." Further, Ludy maintains the circuit court erred in finding claims three, four, and five were not related to the Agreement. He asserts the three claims relate to the parties' relationship as members in the LLC. Additionally, Ludy contends the claim requesting the appointment of a receiver, an accounting, and judicial dissolution is addressed by the provisions of section 15-48-120 of the South Carolina Code, providing for "confirmation of an award" in arbitration by the circuit court. Ludy also asserts the circuit court failed to address the relatedness of any counterclaims, third-party claims, or other claims that may arise in amendments to the pleadings or statements of the claims in arbitration. He requests that all pending claims and counterclaims be sent to arbitration. We agree in part.

"[A]rbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). "An arbitration clause is a contractual term, and general rules of contract interpretation must be applied . . . ." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999). "[P]arties to a contract may agree that an arbitrator rather than a court will resolve disputes arising out of the contract." *Henry Schein, Inc.*, 139 S. Ct. at 527. When a dispute arises, the parties can disagree not only about the merits of the dispute but also about the threshold arbitrability question—whether the arbitration agreement applies to that particular dispute. *Id.* The United States Supreme Court has "held

that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also '"gateway" questions of "arbitrability," such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.'" *Id.* at 529 (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010)). "This line of cases merely reflects the principle that arbitration is a matter of contract." *Rent-A-Ctr., W., Inc.*, 561 U.S. at 69. As long as the parties' agreement delegates the arbitrability question to an arbitrator "by 'clear and unmistakable' evidence," a court may not override the contract and decide the arbitrability question. *Henry Schein, Inc.*, 139 S. Ct. at 529-30 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). In *Towles*, 338 S.C. at 41 n.5, 524 S.E.2d at 846 n.5, this court noted that the arbitrator, instead of the court, determines whether an issue is arbitrable only when the contract clearly demonstrates the intent for the arbitrator to make that decision.

"The construction of a clear and unambiguous contract is a question of law for the court to determine." *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014) (emphasis omitted). "The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract." *First S. Bank v. Rosenberg*, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016) (quoting *Watson v. Underwood*, 407 S.C. 443, 454-55, 756 S.E.2d 155, 161 (Ct. App. 2014)). "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. When a contract is unambiguous, a court must construe its provisions according to the terms the parties used as understood in their plain, ordinary, and popular sense." *Ashley River Props. I, LLC v. Ashley River Props. II, LLC*, 374 S.C. 271, 280, 648 S.E.2d 295, 299 (Ct. App. 2007) (citation omitted).

This court recently addressed a dispute concerning an arbitration clause that provided for arbitrability to be determined by the arbitrator. *Doe v. TCSC, LLC*, 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020). In that case, this court noted, "The [Federal Arbitration Act (FAA)] presumes parties intend that the court, rather than an arbitrator, will decide 'gateway' issues related to arbitration, including whether the arbitration agreement is valid and enforceable and whether it covers the parties' dispute." *Id.* at 608, 846 S.E.2d at 877. The court found, "The parties may, of course, delegate these gateway issues to an arbitrator as long as there is 'clear and unmistakable' evidence of such delegation." *Id.* (quoting *First Options of Chicago, Inc.*, 514 U.S. at 944). The court determined that because the delegation clause

clearly and unmistakably committed issues regarding the "'arbitrability of the claim or dispute' to the arbitrator, the FAA require[d] [the court] to honor that agreement and leave resolution of these discrete gateway issues to the arbitrator." *Id.* at 609, 846 S.E.2d at 877. This court ultimately determined the arbitrator must decide whether the claims arise out of or relate to the agreement. *Id.* at 615, 846 S.E.2d at 881. The court remanded the matter to the circuit court to grant the motion to compel arbitration in order for the arbitrator to rule upon whether the claims were subject to the arbitration contract. *Id.* at 616, 846 S.E.2d at 881.

Here, Respondents argue because Charping could not have foreseen Ludy would engage in the tortious conduct underlying Charping's claims for civil conspiracy and defamation, such claims are outside the scope of the arbitration clause. In *Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007), the supreme court found an arbitration agreement did not apply to outrageous acts that would not have been foreseen at the time the parties executed the agreement to arbitrate. The court held, "Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this [c]ourt will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." *Id.*

However, in *Doe*, this court's majority opinion examined a contention similar to the parties' here and held, "[W]hether the exception applies is a question the parties delegated to the arbitrator, not the court." 430 S.C. at 616, 846 S.E.2d at 881. "Because the outrageous and unforeseen torts exception relates to . . . the arbitrability of the dispute[,] . . . precedent requires that we honor the parties' choice to leave the issue of the exception to the arbitrator." *Id.* (citing *Chassereau v. Glob. Sun Pools, Inc.*, 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007) (treating the outrageous and unforeseen torts exception as a question of the arbitrability of a claim and noting, "*[u]nless the parties provide otherwise*, the question of the arbitrability of a claim is an issue for judicial determination" (emphasis added))). The court noted "the Supreme Court clarified this point just last term" in *Henry Schein, Inc. Doe*, 430 S.C. at 616, 846 S.E.2d at 881. The Court in *Henry Schein, Inc.* observed, "Even when a contract delegates the arbitrability question to an arbitrator, some federal courts nonetheless will short-circuit the process and decide the arbitrability question themselves if the argument that the arbitration agreement applies to the particular dispute is 'wholly groundless.'" 139 S. Ct. at 527-28. However, the Court determined the wholly groundless exception is not consistent

with the FAA. *Id.* at 529. The *Doe* court noted it expressed no opinion on whether the arbitration contract covered the plaintiff's claims or whether the outrageous and unforeseen torts exception prevented arbitration of those claims. 430 S.C. at 615-16, 846 S.E.2d at 881.

In the present case, the Agreement provided, "Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding." This statement is clear that issues of arbitrability are be determined by the arbitrator. *See Henry Schein, Inc.*, 139 S. Ct. at 529-30 (finding as long as the parties' agreement delegates the arbitrability question to an arbitrator "by 'clear and unmistakable' evidence," a court may not override the contract and decide the arbitrability question). This includes claims arising out of conduct that Respondents assert was unforeseeable. *See Doe*, 430 S.C. at 616, 846 S.E.2d at 881 ("Because the outrageous and unforeseen torts exception relates to . . . the arbitrability of the dispute[,] . . . precedent requires that we honor the parties' choice to leave the issue of the exception to the arbitrator.").

The Agreement also states, "Any controversy or claim arising out of or related to this Agreement or the breach thereof, shall be settled, *except as may otherwise be provided herein*, by binding arbitration . . . ." (emphasis added). The Agreement does not exclude civil conspiracy and defamation from arbitration. Accordingly, the circuit court erred in not sending these claims—claims three and four—to the arbitration proceeding to determine if the Agreement requires they be arbitrated.

However, claim five—the request for the appointment of a receiver, an accounting, and judicial dissolution—cannot be sent to arbitration because that claim can only be resolved by the circuit court. In that claim, Respondents sought the dissolution of the LLC pursuant to section 33-44-801 of the Act.[5] Section 33-44-801(4) provides for dissolution "on application by a member or a dissociated member,

---

[5] Judicial dissolution is referenced in the Agreement, which provides the LLC may be dissolved by "judicial decree" pursuant to section 33-44-801(5). That subsection refers to an application to dissolve a limited liability company "on application by a transferee of a member's interest." § 33-44-801(5).

upon entry of a 'judicial decree'" if certain events occur.[6] *See Judicial*, *Black's Law Dictionary* (11th ed. 2019) ("Of, relating to, or by the court or a judge.").

Claim five also requested the appointment of a receiver. In Respondents' complaint, they asserted that request for relief was pursuant to section 33-44-803(a) of the Act. That section provides, "After dissolution, a member who has not wrongfully dissociated may participate in winding up a limited liability company's business, but on application of any member, member's legal representative, or transferee, *the circuit court*, for good cause shown, may order judicial supervision of the winding up." § 33-44-803(a) (emphasis added). Respondents also filed a separate motion to appoint a receiver under section 15-65-10. That section

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[6] Those events include the following, which are the same grounds listed in Respondents' complaint seeking judicial dissolution:

> (b) another member has engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on the company's business with that member;
>
> (c) it is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement; [or]
>
> . . .
>
> (e) the managers or members in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner . . . .

S.C. Code Ann. § 33-44-801(4).

Although the operating agreement only referenced subsection 5, section 33-44-103(b) provides, "The operating agreement may not: . . . . (6) vary the requirement to wind up the limited liability company's business in a case specified in [s]ection 33-44-801(3) or (4) . . . ." § 33-44-103(b).

provides, "A receiver may be appointed by *a judge of the circuit court*." § 15-65-10 (emphasis added). Therefore, both of these matters can only be resolved by the circuit court, not by an arbitrator. Accordingly, claim five falls under the exception to arbitration provided by the Agreement. We disagree with Ludy's argument that the confirmation of the arbitration award by the circuit court would accomplish this.

Therefore, we affirm the circuit court's decision that claim five—requesting the appointment of a receiver, an accounting, and judicial dissolution—was not subject to arbitration. We reverse the circuit court's decision as to claims three—civil conspiracy—and four—defamation—and remand the case to the circuit court to send claims three—civil conspiracy—and four—defamation—to the arbitration proceeding for a determination of whether such claims fall within the scope of the arbitration agreement.

The circuit court ruled on the arbitrability of only the causes of action raised in Respondents' complaint. It did not rule on the causes of action Ludy raised by counterclaim. We note that Ludy's answer and counterclaim stated it was filed out of an abundance of caution in the event his motion to compel arbitration was denied. Ludy's motion to compel arbitration sought to compel the entire case. At the hearing on the motion to compel, Ludy argued the entire case should go to arbitration including Respondents' claims against the Bank. Following the circuit court's order compelling only some of Respondents' causes of action, Ludy filed a Rule 59(e), SCRCP, motion, requesting the circuit court "issue a new or amended order sending all claims (and counterclaims) in the case to arbitration." The circuit court's order denied the motion without further explanation.

"If the [appellant] has raised an issue in the lower court, but the court fails to rule upon it, the [appellant] must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "Once [an] issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised." *Coward Hund Constr. Co. v. Ball Corp.*, 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct. App. 1999) (quoting James F. Flanagan, *South Carolina Civil Procedure* 475 (2d ed. 1996)). "'[T]he Supreme Court identifies two ways to preserve the issue: "a ruling by the trial judge or a post-trial motion." The language implies that a properly requested ruling under Rule 59 is sufficient without a specific judicial

decision on the matter.'" *Pye v. Est. of Fox*, 369 S.C. 555, 566, 633 S.E.2d 505, 511 (2006) (footnotes omitted by court) (quoting Flanagan, *South Carolina Civil Procedure* 475-76), *overruled on other grounds by Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 861 S.E.2d 774 (2021); *see also Zurich Am. Ins. Co. v. Tolbert*, 378 S.C. 493, 500 n.2, 662 S.E.2d 606, 610 n.2 (Ct. App. 2008) (holding an issue preserved for appellate review when the circuit court's order failed to address an issue, the appellants raised the issue in a Rule 59(e) motion, and the circuit court still did not rule on it), *aff'd*, 387 S.C. 280, 692 S.E.2d 523 (2010).

Additionally, "[w]hen a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." *In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) (citing *Godfrey v. Heller*, 311 S.C. 516, 429 S.E.2d 859 (Ct. App. 1993) (finding when a theory of relief was first raised in the lower court's order, the appellant must challenge this theory with a Rule 59, SCRCP, motion))).

As our supreme court has observed, "it may be good practice for us to reach the merits of an issue when error preservation is doubtful." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012). "We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner." *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011).

Here, Ludy filed his pleading setting forth his answer and counterclaims after he moved to compel arbitration, and the pleading stated it was filed only out of an abundance of caution. The circuit court did not rule on whether Ludy's counterclaims should be sent to arbitration. Ludy's position has consistently been that the entire matter should be sent to arbitration. In his Rule 59(e) motion and appeal to this court, he specifically requests that all claims and counterclaims be sent to arbitration. Thus, we find this argument is preserved for appellate review. Therefore, on remand, the circuit court shall use the same criteria described above to determine whether any of Ludy's counterclaims fall within an exception to arbitrability provided in the Agreement, similar to the manner in which this court determined Respondents' claim 5 was not subject to arbitration. Apart from any counterclaims that are specifically exempted from the Agreement, if there is any dispute over the arbitrability of Ludy's counterclaims, the circuit court should send

the counterclaims to the arbitrator to decide which are arbitrable under the Agreement.

Accordingly, the circuit court's order is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GEATHERS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Estate of Thomas G. Moore:

Michael Dennis Moore, Appellant,

v.

Thomas Paul Moore, Francine Laura Lawhon, Estate of Linda Kaye Moore, and Phillip Frederick Moore, Respondents.

Appellate Case No. 2018-001144

Appeal From Florence County
J. Munford Scott, Jr., Probate Court Judge
Thomas A. Russo, Circuit Court Judge

Opinion No. 5887
Submitted November 1, 2021 – Filed January 5, 2022

AFFIRMED IN PART AND REVERSED IN PART

Michael Dennis Moore, pro se.

C. Pierce Campbell, of Turner Padget Graham & Laney, PA, of Florence, for Respondent Thomas Paul Moore.

James Ross Snell, Jr. and Vicki D Koutsogiannis, of Law Office of James R. Snell, Jr., LLC, both of Lexington, for Respondent Phillip Frederick Moore.

THOMAS, J.: Michael Dennis Moore (Appellant), personal representative of the estate of Thomas G. Moore (Decedent), appeals a circuit court order affirming the probate court's order, arguing the circuit court erred in ruling (1) a joint tenancy with a right of survivorship between Decedent and Appellant was defeated at the time a purchase agreement to sell a parcel of real property was signed; (2) Appellant's claims of prejudicial submission of evidence and allowance of new claims on the day of trial were not preserved for the court's review; and (3) a separate envelope containing a document with instructions concerning a piece of Decedent's estate should be integrated into Decedent's last will and testament (Will). We affirm in part and reverse in part.[1]

FACTS/PROCEDURAL HISTORY

Decedent passed away on December 20, 2013, leaving a Will dated September 27, 1997. The Will appointed Appellant as the personal representative. The Will was admitted to the Florence County Probate Court on February 20, 2014, and Appellant filed an Original Inventory and Appraisement for the Estate on April 24, 2014. Decedent was survived by five children: Appellant, Thomas Paul Moore, Phillip Frederick Moore, Francine Laura Lawhon, and Linda Kaye Moore. Thomas, Phillip, Francine, and Linda are Respondents.

The matter appeared before the probate court on December 22, 2015, and July 27, 2016. In its order filed November 29, 2016, the court ruled a document, separate from the Will that was found within Decedent's safe with the Will, should be integrated into the Will. The separate document sought to devise to Thomas an interest in a five-acre piece of property located in Richland County, referred to as the "Church Property" by the probate court because it was located across the street from the house of the pastor of Horrell Hill Baptist Church. The church's pastor was Decedent's brother, Reverend Lester Moore. Decedent and Reverend Moore each owned half of the property.

Appellant filed an appeal with the circuit court. After a hearing on February 14, 2018, the circuit court affirmed the probate court's decision by order filed on May 8, 2018. According to Appellant's brief, Appellant filed a motion to alter or

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

amend, which was denied on June 5, 2018; however, neither the motion to alter or amend nor the order denying the motion is included in the record on appeal. This appeal followed.

STANDARD OF REVIEW

"The standard of review applicable to cases originating in the probate court is controlled by whether the underlying cause of action is at law or in equity." *In re Est. of Hyman*, 362 S.C. 20, 25, 606 S.E.2d 205, 207 (Ct. App. 2004). An action to construe a will is an action at law. *Id.* Thus, our review extends merely to the correction of legal errors. *Id.* "[T]his [c]ourt may not disturb the probate [court's] findings of fact unless a review of the record discloses there is no evidence to support them." *In re Est. of Cumbee*, 333 S.C. 664, 670, 511 S.E.2d 390, 393 (Ct. App. 1999).

LAW/ANALYSIS

I. Joint Tenancy with a Right of Survivorship

Appellant argues the circuit court erred in ruling a joint tenancy with a right of survivorship between Decedent and Appellant was defeated at the time a purchase agreement to sell a parcel of real property was signed. We agree.

Section 27-7-40(a) of the South Carolina Code (2007) provides joint tenancy includes the following incidents of ownership:

> (i) In the event of the death of a joint tenant, and in the event only one other joint tenant in the joint tenancy survives, the entire interest of the deceased joint tenant in the real estate vests in the surviving joint tenant, who is vested with the entire interest in the real estate owned by the joint tenants.
>
> . . . .
>
> (iii) The fee interest in real estate held in joint tenancy may not be encumbered by a joint tenant acting alone

> without the joinder of the other joint tenant or tenants in the encumbrance.
>
> (iv) If all the joint tenants who own real estate held in joint tenancy join in an encumbrance, the interest in the real estate is effectively encumbered to a third party or parties.

Section 27-7-40(c) provides in part:

> Except as expressly provided herein, any joint tenancy severed pursuant to the terms of this section is and becomes a tenancy in common without rights of survivorship. Nothing contained in this section shall be construed to create the estate of tenancy by the entireties. Nothing contained in this section amends any statute relating to joint tenancy with rights of survivorship in personal property but affects only real estate. The provisions of this section must be liberally construed to carry out the intentions of the parties.

Appellant and Decedent jointly purchased 334 Cypress Avenue in Garden City, South Carolina, with each owning half of the property. They entered into an agreement to sell the property in November 2013, prior to Decedent's death on December 20, 2013. The property was sold on December 27, seven days after Decedent's death. Appellant signed the deed individually and received all the proceeds from the sale, despite the existence of the sales contract before Decedent's death.

The probate court cited to section 27-7-40 of the South Carolina Code for the proposition that if all joint tenants who own real property in joint tenancy join in an encumbrance, the interest in the real property is encumbered for a third party or parties. The probate court wrote that this court expounded on the statute in *South Carolina Federal Savings Bank v. San-A-Bel Corporation*, 307 S.C. 76, 78-79, 413 S.E.2d 852, 854 (Ct. App. 1992), when it held a "purchaser under an executory contract for the purchase and sale of real property has an equitable lien on the property in the amount paid for the purchase price," and "[t]his equitable interest arises from payment of the money and does not depend on the purchaser's taking

possession of the real estate." Thus, the probate court reasoned that the sales contract entered into prior to Decedent's death encumbered the property, entitling the purchaser to possession of the property upon payment of the agreed price and Decedent to one-half of the proceeds at closing. The court found that neither the fact that Decedent's signature was not listed on the closing documents nor that the deed was not prepared prior to Decedent's death invalidated Decedent's rights to the proceeds of the sale of the property. Therefore, the probate court ruled the joint tenancy with right of survivorship was defeated by the contract to sell the property and Decedent's Estate was entitled to one-half of the proceeds from the sale. The court ordered Appellant to pay Decedent's Estate $162,500 for the Estate's portion of the sales proceeds.

In its order, the circuit court found there was evidence to support the probate court's findings; thus, they should not be disturbed. As to the legal question of the effect of a contract to purchase and sell real estate creating rights for Decedent after death, after a de novo review, the circuit court found the probate court correctly interpreted and applied the relevant law. The circuit court noted this court has held a "purchaser under an executory contract for the purchase and sale of real property has an equitable lien on the property in the amount paid on the purchase price." *Id.* at 78, 413 S.E.2d at 854. Thus, the court reasoned that once Decedent and Appellant entered into the binding contract to sell the property, Decedent's death did not prevent him from preserving all the rights under it simply because he was waiting for it to be executed. Accordingly, the court held Decedent and Appellant were entitled to receive an equal share of the proceeds of the sale. However, the circuit court noted the probate court incorrectly found half of the $324,500 sale price was $162,500, when it should have been $162,250.

Appellant argues the probate court erred in ruling Appellant and Decedent's joint tenancy with a right of survivorship was severed at the signing of the purchase agreement for the sale of the property. He argues he was the sole owner of the property at the time it was sold because Decedent passed away before the final closing and recording of the property. He asserts the agreement to sell the property, signed by both joint tenants, did not terminate the joint tenancy with a right of survivorship. He argues § 27-7-40(a)(iv) allows for joint tenancies with a right of survivorship to effectively encumber property to third parties but does not state an encumbrance severs a joint tenancy with a right of survivorship. Appellant also argues the probate court incorrectly claimed jurisdiction over a non-probate asset and ruled the joint tenancy with the right of survivorship was terminated at

the moment the contract for sale of the property was signed. He maintains there are no South Carolina cases that address this issue.

We find the case the probate court relied on, *South Carolina Federal Savings Bank v. San-A-Bel Corporation*, does not state a seller's interests in a joint tenancy with a right of survivorship is severed at the signing of a purchase agreement. Also, Section 27-7-40 of the South Carolina Code does not provide that an encumbrance on real estate severs the joint tenancy with a right to survivorship. Thus, we look at other states for guidance. There is a split in authority as to whether a contract for the sale of property severs a joint tenancy with a right to survivorship. "In some jurisdictions, a contract of sale made by both or all of the joint tenants operates as a severance, while a contrary view is taken by other courts." 20 Am. Jur. 2d *Cotenancy and Joint Ownership* § 27.

Appellant cites to a Supreme Court of Washington case, *Estate of Phillips v. Nyhus*, 874 P.2d 154 (Wash. 1994), where joint tenants brought suit against the estate of a deceased joint tenant to declare their entitlement to proceeds from the sale of property. The *Nyhus* court held that "[a] contract or agreement by only one joint tenant to convey property held in joint tenancy destroys the right of survivorship, terminates the joint tenancy and converts it into a tenancy in common." *Id.* at 157-58. However, in the *Nyhus* case, at the time of the joint tenant's death, the property was held by the parties as joint tenants with right of survivorship with contractual rights and obligations arising from an earnest money agreement. *Id.* at 158-59. Because there had been no severance of the joint tenancy by execution of the earnest money agreement at his death, the right of survivorship vested title in the surviving joint tenants along with the contractual rights and obligations. *Id.* The court held the operative event was the joint tenant's death and not the ultimate right to possession of the proceeds which followed as a consequence of the post-death completion of the earnest money agreement. *Id.*

In *Weise v. Kizer,* 435 So. 2d 381, 381 (Fla. Dist. Ct. App. 1983), the sole issue before the Florida District Court of Appeal was whether a joint tenancy is severed and the incident of survivorship destroyed when joint tenants execute a contract to sell real property. In that case, Judith Weise and Wallace Cawthon held real property as joint tenants with a right of survivorship. *Id.* Weise and Cawthon entered into a contract to sell the property to Howard and Karla Moss; however, Cawthon died approximately one month before the closing. *Id.* The *Weise* court held "severance does not automatically occur upon the execution of a contract to

sell that is executed by all joint tenants, unless there is an indication in the contract, or from the circumstances, that the parties intended to sever and terminate the joint tenancy." *Id.* at 382. Thus, severance did not occur, and Weise was entitled to receive all of the proceeds of the sale of the property. *Id.* at 381.

We are inclined to follow the *Weise* court. The sales contract was silent as to whether severance of the joint tenancy was intended by Appellant and Decedent, and no extraneous circumstances indicated severance was intended by the parties. Thus, we find the probate and circuit courts erred in finding the joint tenancy became a tenancy in common without rights of survivorship when Appellant and Decedent entered into a sales contract for the sale of the property and hold the joint tenancy was not severed in this case. Therefore, we reverse the probate and circuit courts on this issue and find the Estate is not entitled to proceeds from the sale.

II. Issue Preservation

Appellant argues the circuit court erred in ruling his claims of prejudicial submission of evidence and allowance of new claims on the day of trial were not preserved for the court's review. We disagree.

At the hearing before the circuit court, Appellant argued the probate court erred in allowing new evidence and new claims of accounting to be submitted by Respondents at the July 27 hearing because they were in Respondents' possession prior to the first hearing on December 22. Appellant asserts he asked the probate court to allow him to respond to the checks submitted by Respondents, and the court denied his request. Thus, Appellant requested the circuit court reverse that decision or at least remand it to the probate court to allow Appellant to review the checks to determine if the money was spent and where it went.

Thomas asserted no written discovery was done by any party in this case, so the documents were not hidden or withheld before trial. He argued the issue was not preserved because Appellant did not object to the introduction of the documents into evidence. As for Appellant's assertion that the probate court denied his request to respond, Thomas stated Appellant asked the court if it wanted a summary of his interpretation of where the checks went and the court replied "no." Appellant did not object.

In its order, the circuit court noted the issue before it was whether the probate court properly considered the evidence and testimony presented at trial and correctly ruled based on that evidence that Appellant failed to pursue loans to Decedent, failed to account for funds received that belonged to the Estate, and failed to account for loans made by Decedent to Appellant's own business. The court found Appellant's primary arguments were that he was surprised by the evidence presented at trial and he was not permitted to submit a summary of the evidence post-trial. However, it noted Appellant chose not to conduct discovery on these matters, as no written discovery was exchanged between the parties, limited depositions were taken, and there were no requests for the production of documents submitted. Further, it found Appellant's trial counsel acquiesced to the admission of evidence related to the issues numerous times, either expressly or by failing to object to its introduction. Thus, the circuit court determined Appellant raised this issue to the court for the first time on appeal; therefore, it was not preserved for its review.

We find the circuit court correctly found Appellant did not preserve this issue for its review. At trial, Appellant did not object to the introduction of the documents into evidence. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."). Also, Appellant did not object when the probate court denied his request to respond to the evidence with a summary of his own. *See id.* Further, even if Appellant raised any errors related to these issues in his motion to reconsider to the probate court, we cannot review that motion because Appellant did not include it in the record on appeal. *See Bonaparte*, 291 S.C. at 444, 354 S.E.2d at 50 (declining to address the appellant's claim of error because the appellant failed to furnish this court with a sufficient record on appeal to permit consideration of the issue); *id.* ("In the absence of such a record, this issue cannot be considered on appeal."); Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal.").

III. Separate Envelope

Appellant argues the circuit court erred in ruling a separate envelope containing a document with instructions devising the Church Property to Thomas should be integrated into Decedent's Will. We decline to consider this issue.

Appellant argues the circuit court erred in affirming the probate court, and the typed document should not have been integrated into the Will because the document was not signed, witnessed, dated, or notarized, and it was in a separate envelope not attached to the Will. The Appellant has not included a copy of the Will or the separate document in the record on appeal. The Appellant bears the burden of providing a sufficient record on appeal from which this court can make an intelligent review. *See Bonaparte v. Floyd*, 291 S.C. 427, 444, 354 S.E.2d 40, 50 (Ct. App. 1987) (declining to address the appellant's claim of error because the appellant failed to furnish this court with a sufficient record on appeal to permit consideration of the issue). "In the absence of such a record, this issue cannot be considered on appeal." *Id.*; Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal."). Our standard of review is that this court may not disturb the probate or circuit courts' findings of fact unless a review of the record discloses there is no evidence to support them. *In re Est. of Cumbee*, 333 S.C. at 670, 511 S.E.2d at 393. Without the inclusion of the Will or the separate document that was allegedly incorrectly integrated into the Will, we decline to consider this issue.

CONCLUSION

Accordingly, we reverse the probate and circuit courts' rulings that the joint tenancy with a right of survivorship between Decedent and Appellant was severed at the time the purchase agreement to sell the property was signed. We affirm the circuit court's ruling that Appellant did not preserve the issue for review of prejudicial submission of evidence and allowance of new claims on the day of trial. We decline to consider the probate and circuit courts' rulings that the separate document disposing of the Church Property should be integrated into Decedent's Will.

AFFIRMED IN PART and REVERSED IN PART.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas, Respondent,

v.

Pennsylvania National Mutual Casualty Insurance Company, Appellant.

Appellate Case No. 2020-001239

Appeal From Richland County
Jean Hoefer Toal, Acting Circuit Court Judge

Opinion No. 5888
Heard November 2, 2021 – Filed January 5, 2022

AFFIRMED

David G. Harris, II, Brady A. Yntema, and David L. Brown, all of Goldberg Segalla, LLP, of Greensboro, NC, for Appellant.

Jescelyn Tillman Spitz, of Rikard & Protopapas, LLC, of Columbia, Jonathan M. Robinson and Shanon N. Peake of Smith Robinson Holler DuBose Morgan, LLC, of Columbia, G. Murrell Smith, Jr., of Smith Robinson Holler DuBose Morgan, of Sumter, and William Bradley Nes, of Washington, DC, all for Respondent.

THOMAS, J.: Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas (Covil), filed this action against Pennsylvania National Mutual Casualty Insurance Company (Penn) alleging breach of insurance contracts based on Penn's failure to participate in the settlement of an underlying claim against Covil. Penn appeals the circuit court's order granting partial summary judgment to Covil, arguing the court erred in (1) granting partial summary judgment where Covil's motion was not supported by sworn affidavits and summary judgment was premature; (2) finding Covil's late notice of the underlying claim did not bar coverage; and (3) holding coverage existed despite a products hazard and operations hazard exclusion in the Penn insurance contracts. We affirm.

FACTS

Covil is a corporation that operated between 1954 and 1991. Its operations "included the installation, repair, replacement, removal or disturbance of thermal insulation and other building materials." Covil's operations allegedly exposed persons to asbestos, resulting in claims and lawsuits against it. Penn insured Covil under comprehensive general liability policies between March 1986 and March 1988. One of the lawsuits against Covil, *Rollins v. Air & Liquid Systems Corp.*, alleged David Rollins was exposed to asbestos due to Covil's operations during the covered period. In November of 2018, the circuit court appointed Protopapas to serve as a Receiver for Covil.

Rollins filed his action on April 22, 2019, alleging he suffered from mesothelioma due to, *inter alia*, exposure at home from his stepfather, who worked at the Bowater Paper Mill where Covil did work between 1986 and 1988. Rollins' at home exposure allegedly occurred because his stepfather routinely came home from work covered in asbestos dust between 1980 and 1991.

On January 27, 2020, Covil's Receiver emailed Penn and requested it attend a court-ordered mediation to settle the *Rollins* action. The notice "respectfully request[ed] that the insurers provide and/or continue to provide a defense to Covil Corporation in these asbestos lawsuits. To the extent that a defense will not be provided, please advise so that [Covil] can take the actions necessary . . . ." The email indicated a copy of the *Rollins* complaint was attached. On February 3,

2020, Covil tendered the complaint by letter to Penn for defense and indemnity. The letter requested Penn "immediately advise in writing whether [it would] . . . accept Covil's tender of [the] suit and . . . provide a full and complete defense of th[e] matter."

Penn responded by sending a Non-Waiver Agreement to Covil's Receiver signed by Penn but not signed by Covil. Penn alleged it was notified of the pending lawsuit on January 27, 2020, and notified of the mediation on February 13, 2020. The mediation was held on February 25, 2020. Penn admitted it "attended the mediation, and expressed a willingness to contribute some amount to the settlement on behalf of Covil." The Receiver settled Rollins' claim for a confidential amount.

On February 28, 2020, Covil filed this breach of contract action against Penn, alleging that although Penn attended the mediation, it refused to participate in the settlement and refused to contribute $50,000 to the settlement. Covil sought damages of up to $74,999.99 for breach of contract, including, *inter alia*, actual damages, consequential damages, attorney's fees, and prejudgment interest. On April 22, 2020, Covil filed a motion for partial summary judgment, arguing Penn wrongly refused to pay the settlement based on exclusions in its policies.

Penn filed a return to the motion for summary judgment, arguing the first notice it had of the lawsuit was the email sent on January 27, 2020. Penn argued Covil was served with the *Rollins* action in April of 2019, Rollins was deposed in February and June of 2019 without any notice to Penn, and the parties engaged in other discovery as required by the Master Asbestos Discovery/Scheduling Order. Penn argued that due to the late notice, it was unable to evaluate the potential coverage prior to the mediation. Penn also argued the "Completed Operations Hazard and Products Hazard" exclusion in the policies barred coverage. In addition, Penn argued summary judgment was premature because it had not had a full and fair opportunity for discovery.

Citing *Re: Operation of the Trial Courts During the Coronavirus Emergency*, South Carolina Supreme Court Order dated April 3, 2020, the trial court found the motions had been fully and comprehensively briefed and a hearing was unnecessary. The court found Penn failed to prove the exclusions it relied on barred coverage. The court also found Penn's late notice defense was "not a valid defense to breach of its insurance contract with Covil." Thus, by order filed

August 13, 2020, the court found Penn was "required to indemnify Covil against the settlement of the *Rollins* action."

Penn moved for reconsideration, again arguing it had late notice, its policy exclusion applied, and summary judgment was premature because discovery was not yet completed. The court denied the motion. This appeal followed.

STANDARD OF REVIEW

"When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP . . . ." *Callawassie Island Members Club, Inc. v. Dennis*, 429 S.C. 493, 497, 839 S.E.2d 101, 103 (Ct. App. 2019), *cert. denied*, Jan. 22, 2021. The standard in Rule 56(c) "provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

LAW/ANALYSIS

I. Unsupported and Premature Grant of Summary Judgment

Penn argues the circuit court's grant of summary judgment was improper because it was unsupported and premature. We disagree.

A. Unsupported

For the first time on appeal, Penn argues the circuit court erred in granting summary judgment because Covil's motion for summary judgment was unsupported by failing to include affidavits or authenticated documents. Because this issue was neither raised to nor ruled upon by the circuit court, it is not preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review.").

B. Premature

Penn also argues the circuit court erred in granting summary judgment because it was premature and denied it a full and fair opportunity to complete discovery. We disagree.

As noted by the circuit court, this action arises out of the *Rollins* asbestos personal injury action against Covil. There is no dispute that the exposure to asbestos alleged in *Rollins* occurred while Covil was performing operations at the Bowater Paper Mill during the period of Penn's policy number 515 5028 537, which was effective March 31, 1986, to March 31, 1987. As stated by the circuit court, "[t]he principal dispute [in this case] is whether an exclusion in the Penn . . . policy applies to bar coverage for the *Rollins* action." As also found by the circuit court, Penn failed to submit a Rule 56(f) affidavit explaining the discovery it needed to conduct. Penn merely presented an "unsupported . . . and self-serving assertion that it needed additional time for discovery . . . ."

In its argument regarding prematurity, Penn relies on *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). In *Baughman*, our supreme court reversed a grant of summary judgment to the defendant as premature. *Id*. at 114, 410 S.E.2d at 545. However, the court in *Baughman* found the plaintiffs had demonstrated a likelihood that further discovery would uncover additional, relevant evidence. *Id.* at 112, 410 S.E.2d at 544. Also, the court found the plaintiffs had not been dilatory in seeking discovery. *Id.* at 113, 410 S.E.2d at 544.

Here, even if Penn was not dilatory for failing to provide evidence it began discovery between the filing of this action in February 2020 and the filing of the court's order granting partial summary judgment in August 2020, it did not demonstrate further discovery would uncover additional, relevant evidence. Instead, it argues the additional discovery was needed to support the issues raised in this appeal: late notice and the applicability of exclusions in the policies. However, as found by the circuit court, Penn failed to submit a Rule 56(f) affidavit setting forth the discovery it needed to conduct. Thus, we find no reversible error. *See* Rule 56(e), SCRCP ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as

otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."); Rule 56(f), SCRCP (applying when it appears "from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition"); *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 320, 548 S.E.2d 854, 856 (2001) (stating that a party opposing summary judgment is required to come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial); *id*. at 321, 548 S.E.2d at 857 (finding Rule 56(f), SCRCP "requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery").

II. Late Notice

Penn argues the circuit court erred in finding Covil's late notice of the *Rollins* lawsuit did not bar coverage for Covil. We disagree.

The policies at issue contained notice provisions as follows:

> **Insured's Duties in the Event of Occurrence, Claim[,] or Suit.**
> (a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured . . . shall be given by or for the insured to [Penn] . . . as soon as practicable.
> (b) If claim is made or suit is brought against the insured, the insured shall immediately forward to [Penn] every demand, notice, summons[,] or other process received . . . .

The circuit court found that although Penn argued a late notice defense, it admitted "a representative of Penn . . . attended the mediation and expressed a willingness to contribute toward [the] settlement on behalf of Covil." The court also found Penn hired the same defense counsel as the other insurers, had access to the same evidence as the other insurers, and deliberately decided not to contribute by "presumably" relying on its policy exclusions. Without citing waiver, the circuit court appears to have concluded Penn waived its rights under the notice provision by attending the mediation. Although Penn sent Covil a Non-Waiver Agreement, it admitted it thereafter attended the mediation and expressed a willingness to

contribute toward settlement on behalf of Covil. In addition, Penn did not cite to any discovery it attempted to undertake during the pendency of the action between February 2020, when the action was filed, and August 2020, when the circuit court ruled on Covil's motion for partial summary judgment.

"An insurance contract, like any other contract, may be altered by the contracting parties, and the insurer may, of course, waive any provision for forfeiture therein." *Fender v. New York Life Ins. Co.*, 158 S.C. 331, 340, 155 S.E. 577, 580 (1930) (quoting *Gandy v. Orient Ins. Co.*, 52 S.C. 224, 229, 29 S.E. 655, 656 (1898)). "Waiver is the voluntary and intentional relinquishment of a known right." *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994) (per curiam). "Acts that are inconsistent with the continued assertion of a right may also give rise to a waiver." *Id.* Although waiver is an affirmative defense and must be specifically pled, waiver may be inferred by acts inconsistent with the known right despite the failure to specifically plead waiver. *Id.*; *Lawrimore v. Am. Health & Life Ins. Co.*, 276 S.C. 112, 114, 276 S.E.2d 296, 297 (1981).

In this case, the circuit court relied on Penn's attendance at the mediation and Penn's expressed willingness to contribute to the settlement. We find Penn's actions at mediation inferred a waiver of its right to timely notice. *See Dreher v. S.C. Dep't of Health & Env't Control*, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015) ("[A]n appellate court may affirm the lower court's decision for any reason appearing in the record[. T]he prevailing party may—but is not required to—raise additional sustaining grounds to support the lower court's decision."); Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

III. Exclusion

Penn argues the circuit court erred in finding its products hazard and completed operations hazards exclusion did not apply to bar coverage. We disagree.

On an endorsement page entitled "Exclusion," the policy states that bodily injury liability coverage does not apply to bodily injury "included within the **Completed Operations Hazard** or the **Products Hazard**." The definitions section of the policy provides as follows:

> "[**C**]**ompleted operations hazard**" includes **bodily injury** . . . arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the **bodily injury** . . . occurs *after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured*. "Operations" include materials, parts[,] or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:
>
> (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed[,]
> (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed[,] or
> (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

(Italics added.)

The policy defines "products hazard" as follows:

> "**[P]roducts hazard**" includes **bodily injury** . . . arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the **bodily injury** . . . occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others.

According to Penn, the products hazard exclusion applies if (1) the bodily injury arises out of the insured's products; (2) the bodily injury occurs away from the insured's premises; and (3) physical possession of the products has been

relinquished. Penn argues Rollins designated Covil as a "Product Defendant" in his complaint; thus, only products liability claims (rather than premises liability claims) were asserted against Covil. Penn next argues Covil relinquished possession of the products *as they were installed during the work* rather than at the end of the contract at Bowater, and because Rollins alleged exposure due to "take-home" exposure, physical possession of Covil's products must necessarily have been relinquished. Penn maintains the exclusion applied because the exposure to asbestos during the policy period took place after Covil either completed its work on the Bowater contract or after Covil relinquished possession of the products it installed at Bowater.

Quoting Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations−What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971), the circuit court found "it is established that the risk insured by the 'products hazard' and the 'completed operations hazard' is 'the possibility that the goods, products[,] or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than the product or completed work itself . . . .'" The court rejected Penn's argument that Covil relinquished its possession of its product during the relevant period.

Penn argues several cases cited by the circuit court support its arguments. The circuit court cited *Friestad v. Travelers Indemnity Co.*, 393 A.2d 1212 (Pa. Super. Ct. 1978). In *Friestad*, the court noted the following:

> Regardless of the involvement of the insured's products, so long as an accident occurs on the insured's business premises or away from his premises, but while he has the jobsite under his control, the premises operations clause obtains and coverage is afforded thereunder. It is only after he has relinquished control of a jobsite that the products hazard or completed operations hazard exclusions will operate to deny coverage.

Id. at 1215 n.5. In *Friestad*, the insured heating company installed a furnace, which caused a fire due to faulty installation. *Id.* at 1213. In a declaratory judgment action, the trial court entered judgment in favor of the insurer. *Id.* at 1212. The appellate court reversed, finding the trial court erred in determining the installation of the furnace "fell within the products hazard provision of the

contract." *Id.* at 1217. Penn relies on language in *Friestad* that states "it is more preferable . . . to define the products hazard in terms of products liability law, and apply the exclusion *only when a product, rather than a service*, is the [c]ause in fact of damages . . . ." *Id.* (emphasis added).

Similarly, Penn argues *Heyward v. American Casualty Co.*, 129 F. Supp. 4 (E.D.S.C. 1955), also relied upon by the circuit court, supports its position because the court in *Heyward* refused to exclude coverage under a products hazard exclusion where the injuries were caused by negligent installation of a heating and plumbing unit. *Id.* at 8–9; *see also B&R Farm Servs., Inc. v. Farm Bureau Mut. Ins. Co.*, 483 N.E.2d 1076, 1077 (Ind. 1985) (finding the products hazard exclusion did not apply because the claims regarding the accidental release of fertilizer into a creek had nothing to do with a defect in a product, but instead arose due to the negligent release of the product).

We find these cases do not support Penn's argument that the products hazard exclusion applied. Covil argues the products hazard exclusion applies only when injury is caused by a defective product placed into the stream of commerce, or when injury is caused by the insured's completed work. Here, we find Covil had neither placed a product into the stream of commerce nor relinquished possession of the product while installing it at the Bowater jobsite during the policy period when Rollins' stepfather was exposed to asbestos; thus, Penn could not establish the applicability of the products hazard exclusion.[1]

Penn also argues the exclusion applies as a completed operations hazard. Penn describes the exclusion as applying to claims (1) arising out of Covil's operations, (2) after such operations are completed, and (3) if the bodily injury occurs away from Covil's premises. Penn argues Rollins is allegedly suffering from mesothelioma arising out of Covil's installation of insulation where his stepfather

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[1] Penn argues the circuit court's finding that there is no evidence indicating Covil supplied asbestos insulation to the Bowater facility during the covered period is inconsistent with the court's other findings. This argument was neither raised to the circuit court in Penn's motion for reconsideration nor ruled upon in the order denying reconsideration. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review.").

worked. According to Penn, "[t]he determinative issue is whether . . . Rollins' exposure to asbestos occurred after Covil's operation[s] were completed." Penn argues a genuine issue of material fact exists, which should have precluded summary judgment, as to whether the "take-home" exposure occurred while a portion of Covil's operations had already been put to their intended use. Finally, Penn relies on *In re The Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004), and argues the exclusion applies if the exposure occurred during an insured's operations and continued thereafter.

In *Wallace & Gale*, the argument was made that the completed operations hazard exclusion did not apply to asbestos-related claims because the alleged bodily injury did not begin after the insured's operations ended. *Id.* at 833–34. The court stated:

> That argument, however, on its face is far broader than the district court's decision we have quoted . . . . For example, a claimant's initial exposure which occurred while Wallace & Gale was still conducting operations was not subject to any aggregate limit for policies in effect at that time even if the exposure extended beyond the operations of Wallace & Gale. Also, if exposure which began during operations continued after operations were completed, the aggregate limits of policies which came into effect after operations would apply, but, as stated, the aggregate limits would not apply to those policies in effect at the time of the exposure during Wallace & Gale's operations.

Id. at 834. Covil argues *Wallace & Gale* does not involve the application of policy exclusions, but concerns the inception dates of each of many policies covering the claimant's injuries and concludes if a claimant's initial exposure occurred while the insured was conducting operations, the claim would be covered without an aggregate limit of liability.

As previously noted, the circuit court found Penn provided no evidence to support the application of the completed operations exclusion. Covil's work was performed under the subcontract, which was entered into on February 26, 1986, and performed between March 11, 1986, and January 25, 1987. The policy at issue provided coverage during this period. We find because Rollins was exposed to

asbestos during the period of the contract coverage, the completed operations exclusion did not apply. Because Rollins' bodily injury was not excluded under the definitions of either products hazard or completed operations, we affirm the circuit court's finding that the exclusion did not apply. *See Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008) ("An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law."); *McPherson ex rel. McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 319, 426 S.E.2d 770, 771 (1993) ("[R]ules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed. This rule of construction inures to the benefit of the insured.").

CONCLUSION

Based on the foregoing, the order on appeal is

AFFIRMED.

GEATHERS, J., and HUFF, A.J., concur.