The Supreme Court of South Carolina

RE: Interest Rate on Money Decrees and Judgments

ORDER

South Carolina Code Ann. § 34-31-20 (B) (2020) provides that the legal rate of interest on money decrees and judgments "is equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus four percentage points, compounded annually. The South Carolina Supreme Court shall issue an order by January 15 of each year confirming the annual prime rate. This section applies to all judgments entered on or after July 1, 2005. For judgments entered between July 1, 2005, and January 14, 2006, the legal rate of interest shall be the first prime rate as published in the first edition of the Wall Street Journal after January 1, 2005, plus four percentage points."

The Wall Street Journal for January 2, 2021, the first edition after January 1, 2021, listed the prime rate as 3.25%. Therefore, for the period January 15, 2021, through January 14, 2022, the legal rate of interest for judgments and money decrees is 7.25% compounded annually.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
January 4, 2021

The Supreme Court of South Carolina

In the Matter of Andrew Smith, Petitioner.

Appellate Case No. 2021-000011

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 29, 2010, Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is an inactive member of the Bar in good standing.

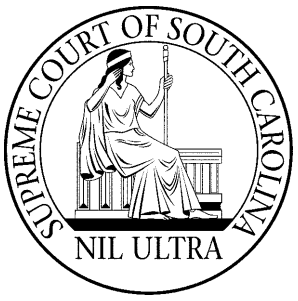
Petitioner has now submitted a resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

Within twenty (20) days of the date of this order, Petitioner shall surrender the certificate of admission to the Clerk of this Court. If Petitioner cannot locate this certificate, Petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

FOR THE COURT

BY 

Columbia, South Carolina
January 7, 2021



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 1
January 13, 2021
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2021-UP-009-Paul Branco v. Hull Storey Retail Group, LLC

2021-UP-010-John Doe v. Beaufort Jasper Academy for Career Excellence

PETITIONS FOR REHEARING

5776-State v. James Heyward	Pending
5779-Cleo Sanders v. Savannah Highway Automotive	Pending
5782-State v. Randy Wright	Pending
5784-Arrowpointe Federal Credit Union v. Jimmy Eugene Bailey	Pending
2020-UP-305-SCDSS v. Natalia Coj and Fernando Hernandez	Pending
2020-UP-323-John Dalen v. State	Pending
2020-UP-336-Amy Kovach v. Joshua Whitley	Pending
2020-UP-338-State v. Luther Brian Marcus	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5588-Brad Walbeck v. The I'On Company	Pending
5641-Robert Palmer v. State et al.	Pending
5691-Eugene Walpole v. Charleston Cty.	Pending
5696-The Callawassie Island v. Ronnie Dennis	Pending
5699-PCS Nitrogen, Inc. v. Continental Casualty Co.	Pending
5714-Martha Fountain v. Fred's Inc.	Pending
5715-Christine LeFont v. City of Myrtle Beach	Pending
5716-Glenn Gunnells v. Cathy G. Harkness	Pending

5717-State v. Justin Jamal Warner	Pending
5721-Books-A-Million v. SCDOR	Pending
5722-State v. Herbie V. Singleton, Jr.	Pending
5723-Shon Turner v. MUSC	Pending
5725-In the matter of Francis A. Oxner	Pending
5726-Chisolm Frampton v. SCDNR	Pending
5729-State v. Dwayne C. Tallent	Pending
5730-Patricia Damico v. Lennar Carolinas	Pending
5731-Jerico State v. Chicago Title Insurance	Pending
5735-Cathy J. Swicegood v. Polly A. Thompson	Pending
5736-Polly Thompson v. Cathy Swicegood	Pending
5741-Martha Lusk v. Jami Verderosa	Pending
5745-Steven K. Alukonis v. Wayne K. Smith, Jr.	Pending
5749-State v. Steven L. Barnes	Pending
5750-Progressive Direct v. Shanna Groves	Pending
5751-State v. Michael Frasier, Jr.	Pending
5755-Stephen A. Connelly v. The Main Street America Group	Pending
5759-Andrew Young v. Mark Keel	Pending
5760-State v. Jaron L. Gibbs	Pending
5764-State Farm v. Myra Windham	Pending
5767-State v. Justin Ryan Hillerby	Pending
5768-State v. Antwuan L. Nelson	Pending

5773-State v. Mack Seal Washington	Pending
2019-UP-331-Rajinder Parmar v. Balbir S. Minhas	Pending
2019-UP-386-John W. Mack, Sr. v. State	Pending
2019-UP-393-The Callawassie Island v. Gregory Martin	Pending
2019-UP-394-Brandon Heath Clark v. State	Pending
2019-UP-396-Zachary Woodall v. Nicole Anastasia Gray	Pending
2019-UP-416-Taliah Shabazz v. Bertha Rodriguez	Pending
2020-UP-013-Sharon Brown v. Cherokee Cty. School District	Pending
2020-UP-018-State v. Kelvin Jones	Pending
2020-UP-020-State v. Timiya R. Massey	Pending
2020-UP-026-State v. Tommy McGee	Pending
2020-UP-032-State v. Kenneth S. Collins	Pending
2020-UP-072-State v. Brenda L. Roberts	Pending
2020-UP-093-Michael Elders v. State	Pending
2020-UP-095-Janice Pitts v. Gerald Pitts	Pending
2020-UP-101-Erick Hernandez v. State	Pending
2020-UP-108-Shamsy Madani v. Rickey Phelps	Pending
2020-UP-118-State v. Samuel Lee Broadway	Pending
2020-UP-128-State v. Scott David Bagwell	Pending
2020-UP-129-State v. Montrell Deshawn Troutman	Pending
2020-UP-132-Federal National Mortgage Assoc. v. D. Randolph Whitt	Pending

2020-UP-133-Veronica Rodriguez v. Peggy Evers	Pending
2020-UP-144-Hubert Brown v. State	Pending
2020-UP-145-Kenneth Kurowski v. Daniel D. Hawk	Pending
2020-UP-148-State v. Ronald Hakeem Mack	Pending
2020-UP-150-Molly Morphew v. Stephen Dudek	Pending
2020-UP-151-Stephen Dudek v. Thomas Ferro (Morphew)(2)	Pending
2020-UP-169-State v. James Alfonza Biggs, III	Pending
2020-UP-178-State v. Christian A. Himes	Pending
2020-UP-196-State v. Arthur J. Bowers	Pending
2020-UP-197-Cheryl DiMarco v. Brian DiMarco (3)	Pending
2020-UP-198-State v. Sidney Moorer	Pending
2020-UP-199-State v. Joseph Campbell Williams, II	Pending
2020-UP-215-State v. Kenneth Taylor	Pending
2020-UP-219-State v. Johnathan Green	Pending
2020-UP-221-SCDSS v. Shannon R. Jacob	Pending
2020-UP-229-SCDSS v. Dekethia Harris	Pending
2020-UP-235-Misty A. Morris v. BB&T Corp. (David Proffitt)	Pending
2020-UP-236-State v. Shawn R. Bisnauth	Pending
2020-UP-237-State v. Tiffany Ann Sanders	Pending
2020-UP-238-Barry Clarke v. Fine Housing, Inc.	Pending
2020-UP-241-State v. Mimi Joe Marshall	Pending
2020-UP-244-State v. Javon Dion Gibbs	Pending

2020-UP-245-State v. Charles Brandon Rampey	Pending
2020-UP-246-State v. Brian W. Lewis	Pending
2020-UP-247-Ex Parte: Teresa L. Ferry (SCDSS v. Reavenell & Nelson)	Pending
2020-UP-255-State v. Angela D. Brewer	Pending
2020-UP-257-Melanie Maddox v. Richard Carroll	Pending
2020-UP-264-SCDSS v. Antonio Bolden	Pending
2020-UP-265-Jonathan Monte, Sr. v. Rodney Dunn	Pending
2020-UP-272-State v. Heyward L. Martin, III	Pending
2020-UP-284-Deonte Brown v. State	Pending
2020-UP-290-State v. Phillip Wesley Walker	Pending

The Supreme Court of South Carolina

In the Matter of Edward Joseph Schafer, Respondent.

Appellate Case No. 2021-000020

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

s\Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
January 8, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Desa Ballard, Appellant/Respondent,

v.

Newberry County, Respondent/Appellant.

Appellate Case No. 2017-002429

Appeal From Newberry County
Thomas A. Russo, Circuit Court Judge

Opinion No. 5787
Heard September 9, 2020 – Filed January 13, 2021

AFFIRMED IN PART, REVERSED IN PART

Desa Ballard, Appellant/Respondent, Pro Se.

Boyd B. Nicholson, Jr., and Sarah P. Spruill, of Haynsworth Sinkler Boyd, P.A., both of Greenville, for Respondent/Appellant.

HEWITT, J.: This case is about whether there is a private right of action when public records have been inadvertently destroyed. It involves two chapters in Title 30 of the South Carolina Code: Chapter 1 (from here forward, the "Public Records Act") and Chapter 4 (the Freedom of Information Act, commonly called FOIA).

A FOIA request revealed that Newberry County failed to retain some government emails and text messages. The circuit court ruled that a private citizen could not bring a civil suit claiming the failure violated the Public Records Act, but the court also ruled that failing to retain the records violated FOIA. We agree there is no civil cause of action for violating the Public Records Act, but we find the circuit court erred when it held a public body violates FOIA if it fails to retain public records.

FACTS

This case arose out of attorney Desa Ballard's representation of a former part-time chief magistrate in Newberry County. After the County resolved a legal dispute with a different magistrate, the County eliminated a stipend for certain magistrates and began the process of doing away with part-time magistrate positions.

Ballard filed a FOIA request with the County in December 2014. Among other things, she sought communications to and from the county administrator pertaining to magistrate positions over a roughly five year period.

The County had problems collecting all of the potentially relevant documents. The administrator's computer crashed in March 2014, months before Ballard's FOIA request, and the County did not have a central email server, a system for "backing up" and archiving email messages, or a system for retaining text messages, which Ballard also requested.

The parties were ultimately able to narrow the list of things the County would produce. Still, the County produced roughly 2,000 pages of documents. The County produced all of the administrator's post-crash emails and several pre-crash emails that the County recovered from other employees or through other means. Ballard nevertheless maintained that the County's production was insufficient and claimed the County violated FOIA in not retaining all emails and text messages that were "public records."

The circuit court split its findings into three sections. First, the circuit court found the County had "no archiving policy, no document retention policy, and no FOIA compliance policy in place" as it related to electronic data. The court further found the County "had no system in place for backing up or archiving county emails, no connected email servers, no cloud storage, [] no end user back-ups," and that this violated FOIA. The court believed a declaratory judgment to this effect was all the

relief it could grant because any information beyond what the County already produced appeared to have been inadvertently and irretrievably destroyed.

Second, the circuit court ruled Ballard did not have a private right of action to sue for the County's alleged violations of the Public Records Act. The court based its decision on the absence of a statute creating such a right and the fact that the Public Records Act explicitly references criminal liability, not civil liability.

Third and finally, the circuit court found the County violated FOIA in failing to disclose the "specific purpose" of several executive sessions held during prior county council meetings. The court awarded Ballard roughly half of her attorney's fees based on its view that the case produced a "split" result.

ISSUES

The County did not appeal the FOIA violation related to executive sessions and the award of attorney's fees. Thus, all parties agree these portions of the circuit court's judgment will stand.

Ballard argues the circuit court erred in holding there is not a private right of action to sue under the Public Records Act. She also argues the circuit court erred in failing to award all of her attorney's fees rather than roughly half of those fees.

The County cross-appeals and argues its failure to retain emails and text messages does not violate FOIA.

STANDARD OF REVIEW

This case requires us to construe the Public Records Act and FOIA. "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Lambries v. Saluda Cty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)).

PUBLIC RECORDS ACT

The Public Records Act consists of sections 30-1-10 through -180 of the South Carolina Code. Among other things, it defines a "public body," identifies the legal custodian of public records, and explains that the Department of Archives and

History is responsible for establishing efficient and economical "standards, procedures, techniques, and schedules" for public bodies to manage the ocean of information they produce. S.C. Code Ann. §§ 30-1-10(B), -20, & -80 (2007).

The Public Records Act also contains enforcement mechanisms. It is a crime to unlawfully remove, deface, or destroy a public record. *See* S.C. Code Ann § 30-1-30 (2007). It is also a crime for a public official to refuse or willfully neglect to perform any of his or her statutory duties. *See* S.C. Code Ann. § 30-1-140 (2007). If someone refuses to surrender a public record to the record's legal custodian or to the Department of Archives, that is a separate crime, and the act empowers certain individuals to bring a civil action for the record's surrender. *See* S.C. Code Ann. § 30-1-50 (2007). Critically, nothing in the Public Records Act grants any interested party, however well-intentioned, the right to enforce the act by bringing a civil action.

We agree with the circuit court that there is also no implied civil right to enforce these statutes. A bellwether case on implied causes of action is *Whitworth v. Fast Fare Markets of South Carolina, Inc.*, which explains "the general rule [] that a statute which does not purport to establish a civil liability, but merely makes [a] provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability." 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985) (quoting 73 Am. Jur. 2d, *Statutes* § 432 (1974)). A private right of action will "be implied only if the legislation was enacted for the special benefit of a private party." *Doe v. Marion*, 373 S.C. 390, 397, 645 S.E.2d 245, 248 (2007).

No one appears to dispute that the Public Records Act was not enacted for anyone's particular benefit. There is also a virtually unbroken string of precedents refusing to recognize implied rights of action in statutes that—like the Public Records Act—describe the government's basic structure and operation.[1]

---

[1] *Kubic v. MERSCORP Holdings, Inc.*, 416 S.C. 161, 785 S.E.2d 595 (2016); *Marion*, 373 S.C. 390, 645 S.E.2d 245; *Adkins v. S.C. Dep't of Corr.*, 360 S.C. 413, 602 S.E.2d 51 (2004); *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 426 S.E.2d 304 (1993); *Citizens for Lee Cty., Inc. v. Lee Cty.*, 308 S.C. 23, 416 S.E.2d 641 (1992); *Dorman v. Aiken Commc'ns, Inc.*, 303 S.C. 63, 398 S.E.2d 687 (1990); *Whitworth*, 289 S.C. 418, 338 S.E.2d 155; *Patterson v. I.H. Servs., Inc.*, 295 S.C. 300, 368

If we were to recognize a general right to seek a declaratory judgment that the Public Records Act has been violated, we would be creating something the General Assembly did not create and might not create if it considered the issue. We are not at liberty to add to the statutory law or subtract from it.

FOIA VIOLATION

FOIA is the nub of this appeal. As Ballard sees it, FOIA allows her to bring a declaratory judgment and enforce the Public Records Act. Building on that premise, she argues there was no "split" result in this case. She says her singular claim that the County was not properly preserving public records fully succeeded and she should consequently be awarded all of her attorney's fees rather than half.

From the County's perspective, the inadvertent destruction of public records is a violation of the Public Records Act, not of FOIA. The County does not object to the amount of fees the circuit court awarded, but argues no additional fees are appropriate.

There is no denying these statutory regimes are related to each other. The Public Records Act imports from FOIA the definition of "public record." § 30-1-10(A). Public records are a large part of how FOIA furthers its announced purpose: to ensure "that public business be performed in an open and public manner[.]" S.C. Code. Ann. § 30-4-15 (2007). To that end, FOIA grants citizens the right to inspect public records, copy public records, or receive public records electronically. S.C. Code Ann. § 30-4-30(A)(1) (Supp. 2019). Certain records are exempt from disclosure, but that does not diminish the point. There is little value in the right to inspect public records if there are no public records for citizens to inspect.

This issue presents a difficult question. It is possible to frame Ballard's contention in a way that makes an answer in her favor seem instinctive. It would be natural for a citizen denied the right to inspect a document that was not retained by a public body to say the public body has violated FOIA. That person might make the argument by pointing out that FOIA's definition of a public record is breathtakingly broad—it includes "all" documentary materials, regardless of form, that are prepared

---

S.E.2d 215 (Ct. App. 1988); *Herald Pub. Co. v. Barnwell*, 291 S.C. 4, 351 S.E.2d 878 (Ct. App. 1986).

or retained by a public body, and that FOIA itself grants citizens the right to inspect and copy public records. S.C. Code Ann. §§ 30-4-20(c), -30(A)(1) (2007 & Supp. 2019).

Even so, we find the County's argument is more faithful to the statutory text. FOIA and the Public Records Act run on parallel tracks, but they differ from each other in a key respect. When read literally, FOIA treats everything a public body produces as a public record. Perhaps because keeping everything would be overwhelming, if not impossible, the Public Records Act acknowledges up front that public bodies are not expected to retain everything they produce. FOIA grants citizens the right "to enforce the provisions of *this chapter*[.]" S.C. Code Ann. § 30-4-100(A) (Supp. 2019) (emphasis added). There is no disputing the Public Records Act is codified in a different chapter.

It is the Public Records Act—not FOIA—that requires the Department of Archives to develop a program and standards for public bodies in managing their public records. *See* § 30-1-80. It is the Public Records Act—not FOIA—that requires the legal custodian of public records to follow that program. *See id*. If a public body violates the requirement to implement a program for archiving and maintaining public records, it violates the Public Records Act—not FOIA. These are separate statutory regimes, and the plain text of FOIA's civil remedy instructs that it is not a tool for enforcing statutes that are not a part of FOIA.

Ballard points us to *Brock v. Town of Mount Pleasant* because in that case, the circuit court declined to find a violation of the Public Records Act but also enjoined a public body from deleting and eliminating records in the future. 411 S.C. 106, 767 S.E.2d 203 (Ct. App. 2014). This court said the trial court in *Brock* did not err in refusing to address past email deletions because "the law in this area is ever developing." *Id*. at 122, 767 S.E.2d at 211. The circuit court's injunction was not appealed, and nothing in this court's opinion remotely approaches a holding that the Public Records Act contains a private right of action or that a past violation of that act is also a violation of FOIA.

We do not overlook Ballard's argument that reversing the FOIA violation could be viewed as frustrating FOIA's purpose and government accountability. With utmost respect, we disagree. We highly doubt our holding will in any way encourage public bodies to violate the Public Records Act. For one, doing so would expose the participating individuals to criminal liability. *See* §§ 30-1-20, -50. Concerns about increased sunlight in government, while undeniably legitimate, cannot overcome the

statutory limitation that a private right of action under FOIA must be tied to enforcing FOIA.

We emphasize that the only evidence with support in the record is that by the time Ballard submitted her FOIA request, the documents in question did not exist and were not in the County's possession. Destruction of pertinent documents covered by a then-pending FOIA request could very well present a different question.

PUBLIC IMPORTANCE STANDING

Ballard asks to enforce the Public Records Act under the "public importance" exception to standing if she may not enforce those statutes through FOIA. Our supreme court has explained that "[t]he key to the public importance analysis is whether a resolution is needed for future guidance." *ATC South, Inc. v. Charleston Cty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008).

We do not see an urgent need for future guidance here. Nothing distinguishes this case from any other conceivable case a citizen could bring challenging whether a public body is following the Public Records Act and its accompanying regulations. *See, e.g.*, S.C. Code Ann. Regs. 12-503.15 (2011) (specifying a county council's obligations for general correspondence and "subject files"). Finding standing here could well invite countless copycat suits filed against public bodies both large and small. That many of these suits might be well-intentioned is beside the point. The Public Records Act delineates specific means of enforcement. We believe it is best to exercise restraint and refuse to do indirectly what the General Assembly could have done directly. We will not recognize a civil right to enforce the act when the General Assembly did not include such a right in the Code.

CONCLUSION

We affirm the circuit court's finding that there is no private right of action for a citizen to bring a civil suit against a public body under the Public Records Act, affirm its award of attorney's fees, and reverse its judgment that the County violated FOIA in failing to retain certain emails and text messages.

AFFIRMED IN PART, REVERSED IN PART.

THOMAS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Russell Levon Johnson, Appellant.

Appellate Case No. 2017-002393

Appeal From Marion County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 5788
Heard October 13, 2020 – Filed January 13, 2021

REVERSED AND REMANDED

Appellate Defender Lara Mary Caudy, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia; and Solicitor Edgar Lewis Clements, III, of Florence, for Respondent.

KONDUROS, J.: Russell Levon Johnson was charged with kidnapping and first-degree domestic violence. A jury convicted Johnson of the domestic violence charge but acquitted him of kidnapping. Johnson appeals his conviction, arguing the circuit court erred in admitting evidence of conduct in other jurisdictions

without instructing the jury that the domestic violence charge had to be supported by evidence within the jurisdiction. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Tonya Richburg and Johnson had lived together in Longs, South Carolina, for approximately four years prior to the incident in this case. Richburg moved to Mullins, located in Marion County, in the summer of 2016 and lived there in a hotel for approximately a month before securing housing. Johnson went to Richburg's home on September 15, 2016, and persuaded her to ride to the store with him so they could talk about their relationship and his impression that she was "moving on." A mentor to one of Richburg's children was visiting, so Richburg told Johnson she could go with him but they could not be away too long. The mentor called Richburg's cell phone to see when the pair would return, and according to Richburg, Johnson took her cell phone, removed the battery, and stated nobody would be getting in touch with her.

Johnson continued driving and told Richburg they were going to Dillon[1] so he could buy some wine and they could talk. Richburg continued telling Johnson she needed to go home, but he kept driving, eventually stopping in a wooded area with which Richburg was unfamiliar. The pair talked and Johnson accused Richburg of having stolen money from him and having cheated on him. Johnson then drove to a store and purchased a beer, and he continued driving to Clio, South Carolina, located in Marlboro County, where he went to another wooded area. As all this was transpiring, Johnson was drinking and using cocaine. Once they stopped in the wooded area, Johnson went to the trunk of the car; retrieved a long, sharp, metal object; and stabbed Richburg in the chest. He pulled her out of the car and kicked and punched her all the while accusing her of cheating and stealing. Finally, he took a hammer and hit Richburg in the head and stated no one would ever find her or him. In an effort to calm him, Richburg told Johnson she would not do anything to hurt him again. At that point, he stopped his attack and helped Richburg back into the car.

The pair drove through Dillon at which time Johnson stopped to let Richburg use the bathroom outside a small church. They drove back to Mullins, and Johnson

---

[1] Dillon is located in Dillon County, which is between Marion and Marlboro Counties.

went into a store to purchase beer. Richburg stated she did not run away because she did not know where she was, she was scared, it was dark, and she just wanted to get home. Johnson stopped at another store and purchased a black t-shirt to hide the blood on Richburg's clothing, and the pair finally arrived at the Imperial Motel. Once there, Johnson told Richburg this would be her last night and he was going to kill himself after he killed her. Johnson retrieved rubber gloves and Windex from his vehicle and then tried to "pop her neck." According to Richburg, Johnson was continuing to snort a white substance and eventually fell asleep on the bed. At that time, she ran next door and asked for help. The people next door called the police. Richburg fled because she did not want Johnson to go to jail, but she was intercepted by a police officer as she was walking down the side of the road.

Johnson was indicted for kidnapping and first-degree domestic violence by a Marion County grand jury. Johnson made a motion in limine to exclude testimony and evidence related to conduct occurring outside Marion County. The circuit court determined the entirety of the events of that night were integral to proving the charge of kidnapping and would be admissible. Johnson did not withdraw his objection but added that if the evidence were admitted, he would request a charge limiting its applicability to the kidnapping charge and not the domestic violence charge. The court indicated it would consider how to best fashion a solution.

The trial proceeded with Richburg as the first witness. As her testimony moved toward the events that occurred outside Marion County, Johnson objected and the circuit court held a conference outside the presence of the jury. The circuit court indicated it would allow the testimony but would "give a clear charge that to prove domestic violence in this case it must come from evidence that happened in Marion County." At the conclusion of the State's case, the circuit court changed its position, "res[ci]nding its prior ruling." In reliance on section 17-21-20 of the South Carolina Code,[2] regarding venue in murder cases, the court determined "we have domestic violence and kidnapping in Marion and possibly Dillon and possibly Marlboro. So I think venue is proper here in Marion." Johnson noted he had read the statute at issue, did not believe it was applicable, and renewed his objection. The defense rested, the parties reviewed the charge and the verdict form, and closing arguments proceeded. The jury acquitted Johnson of kidnapping but

[2] Sections 17-21-10 and -20 of the South Carolina Code (2014) address proper venue in cases when a victim is wounded in the state but dies elsewhere or is wounded in one county and dies in another, respectively.

convicted him of first-degree domestic violence. He was sentenced to ten years' imprisonment. This appeal followed.[3]

LAW/ANALYSIS

Johnson contends the circuit court erred in failing to give a jury charge instructing that only evidence of domestic violence occurring in Marion County could be used to prove the domestic violence charge. We agree.

As an initial matter, the State maintains this issue is not preserved because Johnson failed to object to the circuit court's jury charge when asked whether there were any exceptions thereto. As previously described, the circuit court had ruled it would allow testimony regarding the events in Marlboro and Dillon counties but would "give a clear charge that to prove domestic violence in this case it must come from evidence that happened in Marion County." However, the circuit court rescinded its prior ruling and deemed the admission of evidence in other counties appropriate for both charges based on section 17-21-10, thereby eliminating the need for a limiting instruction. Johnson objected to the decision, stating,

> Your Honor, I actually read these venue statutes before I made that motion this morning. And the way I read it is [sections] 17-21-10 and -20 . . . apply to cases where death actually occurs. I don't think either one of those statutes [ap]ply to this situation that we have here in this case and so I would just renew my objection.

[3] Johnson's appeal initially alleged the circuit court abused its discretion by admitting evidence of unindicted domestic violence in counties other than Marion County *and* by failing to give a jury instruction that only evidence of domestic violence in Marion County could be considered to prove the domestic violence charge. At oral argument, Johnson conceded the evidence of domestic violence in Dillon and Marlboro was admissible as it was relevant to the kidnapping charge in the case. Consequently, we only address the circuit court's ruling as to the jury instruction.

After this discussion, Johnson was advised of his constitutional rights relating to his decision not to testify and the defense rested.[4] The parties quickly reviewed the circuit court's proposed charge without objection and then gave closing arguments. The judge charged the jury and neither party took exception to the charge after it was given.

When "a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at conclusion of the court's instructions." *State v. Johnson*, 333 S.C. 62, 64 n.1, 508 S.E.2d 29, 30 n.1 (1998); *see also Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 494-95, 514 S.E.2d 570, 573-74 (1999) (holding a plaintiff's on the record explanation of his objection to a jury charge along with the court's ruling on that issue was sufficient to preserve the objection). In this case, the issue regarding the limiting instruction was clearly before the circuit court and was finally ruled upon on the record. Furthermore, nothing had occurred between the circuit court's final ruling and the charge that could have affected the court's decision. Therefore, we find the State's preservation argument unavailing.[5]

Turning to the merits, the case of *State v. Ziegler*, 274 S.C. 6, 260 S.E.2d 182 (1979), *overruled on other grounds by State v. Parker*, 351 S.C. 567, 571 S.E.2d 288 (2002), is controlling. In *Ziegler*, the victim was kidnapped in Richland County and then transported to Fort Jackson, a federal installation. *Id*. at 9, 260 S.E.2d at 184. According to the evidence, the defendant stole personal property

---

[4] The colloquy between Johnson and the circuit court is not contained in the record but appears to have constituted approximately two pages of the trial transcript.

[5] The State also maintains Johnson is arguing on appeal for the first time that the circuit court "confused" his argument as relating to venue. The State's preservation argument in this instance is simply without merit. The circuit court knew and understood the nature of Johnson's objection from the beginning of trial. Once the circuit court injected the venue statute into the discussion, Johnson renewed his objection and stated he believed the relied-upon statutes were inapplicable to the case. The matter on appeal was clearly before the circuit court and is preserved. *See State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("In order to preserve for review an alleged error in admitting evidence an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge.").

from the victim in Richland County or possibly at Fort Jackson. *Id*. In any event, the robbery continued onto the base because the victim's items were never again under his dominion or control. *Id*. However, the events providing the basis for the third charge, sexual assault, were viewed by the court as two separate and distinct acts—one having occurred in Richland County and the other on the base. *Id*. at 12, 260 S.E.2d at 185. As to the sexual assault charge, the court stated:

> [W]e conclude that the likelihood of prejudice as relates to the sexual misconduct charge is sufficient to warrant a new trial on this count. There is evidence of two separate incidents of sexual misconduct, one on the fort property, and one off the fort property. We cannot ascertain from the record which of the incidents was charged in the indictment and accepted by the jury as a basis for conviction. Accordingly, a new trial should be held on this count, but the kidnapping conviction and the armed robbery conviction and the sentences are affirmed.

Id.

In this case, the circuit court originally ruled it would follow the rationale set forth in *Ziegler* but would eliminate the prejudice discussed in the previous passage by giving a limiting instruction. The circuit court then turned to the venue statutes regarding kidnapping and murder cases; however, these sections are inapplicable. First, Richburg did not die from her injuries. Second, Johnson never contested venue in Marion County—he contested the admissibility of acts of domestic violence outside Marion County.

In an effort to analogize sections 17-21-10 and -20 to the present case, the circuit court relied upon two cases, *State v. Allen*, 266 S.C. 468, 224 S.E.2d 881 (1976), *overruled on other grounds by State v. Evans*, 307 S.C. 477, 415 S.E.2d 816 (1992), and *State v. Gethers*, 269 S.C. 105, 236 S.E.2d 419 (1977). In *Allen*, the victim was kidnapped and murdered, and evidence in the record established she could have been murdered in either Florence County or neighboring Darlington County. 266 S.C. at 480, 224 S.E.2d at 885. The court concluded venue in Florence County was proper. *Id*. In *Gethers*, the victim was kidnapped from Charleston County, taken to Berkeley County and raped, and returned to Charleston County. 269 S.C. at 106, 236 S.E.2d at 419. The defendant was tried

in Berkeley County for kidnapping and rape, and the court determined venue was proper. *Id*. at 107, 236 S.E.2d at 419. Neither case is analogous to Johnson's. In the present case, no evidence was presented to suggest Johnson's attack in the woods happened anywhere other than Marlboro County. Furthermore, in *Gethers*, the single instance of rape was prosecuted in the county where it occurred.

This case aligns with *Ziegler* wherein certain criminal acts were continuing but the assaults were separate and distinct. Johnson attacked Richburg in the woods in Marlboro County, stabbing her and hitting her with a hammer. Sometime later, he attempted to "pop" her neck in Marion County—two separate acts much like the sexual assaults in *Ziegler*. In sum, the circuit court erred in not giving a limiting instruction to mitigate the prejudice to Johnson and ensure the jury found Johnson's conduct in Marion County established his guilt on the domestic violence charge.

Nevertheless, because the charge was not given, we proceed to a harmless error analysis. *See State v. Battle*, 408 S.C. 109, 121-22, 757 S.E.2d 737, 743-44 (Ct. App. 2014) (conducting a harmless error analysis when the circuit court erred in failing to give the requested involuntary manslaughter charge). "A harmless error analysis is contextual and specific to the circumstances of the case." *State v. Byers*, 392 S.C. 438, 447, 447-48, 710 S.E.2d 55, 60 (2011). "Error is harmless when it could not reasonably have affected the result of the trial." *Id.* at 448, 710 S.E.2d at 60 (quoting *State v. Reeves*, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990)).

The State suggests the solicitor's own comments about the domestic violence in other counties render the circuit court's denial of a limiting charge harmless.

In closing argument, the solicitor stated:

> [W]hat I noticed is that when people go through stressful situations, they respond by not being a hundred percent. And what I bring to th[o]se two events that happened in other counties up before the stabbing and beating with the hammer, they are important not because they're domestic violence I'm here to prosecute. I'm here to prosecute what happened in that hotel room, but they're here to show you why she became compliant.

The solicitor went on to describe the acts constituting domestic violence in this case.

> In her own words, and [Richburg] told you he put his arms around her neck like this and he tried to pop it. Well, you can see not only is he larger, but he's physically stronger I believe when the optics tell us all and he tried to pop my neck. So how do we know that he intended to cause bodily injury at that time? Well, what else do the photograph[s tell] us[?] She told us that he walked in with some gloves and a bottle of Windex. Now, I seriously doubt that he brought those gloves in because he was going to work on her wounds.

While these comments demonstrate the solicitor's own understanding about the limitations on the evidence in this case, these comments are insufficient to render the lack of a clear and unequivocal limiting instruction from the circuit court harmless error. The jury heard testimony about Johnson stabbing Richburg and hitting her in the head with a hammer. They saw photographs of Richburg after the attack, bloody and battered, and they saw photographs of the bloody hotel room. The evidence in the case that clearly established domestic violence relates to the abuse in Marlboro County. The evidence of domestic violence in Marion County is significantly weaker, and we cannot be certain the jury did not consider the precluded evidence in reaching its decision. Therefore, the ruling of the circuit court denying the limiting instruction constitutes reversible error and Johnson's conviction for first-degree domestic violence is

REVERSED AND REMANDED.

LOCKEMY, C.J., and MCDONALD, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William Sean Irvin, Jr., as Personal Representative for the Estate of Jonathan Edward Irvin, deceased, Appellant,

v.

City of Folly Beach, South Carolina Department of Transportation, Daniel Wilcutt, and Mitchell Dewitt Rabon, Jr., Defendants,

Of whom Mitchell Dewitt Rabon, Jr. is the Respondent.

Appellate Case No. 2017-002317

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5789
Submitted May 14, 2020 – Filed January 13, 2021

AFFIRMED

Thomas R. Goldstein, of Belk Cobb Infinger & Goldstein, PA; and Ian Richard O'Shea and Brooklyn Ansley O'Shea, both of O'Shea Law Firm, LLC, all of Charleston, for Appellant.

David Starr Cobb, of Turner Padget Graham & Laney, PA, of Charleston, for Respondent.

WILLIAMS, J.: In this civil matter, William S. Irvin, as the personal representative for the estate of his brother Jonathan E. Irvin (Decedent), appeals the circuit court's order granting summary judgment to Mitchell D. Rabon, Jr. on Irvin's negligence claim arising from the accident that led to Decedent's death. We affirm.

FACTS/PROCEDURAL HISTORY

The dispute at issue arose from a vehicular accident that occurred in Folly Beach, South Carolina, which resulted in the death of Decedent.[1] On October 5, 2013, Decedent was driving his motorcycle on East Cooper Avenue in a westbound direction. Further down the road, East Cooper Avenue intersected with Second Street. The intersection contained stop signs at the Second Street access points, designating East Cooper Avenue drivers with the right of way. As Decedent approached the intersection, Daniel Wilcutt, who was traveling in a southbound direction on Second Street, turned left onto East Cooper Avenue without yielding to oncoming traffic. Consequently, Wilcutt's vehicle collided with Decedent's motorcycle. The collision pushed Decedent's motorcycle further west on East Cooper Avenue where it collided with the rear of Rabon's truck, which was parked off the road along the right side past the intersection in question; Rabon was not in his vehicle. Decedent died at the hospital later that day from his sustained injuries.

Irvin filed a pro se summons and complaint, alleging Rabon's negligence in parking his truck contributed to Decedent's death.[2] In his complaint, Irvin asserted Rabon "illegally parked in the right-of-way on the right shoulder" of East Cooper Avenue. Irvin later obtained counsel and filed an amended summons and complaint, which asserted the same allegations against Rabon. Neither Irvin's original complaint nor the amended complaint specifically alleged how Rabon's

[1] The facts are presented in the light most favorable to Irvin. *See Bennett v. Carter*, 421 S.C. 374, 379–80, 807 S.E.2d 197, 200 (2017) (providing that on appeal from an order granting summary judgment, this court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party).

[2] In his complaint, Irvin also asserted negligence causes of action against Wilcutt, the City of Folly Beach, and the South Carolina Department of Transportation. These claims are not at issue in this appeal.

truck was "illegally parked." Rabon timely answered, denying Irvin's allegations and asserting the defense of comparative negligence.

Rabon subsequently deposed Irvin. In his deposition, Irvin admitted there were no stop signs at the access points of the intersection on East Cooper Avenue and that Rabon's truck was parked along East Cooper Avenue past the intersection and "off the roadway." Irvin also acknowledged that he did not specifically know how Rabon's truck was parked illegally but recalled the crash examiners stating Rabon was parked in a "right of way."

Thereafter, Rabon filed a motion for summary judgment, arguing Irvin had failed to present sufficient evidence to establish a question of fact as to whether any alleged negligence of Rabon contributed to Decedent's injuries and death. Rabon specifically asserted Irvin failed to present evidence showing Rabon's truck was parked in violation of section 56-5-2530 because Irvin admitted Rabon's truck was parked off the roadway and the evidence showed there were no stop signs on East Cooper Avenue at the intersection where the initial collision with Wilcutt's vehicle occurred.[3] Irvin did not file a motion in opposition to Rabon's motion for summary judgment.

At the summary judgment hearing, Irvin conceded Rabon's truck did not violate subsection 56-5-2530(A)(2)(d), but he submitted an affidavit in which he raised a new allegation of negligence against Rabon. Specifically, Irvin alleged Rabon parked his truck in violation of subsection 56-5-2530(A)(2)(c), which prohibits a person from parking a vehicle within twenty feet of a crosswalk at an

[3] *See* S.C. Code Ann. § 56-5-2530(A)(2)(d) (2017) ("Except when necessary to avoid conflict with other traffic, or in compliance with law or the directions of a police officer or official traffic-control device, no person shall: . . . [s]tand or park a vehicle, whether occupied or not, . . . [w]ithin thirty feet upon the approach to any flashing signal, stop sign, yield sign or traffic-control signal located at the side of a roadway.").

intersection.[4, 5] Rabon argued Irvin failed to establish a material question of fact as to whether he parked his truck in violation of subsection 56-5-2530(A)(2)(c) because (1) Irvin's affidavit failed to present admissible evidence of personal knowledge as required by Rule 56(e), SCRCP, and (2) Irvin failed to present any other evidence in his pleadings or deposition sufficient to raise a question of fact. Additionally, Rabon asserted summary judgment was proper because Irvin failed to present any evidence that Rabon's parked truck proximately caused Decedent's injuries and subsequent death, alleging Rabon's truck was merely the "stopping point" for Decedent's motorcycle. Following the parties' arguments, the circuit court took the matter under advisement.

The circuit court granted Rabon's motion for summary judgment, via a Form 4 order, finding "Rabon demonstrated that there [was] no genuine issue of material fact as to the claims against him." Irvin subsequently filed a motion for reconsideration pursuant to Rule 59(e), SCRCP, which the circuit court denied. This appeal followed.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Prince v. Liberty Life Ins. Co.*, 390 S.C. 166, 169, 700 S.E.2d 280, 281 (Ct. App. 2010). This court reviews a grant of summary judgment under the same standard applied by the circuit court under Rule 56(c), SCRCP. *Loflin v. BMP Dev., LP*, 427 S.C. 580, 588, 832 S.E.2d 294, 298 (Ct. App. 2019). Pursuant to Rule 56(c), summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "In determining whether any triable issues of fact exist, the evidence and all inferences

---

[4] *See* S.C. Code Ann. § 56-5-2530(A)(2)(c) (2017) ("Except when necessary to avoid conflict with other traffic, or in compliance with law or the directions of a police officer or official traffic-control device, no person shall: . . . [s]tand or park a vehicle, whether occupied or not, . . . [w]ithin twenty feet of a crosswalk at an intersection.").

[5] Irvin additionally noted Rabon's parked truck violated Folly Beach's city ordinance section 72.01, which he alleged was nearly identical to section 56-5-2530.

which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Id.* at 330, 673 S.E.2d at 803. "[A] scintilla is a perceptible amount. There still must be a verifiable spark, not something conjured by shadows." *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019). "[I]n the rare case whe[n] a verdict is not reasonably possible under the facts presented, summary judgment is proper." *Bloom v. Ravoira*, 339 S.C. 417, 425, 529 S.E.2d 710, 714 (2000).

LAW/ANALYSIS

I. Summary Judgment

A. Genuine Issues of Material Fact

Irvin contends the circuit court erred in granting summary judgment to Rabon because he presented genuine issues of material fact as to Rabon's negligence in parking his truck, therefore rendering summary judgment improper. Specifically, Irvin asserts he presented evidence raising issues of fact in his affidavit. We disagree.

> 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. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), SCRCP. "Supporting and opposing affidavits shall be made on *personal knowledge*, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Id.* (emphasis added). "Allegations made upon information and

belief do not meet the 'personal knowledge' requirements of Rule 56(e)." *Dawkins v. Fields*, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003).

"To establish a cause of action in negligence, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty." *Bloom*, 339 S.C. at 422, 529 S.E.2d at 712. "Negligence per se is negligence arising from the defendant's violation of a statute." *Trivelas v. S.C. Dep't of Transp.*, 348 S.C. 125, 134, 558 S.E.2d 271, 275 (Ct. App. 2001).

We find the circuit court properly granted summary judgment to Rabon because Irvin's affidavit failed to present evidence (1) sufficient to raise a question of fact as to Rabon's alleged negligence in parking his truck or (2) to constitute negligence per se. In his affidavit, Irvin alleged Rabon parked his truck in violation of subsection 56-5-2530(A)(2)(c) by parking within twenty feet of a crosswalk at an intersection. *See* § 56-5-2530(A)(2)(c) ("Except when necessary to avoid conflict with other traffic, or in compliance with law or the directions of a police officer or official traffic-control device, no person shall: . . . [s]tand or park a vehicle, whether occupied or not, . . . [w]ithin twenty feet of a crosswalk at an intersection."). Irvin stated that after his deposition in which he admitted he did not specifically know how Rabon's vehicle was illegally parked, he took measurements of the intersection that indicated Rabon's truck was parked within twenty feet of the crosswalk at the intersection of East Cooper Avenue and Second Street. Although he acknowledged the intersection did not contain a marked crosswalk, Irvin alleged that pursuant to subsection 56-5-500(1), every intersection contains a crosswalk whether it is marked or not. *See* S.C. Code Ann. § 56-5-500(1) (2017) ("A 'crosswalk' is: . . . [t]hat part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or in the absence of curbs from the edges of the traversable roadway . . . ."). In measuring the distance between Rabon's truck and the unmarked crosswalk, Irvin used a generic schematic of an intersection with marked crosswalks that he obtained from the internet and also used the measurements indicated in the coroner's accident report. Irvin opined that based on these measurements, Rabon's truck was parked within ten to fifteen feet of the intersection. Irvin attached to his affidavit a copy of the diagram of the intersection contained in the accident report, the generic schematic, and the diagram he created using the generic schematic and measurements from the accident report.

Based on the foregoing, it is apparent that Irvin's measurements are not based upon personal knowledge as required by Rule 56(e). *See Dawkins*, 354 S.C. at 68, 580 S.E.2d at 438 ("Allegations made upon information and belief do not meet the 'personal knowledge' requirements of Rule 56(e)."). Irvin did not personally measure the intersection on the day of the accident or following the deposition but rather relied on a generic schematic of an intersection and the measurements noted in the coroner's accident report to create his own measurements. Moreover, in his motion for reconsideration, Irvin admitted the accident report did not contain the measurement of the distance between Rabon's parked truck and the intersection. Thus, Irvin's measurements are solely based upon mere conjecture of where a crosswalk would be located in the East Cooper Avenue and Second Street intersection based upon the dimensions of the generic schematic and his understanding of subsection 56-5-500(1). Accordingly, we hold Irvin failed to present facts sufficient to support his contention that Rabon parked his truck in violation of subsection 56-5-2530(A)(2)(c) to constitute negligence per se. *See McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 389, 684 S.E.2d 566, 570 (Ct. App. 2009) ("South Carolina courts have consistently held evidence must amount to more than speculation and conjecture to submit a case to the jury."). Thus, we find the circuit court did not err in granting summary judgment to Rabon. *See Bloom*, 339 S.C. at 425, 529 S.E.2d at 714 ("[I]n the rare case whe[n] a verdict is not reasonably possible under the facts presented, summary judgment is proper.").

B. Remaining Issues

Irvin additionally argues the circuit court erred in granting summary judgment to Rabon because (1) the parties had not completed discovery; (2) the circuit court's order deprived the parties of "meaningful judicial review"; and (3) Rabon asserted the defense of comparative negligence, which rendered summary judgment improper. We disagree.

First, we find Irvin's contention that the circuit court's grant of summary judgment was premature because the parties had not completed discovery is unpreserved for appellate review as Irvin did not raise this argument until his motion for reconsideration. *See Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (per curiam) ("An issue may not be raised for the first time in a motion to reconsider."). Although Irvin did note in his affidavit and at the summary judgment hearing that the parties had not completed discovery, he made

no assertion to the circuit court that summary judgment would be improper on that basis. Moreover, we find this argument lacks merit because even if further discovery revealed evidence that Rabon illegally parked his truck, the record indicates Irvin would still be unable to establish a causal relationship between Rabon's statutory violation and Decedent's injuries and consequential death. *See Dawkins*, 354 S.C. at 69, 580 S.E.2d at 439 (providing that although summary judgment is a drastic remedy and ordinarily should not be granted until the parties have had a fair opportunity to complete discovery, the nonmoving party must still demonstrate that further discovery will reveal additional relevant evidence to support his claim); *id.* at 71, 580 S.E.2d at 439–40 (holding the circuit court did not err in granting summary judgment even though the parties had not completed discovery because "further discovery was unlikely to create any genuine issue of material fact").

Second, we find Irvin's assertion that the circuit court deprived the parties of meaningful judicial review by solely issuing a Form 4 order without specific findings of fact is without merit. *See* Rule 52(a), SCRCP ("Findings of fact and conclusions of law are *unnecessary* on decisions of motions *under Rules 12 or 56* or any other motion except as provided in Rule 41(b)." (emphases added)).

Finally, we find Irvin's argument that the circuit court improperly granted summary judgment because Rabon raised the defense of comparative negligence is unpreserved for appellate review as Irvin never raised this argument to the circuit court. *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 [circuit court] to be preserved for appellate review.").

CONCLUSION

Based on the foregoing, the circuit court's order is

AFFIRMED.

KONDUROS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Provins, Employee/Deceased, Debra Provins, Alleged Dependent, Claimants, Appellants,

v.

Spirit Construction Services, Inc., Employer, and Insurance Company of the State of PA, Carrier, Respondents.

Appellate Case No. 2018-000133

Appeal From The Workers' Compensation Commission

Opinion No. 5790
Heard September 22, 2020 – Filed January 13, 2021

AFFIRMED

Donald Loren Smith, of Attorney Office of Donald Smith, of Anderson, for Appellants.

J. South Lewis, II, of Willson Jones Carter & Baxley, P.A., of Greenville, for Respondents.

KONDUROS, J.: Debra Provins, widow of James Provins, appeals the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission (the Commission) denying her claim for death benefits and finding Provins's death was not causally related to the accident on the job. She also asserts the Appellate Panel erred in (1) failing to find Spirit Construction Services, Inc., employer, and

Insurance Company of the State of PA, carrier, acted in bad faith in delaying medical authorization, which was also against public policy; (2) giving greater weight to one medical opinion over others; and (3) failing to find permanent impairment. We affirm.

FACTS/PROCEDURAL HISTORY

Spirit Construction Services hired James Provins (Employee), a life-long ironworker with thirty years' experience, to help construct a building in Anderson. Approximately six months after starting this job, on January 24, 2012, Employee and a coworker were together moving a corrugated sheet of galvanized steel when Employee felt a pop in his right shoulder. The safety foreman drove Employee to Spirit's clinic and a physician's assistant (PA) obtained an x-ray, diagnosed a shoulder sprain, prescribed medications and exercises, and put Employee's right arm in a sling.

One week later Employee returned to Spirit's PA. The PA's notes indicate Employee continued to have pain and decreased mobility of his arm: "Patient states he has had no improvement of symptoms. He states he is unable to lift arm above his head and wakes up in the middle of the night if he rolls over onto his shoulder." The PA requested a magnetic resonance imaging scan (MRI): "Signs and symptoms suspicious for rotator cuff injury. Will have patient scheduled for MRI of shoulder pending [workers' compensation] approval." However, the employer and carrier (collectively, Employer) did not authorize the MRI. Employee therefore independently obtained an MRI, which showed extensive tearing of the rotator cuff. Employee was given several days of light duty work, until Spirit ended Employee's employment indicating no additional light duty work was available. Employee returned to his permanent home in Louisville, Kentucky.

Despite Spirit's PA's examination and recommendation to obtain an MRI and despite the results of the independent MRI showing an extensive tear, Employer denied approval for medical treatment and benefits. Employee then moved for a hearing before the Commission to seek benefits and treatment.

On September 7, 2012, the single commissioner, noting Employee was "very credible," found the accident was within the scope of Employee's employment and required Employer to provide benefits and medical treatment to him in his home state of Kentucky. Employee began treatment with an orthopedist, Frank

Bonnarens, M.D., the authorized medical provider in Kentucky where Employee resided. Dr. Bonnarens performed rotator cuff surgery on May 15, 2013. The surgical notes state Employee had "a massive tear of the rotator cuff" and a tear "of the long head of the biceps." Following surgery, Dr. Bonnarens ordered physical therapy. Employee faithfully followed those orders from June 7, 2013, through August 23, 2013. The physical therapy notes repeatedly reference Employee's continued pain and limitations.

Employee returned to Dr. Bonnarens on August 26, 2013, and reported "he fe[lt] like he is not getting any better" and "his active range of motion is poor at this point." Dr. Bonnarens then ordered additional weeks of therapy, followed by an MRI performed on October 2, 2013. This second MRI revealed "a large recurrent full thickness tear" and atrophy.

Both parties indicated Dr. Bonnarens recommended a second surgery; however, after a telephone conference with Dr. Bonnarens on December 30, 2013, the Employer chose to pursue an investigation to determine the cause of the re-tear. Employee filed a motion on March 14, 2014, to compel Employer to provide treatment, seeking coverage for the second surgery. In the motion, Employee stated:

> Due to the high risk of failure of rotator cuff surgeries, [Employee] re-tore his rotator cuff without intentional cause. Dr. Frank Bonnarens stated that this injury is directly related to the injury [Employee] sustained while under the scope of his employment on January 24, 2012[,] during a phone conference on December 30, 2013. As such, [Employer is] held responsible for providing [Employee] with necessary treatment.

In response to Employee's motion, Employer described the opinion of Dr. Bonnarens differently, asserting Dr. Bonnarens reported Employee had decreased his alcohol use and suffered from alcohol withdrawal symptoms. Employer argued Dr. Bonnarens indicated it was possible Employee's alcohol withdrawal symptoms caused the re-tear, but without any evidence of a subsequent injury, it was his opinion the re-tear was related to the 2012 work injury. Based on this telephone conference with Dr. Bonnarens, Employer asked Employee to sign authorization forms so it could obtain medical records from his providers in Kentucky to

investigate the re-tear further. Employee did not sign the medical authorization forms. Employer moved to compel Employee to sign the forms.

On April 10, 2014, while the above motions were pending, Employee asked a friend to drive him to the emergency room of a hospital, complaining of chest pain. Employee was intubated and transferred to another hospital where he was admitted to the intensive care unit. Employee died four days later on August 14, 2014. The death certificate indicated the immediate cause of death was the result of "acute respirator[y] failure" and "septic shock," and that "significant conditions contributing to death" were "pneumonia, acute renal failure, [and] alcohol abuse."

After Employee's death, orthopedist Dr. Dwight A. Jacobus, who had not treated Employee, opined Employee had a 10% to 13% disability to his shoulder. In follow up correspondence, Dr. Jacobus further opined:

> [W]hether the patient was not deceased and was able to have a second surgery, he would still have a disability percentage of at least 10% to 13% . . . . It is my opinion that a second surgery would not relate to a diminished percentage of disability because of the pathology that was present at the time the first surgery was completed.

Debra Provins (Widow) filed a Form 52 claim for death benefits asserting Employee's death was causally related to the work injury because the bad faith denial of medical care by Employer caused Employee's increased use of alcohol, which contributed to his death.[1] The use of alcohol by Employee was chronicled throughout the workers' compensation proceedings. The Record reveals that Employee drank alcohol, often in excess, for much of his life. A single commissioner heard Widow's claim for death benefits on December 5, 2016, in which Widow testified about her husband's decline as he suffered the effects of the injury and the re-tear of his shoulder, his inability to support his family, and his change in demeanor. Widow testified Employee increased his alcohol consumption after the 2012 accident and became withdrawn from his family, spending time in his bedroom alone. In support of her claim for death benefits, Widow submitted the opinion of a psychologist, David R. Price, Ph.D., and an

[1] Widow originally filed claims pursuant to Form 50, but withdrew those forms, and ultimately filed a claim for death benefits pursuant to Form 52.

affidavit from a psychiatrist, Thomas V. Martin, M.D., both of whom indicated Employee's death was causally related to the work injury, as well as the opinion of Dr. Jacobus regarding the permanency rating. Employer submitted the opinion of psychiatrist James C. Ballenger, M.D., who opined Employee's death was not caused by the work injury, but caused by Employee's alcohol use.

In an order filed on March 6, 2017, the single commissioner concluded Widow did not prove Employee's death was causally related to the work injury. The commissioner noted: "[t]here was no objective evidence—only subjective history provided by Employee's relatives—that his drinking increased significantly after his work injury." The commissioner found "[e]ven assuming Employee had increased his alcohol intake after—and because of—the work injury, such would not constitute a compensable work 'injury by accident' or death." The single commissioner also noted the evidence showed Employee abused alcohol before the work accident; Employee died before he reached maximum medical improvement [MMI] and was still being treated by Dr. Bonnarens at the time of his death; and "[t]here was no bad faith denial of medical treatment or unreasonable delay by [Employer]."

Widow appealed to the Appellate Panel. After a hearing on November 14, 2017, the Appellate Panel agreed with the single commissioner and found Employee died before reaching MMI; "[t]here was no bad faith denial of medical treatment or unreasonable delay by [Employer]"; and prior to the work-related injury, Employee "suffered from a significant alcohol abuse problem." The Appellate Panel expressly found none of the medical reports submitted stated Employee's alcohol use changed after the accident, and Employee's death was "multifactorial, to include sepsis, respiratory failure, multi-organ decompensation, and alcohol abuse." The Appellate Panel concluded Employee's death was not caused by the injury he sustained at work in 2012. This appeal followed.

STANDARD OF REVIEW

> The Administrative Procedures Act ("APA") governs this [c]ourt's review of the [Appellate Panel's] decisions. We can reverse or modify the [Appellate Panel's] decision in this case only if [the claimant's] substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the

> reliable, probative, and substantial evidence on the whole record. Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the [Appellate Panel] reached.

Shealy v. Aiken County, 341 S.C. 448, 454-55, 535 S.E.2d 438, 442 (2000) (citations omitted).

"[T]he [Appellate Panel] is the ultimate fact finder. The final determination of witness credibility and the weight to be accorded evidence is reserved to the [Appellate Panel]. It is not the task of this [c]ourt to weigh the evidence as found by the [Appellate Panel]." *Id.* at 455, 535 S.E.2d at 442 (citations omitted).

LAW/ANALYSIS

I. Death Benefits

Widow asserts the Appellate Panel erred in denying her claim for death benefits, contending Employee's death "was a consequence of [Employer's] delay in [the] provision of medical assistance and grant of benefits to [Employee]." Widow contends the accident and "[Employer's] continued refusal to provide the necessary and timely medical assistance[] triggered and/or aggravated [Employee's] state of decline." Widow contends "[h]e lost hope of ever recovering" and "[a]nyone in his condition would have suffered extreme depression, documented or not." We disagree.

Employer contends no evidence was presented to the Appellate Panel of Employee's depression from the injury and there was no diagnosis of depression from the treating physician as a result of the work-related accident. Employer also argues Employee abused alcohol throughout his life, including before the accident. Finally, Employer asserts Employee's use of alcohol was an intentional act on his part, and not caused by Employer. The Employer's expert, Dr. Ballenger, opined Employee's death was not causally related to the work injury and the evidence revealed Employee died as a result of his lifelong consumption of alcohol.

The Appellate Panel reviewed the evidence and found that prior to the work injury, Employee abused alcohol for most of his life, he undertook the risk of heavy alcohol use, and no medical evidence indicated Employee's use of alcohol increased after the accident. This evidence included the consultation report when Employee went to the emergency room four days before his death, which stated: "[t]he patient is a 52-year-old male who is an alcoholic and drinks about half a pint of vodka every day for most of his life" and medical records from 2009, when Employee was hospitalized during a difficult time in his life, which stated: "[h]eavy alcohol use. . . . Patient is a longstanding alcoholic (16 to 18 beers a day, ½ [pint] to 1 pint[])]." Furthermore, the Appellate Panel referenced Dr. Ballenger's opinion, noting Employee "suffered from a progressively worsening alcoholism over the course of his adult life," and such was "consistent with the medical records, both prior to and subsequent to the work injury." The Appellate Panel also stated: "[T]here is not a single medical record, either with the treating workers' compensation doctors or his personal doctor/hospitals in Kentucky, which indicate that Employee's alcohol consumption increased after the work injury."

We believe the Record contains substantial evidence to support the Appellate Panel's denial of Widow's claim for death benefits. *See Shealy*, 341 S.C. at 455, 535 S.E.2d at 442 (citations omitted) ("In workers' compensation cases, the [Appellate Panel] is the ultimate fact finder. The final determination of witness credibility and the weight to be accorded evidence is reserved to the [Appellate Panel]. It is not the task of this [c]ourt to weigh the evidence as found by the [Appellate Panel]."). Accordingly, we affirm the Appellate Panel's denial of the claim for death benefits.

II. Weight of Medical Evidence

Widow also contends the Appellate Panel erred in giving more weight to one physician's opinion over the opinion of other medical experts. We disagree.

"Expert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony." *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). In addition, "the Commission is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established." *Id.* at 339-40, 513 S.E.2d at 846.

"Where there is conflicting medical evidence . . . the findings of fact of the [C]ommission are conclusive." *Nettles v. Spartanburg Sch. Dist. # 7*, 341 S.C. 580, 592, 535 S.E.2d 146, 152 (Ct. App. 2000). "The existence of any conflicting opinions between the doctors is a matter left to the Commission." *Harbin v. Owens-Corning Fiberglas*, 316 S.C. 423, 427, 450 S.E.2d 112, 114 (Ct. App. 1994). Furthermore, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent [the Commission's] finding from being supported by substantial evidence." *Tiller*, 334 S.C. at 338, 513 S.E.2d at 845.

We find the Appellate Panel relied on substantial evidence to support its decision to give greater weight to the opinion of Employer's expert, psychiatrist Dr. Ballenger. The decision of the Appellate Panel referenced Dr. Ballenger's extensive credentials and lengthy career, as well as his more complete review of the medical records. The Appellate Panel also set forth its reasoning for giving less weight to other medical experts, finding Dr. Martin's affidavit unreliable because it relied on "subjective history" and noting he did not review medical records of Employee's alcohol use prior to the work injury. The Appellate Panel found Dr. Price, a clinical psychologist, unqualified to provide a medical opinion regarding a cause of death and that his opinion was also based upon limited information.

The law expressly gives to the Appellate Panel the full authority to make determinations regarding the credibility of witnesses and the weight to be afforded their opinions. Accordingly, we find no error in the Appellate Panel's decision.

III. Permanent Impairment Rating

Widow contends the Appellate Panel erred in failing to award Employee a permanency rating. We disagree.

The single commissioner found Employee "passed away . . . before he reached [MMI] for his right shoulder," and "had not been released from care for his right shoulder, and was still undergoing treatment with Dr. Bonnarens" at the time of his death. The single commissioner made no finding regarding a permanency rating. Widow submitted a memorandum to the Appellate Panel, which included raising the issue whether the single commissioner erred in finding Employee did not have a permanent injury. However, the Appellate Panel found Employee was still

receiving treatment and had not been released from care or reached MMI at the time of his death. The Appellate Panel did not make a specific finding regarding a permanency rating.

We note that while Dr. Jacobus's opinion was included in the submission of exhibits to the Commission, Widow did not raise the issue of a permanency rating to the Commission at the hearing. Widow was only before the Commission on a Form 52 seeking death benefits; she had previously withdrawn her Form 50 notices. Accordingly, we find no error by the Appellate Panel.

IV. Bad Faith and Public Policy

Widow asserts the Appellate Panel erred in failing to find Employer acted in bad faith by delaying authorization for medical treatment. Widow contends Employer acted in bad faith by refusing to authorize the initial MRI and need for surgery, asserting this delay caused Employee "irreparable damage" to his shoulder. Widow also contends Employer acted in bad faith by denying authorization for the proposed second surgery to repair the re-tear. Additionally, Widow asserts the Appellate Panel "contradicted public policy by fostering and facilitating bad faith denial of benefits."

Treatment for the first surgery was addressed by the single commissioner's order of September 7, 2012, providing Employee medical treatment in Louisville, Kentucky, and awarding Employee temporary total disability until he reached MMI.[2]

When Widow later filed a Form 52 seeking death benefits, both the decisions of the single commissioner on March 6, 2017, and of the Appellate Panel on January 11, 2018, included findings of fact that there was no bad faith denial by the Employer and that Employer had requested medical releases to investigate the need for the second surgery. More specifically, in its order of January 11, 2018, the Appellate Panel found: "There was no bad faith denial of medical treatment or unreasonable delay by [Employer]. The evidence . . . indicate[s] that another surgery had been recommended by Dr. Bonnarens (for a recurrent rotator cuff tear)

[2] The single commissioner's ruling dated September 7, 2012, in which Employee sought benefits and medical treatment is not the subject of this appeal.

and [Employer] requested medical releases be signed to further investigate causation of same."

In response to Widow's bad faith argument, Employer contends an allegation of bad faith is "simply unfounded" and "there is no recognizable claim for bad faith within the South Carolina workers' compensation arena." Employer also argues the evidence supported the need for medical authorization documents from Employee because the Record contained no definite medical opinion that related the re-tear of the rotator cuff to the work injury.

We note that at the time of Employee's death, the parties had outstanding motions regarding Employee's request for authorization for the second surgery and Employer's request Employee sign medical authorizations. Sadly, Employee passed away before the Commission could rule on these motions.

In finding Employer did not deny medical treatment in bad faith or unreasonably delay authorizing treatment, the Appellate Panel made the following finding of fact: "[t]he evidence, including emails among counsel included in [Employer's] exhibits, indicate that another surgery had been recommended by Dr. Bonnarens (for a recurrent rotator cuff tear) and [Employer] requested medical releases be signed to further investigate causation of same."

We affirm the decision of the Appellate Panel finding there was no bad faith denial of medical care by Employer. We point to our jurisprudence which established the statutory system of workers' compensation law to address all claims made by an employee against his employer for a work-related injury. As set forth in the Workers' Compensation Act:

> The rights and remedies granted by this title to an employee when he and his employer have accepted the provisions of this title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.

S.C. Code Ann. § 42-1-540 (2015).

This court addressed the claim of an employee seeking damages in circuit court for his employer's bad faith denial of benefits in *Cook v. Mack's Transfer & Storage*, 291 S.C. 84, 352 S.E.2d 296 (Ct. App. 1986). In *Cook*, this court determined all disputes in a workers' compensation matter must be directed to the Commission by statute: "[I]f an employer and injured employee fail to reach an agreement in regard to compensation within fourteen days after the employer has knowledge of the injury, then the worker may make application to the Commission for a hearing in regard to the matters at issue and for ruling thereon." *Id*. at 87-88, 352 S.E.2d at 298.

The court went on to confirm the Commission has exclusive jurisdiction to decide questions an employee may raise about his employer's denial of benefits, and "[w]hether the denial is willful, in bad faith, negligent, or the result of a good faith difference is immaterial to the question of the Commission's exclusive jurisdiction." *Id.* at 88, 352 S.E.2d at 299. In *Cook*, this court recognized the exclusive jurisdiction of the Commission means an employee does not have the same causes of action available to him as he would in common law: "a worker whose injury is compensable exclusively under the workers' compensation law may be at a disadvantage compared to a person with access to modern tort remedies." *Id.* at 92, 352 S.E.2d at 301.

As the Form 50 notices were withdrawn, and substantial evidence supports the decision of the Appellate Panel to deny death benefits, we need not rule on the question of any bad faith failure of Employer to authorize treatment.

CONCLUSION

We conclude the Record contains substantial evidence to support the Appellate Panel's decision. Accordingly, the Appellate Panel's decision is

AFFIRMED.

LOCKEMY, C.J., and MCDONALD, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jaycoby Terreak Williams, Appellant.

Appellate Case No. 2017-000872

Appeal From Allendale County
Perry M. Buckner, III, Circuit Court Judge

Opinion No. 5791
Heard December 12, 2019 – Filed January 13, 2021

AFFIRMED

Appellate Defender David Alexander, 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, Assistant Attorney General Samuel Marion Bailey, Assistant Attorney General William Joseph Maye, and Assistant Attorney General Michael Douglas Ross, all of Columbia; and Solicitor Isaac McDuffie Stone, III, of Bluffton; all for Respondent.

MCDONALD, J.: Jaycoby Terreak Williams appeals his murder conviction, arguing the circuit court erred in refusing to allow him to cross-examine one of the State's key witnesses about the potential sentences the witness faced on his pending charges for drug possession and armed robbery. We affirm, as the circuit court's error in denying this line of questioning was harmless in this case.

Facts and Procedural History

In the early evening of May 26, 2015, James Spellman (Victim) was shot outside his Allendale apartment; he later died at the hospital. Williams was subsequently arrested, indicted, and tried for Victim's murder.

Several witnesses from Victim's apartment complex testified at trial. Just before the shooting, Victim's neighbor, Franklin Williams (Franklin), was taking out his trash when he saw people he did not recognize in the apartment complex breezeway. Shortly thereafter, while on the phone with his uncle, Franklin heard a gunshot and looked out the window to see a "blue car pull off." He further described the car as "small." Franklin could not identify who was in the car, he "just saw the blue car."

Debentris Breeland, another of Victim's neighbors, spoke with South Carolina Law Enforcement Division (SLED) Agent Richard Johnson after the shooting. Although Breeland initially denied telling Agent Johnson that Victim was afraid of Williams, he reluctantly admitted "I was saying he was scared of him. I knew he didn't want no problems or nothing with him."[1] Breeland denied seeing the blue car but testified he heard one gunshot while inside his apartment.

Tiffany Loadholt lived with Victim at the time of the shooting. She testified they had been dating on and off for three years. Williams is the father of Loadholt's two children, who were four and eight at the time of trial.

Victim's cousin, Dequincy Best, was with the victim in an outdoor stairwell at the time of the shooting. While Best and Victim were talking, a blue Ford Focus drove up to the complex; Williams and Rehem Devoe exited the vehicle. Devoe shook

[1] Later in the trial, Fourteenth Circuit Solicitor's Office Investigator Donnie Hutto confirmed that Breeland said the victim "told him he was scared" of Williams.

Best's hand, spoke to Victim, and continued up the stairs. Williams followed Devoe up the stairs and also shook Best's hand. Best testified that when Williams shook his hand he saw "a pistol tucked on the side of his shoulder, on the side of his pants." He identified the weapon as an automatic, "probably a .40 Glock." As Best walked up the stairs, Williams turned to come down. Best then heard a gunshot, turned, and saw Williams pointing the gun at Victim. Best yelled—and he heard Devoe yell—"Stop, don't shoot my cousin" because "Williams was over him with the gun, getting ready to shoot him again." Williams then fled, and Best did not know where he went. When asked to identify the man who shot his cousin, Best identified the defendant, Williams.

Devoe, who was riding with Williams on the day of the shooting, also testified. Prior to this testimony, the circuit court held a bench conference to consider whether Williams could cross-examine Devoe about his pending armed robbery and drug possession charges. The circuit court ruled that under Rule 608, SCRE, Williams could cross-examine Devoe about pending charges, but not any potential penalty because "the penalty was a matter for the court."[2]

On direct examination, Devoe testified that he saw Williams on a regular basis and had known Williams for "[b]asically, all [his] life." Devoe was at his uncle's house when Williams and two other men picked him up in a blue car he identified as a Ford Escort. The group rode around for a while and eventually ended up at the apartment complex. Many people were outside the complex, including Devoe's cousins, Breeland and Victim. Devoe claimed he did not see Williams exit the vehicle, but heard the car door shut behind him. He heard the gunshot as soon as he reached the top of the outdoor stairs. Devoe ducked, turned, and saw Williams standing over Victim, who was on the ground. Williams was holding a handgun, which Devoe described as an automatic. He identified Williams as the man he saw standing over his cousin with a gun.

---

[2] "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Rule 608(c), SCRE. The circuit court further noted Devoe had "been convicted of failing to stop for a blue light" and "under Rule 609, [SCRE,] " it would permit Williams's counsel to use this to attempt to "attack the witness's credibility or believability."

The solicitor then asked Devoe whether he had "any current pending charges." During his direct examination, Devoe acknowledged his pending "sale undercover" and robbery charges. On cross-examination, when asked about the substance he was charged with selling, Devoe responded, "Marijuana, methamphetamine, whatever it is. I don't know." When asked about the pending armed robbery charge, Devoe admitted both charges were from Allendale County, would be prosecuted by the same Solicitor's office, and were investigated by the same police department. On redirect, Devoe testified the State did not promise anything or tell him his charges would be dropped in exchange for his assistance in the case against Williams.

Williams's cousin, Dwain Dean, testified he gave Williams a ride to Columbia on the night of the shooting. On cross-examination, Dean denied making a prior statement to police that "[Williams] wanted a ride back to Allendale to turn himself in because he said he didn't do it."

Detective Qutique R. Manor of the Allendale Police Department (APD) testified that when he interviewed Williams following his arrest, Williams claimed he was in Columbia at the time of the shooting. On cross-examination, Manor confirmed Williams turned himself in to law enforcement.

SLED assisted the APD with the investigation of the shooting. At trial, Agent Johnson did not recall "any items of evidentiary value being collected" from the scene, and the gun was never recovered. No shell casings were found at the scene. Agent Dawn Claycomb of SLED's Crime Scene Unit responded to the secured scene, where she marked items of interest, took photographs, and collected evidence. Her work including marking any areas of interest the investigators could swab or dust. She also attended the victim's autopsy at Newberry County Memorial Hospital, where she received sealed evidence from the forensic pathologist.

Agent James William Green, a SLED forensic firearms examiner, received and analyzed the fired bullet and bullet jacket fragment that Agent Claycomb collected from victim's autopsy. He determined the bullet "was most consistent with being a bullet loaded into some .40 S&W caliber cartridges or some 10 millimeter auto caliber cartridges." Based on his analysis and information from the database the FBI provides to SLED, Agent Green determined the bullet was likely fired from a semi-automatic pistol manufactured by Smith and Wesson. On cross-examination,

Agent Green noted that while the database provided a number of firearms models meeting the specifications of the bullet, a "Smith & Wesson in a .40" would be the easiest way to describe the firearm sought in connection with this shooting. The jacket fragment provided no useful information.

Dr. Janet Ross, the forensic pathologist who performed the victim's autopsy, was the State's final witness. The jury unanimously found Williams guilty of murder, and the circuit court sentenced him to thirty-five years' imprisonment.

Standard of Review

In criminal cases, this court only reviews errors of law. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed absent a manifest abuse of discretion." *State v. Quattlebaum*, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Douglas*, 369 S.C. 424, 429–30, 632 S.E.2d 845, 848 (2006). Additionally, the circuit court's decision will not be reversed on appeal absent a showing of prejudice. *State v. Colf*, 337 S.C. 622, 625, 525 S.E.2d 246, 247–48 (2000). "The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers." *State v. Aleksey*, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000). "This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination." *Id.* at 33–34, 538 S.E.2d at 255. "On the contrary, 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Id.* at 34, 538 S.E.2d at 255 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

Law and Analysis

Williams argues the circuit court erred in preventing him from cross-examining Devoe regarding the potential sentence he faced on the pending armed robbery charge because the possibility of a serious penalty was proper impeachment evidence relevant to Devoe's bias and motive to testify against him. Williams asserts the circuit court's error could not be harmless because the State presented

no forensic evidence connecting him to the murder, the State's other witnesses either did not witness the crime or were not credible, Devoe and Best are both related to Victim, and there were multiple unidentified individuals at the scene of the shooting. We disagree.

"The Confrontation Clause provides 'in all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . .'" *State v. Gracely*, 399 S.C. 363, 372, 731 S.E.2d 880, 885 (2012) (alteration in original) (quoting U.S. Const. amend. VI). "The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias." *Id*. "A defendant demonstrates a Confrontation Clause violation when he is prohibited from 'engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias . . . from which jurors . . . could draw inferences relating to the reliability of the witness.'" *State v. Clark*, 315 S.C. 478, 481, 445 S.E.2d 633, 634 (1994) (alterations in original) (quoting *Van Arsdall*, 475 at 680).

In *Gracely*, a State Grand Jury investigation of the sale of methamphetamine in Pickens County resulted in an indictment alleging fifty-two separate crimes against various individuals. 299 S.C. at 366, 731 S.E.2d at 881. To establish its case against Gracely, the State relied on the testimony of seven individuals also named in the indictment. *Id.* at 366, 731 S.E.2d at 881–82. Gracely "sought to show the potential bias of each witness by presenting to the jury information regarding the significantly lighter sentences th[o]se witnesses received in exchange for their testimony." *Id.* at 366–67, 731 S.E.2d at 882. However, following the State's objection, the circuit court limited the cross-examination and "instructed defense counsel that the State's witnesses could be questioned about the maximum punishment, but not the mandatory minimum punishment, for those charges they had in common with Appellant." *Id.* at 367, 731 S.E.2d at 882.

Our supreme court reversed, explaining the circuit court "allowed defense counsel to cross-examine the witnesses regarding possible bias, but improperly prevented questioning which would have examined the extent of that bias and the witnesses' possible motivations for testifying against Appellant." *Id.* at 373–74, 731 S.E.2d at 885. The supreme court held, "[t]he fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury." *Id*. at 374–75, 731 S.E.2d at 886. Additionally, the court applied the five factor test set forth in *Van Arsdall*, to determine whether the violation of the Confrontation Clause constituted harmless error:

> The factors include [1] the importance of the witness's testimony in the prosecution's case, [2] whether the testimony was cumulative, [3] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, [4] the extent of cross examination otherwise permitted, and, of course, [5] the overall strength of the prosecution's case.

Id. at 375, 731 S.E.2d at 886 (quoting *Van Arsdall,* 475 U.S. at 684); *see also State v. Graham,* 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994) (explaining the list of factors set out in *Van Arsdall* is not exhaustive). Ultimately, the *Gracely* court found:

> [A]ll of the witnesses in the present case had significant involvement with illegal drugs and other criminal activities, and cooperated following arrest and the possibility of long prison terms. In a case built on circumstantial evidence, including testimony from witnesses with such suspect credibility, a ruling preventing a full picture of the possible bias of those witnesses cannot be harmless.

399 S.C. at 377, 731 S.E.2d at 887.

Here, the circuit court erred in limiting Williams's cross-examination of Devoe because Devoe's potential sentencing exposure on his pending charges impacted his potential bias and motive for testifying. *See e.g.*, *State v. Pradubsri*, 403 S.C. 270, 280, 743 S.E.2d 98, 103–04 (Ct. App. 2013) (finding the circuit court's refusal to allow Pradubsri to question Martin on the exact potential sentence she faced on each charge was error; the evidence was critical to showing Martin's potential bias, and "Martin's potential legal exposure was relevant to her bias and potential motive in testifying."); *State v. Mizzell,* 349 S.C. 326, 331–32, 563 S.E.2d 315, 318 (2002) ("The jury is, generally, not entitled to learn the possible sentence of a defendant because the sentence is irrelevant to finding guilt or innocence. However, other constitutional concerns, such as the Confrontation Clause, limit the applicability of this rule in circumstances where the defendant's right to effectively cross-examine

a co-conspirator witness of possible bias outweighs the need to exclude the evidence.").

However, we find any error in limiting this cross-examination was harmless. Devoe was one of two witnesses who positively identified Williams as the shooter, and the circuit court did not otherwise limit his cross-examination. The State presented independent testimony reflecting the strained relationship between Williams and the victim, placing Williams at the crime scene, and identifying Williams as the shooter. Although Devoe's eyewitness testimony was significant, it mirrored that of DeQuincy Best, who testified he saw Williams standing over the fallen victim, pointing his gun at him before fleeing the scene. Moreover, even with the limitation placed on his cross-examination, Williams's counsel was able to muddy Devoe's credibility. Devoe falsely claimed he was charged with selling marijuana—as opposed to methamphetamine—to an undercover officer; this is hardly an insignificant distinction, and defense counsel seized upon it. Further, Devoe acknowledged both the drug charge and the armed robbery charge were still pending in Allendale County, the same solicitor's office was prosecuting him, and the same law enforcement agency investigating his charges was involved in the investigation of Williams. Thus, we find Williams was able to effectively adduce evidence of Devoe's "[b]ias, prejudice or . . . motive to misrepresent" for impeachment purposes despite the circuit court's exclusion of the sentencing line of inquiry. *See* Rule 608(c); *see, e.g.*, *State v. Whatley*, 407 S.C. 460, 469–471, 756 S.E.2d 393, 397–98 (Ct. App. 2014) (trial court's error in preventing cross-examination of witness Ussery as to mandatory minimum sentence she faced for reduced charges pending at time of trial was deemed harmless where the defendant had ample opportunity to otherwise demonstrate Ussery's bias, testimony of another witness established same material facts Ussery recounted, and Ussery's testimony did not contradict that of the other witness on any essential point).

Accordingly, after considering the *Van Arsdall* factors in this instance, we find the circuit court's limitation of Williams's cross-examination of Devoe was harmless, and Williams suffered no prejudice. *See e.g.*, *State v. Young*, 420 S.C. 608, 628, 803 S.E.2d 888, 899 (Ct. App. 2017) ("[T]he harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." (quoting *Van Arsdall*, 475 U.S. at 681)).

Conclusion

Based on the foregoing, Williams's conviction is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert F. Berry, Respondent,

v.

Scott A. Spang, Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, and Wells Fargo Bank, N.A., Appellants.

Appellate Case No. 2017-001690

Appeal from Lexington County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5792
Submitted June 1, 2020 – Filed January 13, 2021

AFFIRMED

Sarah Patrick Spruill, of Haynsworth Sinkler Boyd, PA, of Greenville; Adam Noah Yount and Pierce Talmadge MacLennan, both of Haynsworth Sinkler Boyd, PA, of Charleston; and Frederick T. Smith, of Charlotte, North Carolina, for Appellants.

Mitchell Willoughby, Elizabeth Ann Zeck, and Chad Nicholas Johnston, all of Willoughby & Hoefer, PA, of Columbia, for Respondent.

LOCKEMY, C.J.: Scott A. Spang, Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, and Wells Fargo Bank, N.A. (collectively, Appellants) appeal the circuit court's denial of their motion to dismiss and compel arbitration of Robert F. Berry's claims. Appellants argue the circuit court erred by (1) denying their motion to reconsider or amend when they provided supporting documentation to establish Berry's agreement to resolve his claims through mandatory FINRA[1] arbitration and (2) denying their motions to dismiss and reconsider when public records and publicly available FINRA rules established Berry was obligated to arbitrate his claims against Appellants as a condition of his admitted registration as a FINRA-regulated broker. We affirm.[2]

FACTS/PROCEDURAL HISTORY

Berry commenced this action against Appellants in 2017, asserting various causes of action including wrongful termination, breach of contract, and defamation. Berry alleged that, in 2014, Appellants forced him to resign from his position as a Wealth Manager and Senior Vice President with Wells Fargo Advisors.[3] He claimed this was in retaliation for his challenges to changes in his compensation arrangement and his refusal to participate in an allegedly illegal cross-selling program. In addition, Berry alleged that in 2016, he learned Wells Fargo Advisors had filed a Form U5 termination notice, which appeared on his official record. The Form U5 stated Wells Fargo Advisors had permitted him to resign, and it noted that his branch office manager had discovered several binders of customer information in the trunk of Berry's vehicle.

---

[1] "FINRA" is the abbreviation for Financial Industry Regulatory Authority, Inc.

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

[3] Berry stated he joined the brokerage firm of "Wheat Butcher Singer" in 1994; in 1997, First Union Corporation acquired Wheat Butcher Singer, and the firm became "Wheat First Union"; in 2001, the firm's parent company merged with Wachovia Corporation, and its name changed to "Wachovia Securities"; finally, in 2008, "Wells Fargo" acquired "Wachovia," and the retail brokerage changed to "Wells Fargo Advisors" in 2009. Berry asserted that due to the 2009 acquisition, he became an employee of Wells Fargo Clearing Services, LLC, formerly known as Wells Fargo Advisors, LLC, and its parent company, Wachovia Securities Financial Holdings, LLC (collectively, Wells Fargo Advisors).

Appellants filed a motion to dismiss or stay the action pending arbitration, which the parties and the court treated as a motion to compel arbitration. They attached a supporting memorandum, three Forms U4, and the affidavit of Beverly W. Jackson. The three Forms U4 were dated November 5, 1994, January 16, 1995, and September 28, 1995, respectively. Each form included the following language:

> I agree to arbitrate any dispute, claim, or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations indicated in Item 10 as may be amended from time to time . . . .

Item 10 included the abbreviation "SRO"[4] and the heading "to be registered with," and a list of ten SROs appeared with a box above each that the registrant could select. All three forms listed Wheat First Securities, Inc. as the firm name. On the 1994 form, the boxes next to the following SROs were selected in Item 10: ASE (the American Stock Exchange), NASD (National Association of Securities Dealers), NYSE (the New York Stock Exchange), and PHLX (the Philadelphia Stock Exchange). Only the November 1994 form designated any SROs.

The circuit court held a hearing on Appellants' motion. Appellants argued brokers wishing to work in the securities industry must sign a Form U4, register with and be licensed through FINRA, and abide by FINRA's rules. They asserted Berry completed a Form U4 in 1994 when he began working for the predecessor entity and the arbitration provision contained within the form was binding upon Berry and Wells Fargo Advisors. In addition, Appellants argued Berry was a registered representative or associated person under FINRA and that FINRA Rule 13200(A)[5] bound the parties to arbitration.

---

[4] SRO refers to a "self-regulatory organization." *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 386 n.12, 759 S.E.2d 727, 735 n.12 (2014) (noting a self-regulatory organization (SRO) is a forum that "must operate in strict compliance with the Securities and Exchange Act of 1934").

[5] FINRA Rule 13200(A) provides that "a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among. . . Members and Associated Persons." According

Berry neither admitted nor denied that he was registered with FINRA or that he was a registered associate of Wells Fargo Advisors. He argued Appellants, as the parties seeking to compel arbitration, failed to satisfy their burden to prove that FINRA rules applied, that Berry was registered with FINRA, or that an agreement to arbitrate existed. Berry argued Jackson's affidavit was insufficient to authenticate the Forms U4 and Appellants were not parties to any of the forms. In addition, Berry asserted the form designated SROs that no longer operated arbitration forums. He agreed that there was a "consolidation" of the NASD and NYSE arbitration forums in 2007, and he conceded the new entity became FINRA. However, Berry contended neither NASD nor NYSE continued to operate a separate arbitration forum and the court could not substitute FINRA for NASD in the agreement. He acknowledged FINRA operated an arbitration forum but asserted the arbitration clause in the Form U4 failed because Item 10 did not include FINRA as a possible forum.

In response, Appellants suggested the court take judicial notice that, in the mid-2000s, NASD turned over its responsibilities for the regulation of the financial services industry, broker-dealers, and brokers to, and "essentially morphed" into, a newly created entity called FINRA. In addition, Appellants argued it was routine in the financial industry for disputes of this nature to proceed to arbitration and that they were entitled to enforce the arbitration agreement contained in the Forms U4 because Berry laid out the "transformation" of Wheat First Securities into Wells Fargo Advisors.

The circuit court took the matter under advisement and instructed the parties to provide proposed orders. Thereafter, the circuit court issued an order denying Appellants' motion to stay and compel arbitration. The court concluded (1) Appellants did not properly authenticate the forms; (2) the three Forms U4 did not satisfy Appellants' burden to prove the existence of an agreement by Berry to arbitrate his dispute with Appellants; and (3) even assuming an arbitration agreement arose between the parties by virtue of the 1994 Form U4, the agreement was void because the arbitration forums specified in the agreement no longer existed. Specifically, the circuit court concluded the 1994 and 1995 Forms U4 did not establish an agreement to arbitrate because Appellants were not parties to the

---

to the FINRA rules, "the Code," as referenced in Rule 13200, "means the Code of Arbitration Procedure for Industry Disputes." FINRA Rule 13100(h).

forms. The court reasoned that the predecessor, Wheat First, was the named firm on the forms, and the forms contained no language stating that an arbitration obligation would extend to successors or assigns of that firm. The court noted that even if it were appropriate to take judicial notice of FINRA Rule 13200, Appellants failed to show it applied to Berry such that it would bind him to its arbitration procedure. The court concluded the selection of the designated forums constituted an integral term of the arbitration clause in the 1994 form. It found that because none of the identified forums existed and Appellants failed to show the court could simply substitute FINRA as a forum, the arbitration agreement was impossible to perform and void.

Appellants then moved the court to reconsider or amend its order pursuant to Rules 59(e) and 60, SCRCP, asserting they obtained more recent Forms U4 that established (1) an enforceable arbitration agreement between Berry and Wells Fargo Advisors existed and (2) Berry was registered with FINRA, which provided an independent basis to compel arbitration of his claims. Appellants attached the additional forms and an affidavit of Michael Zuhr. The circuit court summarily denied the motion but noted it considered the submissions of the parties. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err by refusing to reconsider its order denying the motion to compel arbitration when Appellants submitted an affidavit and newly discovered evidence showing Berry agreed to arbitrate his claims?

2. Did the circuit court err by denying the motion to compel arbitration when public records and FINRA rules established Berry was obligated to arbitrate his claims against Appellants as a condition of his admitted registration with FINRA?

STANDARD OF REVIEW

"Appeal from the denial of a motion to compel arbitration is subject to de novo review." *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009).

"The admission of evidence is within the discretion of the [circuit] court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the conclusions of the [circuit] court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (citation omitted).

LAW/ANALYSIS

I. Evidentiary Issues

Additional Evidence

Appellants first argue the circuit court erred by refusing to consider the additional Forms U4 they submitted with their motion to reconsider filed pursuant to Rules 59(e) and 60(b), SCRCP. We find this argument is without merit. The circuit court's order denying the motion to reconsider indicated it considered the submissions of the parties.

Judicial Notice

Appellants argue that pursuant to Rule 201, SCRE, the circuit court erred by declining to take judicial notice of FINRA's rules, the content and use of the Form U4, and facts publicly available through FINRA's "statutorily-mandated 'BrokerCheck' website." We find this argument is unpreserved. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the [circuit] court."). In denying the motion to compel, the circuit court declined to rule upon Appellants' request that it take judicial notice of FINRA Rule 13200. In their motion to reconsider, they did not argue the circuit court failed to rule on this request, nor did they request that the court take judicial notice of any other matters. Therefore, we find Appellants' arguments that the circuit court failed to take judicial notice of the foregoing facts are unpreserved. *See Elam*, 361 S.C. at 24, 602 S.E.2d at 780 (noting a party must file a Rule 59(e), SCRCP, motion when "an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review").

Authentication

Appellants argue the circuit court erred by failing to consider on authentication grounds the Forms U4 dated 1994 and 1995 that it submitted at the hearing. We agree.

"A party offering evidence must meet '[t]he requirement of authentication . . . as a condition precedent to admissibility.'" *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (alteration and omission in original) (quoting 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.")). "'[T]he burden to authenticate . . . is not high' and requires only that the proponent 'offer[ ] a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.'" *Id.* (alterations and omissions in original) (quoting *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014)).

We conclude the circuit court abused its discretion by excluding the 1994 and 1995 Forms U4 submitted with the motion to compel based on Rule 901(a), SCRE.[6] Jackson attested that, as a paralegal of Wells Fargo & Company, she had "access to certain personnel records of current and former employees . . . and related corporate entities." In addition, she stated "[t]he [attached] Form U4 for Mr. Berry show[ed] that he was employed by Wheat First Securities Inc. at the time of its filing." We acknowledge Jackson's affidavit did not explain what a Form U4 was, identify the actual custodian of the document, or indicate that it was a true and correct copy. However, because the burden to authenticate is low, we find the foregoing was sufficient to satisfy Rule 901, SCRE, and the circuit court erred by excluding these documents. We now turn to the question of whether these forms established an agreement to arbitrate between the parties.

[6] The circuit court made no finding as to authentication of the records Appellants submitted with their post-hearing motion. Therefore, its ruling as to authentication did not extend to those documents.

II. Denial of the Motion to Compel Arbitration

A. Agreement to Arbitrate

Forms U4

In their reply brief, Appellants argue the circuit court erred by rejecting Berry's agreements to arbitrate based on the alleged failure of the choice of forum. In addition, they argue the circuit court erred by finding no agreement between Wells Fargo Advisors and Berry existed because Wells Fargo Advisors was not listed as the firm on the 1994 and 1995 Forms U4. We disagree.

"The policies of the United States and this State favor arbitration of disputes." *New Hope Missionary Baptist Church*, 379 S.C. at 630, 667 S.E.2d at 6. "However, arbitration is a matter of contract[,] and a party cannot be required to submit to arbitration any dispute [that] he has not agreed to submit." *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323. "Arbitration is available only when the parties involved contractually agree to arbitrate." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999). "The initial inquiry to be made by the [circuit] court is whether an arbitration agreement exists between the parties." *Hous. Auth. of City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003). "The determination of whether an arbitration agreement exists is 'a matter to be forthwith and summarily tried by the [c]ourt.'" *Id.* at 335, 588 S.E.2d at 620 (quoting *Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 404, 440 S.E.2d 877, 879 (1994)).

"In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract." *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). "[O]nly if the choice of forum is an integral part of the agreement to arbitrate, rather than an 'ancillary logistical concern[,]' will the failure of the chosen forum preclude arbitration." *Id.* at 131, 678 S.E.2d at 438 (quoting *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000)). "Whe[n] designation of a specific arbitral forum has implications that may substantially affect the substantive outcome of the resolution, . . . it is neither 'logistical' nor 'ancillary.'" *Id.* at 132, 678 S.E.2d at 439 (holding when the parties' agreement stated disputes arising between the parties "shall be resolved by binding arbitration administered by the National Health Lawyers Association," the specific

designation of that organization as an arbitrator was an "integral term of th[e] arbitration agreement" and the organization's unavailability to arbitrate the parties' dispute rendered the agreement unenforceable).

In *Dean v. Heritage Healthcare of Ridgeway, LLC*, our supreme court found that a "named arbitral forum is not a material term to agreements in which the parties agree to arbitrate 'in accordance with' the named forum's rules, absent other evidence to the contrary" but opined that "when parties elect for a proceeding [to be] 'administered by' a named forum, that forum should be viewed as integral to the arbitration agreement, absent other evidence to the contrary." 408 S.C. 371, 384, 759 S.E.2d 727, 734 (2014). However, the *Dean* court distinguished cases in which the parties agreed to arbitrate "in accordance with" the rules of an SRO. *See id.* at 386 n.12, 759 S.E.2d 727, 735 n.12 (distinguishing two cases in which the parties agreed to arbitrate "'in accordance with' a named forum's rules" because those "cases involve[d] federal securities law and the decision to arbitrate before a[n SRO]," which is a forum that "must operate in strict compliance with the Securities and Exchange Act" (quoting *Deeds v. Regence Blueshield of Idaho*, 141 P.3d 1079, 1082 (Idaho 2006))); *id.* ("In contrast to the SROs, which are closely governed by the Securities and Exchange Commission and have developed complex regulatory schemes for overseeing arbitration of securities disputes, the AAA simply provides a list of potential arbitrators from which the parties can choose, as well as procedural rules for conducting the arbitration, and coordinates the logistics of setting up the parties with the chosen arbitrator. . . . Unlike the SROs, arbitration 'in accordance with the applicable rules of the AAA' is not dependent on the AAA overseeing the arbitration." (quoting *Deeds*, 141 P.3d at 1082)).

We find the failure of the choice of forum invalidated the agreements contained in the 1994 and 1995 Forms U4. Here, all three of the Forms U4 Appellants submitted with their motion to compel arbitration listed "Wheat First Securities, Inc." as the firm name, and the only SROs selected were the ASE, NASD, NYSE, and PHLX. Even if any of these SROs still existed, the parties did not dispute they no longer provided arbitration services. We find the arbitration forum was a material and integral term of the agreement, and because the indicated organizations no longer existed or provided arbitration services, there was no enforceable agreement to arbitrate.

Further, we find none of the Forms U4 established an agreement to arbitrate between Berry and Appellants. First, the agreements contained in the 1994 and 1995 Forms U4 were between Berry and a firm that no longer existed, and they contained no language binding successors or assigns to the named firm. Appellants, therefore, could not enforce any purported agreement to arbitrate contained therein. Second, the 1999 and 2014 Forms U4 that Appellants submitted with their motion to reconsider likewise failed to establish an enforceable agreement to arbitrate between Berry and Appellants. Jackson's affidavit stated "Wachovia Securities Financial Holdings, Inc." was the parent company of Wells Fargo Clearing Services, LLC, formerly known as Wells Fargo Advisors, LLC, and an "indirect subsidiary of Wells Fargo & Company." She attested "Wheat First Securities, Inc." was "the predecessor in interest to Wells Fargo Advisors, LLC" and gave the history of the mergers and acquisitions that resulted in the creation of this entity. The 1999 Form U4 designated "Everen Securities" as the firm name[7] and contained the same arbitration clause that was included on the 1994 and 1995 Forms U4. However, this form contained no language indicating it bound successors and assigns to the named firm. Further, FINRA was not yet in existence and therefore was not included as an SRO on the 1999 Form U4. Finally, the 2014 Form U4 designated Wells Fargo Advisors as the firm and FINRA as an SRO, but it contained no arbitration agreement. Therefore, although we acknowledge the 2014 form indicated Berry was registered with FINRA in 2014, we find neither the 1999 nor the 2014 form established Berry agreed to arbitrate his claims against Appellants. *See Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44 ("Arbitration is available only when the parties involved contractually agree to arbitrate."); *Cornerstone Hous., LLC*, 356 S.C. at 334, 588 S.E.2d at 620 ("The initial inquiry to be made by the [circuit] court is whether an arbitration agreement exists between the parties.").

FAA

Appellants contend the Federal Arbitration Act (the FAA)[8] applies to "the arbitration agreement found in the Form U4 [that] every registered representative

[7] Zuhr attested Everen Securities was a predecessor of Wells Fargo Advisors.
[8] *See, e.g.*, 9 U.S.C. § 2 (providing "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

must complete to sell securities in the United States and compels arbitration for claims such as those raised here." We disagree.

Even if a contested arbitration agreement complies with the FAA, the parties "must still have agreed, as a matter of general state contract law, to arbitrate." *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 80, 749 S.E.2d 139, 145 (Ct. App. 2013).

Appellants rely upon *Stokes v. Metropolitan Life Insurance Co.*, 351 S.C. 606, 610, 571 S.E.2d 711, 713 (Ct. App. 2002) to support their argument. We acknowledge that if an enforceable arbitration agreement in fact existed between the parties, the FAA would apply, and *Stokes* supports this conclusion. *See id.* at 610, 571 S.E.2d at 713. However, the parties in *Stokes* did not dispute the continued existence of the named forum or that an agreement between the parties to arbitrate in fact existed. *See id.* Further, the parties in *Stokes* did not raise the question of whether the party seeking to compel arbitration was a party to the Form U4. Here, as we stated, none of the Forms U4 contain an agreement between the parties to arbitrate their disputes. Therefore, the FAA does not apply.

Based on the foregoing, we find the Forms U4 did not create an enforceable agreement between the parties to arbitrate, and we affirm the circuit court's denial of the motion to compel arbitration.

B. FINRA Rules as Independent Basis to Compel Arbitration

Appellants argue that regardless of whether the Forms U4 established an enforceable agreement to arbitrate, FINRA Rule 13200 nevertheless required Berry to arbitrate this dispute. They contend that to sell securities, Berry was required to have an active Form U4 at all times, and FINRA Rule 13200 mandated arbitration of all industry disputes. Appellants assert the enforceability of FINRA's rules mandating arbitration is "so inescapable that courts have repeatedly held that *the rule itself* is an enforceable, written agreement to arbitrate," and compelled arbitration on those grounds. We disagree.

"Arbitration is available only when the parties involved contractually agree to arbitrate." *Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44. FINRA Rule 13200(a) provides,

> Except as otherwise provided in the Code, a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among:
>
> - Members;
> - Members and Associated Persons; or
> - Associated Persons.

"The term 'Code' means the Code of Arbitration Procedure for Industry Disputes." *See* FINRA Rule 13100(h).

Even assuming Berry was registered as an associated person with FINRA, no precedent requires us to conclude FINRA Rule 13200, in and of itself, constituted an enforceable arbitration agreement between Berry and Appellants. Although Appellants assert courts have uniformly interpreted a similar FINRA rule—Rule 12200—as an enforceable agreement to arbitrate, Rule 12200 pertains to disputes between members and customers. *See Waterford Inv. Servs., Inc. v. Bosco*, 682 F.3d 348, 353 (4th Cir. 2012) ("The FINRA Code provides that a customer can compel arbitration of a dispute 'between a customer and a member or associated person of a member' when the dispute 'arises in connection with the business activities of the member or the associated person.'" (quoting FINRA Rule 12200)); *Id.* ("This provision 'constitutes an "agreement in writing" under the F[AA,] . . . which binds . . . [a FINRA] member, to submit an eligible dispute to arbitration upon a customer's demand.'" (second alteration in original) (quoting *Wash. Square Secs., Inc. v. Aune*, 385 F.3d 432, 435 (4th Cir. 2004))). We have been unable to identify any precedent extending the foregoing interpretations to FINRA Rule 13200. Notwithstanding the language of FINRA Rule 13200, we conclude the record must demonstrate the parties agreed to arbitrate their disputes, independent of either party's registration with FINRA. *See Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44 ("Arbitration is available only when the parties involved contractually agree to arbitrate."). As we stated, the Forms U4 Appellants included with their motion to compel arbitration did not demonstrate an agreement to arbitrate existed between Appellants and Berry. We conclude that without such an agreement, FINRA Rule 13200 does not bind an associated person to arbitrate his disputes with a member. Accordingly, even assuming Berry was registered as an associated person with FINRA, we conclude FINRA Rule 13200 did not constitute

an independent basis upon which to compel him to arbitrate his claims.[9] We therefore affirm the circuit court's denial of the motion to compel arbitration.

CONCLUSION

For the foregoing reasons, the circuit court's ruling denying Appellants' motion to compel arbitration is

AFFIRMED.

GEATHERS and MCDONALD, JJ., concur.

[9] We need not consider Appellants' argument that Berry failed to establish a valid defense to arbitration because they concede the circuit court did not rule upon this question. *See, e.g.*, *Elam*, 361 S.C. at 23, 602 S.E.2d at 779-80 ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the [circuit] court.").