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, 2024, the first edition after January 1, 2024, listed the prime rate as 8.50%. Therefore, for the period January 15, 2024, through January 14, 2025, the legal rate of interest for money decrees and judgments is 12.50% compounded annually.

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

Columbia, South Carolina
January 4, 2024

Judicial Merit Selection Commission

Erin B. Crawford, Chief Counsel
Patrick Dennis, Counsel

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

January 15, 2024

The Judicial Merit Selection Commission found the following judicial candidates qualified and nominated at the public hearings held November 6-9, 13-15, and 28-29, 2023; and January 15, 2024:

Supreme Court

Chief Justice	**The Honorable John W. Kittredge,** Greenville, SC

Court of Appeals

Seat 8	**The Honorable Jerry Deese Vinson, Jr.,** Florence, SC
Seat 9	**Whitney B. Harrison**, Columbia, SC **The Honorable Jan B. Bromell Holmes**, Georgetown, SC **The Honorable Matthew Price Turner**, Laurens, SC

Circuit Court

2nd Judicial Circuit, Seat 2	**Grant Gibbons**, Aiken, SC **David W. Miller**, Aiken, SC **Martha M. Rivers Davisson**, Aiken, SC
3rd Judicial Circuit, Seat 1	**The Honorable S. Bryan Doby**, Bishopville, SC **Christopher R. DuRant**, Gable, SC **Samuel L. Floyd**, Kingstree, SC
3rd Judicial Circuit, Seat 2	**The Honorable Kristi Fisher Curtis,** Sumter, SC
4th Judicial Circuit, Seat 2	**The Honorable Michael S. Holt,** Hartsville, SC
5th Judicial Circuit, Seat 1	**James Smith,** Columbia, SC **Justin T. Williams,** Columbia, SC

5th Judicial Circuit, Seat 2	**The Honorable Daniel McLeod Coble,** Columbia, SC
7th Judicial Circuit, Seat 1	**J. Derham Cole, Jr.,** Spartanburg, SC
7th Judicial Circuit, Seat 2	**The Honorable Grace Gilchrist Knie,** Campobello, SC
8th Judicial Circuit, Seat 2	**The Honorable Eugene Cannon Griffith, Jr.,** Prosperity, SC
9th Judicial Circuit, Seat 4	**The Honorable Daniel E. Martin, Jr.,** Charleston, SC **Thomas J. Rode**, Charleston, SC **The Honorable Dale E. Van Slambrook**, Goose Creek, SC
10th Judicial Circuit, Seat 2	**The Honorable R. Scott Sprouse,** Walhalla, SC
11th Judicial Circuit, Seat 1	**The Honorable William Paul Keesley,** Edgefield, SC
11th Judicial Circuit, Seat 2	**The Honorable Walton J. McLeod, IV,** Columbia, SC
12th Judicial Circuit, Seat 1	**The Honorable Michael G. Nettles,** Florence, SC
13th Judicial Circuit, Seat 2	**The Honorable Jessica Ann Salvini,** Greenville, SC
13th Judicial Circuit, Seat 4	**Vernon F. Dunbar,** Greenville, SC **Ken Gibson,** Greenville, SC **Will Grove,** Greenville, SC
14th Judicial Circuit, Seat 1	**The Honorable Robert Bonds,** Walterboro, SC
14th Judicial Circuit, Seat 3	**The Honorable Marvin Dukes, III,** Beaufort, SC
15th Judicial Circuit, Seat 3	**David Pierce Caraker, Jr.,** Myrtle Beach, SC **Joshua D. Holford,** Myrtle Beach, SC **Douglas M. Zayicek,** Conway, SC
At-Large, Seat 4	**Daniel J. Ballou,** Rock Hill, SC **William C. McMaster, III,** Greenville, SC
At-Large, Seat 8	**Kimberly V. Barr,** Florence, SC **T. William "Billy" McGee, III,** Columbia, SC **William Vickery Meetze,** Marion, SC
At-Large, Seat 11	**Joseph Bias,** Lexington, SC **The Honorable Russell D. Hilton,** Ridgeville, SC **The Honorable Milton G. Kimpson,** Columbia, SC

At-Large, Seat 16	**Riley Maxwell,** Columbia, SC **Charles J. McCutchen,** Orangeburg, SC **Jane H. Merrill,** Greenwood, SC

Family Court

1st Judicial Circuit, Seat 4	**Jerrod A. Anderson,** Orangeburg, SC **Deanne M. Gray,** Summerville, SC
7th Judicial Circuit, Seat 4	**Pete G. Diamaduros,** Spartanburg, SC **Jonathan W. Lounsberry,** Spartanburg, SC
9th Judicial Circuit, Seat 4	**Blakely Copeland Cahoon,** Summerville, SC
9th Judicial Circuit, Seat 6	**Gina J. McAlhany,** Summerville, SC
10th Judicial Circuit, Seat 1	**David J. Brousseau,** Anderson, SC **Heather Vry Scalzo,** Anderson, SC
16th Judicial Circuit, Seat 1	**Sammy Diamaduros,** Union, SC
16th Judicial Circuit, Seat 3	**R. Chadwick "Chad" Smith,** Rock Hill, SC **Erin K. Urquhart,** Rock Hill, SC

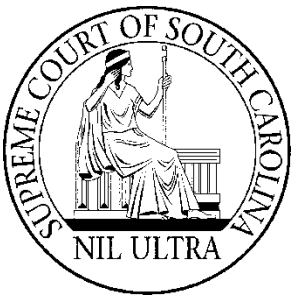
Administrative Law Court

Seat 1	**The Honorable Ralph K. Anderson, III,** Columbia, SC

As a reminder, the record remains open until the final report is issued at 12:00 Noon, Tuesday, January 16, 2024. Accordingly, judicial candidates are not free to seek or accept commitments until that time.

The election is currently scheduled for Noon on Wednesday, February 7, 2024.

Correspondence and questions should be directed to the Judicial Merit Selection Commission as follows: Erin B. Crawford, Chief Counsel, Post Office Box 142, Columbia, South Carolina 29202, (803) 212-6689 or Lindi Putnam, JMSC Administrative Assistant, (803) 212-6623.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 2
January 17, 2024
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Applied Building Sciences, Inc., Appellant,

v.

South Carolina Department of Commerce, Division of Public Railways, Respondent.

Appellate Case No. 2021-000051

Appeal from Charleston County
Bentley Price, Circuit Court Judge

Opinion No. 28184
Heard September 12, 2023 – Filed January 17, 2024

AFFIRMED

Gene McCain Connell, Jr., of Kelaher, Connell & Connor, P.C., of Surfside Beach, for Appellant.

Keith M. Babcock and Joseph B. Berry, both of Lewis Babcock L.L.P., of Columbia, for Respondent.

Paul Dezso de Holczer, of Columbia, for Amicus Curiae South Carolina Department of Transportation. Bryan Eric Shytle, of Columbia, for Amicus Curiae Municipal Association of South Carolina.

JUSTICE JAMES: We certified this case pursuant to Rule 204(b), SCACR. We affirm the circuit court and hold the $50,000 statutory limit on reimbursement of reestablishment expenses in condemnation proceedings set forth in S.C. Code Ann. section 28-11-30(4) (Supp. 2023) is constitutional.

I.

Appellant Applied Building Sciences, Inc. (ABS) is an engineering firm that was a tenant in a building in Charleston County owned by Hibernian Heights, LLC (Landlord). The South Carolina Department of Commerce, Division of Public Railways (Public Railways) condemned the building and the surrounding real property (the Milford Property) for public use. Because ABS was a tenant of the Milford Property, ABS was entitled to just compensation for the value of its leasehold interest; thus, ABS was named as an "Other Condemnee" in the resulting condemnation action.

The taking of the Milford Property forced ABS to move its business operations to a new location. In addition to damages recoverable by ABS as just compensation for its leasehold interest in the Milford Property, ABS was entitled to reimbursement of two other types of expenses from Public Railways. First, under South Carolina Code section 28-11-10, a relocating business such as ABS may apply for reimbursement of reasonable expenses for moving tangible personal property to the new business location. Public Railways paid the moving expenses to ABS, and they are not an issue in this appeal.

Second, under S.C. Code section 28-11-30(4), a relocating business may seek reimbursement of other reestablishment expenses. S.C. Code section 28-11-30(4) provides:

> Reestablishment expenses related to the moving of a small business, farm, or nonprofit organization payable for transportation projects pursuant to federal guidelines and regulations may be paid in an amount *up to fifty thousand dollars*, notwithstanding a lower limitation imposed by federal regulations.

S.C. Code Ann. § 28-11-30(4) (emphasis added).

ABS renovated the replacement site and sought reimbursement from Public Railways for those expenses in excess of $560,000 ("reestablishment expenses"). Citing section 28-11-30(4), Public Railways refused to pay more than $50,000.

Along with its claim for just compensation for the taking of its leasehold interest, ABS asserted an inverse condemnation claim against Public Railways for the entire amount of reestablishment expenses, alleging the $50,000 cap in section 28-11-30(4) is unconstitutional under the Takings Clauses of the South Carolina and United States Constitutions.

Landlord, ABS, and Public Railways settled the condemnation action for $1,700,000, and ABS received a portion of the settlement proceeds as just compensation for its leasehold interest. ABS and Public Railways agreed to sever ABS's inverse condemnation claim and litigate it separately. ABS and Public Railways then filed cross motions for summary judgment with regard to that claim. The primary issue before the circuit court was whether the $50,000 cap is an unconstitutional limitation on the reimbursement of reestablishment expenses. The circuit court found the cap constitutional and granted Public Railways' motion for summary judgment. ABS appealed.

II.

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (the Federal Relocation Act) was enacted to entitle any person "displaced" from his home or place of business by a federal or federally-funded project to relocation expenses, including reimbursement for certain moving expenses. 42 U.S.C. §§ 4601-4655; *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 32 (1983). The Federal Relocation Act generally provides that displaced persons are entitled to the following benefits:

> (1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;
>
> (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency;
>
> (3) actual reasonable expenses in searching for a replacement business or farm; and

> (4) actual reasonable expenses necessary to reestablish a displaced farm, nonprofit organization, or small business at its new site, but not to exceed $25,000, as adjusted by regulation, in accordance with section 4633(d) of this title.

42 U.S.C. § 4622(a). The Federal Relocation Act thus limits reestablishment expenses to $25,000. 42 U.S.C. § 4622(a)(4).

South Carolina codified the relocation requirements of the Federal Relocation Act in sections 28-11-10 to -70, mandating relocation payments to displaced persons and businesses regardless of whether a project uses any federal dollars. *See* S.C. Code Ann. § 28-11-10 (2007); *Brown v. City of N. Charleston*, 314 S.C. 298, 299-301, 442 S.E.2d 633, 634-35 (Ct. App. 1994); Act No. 1345, 1972 S.C. Acts 2522 (referring to relocation assistance "when any program or project undertaken involving acquisition of real property will result in displacement of any person or other legal entity"); 18 S.C. Jur. *Eminent Domain* § 22.1 (West 2023). When the government uses the power of eminent domain to take property which is being leased, the tenants may recover moving costs and rent differential payments. *See* S.C. Code Ann. § 28-11-10; *Brown*, 314 S.C. at 299-301, 442 S.E.2d at 634-35; 18 S.C. Jur. *Eminent Domain* § 22.1.

Section 28-11-30(4) was enacted in 2010 and, as noted above, caps at $50,000 "reestablishment expenses related to the moving of" small businesses, farms, and non-profit organizations. S.C. Code Ann. § 28-11-30(4). South Carolina's relocation assistance statute expressly provides: "Nothing in this chapter shall be construed as creating an element of damage in an eminent domain proceeding." S.C. Code Ann. § 28-11-70 (2007).[1]

III.

This case hinges on two questions: (1) are reestablishment expenses separate from constitutional just compensation in an eminent domain action; and (2) is the

[1] Twenty-five other states have a statute authorizing the repayment of reestablishment expenses to a displaced farm, nonprofit organization, or small business as a result of eminent domain with a set monetary cap. The constitutionality of the statutes in other states has apparently not been challenged.

statutory cap on the reimbursement of reestablishment expenses constitutional? We hold the answer to both questions is yes.

"This Court has a very limited scope of review in cases involving a constitutional challenge to a statute. All statutes are presumed constitutional and will, if possible, be construed so as to render them valid." *Joytime Distribs. & Amusement Co., Inc. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) (citing *Davis v. Cnty. of Greenville*, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996)). "A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." *Id.* (citing *Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 62, 467 S.E.2d 739, 741 (1995)). "A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution." *Id.* (citing *Westvaco Corp.*, 321 S.C. at 62, 467 S.E.2d at 741). The party challenging the constitutionality of a statute bears the burden of establishing unconstitutionality. *Knotts v. S.C. Dep't of Nat. Res.*, 348 S.C. 1, 6, 558 S.E.2d 511, 513 (2002) (citing *Home Health Serv., Inc. v. S.C. Tax Comm'n*, 312 S.C. 324, 327, 440 S.E.2d 375, 377 (1994)).

The Takings Clause of the Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V; *see Chi., Burlington & Quincy R.R. Co. v. City of Chi.*, 166 U.S. 226, 239 (1897) (making the Takings Clause applicable to the states via the Due Process Clause of the Fourteenth Amendment). "As its text makes plain, the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power,'" namely, the payment of just compensation to the affected property owner. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (quoting *First Eng. Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 314 (1987)).

The South Carolina Constitution states, "[P]rivate property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property." S.C. Const. art. I, § 13. The General Assembly established how just compensation should be ascertained in an eminent domain proceeding in section 28-2-370 of the South Carolina Code: "In determining just compensation, only the value of the property to be taken, any diminution in the value of the landowner's remaining property, and any benefits as provided in § 28-2-360 may be considered." S.C. Code Ann. § 28-2-370 (2007).

Several United States Supreme Court decisions issued prior to the enactment of the foregoing federal and South Carolina relocation assistance statutes are pertinent to our decision today. The Supreme Court has noted the Constitution and statutes do not define "just compensation," but it has become recognized that "just compensation is the value of the interest taken," the so-called "market value." *United States v. Petty Motor Co.*, 327 U.S. 372, 377 (1946). In *Petty Motor*, as here, there was a complete taking of the tenant's leasehold interest. *Id.* at 378. As part of the tenant's evidence of just compensation for the loss of its leasehold interest, the trial court allowed the tenant to introduce evidence of the expenses the tenant incurred in moving and reinstalling its equipment at its new business location. *Id.* at 377. The *Petty Motor* Court held this was error, finding the removal or relocation of personal property is not to be included in valuing property taken and that businesses displaced as a result of condemnation do not have a constitutional right to receive expenses related to relocation. *See id.* at 377-78 ("Since 'market value' does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, *evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings*." (emphasis added)). The Court held the cost of removal or relocation should not be admitted because these costs "are apart from the value of the thing taken" and are "personal to the lessee." *Id.* at 378. The Court noted the lessee would have to move at the end of his term unless the lease was renewed and, therefore, the compensation for the value of the leasehold covers the loss from premature termination in most situations. *Id.* at 378-79.

United States v. Westinghouse Electric & Manufacturing Co. clarified that when the government takes a tenant's entire leasehold interest, the expenses of removal or of relocation are not to be included in valuing what is taken. 339 U.S. 261, 264 (1950). The Supreme Court has also held the cost of removing personal property from land taken is recoverable only if provided for by statute. *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 676 (1923) (holding "the cost of removing personal property from land taken is not a proper element of damage unless made so by express statute, and it was not an unconstitutional exercise of power for the Legislature, in creating the right, to define its extent" (internal citation omitted)).

"South Carolina courts have embraced federal takings jurisprudence as providing the rubric under which we analyze whether an interference with someone's property interests amounts to a constitutional taking." *Hardin v. S.C. Dep't Transp.*, 371 S.C. 598, 604, 641 S.E.2d 437, 441 (2007) (citing *Byrd v. City of Hartsville*, 365

S.C. 650, 656 n.6, 620 S.E.2d 76, 79 n.6 (2005)). Therefore, *Petty Motor*, *Westinghouse*, and *Joslin Mfg. Co.* guide our decision today. Because reestablishment expenses are separate from damages awardable as just compensation under the United States and South Carolina Constitutions, the $50,000 cap set forth in section 28-11-30(4) violates neither the Takings Clause of the Fifth Amendment nor Article I, section 13 of the South Carolina Constitution. *Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 96, 44 S.E.2d 88, 96 (1947) (holding the General Assembly's plenary power is limited only by the United States and South Carolina Constitutions and legislation "not expressly or impliedly inhibited by one or the other of these documents may be validly enacted").

IV.

ABS has not met its burden of establishing the cap on reestablishment expenses in section 28-11-30(4) is unconstitutional. As long as the General Assembly acts within constitutional confines, it has plenary power to make policy decisions. Such a policy decision is reflected in the General Assembly's enactment of the $50,000 cap in section 28-11-30(4). *See Ashmore*, 211 S.C. at 96, 44 S.E.2d at 97 ("[I]n the General Assembly rests plenary legislative power, limited only by the constitutions, State and Federal."). We affirm the circuit court.

AFFIRMED.

BEATTY, C.J., KITTREDGE, FEW and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Tommy Lee Benton, Petitioner.

Appellate Case No. 2021-001498

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 28185
Heard June 7, 2023 – Filed January 17, 2024

AFFIRMED AS MODIFIED

Robert Walker Humphrey, II, of Willoughby Humphrey & D'Antoni, P.A., of Charleston, and Chief Appellate Defender Robert Michael Dudek, of Columbia, both for Petitioner.

Solicitor Jimmy A. Richardson, II, of Conway; Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney

General Tommy Evans, Jr., all of Columbia, all for Respondent.

JUSTICE HILL: Tommy Lee Benton was indicted for murder and other violent offenses. His first trial ended in a mistrial after the jury had been sworn and heard opening arguments but before any evidence was presented. At his retrial, a jury convicted Benton of the murder of Charles Bryant Smith (Victim), as well as two counts of first-degree burglary, one count of first-degree arson, and one count of third-degree arson. The court of appeals affirmed his convictions. *State v. Benton*, 435 S.C. 250, 865 S.E.2d 919 (Ct. App. 2021). We granted Benton's petition for a writ of certiorari to review the court of appeals' decision that: (1) his first trial was not improvidently declared a mistrial and, thus, his second trial and ensuing convictions were not barred by double jeopardy; (2) the trial court did not err in admitting several disturbing photographs of Victim's body from the crime scene; and (3) the trial court did not err in admitting certain text and Facebook messages.

I. Factual and Procedural Background

The opinion of the court of appeals sets forth the pertinent facts. In sum, this case involves a depraved plot by Benton, Michael Cheatham, and several others to rob and kill Victim, a well-known store owner in Aynor. Benton and his cohorts targeted Victim, believing he stored large amounts of cash at his store and home. They first burgled Victim's home, stealing some $27,000. They next broke into his store and, finding neither cash nor the Victim, burned the store down. Finally, a few days later, they returned to Victim's home. The evidence demonstrated they tied Victim to a chair and handcuffed him, Benton beat him with a crowbar, poured gasoline on Victim and around his home, set the home on fire, and fled. Law enforcement discovered Victim's charred, handcuffed body in the chair. The autopsy concluded Victim died of carbon monoxide poisoning, meaning he was burned alive.

During opening arguments at Benton's first trial, Benton asserted his great-grandmother would be testifying that, on the night of Victim's murder, Benton was with her in North Carolina. The State objected, contending Benton should be precluded from offering his alibi evidence at trial because he had never responded to the State's Rule 5(e), SCRCrimP request for disclosure of alibi. After Benton conceded he had not responded to the alibi disclosure request, the trial court gave him and the State the opportunity to be further heard, in essence an open invitation

for both sides to explain their perspectives on the harm caused by Benton's failure to disclose. Ultimately, the trial court *sua sponte* declared a mistrial, reasoning it was:

> faced with the situation that if [it] impose[s] the strictures or the sanctions that are set forth in Rule 5, it would deprive the defendant basically of his defense to these crimes and the most probable consequence of that would be that there would be a less than complete factual presentation of the case to the jury and they would base their decision on a less than complete factual basis.

The trial court went on to explain that, if it decided not to exclude Benton's undisclosed witnesses, the State would not have a full and fair opportunity to challenge Benton's alibi or present evidence disputing it. The trial court ruled:

> I have no choice but to declare a mistrial in this matter. I do find there is manifest necessity in doing so based upon the reasons that I have said. The harm that it would do to the defendant, the harm that it would do the State, I find there is no other reasonable conclusion that can be had in this matter because of that.

The trial court later reaffirmed its finding of manifest necessity in a written order.

Before Benton's retrial began, Benton moved to have the charges against him dismissed as barred by double jeopardy, asserting the trial court had improvidently declared his first trial a mistrial. The motion was denied.

II. Standard of Review

Our review extends only to corrections of errors of law. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). We review a trial court's mistrial decision for abuse of discretion. *Renico v. Lett*, 559 U.S. 766, 774 (2010). A mistrial should be declared cautiously and only in the most urgent circumstances for plain and obvious reasons. *Id*. We review evidentiary rulings for abuse of discretion. *State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004).

III. Double Jeopardy

We affirm as modified the court of appeals' decision that there was no double jeopardy violation. When a defendant's first trial ends in a mistrial, the double jeopardy clause bars a second prosecution unless the mistrial was declared due to "manifest necessity," that is a "high degree" of necessity to further the ends of justice and preserve public confidence in fair trials. *Renico*, 559 U.S. at 774–75; *Illinois v. Somerville*, 410 U.S. 458, 468 (1973). Like the court of appeals, we conclude the trial court exercised sound discretion in declaring a mistrial in Benton's first trial. The trial court conscientiously considered alternatives to the drastic remedy of declaring a mistrial. *Cf. United States v. Jorn*, 400 U.S. 470, 487 (1971) (holding a trial court abused its discretion in declaring a mistrial when it did so without allowing either party to object or request a continuance); *see also Arizona v. Washington*, 434 U.S. 497, 506 (1978) (explaining the "manifest necessity" test cannot be applied "mechanically or without attention to the particular problem confronting the trial [court]"). There may have been some space for the trial court to have recessed the trial so the State could conduct a due diligence investigation of Benton's alibi disclosure, but given the skimpy record before us, we cannot say so without speculating. The transcript states an "off the record" conference occurred before the trial court's ruling. The trial court should have held or memorialized these discussions on the record, a point we will discuss more fully in the next section of this opinion. Still, we agree with the court of appeals that the trial court otherwise well navigated the issue. Benton and the solicitor shared fault perhaps for the circumstances and apparent misunderstandings that led to the mistrial. *Cf. Oregon v. Kennedy*, 456 U.S. 667, 676 (1982) (stating there can be no manifest necessity to declare a mistrial when the prosecutor intentionally goads the defendant into moving for one). The trial court gave both the solicitor and Benton's skilled trial counsel the opportunity to be heard and offer comments. Neither Benton nor the State objected to the trial court's analysis or its declaration of a mistrial.

The only quibble we have with the court of appeals' double jeopardy analysis is its discussion that Benton suffered no prejudice from the mistrial because he was allowed to present his alibi witnesses at his retrial. The constitutional guarantee against double jeopardy protects defendants from the dread, anxiety, and financial cost of enduring the gauntlet of criminal prosecution and punishment more than once for the same offense. *See Arizona*, 434 U.S. at 503–05 (explaining the double jeopardy clause protects "the defendant's 'valued right to have his trial completed by a particular tribunal'" and this right is valued because "a second prosecution . . .

increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted" (citations removed)). The defendant's interest in having his fate determined by the first impaneled jury is therefore "a weighty one." *Somerville*, 410 U.S. at 471. As such, "the lack of apparent harm to the defendant from the declaration of a mistrial [does] not itself justify the mistrial[.]" *Id*. at 469. Further, in *Jorn*, a plurality of the Supreme Court noted inquiries into who benefits from a mistrial are "pure speculation." 400 U.S. at 483. Therefore, the *Jorn* plurality concluded that to allow a retrial "based on an appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision." *Id.*

Here, the trial court focused, as it should have, on whether, given all the circumstances, a mistrial was necessary to further the ends of public justice. *See United States v. Perez*, 22 U.S. 579, 580 (1824) (stating a mistrial may be granted without violating double jeopardy when, in the sound discretion of the court, "taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated"); *Gori v. United States*, 367 U.S. 364, 368 (1961) ("Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection . . . ."). The trial court wisely understood that not granting a mistrial under the circumstances could undermine public confidence in the outcome. *See Wade v. Hunter*, 336 U.S. 684, 689 (1949) ("[A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgements."). We therefore vacate the court of appeals' prejudice discussion but otherwise affirm its double jeopardy ruling.

IV. Admissibility of Crime Scene Photographs

Next, we agree with the court of appeals that the trial court did not abuse its discretion in admitting the graphic crime scene photographs of Victim's burned body. (State's Ex. 54-55). It is inescapable that the photographs were gruesome and revolting. We have long warned the State not to overplay its hand in criminal trials by seeking to admit shockingly graphic photographs that have scant probative value in violation of Rule 403, SCRE, just to inflame the passions of the jury. We recently reversed a conviction the State had secured by doing just such a thing. *See State v. Nelson*, Op. No. 28171 (S.C. Sup. Ct. filed Aug. 9, 2023) (Howard Adv. Sh. No. 31

at 25) (reversing murder conviction due to the prejudice caused by erroneous admission of gruesome autopsy photographs).

This case differs from *Nelson* in several ways. The photographs at issue in *Nelson* were autopsy pictures of the victim's decomposing and disfigured body. *Id*. at 28–29. They could corroborate nothing but the prosecutor's overreach. *Id*. at 35. By contrast, the pictures here were relevant as they depicted the crime scene. They drew probative force from their unique power to make Benton's accomplices' testimony more believable. The pictures gave important context to the testimony and other evidence about who did what at the scene. Under the specific circumstances of this case, the pictures assisted the jury in their task to understand other key evidence.

In our review of the trial court's admission of the photographs, we note the trial court again did not place its Rule 403 analysis on the record. Instead, after an off-the-record bench conference, the trial court simply admitted the three photographs, commenting they were a "proper representation of the scene." As we have expressed in the past, "we stress the importance of placing on the record arguments and rulings that took place off the record, whether during a bench conference, in emails, or in chambers." *State v. Washington*, 431 S.C. 394, 405 n.4, 848 S.E.2d 779, 785 n.4 (2020). We emphasize that on-the-record arguments and rulings enable judicial review and allow the parties and the public to better understand the rulings.

At any rate, any error during the process of admitting the pictures was harmless, as their introduction did not affect the result of the trial. *See State v. Byers*, 392 S.C. 438, 447, 710 S.E.2d 55, 60 (2011) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." (quoting *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006))); *id*. ("Where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,' an insubstantial error that does not affect the result of the trial is considered harmless." (quoting *Pagan*, 369 S.C. at 212, 631 S.E.2d at 267)). The record is loaded with compelling evidence incriminating Benton of each of the crimes in this violent spree. We conclude the photographs did not contribute to the verdict in any significant way.

V. Admissibility of Text and Facebook Messages

We affirm the decision of the court of appeals affirming the admission of the text and social media messages.

AFFIRMED AS MODIFIED.

BEATTY, C.J., KITTREDGE and JAMES, JJ., concur. FEW, J., concurring in a separate opinion.

JUSTICE FEW: I concur with the majority's ruling on the admissibility of the autopsy photographs. The record supports the trial court's determination the photos had enough probative value to survive Benton's Rule 403 challenge and, thus, the trial court's decision to allow them into evidence was within its discretion.

As to the mistrial issue, however, the majority stretches itself too far to say the trial court acted "wisely" and "conscientiously." In my view, the trial court acted rashly. The majority points out the trial court's two errors.

First, the trial court did not consider whether a short recess in the trial could have given the State time to respond to the late-disclosed alibi witness. As the majority under-states, "There may have been some space for the trial court to have recessed the trial so the State could conduct a due diligence investigation of Benton's alibi disclosure." Absolutely, the trial court should have paused, reflected, and listened. The trial court's failure to do this—by itself—was error.

Second, the trial court appears to have conducted an off-the-record discussion of Benton's late-disclosed alibi witness. As the majority states, "The trial court should have held or memorialized these discussions on the record." This failure also was error.

The majority nevertheless justifies the trial court's impatience by rationalizing—incorrectly in my view—"the trial court gave [Benton] and the State the opportunity . . . to explain their perspectives on the harm caused by Benton's failure to disclose." The record does not indicate the trial court gave the parties such an opportunity. If it were true the trial court did that, my position would be different. But this event did not occur on the record, and we have no idea what occurred in the proceedings the trial judge conducted off the record in his office.

Ultimately, however, on the unique facts of this case, the trial court's decision to grant a mistrial does not prevent a retrial under the Double Jeopardy Clause because Benton brought this on himself by failing to disclose the alibi witness as our Rules plainly require. Thus, as to the mistrial issue, I concur with the majority only in result.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jeffrey Lance Cruce, Petitioner,

v.

Berkeley County School District, Respondent.

Appellate Case No. 2021-001520

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Berkeley County
The Honorable Kristi Lea Harrington, Circuit Court Judge

Opinion No. 28186
Heard April 19, 2023 – Filed January 17, 2024

REVERSED

Lucy Clark Sanders and Nancy Bloodgood, both of Bloodgood & Sanders, LLC, of Mt. Pleasant, for Petitioner.

E. Brandon Gaskins, of Moore & Van Allen, PLLC, of Charleston; Richard J. Morgan, of Burr & Forman LLP, of Columbia; and Andrew F. Lindemann, of Lindemann Law Firm, P.A., of Columbia, all for Respondent.

JUSTICE HILL: Petitioner Jeffrey L. Cruce became the head football coach and athletic director for Berkeley High School in 2011. For the 2015 season, he adopted a controversial "no punt" offensive scheme for the football team. This strategy stirred intense debate among followers of the team and was covered in local and even national sports pages. The controversy deepened as the team suffered lopsided defeats. In December 2015, the Deputy Superintendent of the Berkeley County School District (the District) sent Cruce a letter advising him he was being relieved as coach and athletic director and reassigned to a position as a middle school guidance counselor because he had failed to meet certain performance goals. The District never revealed the reason for Cruce's reassignment to the public. Cruce requested the District reconsider his reassignment.

On January 7, 2016, Berkeley High athletic trainer Chris Stevens sent an email to forty-five people, including administrators, athletic department employees, and volunteer coaches, questioning the integrity and completeness of student athlete files Cruce had maintained. In the email, Stevens remarked the filing issues were a potential "liability" to the District.

On January 8, the District Superintendent sent Cruce a letter upholding his reassignment. Although Cruce completed the rest of the year at the middle school, he resigned at the end of the school year, noting in his resignation letter how the District had humiliated him and destroyed his career by removing him from his coaching and athletic director positions without any public explanation.

Cruce and his wife sold their home and moved out of state. He contended he could not find a suitable coaching job–or even a position as a volunteer coach–because of the District's actions.

Cruce later brought this lawsuit against the District, alleging wrongful termination and defamation. His defamation claim was based on several things, including Stevens' email. The trial court granted the District a directed verdict on Cruce's wrongful termination claim. The trial court also granted the District a directed verdict as to his defamation claim, except the portion of the claim related to Stevens' email. In sending the defamation claim based on Steven's email to the jury, the trial court rejected the District's contention that Cruce was required to prove actual malice, ruling Cruce was not a public figure.

The jury awarded Cruce $200,000 in actual damages. The District appealed. The court of appeals reversed, holding Cruce was a public official for purposes of defamation law and the District was therefore entitled to immunity because §15-78-60(17) of the South Carolina Tort Claims Act (2005) (SCTCA) immunizes the District from losses caused by employee conduct amounting to "actual malice."

We granted Cruce's petition for a writ of certiorari to address the issue of whether Cruce was a public official or public figure.

I. Public Official

According to the court of appeals, Cruce was a public official due to his status as a high school football coach and athletic director. If deemed a public official, Cruce would be required to prove constitutional actual malice as articulated by *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964), to prevail on his defamation claim, and that requirement inherently bars his claim because the SCTCA grants the District immunity from loss arising from employee conduct constituting actual malice. § 15-78-60(17).

Whether Cruce was a public official for purposes of defamation law is a question of law for the court to decide. *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 468, 629 S.E.2d 653, 666 (2006).

The precedent dealing with the definition of "public official" is imprecise, but "it cannot be thought to include all public employees." *Hutchinson v. Proxmir*e, 443 U.S. 111, 119 n.8 (1979) (noting the Supreme Court "has not provided precise boundaries for the category of 'public official'"). The lead decision on the issue holds that the public official category applies "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). To qualify as a public official, the plaintiff must occupy a position that "would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in the controversy." *Id*. at 86 n.13. Put another way, the position must be one that attracts public scrutiny above and beyond that of the rank and file government job, such that "the public has an independent interest in the qualifications and performance of the person" holding the position. *Id*. at 86.

In deciding whether someone is a public official in the defamation context, it is helpful to keep in mind the reason behind the classification: to apply the actual malice standard only where society's strong interest in free and open public debate about public issues outweighs the individual's important interest in protecting his reputation. The right to protect one's reputation, a vital strand of our national history, "reflects no more than our basic concept of the essential dignity and worth of every human being–a concept at the root of any decent system of ordered liberty." *Id*. at 92 (Stewart, J., concurring).

We have considered the public official designation in numerous defamation cases. *See, e.g.*, *Goodwin v. Kennedy*, 347 S.C. 30, 45, 552 S.E.2d 319, 327 (Ct. App. 2001) (assistant high school principal not a public official); *Erickson*, 368 S.C. at 471, 629 S.E.2d at 668 (private guardian ad litem not public official); *Miller v. City of West Columbia*, 322 S.C. 224, 228–29, 471 S.E.2d 683, 685–86 (1996) (assistant police chief deemed public official); *McClain v. Arnold*, 275 S.C. 282, 284, 270 S.E.2d 124, 125 (1980) (police officer deemed public official); *Anderson v. The Augusta Chronicle*, 365 S.C. 589, 592, 594–95, 619 S.E.2d 428, 429, 431 (2005) (candidate for state office deemed public official); *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002) (state trooper deemed public official); *see generally* Hubbard and Felix, *The South Carolina Law of Torts* 611 (5th ed. 2023).

We have not, however, confronted whether a high school football coach or athletic director is a public official in the defamation context. The District insists Cruce is a public official, pointing to his public employment and the enormous array of newspaper articles cluttering the record that were written about him and his unorthodox coaching strategies, as well as his appearances in other media, including a regular radio show.

We understand Cruce was a public employee and enjoyed media attention akin to that of many sports figures. But that does not transform him into a public official, a classification that would strip him of his right to protect his name from being defamed to the same extent as a private citizen. No matter how intense the public gaze may be upon sports figures, they do not have any official influence or decision-making authority about serious issues of public policy or core government functions, such as defense, public health and safety, budgeting, infrastructure, taxation, or law and order. It is these public issues and functions that the First Amendment recognizes as so essential to democracy that public debate about them and their policymakers should be unchecked, except where the speech is knowingly

false or uttered with reckless disregard of its truth or falsity, i.e. the "actual malice" standard of *New York Times v. Sullivan*.

As *New York Times v. Sullivan* explained, the actual malice rule protects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." 376 U.S. at 270. Fielding a football team or devising an offensive strategy is not the type of public issue envisioned by the Framers of the First Amendment. Baseball may be the national pastime, but it and other sports are just that: pastimes. They are not forums for civic concerns, and sports figures–regardless of how far and wide their fame may spread–are not public officials. In holding that a high school basketball coach was not a public official, the Utah Supreme Court summed things up well:

> We view the constitutional standard for public official announced by the Supreme Court to be limited to those persons whose scope of responsibilities are likely to influence matters of public policy in the civil, as distinguished from the cultural, educational, or sports realms . . . . Nor is celebrity, for good or ill, of the government employee particularly relevant. Rather, it is the nature of the governmental responsibility that guides our public official inquiry. The public official roster is comprised exclusively of individuals in whom the authority to make policy affecting life, liberty, or property has been vested . . . . The policies and actions of the coach of any high school athletic team does not affect in any material way the civic affairs of a community—the affairs most citizens would understand to be the real work of government.

O'Connor v. Burningham, 165 P.3d 1214, 1219 (Utah 2007); *see also McGuire v. Bowlin*, 932 N.W.2d 819, 825–28 (Minn. 2019) (holding high school basketball coach was not a public official; although coach was public employee, "his coaching duties are ancillary to core functions of government; put simply, basketball is not fundamental to democracy").

We therefore hold Cruce was not a public official. Consequently, we reverse the decision of the court of appeals. In fairness, the court of appeals conclusion that

Cruce was a public official understandably relied on *Garrard v. Charleston County School District*., which held a high school football coach was a public official. We have since vacated that portion of *Garrard*. 429 S.C. 170, 209–10, 838 S.E.2d 698, 719 (Ct. App. 2019), *aff'd in part, vacated in part sub nom, Garrard for R.C.G. v. Charleston County School District*, Op. No. 28155 (S.C. Sup. Ct. filed May 31, 2023) (Howard Adv. Sh. No. 31).

II. Limited Public Figure

The District's backup argument is that, if Cruce is not a public official, then he is a public figure. The District relies on *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967), which held that the head football coach at the University of Georgia (who was privately paid and not a public employee) was a "public figure" in a defamation case involving allegations of bribery. Cruce could not be an all-purpose "public figure" as that term of art from *Butts* was later clarified as limited to those who "have assumed roles of especial prominence in the affairs of society . . . [or] occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). Nor is he that unicorn of defamation law, the "involuntary public figure," a species *Gertz* described as "exceedingly rare," and some now believe to be extinct. *Id*; *see generally* Elder, *Defamation: A Lawyer's Guide* § 5.8 (Oct. 2022).

Nevertheless, the District claims Cruce fits the definition of a limited public figure, a category announced in *Gertz* that describes one who "voluntarily injects himself or is drawn into a particular controversy and thereby becomes a public figure for a limited range of issues." *Gertz*, 418 U.S. at 351; *see also id*. at 345 (explaining that limited public figures "invite attention and comment" because they "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved"). The rationale for requiring limited public figures to prove actual malice is that such persons have not only assumed the risk by voluntarily entering the forefront of a public controversy where it is essential that speech be unbridled, but they also have superior access to media outlets to defend themselves and express counter speech. *See Gertz*, 418 U.S. at 344. The idea is that by stepping into the bully pulpit of public debate, one must expect to endure the slings and arrows of outrageous (but not knowingly or recklessly false) statements hurled in the hurly burly of civic discourse. To paraphrase Justice Brandeis, the patriots who fought to found our country were not cowards; they did not fear political battle and knew that freedom to speak out against the government was the oxygen

of democracy; they were aware, through bitter experience, that the stifling of speech was a preferred weapon of tyranny because it replaces tolerance with repression, producing a climate of fear, anger, and apathy that can topple republics. *See Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring).

In *Erickson*, we adopted a five factor test for determining whether one is a limited public figure. 368 S.C. at 474, 629 S.E.2d at 669 ("In order for the court to properly hold that a plaintiff is a public figure for the limited purpose of comment on a particular public controversy, the defendant must show: (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation."). According to the District, the trial court erred in concluding Cruce did not meet the *Erickson* test.

We borrowed the *Erickson* test from the Fourth Circuit. As that court has explained, before applying the test, a court must decide the threshold issue of whether a genuine public controversy exists. *Carr v. Forbes, Inc.*, 259 F.3d 273, 278 (4th Cir. 2001). A public controversy is not merely a dispute that has garnered publicity. It must be a controversy about civic issues of concern to the public as a whole (or at least a broad segment of it), not just the participants in the dispute and their supporters, no matter how fanatic they may be. *See id*. at 279 (stating term "public controversy" does not encompass every conceivable issue of interest to the public, only a dispute that has received public attention because its ramifications affect even members of the public not participating in the dispute). This is, we think, consistent with *Gertz*'s description of public figures as persons who "assume special prominence in the resolution of public questions." 418 U.S. at 351; *see also Time, Inc. v. Firestone*, 424 U.S. 448, 453–55 (1976) (refusing to designate wealthy divorcee as limited public figure despite her celebrity and widespread notoriety).

The *Erickson* template is well-intentioned but awkward to apply. We believe a better test for determining whether one is a limited public figure considers three things: (1) whether the plaintiff voluntarily injected herself into and played a prominent role in a public controversy, defined as a controversy whose resolution affects a substantial segment of the public; (2) whether the defamation occurred after the plaintiff voluntarily entered the controversy but while still embroiled in it; and (3) whether the defamation was related to the controversy. *See Prosser and Keeton on Torts* 806 (W. Page Keeton et al. eds., 5th ed. 1984); *The Law of Torts* § 561 (Dan B. Dobbs

et al., 2d ed., 2011); Smolla, *1 Law of Defamation* §§ 2:23 & 2:24 (2d ed., 2023). We therefore replace the *Erickson* factors with this three-part inquiry.

We conclude Cruce is not a limited public figure under this test or *Erickson*. First, no public controversy was present. The merit of Cruce's coaching strategy was not a controversy that affected large segments of society. Second, even if a public controversy existed over Cruce's coaching strategy, Stevens' defamatory comments related to Cruce's paperwork skills, not his gridiron acumen. *See Bowlin*, 932 N.W.2d at 829 (even if high school coach's tactics were subject of public controversy, alleged defamation related to claims of improper conduct towards players).

III. Remaining Elements of Cruce's Defamation Claim

Because we have held Cruce was neither a public official, nor a public figure, we must address the District's argument that the jury's damages verdict should nevertheless be set aside because Cruce failed to prove the content of Stevens' email was defamatory, Cruce failed to prove Stevens acted with common law malice in writing and sending the email, and Cruce failed to prove the email proximately caused his damages. We will take up each of these arguments in turn, mindful that because we are reviewing the trial court's denial of the District's judgment not withstanding the verdict (JNOV) motion, we must construe the evidence in the light most favorable to the non-moving party, we may not weigh the credibility of the evidence, and we must uphold the trial court's ruling if it is supported by any evidence. *Curcio v. Caterpillar*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003).

Our analysis begins by recognizing that to prevail on a defamation claim brought by a private figure against a non-media defendant related to a private concern, Cruce bore the burden of proving the District or its agent published a defamatory and unprivileged statement about him to others; that the District was at fault (in the sense it was at least negligent); and that either general damages are presumed from the statement or the publication caused the plaintiff special harm. *Cf. Erickson*, 368 S.C. at 465, 629 S.E.2d at 664; *see generally Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497 (1998) (*Holtzscheiter II*).

A. Defamatory Meaning and Proof of Falsity

We take up the defamatory content argument first. A statement is defamatory if it tends to harm one's reputation so as to lower him in the esteem of his community or deter others from dealing or associating with him. *Fleming v. Rose*, 350 S.C. at 494, 567 S.E.2d at 860. A statement may be deemed non-defamatory as a matter of law only if it is incapable of being interpreted as defamatory by any reasonable construction. *Fountain v. First Reliance Bank*, 398 S.C. 434, 443, 730 S.E.2d 305, 310 (2012). Whether a statement is defamatory is initially a question of law for the court. *White v. Wilkerson*, 328 S.C. 179, 183, 493 S.E.2d 345, 347 (1997).

We conclude a reasonable person who received Stevens' email could read it as suggesting Cruce's filing and management skills were incompetent. In the email, Stevens states that essential information from the student athlete files "could" be missing, posing a potential "liability" for the District. The District seizes upon Stevens' hedging and contends that because Stevens never directly stated Cruce had done anything improper, he did not defame Cruce. Our role, however, is to interpret the words fairly and in their natural sense. *Timmons v. News & Press, Inc.*, 232 S.C. 639, 644, 103 S.E.2d 277, 280 (1958). A rational reader of Stevens' email could conclude that it was communicating information suggesting Cruce was incompetent and unfit to perform the administrative duties of his position. *See Johns v. Amtrust Underwriters, Inc.*, 996 F.Supp.2d 413, 418–19 (D.S.C 2014) (derogatory comment made by auditor of plaintiff's work files was defamatory per se because it could be interpreted that plaintiff was unfit for job). The "liability" buzzword added a suggestion of not just incompetence but illegality. Because the email was susceptible of a defamatory meaning, the trial court did not err in submitting the issue to the jury and denying the District's JNOV motion. *White*, 328 S.C. at 183–84, 493 S.E.2d at 347.

The District argues that because the statements in Stevens' email could be read as non-defamatory, the trial court should have declared them so and granted JNOV to the District. The District is in essence trying to resurrect the ancient doctrine of *mitior sensus* ("gentler sense"), which held that if words may be construed as either defamatory or not, the court must give them the non-defamatory meaning as a matter of law. *Wardlaw v. Peck*, 282 S.C. 199, 203, 318 S.E.2d 270, 273 (Ct. App. 1984) (discussing doctrine). English courts cast the doctrine off by the early 18th century, and we inherited that common law by the reception statute. *Id*. We have since directly rejected the doctrine, most famously in Judge O'Neall's decision in *Davis v. Johnston*, 185 S.C.L. 579, 579–80 (1832), and most recently in Judge Bell's

comprehensive opinion in *Wardlaw*, both of which we reaffirm today. *See generally* Eldredge, The Law of Defamation § 24 at 161 (criticizing the doctrine as "peculiar" and one that would allow defamers to destroy another's reputation and escape liability by phrasing the defamatory statement in such a way that it can also be interpreted as an innocent comment).

The District alternatively argues there was no evidence Stevens' comments about the files were false. The common law presumed a defamatory statement to be false. *See Pierce v. Inter-Ocean Cas. Co.*, 148 S.C. 8, 145 S.E. 541, 543 (1928) ("[T]he falsity of defamatory matter is presumed . . . ." (citation removed)); *Parrish v. Allison*, 376 S.C. 308, 327, 656 S.E.2d 382, 392 (Ct. App. 2007) ("A defamatory communication is presumed to be false under the common law. The plaintiff does not have the burden of proving falsity. However, truth can be asserted as an affirmative defense, the burden of which is on the defendant."). Whether the First Amendment requires our state common law to include falsity as an element of the tort of defamation in cases brought by a private plaintiff against a non-media defendant in matters of private concern has not been resolved and is not an issue raised by the parties here. *See* Smolla, 1 *Law of Defamation* § 5:11 (2d ed. 2023); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 429 (1985); Restatement (Second) of Torts § 581A, comment b. (1977).

We note the jury was instructed, without objection, that truth was a defense, not an element of the defamation claim. The case was therefore tried on the theory that truth was an affirmative defense. There is abundant evidence in the record the jury could have used to find Stevens' email contained false statements about the content of the files. Cruce testified that the files and record keeping had recently passed a state audit. He also testified Stevens' statements in the email about what content was required in student athlete files was incorrect and "fraudulent."

B. Common Law Malice

Next, we address the District's claim that Cruce failed to prove Stevens acted with common law malice, which we have defined in defamation cases as including statements made with such recklessness as to show conscious disregard of another's rights. *Holtzscheiter II*, 332 S.C. at 519 n.3, 506 S.E.2d at 506 n.3. The record here demonstrates Stevens could have been reckless. There was testimony indicating Stevens was not authorized to review student athlete files, nor was he trained to know the applicable requirements. Still, he rummaged through the files and broadcast his belief about their integrity to forty-five of Cruce's peers. After

declaring the files were incomplete or out of order, he reported he would continue reviewing them over the next few days "to make sure the correct files are in place." This remark shows Stevens' review of the files before sending the email was cursory and incomplete. In short, there was sufficient evidence of recklessness to withstand a JNOV motion.

We should point out that the trial court charged the jury that Cruce had to prove common law malice. Cruce initially objected to this charge, correctly arguing that because the defamation involved libel, Cruce was relieved of the burden of proving common law malice and general damages would be presumed. *See Holtzscheiter II*, 332 S.C. at 510–11, 506 S.E.2d at 525–27. The trial court overruled Cruce's objection. Because this issue was not appealed, it is not before us.

C. Proximate Cause

At trial, Cruce relied on the concept of general damages. General damages in a libel case are those that one suffers by being defamed: the embarrassment, humiliation, and emotional suffering resulting from the loss of one's reputation. *See Kunst v. Loree*, 424 S.C. 24, 45, 817 S.E.2d 295, 306 (Ct. App. 2018) (explaining defamation focuses on injury to reputation, not to one's feelings). The jury was charged Cruce bore the burden of proving his reputation was damaged by the defamation. It was also instructed, consistent with controlling law, that a defamatory statement is one that "tends to attack the honesty, integrity, virtue, or reputation of a person and exposes the person to disgrace, public hatred, avoidance, contempt or ridicule." The jury was further charged that Cruce could not recover speculative damages, but only those proximately caused by the defamation, and that the nature of some of those damages defied objective "monetary value."

Viewing the evidence most favorably to Cruce, as we must, we conclude the jury's damages award must be upheld. Cruce testified as to his humiliation, how his reputation was ruined due to the District's conduct towards him, how he could not find another job in coaching, that he was "shunned," and that there was a "black mark" on his name. Cruce's wife testified her husband was affected emotionally.

The District contends Cruce did not link any of these damages directly to Stevens' email. According to the District, Cruce's damages evidence related to the District's dismissal of him as coach and athletic director. Because the trial court granted the District a directed verdict on Cruce's defamation claim except as to Stevens' email, the District claims no evidence exists to support the jury's damages award.

We disagree. The jury heard Cruce's damages evidence. Like most general damage evidence in defamation cases, it was, well, general. Reputational damages are intangible and notoriously hard to pinpoint and quantify, a reality the law has long recognized. We could dissect the record and perhaps conclude Cruce did not flatly state precisely how Stevens' email humiliated him or caused his wife to believe it had, as she said, knocked him off his emotional "footing." But to do so, we would have to ignore our duty under the governing standard of review for JNOV rulings to consider the evidence in the light most favorable to Cruce and construe all reasonable inferences and ambiguities in his favor. *See Curcio*, 355 S.C. at 320, 585 S.E.2d at 274.

The jury's general verdict found the email defamed Cruce. Implicit in that finding is the recognition that the email damaged Cruce's reputation. There was enough evidence to support the jury's further implicit findings as to proximate cause and the damages amount. *See Welch v. Epstein*, 342 S.C. 279, 300–01, 536 S.E.2d 408, 419 (Ct. App. 2000) (denying JNOV and noting a "jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision").

IV. Conclusion

We reverse the decision of the court of appeals and hold Cruce was not a public official or a limited public figure. Cruce's defamation claim was supported by the evidence. We therefore reinstate the jury's damages award.

REVERSED.

BEATTY, C.J., and KITTREDGE, J., concur. JAMES, J., concurring in part and dissenting in part in a separate opinion, in which FEW, J. concurs. FEW, J. dissenting in a separate opinion.

JUSTICE JAMES: I agree with the majority that Mr. Cruce was not a public official or public figure (limited or otherwise). However, I disagree with the majority that Stevens' email could reasonably be construed as defamatory. Therefore, I concur in part and dissent in part and would reverse the trial court's denial of the District's motion for JNOV.

As athletic director, Cruce was responsible for maintaining student-athlete eligibility files. In December 2015, Cruce was removed as athletic director head and football coach and was reassigned to a position as a guidance counselor at a middle school in the District. Chris Stevens was the head athletic trainer at Berkeley High School. During Christmas break of the 2015-16 school year—after Cruce had been relieved of his athletic director and coaching duties—strength coach Mike Ward asked Stevens about the status of the eligibility files of students playing winter sports. Stevens testified he had been in athletic training since 2010 and had experience with and knowledge of records that had to be in the files. On January 7, 2016, Stevens, Ward, and an assistant principal went into Cruce's former office and examined the files for students who were weightlifting to make sure the students were medically cleared to be in the weight room. After reviewing the files, Stevens sent the subject email to forty-five recipients connected with athletic programs in the District. The email read as follows:

> Today, January 7th 2016, myself, coach Ward, and Mr. Gallus went into the athletic director[']s office to check on the status of the student files left by our previous athletic director. After spending some time looking through files it has come to my attention that there could be some documents that could be misplaced and others that are out of order. From a liability stand point with competing sports and athletes it is necessary that all of the files be present to safeguard the athletes as well as to maintain the proper care for those athletes if something were to happen.
>
> I will be in the AD's office during the next few day[s] to make sure the correct files are in place for competing athletes and those weightlifting after school to make sure EVERY child has the correct paperwork on file.
>
> I would ask if you have athletes competing and/or conditioning at the present time, this includes weightlifting, that you send me a copy of that roster ASAP so that I can check your student-athletes off the "no-fly"

> list. ALL students MUST have the following files in order to participate in scholastic sports:
>
> - Risk Acknowledgment and Consent to Participate form
>
> - Pre-participation Physical Examination form (signed by a doctor)
>
> - Proper understanding of HIPAA and FERPA rights
>
> - Emergency Insurance Information and Consent to Treat form
>
> - ANY special accommodations such as asthma, allergies etc. must have a written Doctor's note filed and must have necessary treatment (Inhaler, Epi-pen) present at all times.
>
> - Copies of Birth Certificate and Social Security Cards.
>
> I will update everyone again next week once everything has been checked off. Thank you in advance for your cooperation.

As the majority notes, whether a published statement is defamatory is in the first instance a question of law for the court. *See White v. Wilkerson*, 328 S.C. 179, 183, 493 S.E.2d 345, 347 (1997) ("It is the trial court's function to determine initially whether a statement is susceptible of having a defamatory meaning." (citing *Pierce v. Northwestern Mut. Life Ins. Co.*, 444 F.Supp. 1098 (D.S.C. 1978))). The statement may be deemed non-defamatory as a matter of law only if it is incapable of being interpreted as defamatory by any reasonable construction. *See Fountain v. First Reliance Bank*, 398 S.C. 434, 443, 730 S.E.2d 305, 310 (2012) (citing *Adams v. Daily Tel. Co.*, 292 S.C. 273, 279, 356 S.E.2d 118, 122 (Ct. App. 1986)).

The majority concludes that "a reasonable person who received Stevens' email could read it as suggesting Cruce's filing and management skills were incompetent" and that Cruce "was incompetent and unfit to perform the administrative duties of his position." I disagree. Such a mild critique of Cruce's paperwork skills is not in any sense defamatory. The majority also concludes "the 'liability' buzzword" adds a suggestion of "illegality." I disagree. The use of the term "liability" suggests no such thing.

I would hold the email is not defamatory under any reasonable construction. Therefore, I would reverse the trial court's denial of the District's motion for JNOV and enter judgment for the District.

FEW, J., concurs

JUSTICE FEW: I respectfully dissent. I agree with Justice James's opinion that the one email was—as a matter of law—not defamatory. Thus, I would not reach the question whether Cruce was a public figure or a public official. I would affirm the court of appeals because it reached the correct result. *See* Rule 220(c), SCACR (stating we "may affirm any ruling . . . upon any ground[] appearing in the Record on Appeal").

I respectfully disagree with the majority on one other point. For reasons not explained by the majority, nor addressed in the briefs of the parties, nor mentioned at oral argument, the majority changes the words of our *Erickson* test for when a person becomes a limited public figure. The majority's proposed change is not substantive and will not affect the outcome of any cases. While it is always beneficial for courts to attempt to better articulate law we use to decide cases, this particular "change" accomplishes nothing. Thus, I see no reason for this Court to change the words of the *Erickson* test.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes, Petitioner,

v.

Bank of America National Association, Respondent.

Appellate Case Nos. 2021-001339 and 2022-000079

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
R. Keith Kelly and Grace Gilchrist Knie, Circuit Court Judges

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Opinion No. 28187
Heard March 28, 2023 – Filed January 17, 2024

AFFIRMED AS MODIFIED IN PART, REVERSED IN PART, AND REMANDED

Bradley Davis Hewett and D. Michael Kelly, of Mike Kelly Law Group, LLC; and Jamie Nicole Smith, of South Carolina Human Affairs Commission, all of Columbia, for Petitioner.

Robert A. Muckenfuss, of Charlotte, NC; Elizabeth Marion Zwickert Timmermans and Jonathan Y. Ellis, of

Raleigh, NC; and Kathryn M. Barber, of Richmond, Virginia, all of McGuire Woods LLP, for Respondent.

JUSTICE JAMES: This suit arises out of $795.20 in insurance premiums charged by respondent Bank of America to Petitioner's parents in connection with a home equity line of credit they obtained from Bank of America in 2006. The extraordinarily convoluted procedural history of this case ends with this consolidated opinion. Petitioner, as personal representative of the estate of Jane Hughes (his late mother), sued Bank of America for fraud, fraudulent concealment, and breach of contract accompanied by a fraudulent act. The issues are (1) whether we should overrule precedent holding the claims do not survive a party's death; (2) whether, even if these claims do survive, the claims are barred in this case by res judicata and the statute of limitations; and (3) whether the circuit court erred in ruling Bank of America's motion for sanctions pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act (FCPSA)[1] and Rule 11, SCRCP was premature. The first two issues stem from the court of appeals' decision in *Hughes ex rel. Estate of Hughes v. Bank of America National Association*, Op. No. 2021-UP-341 (S.C. Ct. App. filed Sept. 29, 2021). The third issue stems from the court of appeals' decision in *Hughes ex rel. Estate of Hughes v. Bank of America National Association*, Op. No. 2021-UP-354 (S.C. Ct. App. filed Oct. 13, 2021).

The circuit court (Judge Kelly) granted Bank of America's motion to dismiss all three causes of action, ruling the claims did not fall within the survival statute (S.C. Code Ann. § 15-5-90 (2005)) and therefore did not survive Jane Hughes' death, and also ruling the claims were barred by the three-year statute of limitations and by the res judicata effect of rulings in related federal court litigation. Judge Kelly also ruled the statute of limitations was not equitably tolled. The court of appeals affirmed Judge Kelly's ruling on the survival statute and did not reach the remaining issues. *Hughes*, Op. No. 2021-UP-341, at 1-2.

We granted Petitioner's petition for a writ of certiorari and granted Petitioner's motion to argue against precedent. We hold Petitioner's claims for fraud and fraudulent concealment survived the death of Jane Hughes. For a different reason, we hold the claim for breach of contract accompanied by fraudulent act also survived

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[1] *See* S.C. Code Ann. §§ 15-36-10 to -100 (2005 & Supp. 2023).

her death. However, we hold all three causes of action are barred by the preclusive effect of the rulings of the United States District Court, as affirmed by the Fourth Circuit in 2018. Therefore, we affirm as modified in part and reverse in part the court of appeals' decision in Op. No. 2021-UP-341.

Bank of America moved for sanctions in the circuit court, but the circuit court (Judge Knie) ruled the motion could not be heard until the conclusion of Petitioner's appeal of the Rule 12(b)(6) dismissal. Bank of America appealed that ruling, and the court of appeals reversed and remanded the sanctions motion to the circuit court, holding the sanctions motion was not premature. *Hughes*, Op. No. 2021-UP-354, at 6-9. We affirm the court of appeals on that issue in Section IV of this opinion.

I.

In June 2006, John and Jane Hughes opened a home equity line of credit with Bank of America. They authorized Bank of America to automatically draft payments of principal and interest from their joint Bank of America checking account. At closing, Bank of America offered an insurance plan that would cancel loan payments in the event of disability, accidental death, or involuntary unemployment. Petitioner claims that even though Mr. and Mrs. Hughes initialed a form at closing declining the offer, Bank of America immediately began drafting $28.40 from the Hughes' checking account each month in payment of the premium for that insurance. That premium charge was itemized each month on the Hughes' bank statement, with the notation "Ad Insurance Des:XXXXXX:4374 ID: 6 R# XXXXXXX1070 Indn: Hughes Sr, John P Co ID:XXXXXX4660 Ppd."

Mr. Hughes died in 2008. In 2015, the Hughes family advised Bank of America of Mr. Hughes' death, and Bank of America refunded the premiums drafted during that roughly seven-year period. Bank of America did not, however, refund premiums of $795.20 drafted during the twenty-eight months between the 2006 closing and Mr. Hughes' 2008 death.

Mrs. Hughes died in 2015, and Petitioner was appointed personal representative of her estate. In 2015, Petitioner sued Bank of America in Spartanburg County for violation of the Truth in Lending Act (TILA),[2] breach of contract, fraud, fraudulent concealment, and breach of contract accompanied by

[2] *See* 15 U.S.C. §§ 1601-1667f.

fraudulent act. Bank of America removed the case to federal court, where Petitioner voluntarily dismissed without prejudice his claims for fraud, fraudulent concealment, and breach of contract accompanied by fraudulent act. The district court granted BOA's motion to dismiss Petitioner's TILA and breach of contract claims, finding Petitioner "fail[ed] to dispute [he] neglected to file [his] lawsuit before the pertinent statutes of limitations expired. Instead, [he relies] on the doctrine of equitable tolling to argue [his] claims are timely." *Hughes ex rel. Est. of Hughes v. Bank of Am., Nat'l Ass'n*, No. 7:15-5083, 2017 WL 569847, at *2 (D.S.C. Feb. 13, 2017). The district court rejected Petitioner's equitable tolling argument, and the Fourth Circuit affirmed in an unpublished opinion. *Hughes ex rel. Est. of Hughes v. Bank of Am. Nat'l Ass'n.,* 697 F. App'x 191 (4th Cir. 2017). The United States Supreme Court denied certiorari. *Hughes ex rel. Est. of Hughes v. Bank of Am. Nat'l Ass'n*, 583 U.S. 1103 (2018).

In 2017, while Petitioner's appeal to the Fourth Circuit was pending, Petitioner commenced the instant litigation against Bank of America in Spartanburg County, asserting claims for fraud, fraudulent concealment, and breach of contract accompanied by fraudulent act (the three claims Petitioner voluntarily dismissed in federal court). Bank of America moved to dismiss the action for failure to state a claim upon which relief can be granted. *See* Rule 12(b)(6), SCRCP. As noted above, Judge Kelly granted the motion to dismiss, finding none of Petitioner's claims survived Mrs. Hughes' death, the claims were barred by res judicata, the three-year statute of limitations had expired for all three claims, and equitable tolling of the limitations period did not apply.

Petitioner appealed, and our court of appeals affirmed Judge Kelly's ruling that Petitioner's claims did not survive Mrs. Hughes' death. *See Hughes*, Op. No. 2021-UP-341, at 1-2. Finding that holding was dispositive, the court of appeals did not address the issues of res judicata, the expiration of the statute of limitations, or equitable tolling. Bank of America raises these three issues to this Court as additional sustaining grounds.

As he did in the federal litigation, Petitioner contends the three-year statute of limitations for his three current causes of action was equitably tolled for two basic reasons: (1) Bank of America's fraudulent concealment of its debiting of the Hughes' joint checking account for the insurance premiums, and (2) Mrs. Hughes' alleged blindness, mental decline, and other health problems. In the federal litigation, the district court considered and rejected both arguments as a basis for invoking equitable tolling, and the Fourth Circuit affirmed. On the first point, Petitioner

emphasizes the notation Bank of America placed beside each checking account entry for the premium: "Ad Insurance Des:XXXXXX:4374 ID: 6 R# XXXXXXX1070 Indn: Hughes Sr, John P Co ID:XXXXXX4660 Ppd." On the second point, Petitioner's affidavit filed in the federal litigation is in the record. In that affidavit, Petitioner stated that "[i]n the years leading to her death in 2015," Mrs. Hughes underwent major heart surgery, suffered from dementia, suffered from cataracts, and underwent eye surgery. Petitioner swore Mrs. Hughes' poor eyesight rendered her unable to read documents "for several years prior to her death" in 2015. He similarly stated in the affidavit that Mrs. Hughes' physical and mental ailments rendered her unable to read or understand her monthly bank statements "in the years prior to her death." This vague time frame referenced by Petitioner in his federal court affidavit—the "years prior to her death"—is consistent with Petitioner's allegations in his complaint in this action that Mrs. Hughes was age 85 at the time of the closing and that she suffered from impaired cognition, psychosis, lack of decisional capacity, blindness, and heart problems "in the years subsequent to June 2006." Even though Mrs. Hughes' alleged cognitive deficit or lack of capacity has always been the linchpin of Petitioner's equitable tolling argument, at no time has Petitioner alleged with any specificity when Mrs. Hughes' cognitive deficit or mental capacity issues manifested themselves.

Two days after Petitioner filed his notice of appeal from Judge Kelly's order, Bank of America timely moved for sanctions in the circuit court. As noted above, Judge Knie ruled the sanctions motion could not be heard until Petitioner's appeal from Judge Kelly's ruling was concluded. The court of appeals reversed. *Hughes*, Op. No. 2021-UP-354, at 9.

II.

A. The common law and the survival statute

Before the enactment of the survival statute over a century ago, the common law dictated whether a cause of action survived the death of either the wronged or the wrongdoer. A tort action—of which fraud is one—is a cause of action ex delicto. "Under the rule of the common law, the only causes of action that do not survive the death of either party, plaintiff or defendant, are causes of action ex delicto." *Page v. Lewis*, 203 S.C. 190, 193, 26 S.E.2d 569, 570 (1943). Consequently, an action ex contractu—one based in contract—survived at common law.

The common law prohibition of the survival of tort actions was "partially abrogated" by the 1905 amendment of the survival statute, which provided "any and all injuries to the person or to personal property" survived the deaths of either party. *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002); *see Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 261-62, 15 S.E.2d 117, 119 (1941). Except for minor grammatical changes, the survival statute has remained intact since 1905. The statute now provides:

> Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding.

S.C. Code Ann. § 15-5-90 (emphasis added).

Petitioner argues we should overrule South Carolina case law holding that a fraud cause of action does not fall within the survival statute. Before we discuss that issue with respect to fraud and fraudulent concealment, we will briefly address whether Petitioner's cause of action for breach of contract accompanied by a fraudulent act falls within the survival statute.

B. A cause of action for breach of contract accompanied by a fraudulent act survives the death of the parties

Bank of America rightly acknowledges that an action for breach of contract survives death under the common law. Bank of America argues a cause of action for breach of contract accompanied by a fraudulent act does not survive because it is "fraud-based." We disagree. As we noted in *Smith v. Canal Ins. Co.*, "[t]here is no cause of action distinct from breach of contract for breach of contract accompanied by a fraudulent act." 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980). "An action for breach of contract accompanied by a fraudulent act is an action ex contractu, not ex delicto." *Peeples v. Orkin Exterminating Co.,* 244 S.C. 173, 178, 135 S.E.2d 845, 847 (1964) (first citing *Cain v. United Ins. Co.*, 232 S.C. 397, 102 S.E.2d 360 (1958); and then citing *Ross v. Am. Income Life Ins. Co.*, 232 S.C. 433, 102 S.E.2d 743 (1958)). Therefore, Petitioner's contract-based cause of action for breach of contract accompanied by a fraudulent act survives under the common law and is not impacted by the survival statute. We will further discuss the viability of

this cause of action under the facts of this case when we address the issue of res judicata.

C. Common law principle that a tort action for fraud does not survive

As background to our discussion of whether a fraud action falls within the scope of the survival statute, we address the common law principle that a fraud and deceit action does not survive the death of either the victim or the perpetrator.

Of course, fraud and fraudulent concealment are tort actions. Under the common law, tort actions did not survive the death of either the victim or the tortfeasor. Our case law does not explain why. The decisions simply say it is so. For example, in *Chaplin v. Barrett*, the Court noted:

> We have seen the right of action for the breach of a contract upon the death of either party, in general survives against the executor or administrator of each; but in the case of torts, where the action must be in form ex delicto, for the recovery of damages, and the plea is not guilty, the rule at common law was otherwise.

46 S.C.L. (12 Rich.) 284, 284-85 (1859).

Professors Dobbs, Hayden, and Bublick have commented on the absence of an explanation for this common law principle:

> [Under the common law], personal actions die with the person. The common law [held] . . . that the death of either the tortfeasor or the victim eliminated all tort claims. In particular: (1) If the tort victim died, his cause of action was at an end. His estate had no cause of action. (2) If the tortfeasor himself died after committing a tort against his victim, the victim's claim died as well. (3) If the victim died, her survivors had no independent claim of their own against the tortfeasor for the loss of their support or for their grief and sorrow.

2 Dan B. Dobbs et al., The Law of Torts § 372, at 501 (2d ed. 2011) (footnotes omitted). The authors noted "[t]here has never been any good explanation for all these rules" and then commented,

> However, an historical explanation for some of the rules can be found in primitive English law. The English idea was that there was no

> private tort action for a felony because the tort action merged in the felony, which was to say that the felon's property was forfeited to the Crown, which was unwilling to share any of the assets with the felon's victim.

Id. at n. 4. Indeed, Black's Law Dictionary defines the term "ex delicto" as "[a]rising from a crime or tort." *Ex delicto*, Black's Law Dictionary (11th ed. 2019).

Similarly, it is stated in Prosser and Keeton on Torts:

> The historical reasons for the rule that personal torts died with the person of either the plaintiff or the defendant are obscure. Probably they derive from a day when little distinction was drawn between tort and crime; death of the defendant minimized the capacity of the law to exact punishment, and the death of the plaintiff minimized the need to substitute tort damages for vengeance. These grounds have, of course, disappeared with the establishment of tort as a separate branch of law with emphasis on compensation as well as punishment . . . .

W. Page Keeton et al., Prosser & Keeton on Torts § 126, at 942 (5th ed. 1984) (footnotes omitted).

We decided *Page v. Lewis* in 1943. 203 S.C. 190, 26 S.E.2d 569. We acknowledged that an equity action for cancellation of a fraudulent real estate conveyance did survive death under the common law. We concluded that if the action were not to survive the defrauded person's death, the "perpetrator of the outrage could openly proclaim his own guilt without any fear of having to disgorge his ill gotten gains. To state such a proposition is to refute it." *Id.* at 196, 26 S.E.2d at 571; *see Hughey v. Mooney*, 282 S.C 597, 600-02, 320 S.E.2d 475, 476-77 (Ct. App. 1984) (discussing *Page v. Lewis*). This rationale arguably extends to an at-law fraud action. However, as we will now discuss, an action at law for fraud and deceit does fall within the survival statute; therefore, we need not consider abolishing the common law principle that such a cause of action does not survive death.[3]

D. Does a fraud action fall within the language of the survival statute?

[3] Over time, the common law rule that an at-law fraud action does not survive death became the common law "exception" to the broad scope of the survival statute.

Bank of America argues *Faircloth v. Finesod*, 938 F.2d 513 (4th Cir. 1991) sufficiently explains why our legislature chose not to include fraud actions within the survival statute. In *Faircloth*, the Fourth Circuit considered an equal protection challenge to the survival statute and held there was a rational basis for the General Assembly drafting the survival statute to allow fraud-based equitable rescission claims—but not common law fraud claims—to survive:

> The "rational basis" for the distinction is the real issue, and the basis posited by appellant is enough. Appellant argues that fraud is a tort that requires a special quality of proof, and the states of mind of the victim (*e.g.,* whether he knew the statement was false, relied upon it, and was justified in so relying) and the perpetrator are especially vital. Appellant asserts that a legislature could rationally conclude that the difficulty and potential unfairness of proving the state of mind of a dead party to a fraudulent transaction justified excepting fraud from the survival statute. In rebuttal, Faircloth points out that equitable rescission claims based on fraud do survive in South Carolina. *Page v. Lewis,* 203 S.C. 190, 26 S.E.2d 569 (1943). Faircloth's argument has some merit, though we think it rational to distinguish between a common-law fraud action (in which consequential and punitive damages are available) and a rescission claim based on fraud (where restoration of the status quo ante is the entire remedy), and to allow only the less expansive remedy where a party is dead.

938 F.2d at 517 (footnote omitted). As we will explain, *Mattison*— and subsequent cases addressing the survival of a fraud action—were wrongly decided; therefore, the Fourth Circuit's reasoning is of no import. In any event, while there is indeed a "special quality of proof" inherent in a fraud cause of action, nothing in the way of legislative history or otherwise indicates the General Assembly purposefully excluded a fraud action from the survival statute.

Bank of America argues other "special concerns" justify the conclusion fraud does not fall within the survival statute:

> [T]his action is, in fact, exactly the kind that raises the special concerns surrounding fraud. [Petitioner's] parents, not him, were the ones who signed the relevant paperwork, met with [Bank of America] employees, and were charged for LPP coverage. Even if [Petitioner] could identify a fraudulent statement that was made to his parents—and he has not—

> [Bank of America] would be unable to examine whether [Petitioner's] parents knew that statement was false or actually (and justifiably) relied on it. Evidence central to [Petitioner's] fraud-based claims disappeared when his parents died. Precluding such claims from the survival statute thus makes perfect sense here.

As was the Fourth Circuit's reasoning in *Faircloth*, Bank of America's rationale is based on the assumption that the survival statute excludes fraud actions; again, as we will discuss below, *Mattison* and its progeny were wrongly decided. In any event, if the death of an alleged fraud victim prevents her estate from proving the elements of a fraud claim, those proof problems are in the lap of the estate, not the defendant. However, the possibility of proof problems is not a sufficient reason to bar outright the survival of the fraud claim.

We are finally at the point in this opinion where we explain, if possible, South Carolina case law on the issue of the survival of an action for fraud and deceit. In 1941, we first addressed the question in *Mattison v. Palmetto State Life Ins. Co.* With no analysis, we held a cause of action for "taking and carrying away [an insurance contract] . . . with intent to cheat and defraud [the] plaintiff's intestate . . . . does not come within either of the instances where a cause of action survives" under the survival statute. 197 S.C. at 259, 262, 15 S.E.2d at 118-19. Citing *Mattison*, this Court and the court of appeals have repeated the premise several times, again with no analysis. *See Brewer v. Graydon*, 233 S.C. 124, 128, 103 S.E.2d 767, 769 (1958); *Pamplico Bank & Tr. Co. v. Prosser*, 259 S.C. 621, 625, 193 S.E.2d 539, 540 (1972); *Ferguson*, 349 S.C. at 563-64, 564 S.E.2d at 97; *Hughey v. Mooney*, 282 S.C. 597, 602, 320 S.E.2d 475, 477 (Ct. App. 1984); *Brailsford v. Brailsford*, 380 S.C. 443, 449, 669 S.E.2d 342, 345 (Ct. App. 2008); *Bennett v. Carter*, 421 S.C. 374, 383, 807 S.E.2d 197, 202 (2017).

In *Ferguson*, we noted with some reservation that even though the language of the survival statute "is broad and ostensibly appears to include almost every conceivable cause of action," our case law "has continued to recognize a common law exception regarding causes of action for fraud and deceit." 349 S.C. at 564, 564 S.E.2d at 97. That reservation was understandable, as we have never articulated <u>why</u> the survival statute does not include a fraud cause of action.

Bank of America argues the question of "why" does not matter because the General Assembly ratified *Mattison* by re-enacting the survival statute in 1942, 1952, and 1962 without disturbing its operative text. Legislative inaction is one

canon of statutory construction, but it is not the only one. We should not rely exclusively on legislative inaction when the underlying statute has never been fully analyzed by an appellate court. *See State v. Ramsey*, 409 S.C. 206, 213, 762 S.E.2d 15, 18 (2014) ("[L]egislative inaction cannot legitimize a flawed analysis nor does it alter our obligation to rely on the plain language of a statute."). We take this opportunity to meaningfully construe the survival statute in the fraud context for the first time.

To say a cause of action is "abated" at the time of death of a party or a potential party is to say the cause of action is no longer viable because of that death. The Supreme Court of Missouri recently addressed the issue of abatement and survival in the context of an ex-wife's motion to set aside for fraud a property settlement agreement she previously entered into with her ex-husband, who died while the motion was pending. *Olofson v. Olofson*, 625 S.W.3d 419 (2021). The *Olofson* court's reasoning is instructive as to the nature of a fraud cause of action and why it falls within our survival statute. In concluding the ex-wife's motion remained viable in spite of her ex-husband's death, the court analyzed the Missouri survival statute, Mo. St. § 537.010, which provides, in pertinent part, for the survival of "[a]ctions for wrongs done to property or interests therein." This language is essentially the same as the language of the South Carolina survival statute allowing the survival of causes of action for "any and all injuries … to personal property." S.C. Code Ann. § 15-5-90.[4] The *Olofson* court observed,

> The rationale behind the rule of abatement is pragmatic. An action involving purely personal issues abates with the death of a party, except where otherwise provided by statute, because "the need to redress purely personal wrongs ceases to exist." By contrast, an action that primarily concerns property or property interests and only incidentally implicates personal issues does not abate with the death of a party because such an action can achieve its purpose after death. Similarly, section 537.010 provides that wrongs done to property interests survive the death of the wrongdoer, and a fraud claim that involves "a loss of money due to the fraudulent actions of the defendant" is a such a wrong.

[4] As used in section 15-5-90, "personal property" includes "money, goods, chattels, things in action and evidences of debt." S.C. Code Ann. § 15-1-40 (2005).

Olofson, 625 S.W.2d at 430 (cleaned up) (emphasis added). The *Olofson* court then noted that it "has long been the law" in Missouri that "[a]ctions for fraud and deceit are considered property torts and [are] 'more than merely personal' when they involve matters diminishing the property of the person defrauded." *Id.*

We agree with the Missouri approach. In *Mattison* and in every succeeding case, neither this Court nor our court of appeals in following our lead has ever explained why a fraud action does not fall within the survival statute. We have just said it is so. The survival statute provides "causes of action for and in respect to . . . any and all injuries to . . . personal property shall survive . . . ." S.C. Code Ann. § 15-5-90. We hold this language plainly applies to actions for fraud and deceit. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.*

We therefore reverse the court of appeals on this issue and turn to the additional sustaining grounds raised by Bank of America.

III.

A. Res Judicata

Bank of America's first additional sustaining ground is that the circuit court properly ruled all three causes of action are barred by res judicata. "Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (citing *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 417 S.E.2d 569 (1992)). Res judicata may apply if (1) the identities of the parties are the same as in the prior litigation, (2) the subject matter is the same as in the prior litigation, and (3) there was a prior adjudication of the action by a court of competent jurisdiction. *Catawba Indian Nation v. State*, 407 S.C. 526, 538, 756 S.E.2d 900, 907 (2014) (citing *Johnson v. Greenwood Mills, Inc.,* 317 S.C. 248, 250-51, 452 S.E.2d 832, 833 (1994)). "[R]es judicata is more commonly referred to simply as claim preclusion." *Id.* at 537, 756 S.E.2d at 906 (citing *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 449, 511 S.E.2d 48, 57 (1998)). "Claim preclusion bars plaintiffs from pursuing a later suit where the claim (1) was litigated

or (2) could have been litigated." *Id.* at 537, 756 S.E.2d at 906 (citing *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 216, 493 S.E.2d 826, 835 (1997)). However, the doctrine of res judicata is not an "ironclad bar" to a later lawsuit. *Id.* at 538, 756 S.E.2d at 907.

Petitioner concedes the first and second elements of res judicata have been met. As to the third element, Petitioner argues his three current claims were not adjudicated in the federal suit because they were dismissed without prejudice in the district court. We agree with Petitioner as to his claims for fraud and fraudulent concealment, because a dismissal without prejudice in federal court litigation "does not 'operat[e] as an adjudication upon the merits,' [Fed. R. Civ. P.] 41(a)(1), and thus does not have a res judicata effect." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) (second brackets added); *see McEachern v. Black*, 329 S.C. 642, 651, 496 S.E.2d 659, 663 (Ct. App. 1998) (quoting *Collins v. Sigmon*, 299 S.C. 464, 467, 385 S.E.2d 835, 837 (1989)). However, we disagree with Petitioner with respect to his claim for breach of contract accompanied by fraudulent act. Although Plaintiff voluntarily dismissed this claim without prejudice in the federal litigation, the district court dismissed <u>with</u> prejudice Petitioner's claim for breach of contract, and the Fourth Circuit affirmed that dismissal. As noted above, "[t]here is no cause of action distinct from breach of contract for breach of contract accompanied by a fraudulent act." *Smith*, 275 S.C. at 260, 269 S.E.2d at 350. Without a viable breach of contract action, there can be no action for breach of contract accompanied by a fraudulent act. As to that cause of action, all three elements of res judicata exist—identity of the parties, identity of the subject matter, and adjudication of the claim in the former suit. Consequently, res judicata bars Petitioner's claim for breach of contract accompanied by a fraudulent act.

The question of whether res judicata bars Petitioner's fraud and fraudulent concealment claims requires a different analysis. Bank of America argues Petitioner's three claims could have been litigated in the federal litigation, but Petitioner chose to voluntarily dismiss them without prejudice. However, Petitioner's end game is to convince this Court to overrule precedent holding the survival statute does not extend to a fraud cause of action. Citing Rule 244(a) of the South Carolina Appellate Court Rules, Petitioner contends he was in a quandary in federal court, as neither the district court nor the Fourth Circuit could certify to this Court a settled question of state law. *See* Rule 244(a), SCACR ("The Supreme Court in its discretion may answer questions of law certified to it by any federal court of the United States … when it appears to the certifying court <u>there is no controlling</u>

precedent in the decisions of the Supreme Court." (emphasis added)). Petitioner claims a request of either the district court or the Fourth Circuit to certify the question of the interpretation of the survival statute would have been futile because *Mattison* and subsequent decisions of this Court hold a fraud and deceit action does not survive. Bank of America contends there is ample "controlling precedent" for the proposition that a fraud and deceit action does not survive, but at the same time contends Petitioner should have at least asked the federal court to certify the question of whether this Court should overrule or clarify its prior decisions.

We repeat that res judicata is not "an ironclad bar." Under the unique circumstances of this case, we hold res judicata does not bar Petitioner's fraud and fraudulent concealment actions.

B. Statute of Limitations

Bank of America's second additional sustaining ground is that the circuit court properly ruled all three causes of action are barred by the three-year statute of limitations set forth in S.C. Code section 15-3-530(7) (2005). This limitations period "is governed by the 'discovery rule,' and does not begin to run until discovery of the fraud itself or of 'such facts as would have led to the knowledge thereof, if pursued with reasonable diligence.'" *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.*, 300 S.C. 182, 185, 386 S.E.2d 798, 799 (Ct. App. 1989) (quoting *Grayson v. Fid. Life Ins. Co. of Phila.*, 114 S.C. 130, 135, 103 S.E. 477, 478 (1920)). In other words, "[t]he statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) (citing *Johnston v. Bowen*, 313 S.C. 61, 437 S.E.2d 45 (1993)). This issue was not squarely addressed by the district court or the Fourth Circuit, as both courts went directly to the issue of equitable tolling. Therefore, we address the issue for the first time.

We must construe Petitioner's complaint and determine if the facts alleged and all inferences reasonably deducible from the complaint would support a finding that Petitioner commenced this action within the three-year limitations period. *See Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). Petitioner cites five allegations in his complaint in support of his argument that dismissal of his fraud-based claims at the 12(b)(6) stage on statute of limitations grounds was error: (1) Mrs. Hughes was eighty-five years old when the line of credit transaction was closed in 2006; (2) thereafter (Petitioner does not state when), Mrs. Hughes suffered

from dementia, impaired vision, decisional incapacity, and other health problems; (3) Bank of America did not inform Mrs. Hughes of the now-disputed charges until March 2015; (4) the charges were "ambiguously listed and appeared amid numerous other monthly charges" on Mrs. Hughes' Bank of America joint checking account statement; and (5) in March of 2015, Mrs. Hughes received notice (addressed to the then-late Mr. Hughes) from Bank of America that the disputed insurance plan was in effect as to Mr. Hughes.

We disagree with Petitioner. Petitioner acknowledges the charge appeared on each statement "for several years" beginning in 2006 Thus, even considering the allegations in the light most favorable to Petitioner, Mr. and Mrs. Hughes knew, or by the exercise of reasonable diligence, should have known, they were being charged $28.40 for something. It was incumbent upon them to conduct a reasonably diligent inquiry into the nature of the charge; however, they did not do so, and the limitations period expired before Petitioner commenced this action.

C. Equitable Tolling and Collateral Estoppel

Bank of America's third additional sustaining ground is that the circuit court properly ruled the statute of limitations was not equitably tolled. As he does here, Petitioner argued in the federal litigation that even if the statute of limitations otherwise expired, it was equitably tolled, thus precluding Rule 12(b)(6) dismissal. Applying federal case law, the district court and Fourth Circuit rejected Petitioner's argument. We must determine whether the Fourth Circuit's ruling on equitable tolling collaterally estops Petitioner from relitigating the issue in this state court litigation. In Section III.A above, we discussed the role of res judicata in this case. "*Res judicata* bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding." *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997). The doctrine of collateral estoppel precludes a party from relitigating an issue decided in prior litigation, regardless of whether the claims in the prior and instant litigation are the same. *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554-55, 684 S.E.2d 779, 782 (Ct. App. 2009).

For collateral estoppel to apply, it must be shown that the issue "was: (1) actually litigated in the prior action; (2) directly determined in the prior action; (3) necessary to support the prior judgment." *Id.* (citing *Beall v. Doe*, 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 189-90 n.1 (Ct. App. 1984)). "The doctrine of collateral estoppel is intended to reduce litigation and conserve the resources of the court and

litigants and it is based upon the notion that it is unfair to permit a party to relitigate an issue that has already been decided." *State v. Bacote*, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998). "Since it is grounded upon concepts of fairness, it should not be rigidly or mechanically applied." *Id.*

In support of his equitable tolling argument, Petitioner relies in part upon the same allegations in his complaint he relies upon in arguing the limitations period had not expired—Mrs. Hughes' diminished mental capacity, poor eyesight, and general poor health. In rejecting this argument, the district court found:

> The charge for the mortgage insurance appeared on the Hughes' monthly checking account statements from 2006 to 2015. Thus, any argument they failed to discover the purported wrongdoing by [Bank of America] during this period of time, although they exercised due diligence, is bereft of any merit. Assertions [Jane] Hughes "underwent major heart surgery, suffered from dementia, experienced vision impairments, including cataracts and eye surgery, and suffered a broken hip that required hospitalization and extensive rehabilitation at White Oak Manor Nursing Home in Spartanburg, South Carolina," although unfortunate, are simply insufficient to satisfy the due diligence requirement.
>
> . . . .
>
> The fact equitable tolling is to be employed sparingly is so established as [t]o make a citation to authority unnecessary. For the Court to adopt [Hughes'] position [his] claims are entitled to equitable tolling would mean statutes of limitations are inconsequential. And, of course, that is not so.

Hughes, 2017 WL 569847, at *2 (citation omitted).

The Fourth Circuit affirmed, citing its equitable tolling precedent:

> Generally, parties "are entitled to equitable tolling only if they show that have pursued their rights diligently and extraordinary circumstances prevented them from filing on time." *Raplee v. United States*, 842 F.2d 328, 333 (4th Cir. 2016), *cert denied*, 137 S. Ct. 2274 (2017). "Equitable tolling is reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be

> unconscionable to enforce the limitation period against the party and gross injustice would result." *Id*. at 333. "The use of equitable tolling must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes." *Lawrence v. Lynch*, 826 F.2d 198, 204 (4th Cir. 2016).

Hughes, 697 F. App'x at 192-93 (cleaned up).

Petitioner also argues equitable tolling is appropriate because Bank of America fraudulently concealed the details of the monthly insurance charge on the Hughes' checking account statements. The Fourth Circuit addressed this argument as well, citing *Supermarket of Marlington, Inc. v. Meadow Gold Dairies, Inc.* for the proposition that when a plaintiff alleges fraudulent concealment of his cause of action by the defendant, the plaintiff seeking equitable tolling must show (1) the defendant pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff's claim and (2) the plaintiff failed to discover those facts within the limitations period despite the exercise of due diligence. *Hughes*, 697 F. App'x at 192-93 (citing *Supermarket of Marlington, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995)). The Fourth Circuit held Petitioner did not make the required showing. *Id.* at 193. In cases in which a plaintiff contends the defendant had fraudulently concealed a cause of action, the showing required by *Supermarket of Marlington* is in accord with South Carolina law.

Petitioner contends the federal court disposition of the equitable tolling issue does not preclude consideration of the equitable tolling issue because "South Carolina's stance on equitable tolling … is more lenient than that of the federal courts" and the circuit court did not review this case under the supposedly more lenient standard. In South Carolina, the party claiming the application of equitable tolling bears the burden of establishing sufficient facts to justify its use. *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (citing *Ocana v. Am. Furniture Co.,* 91 P.3d 58, 65 (N.M. 2004)). Equitable tolling typically applies when a litigant was prevented from timely commencing an action because of an extraordinary event beyond his control. *Hooper*, 386 S.C. at 116, 687 S.E.2d at 32 (citing *Ocana*, 91 P.3d at 66). In *Hooper*, we noted there is not an exclusive list of circumstances that justify the application of equitable tolling and it may be applied where it is justified under all the circumstances. *Id.* at 116-17, 687 S.E.2d at 33. However, the Court cautioned that equitable tolling "should be used sparingly and only when the interests of justice compel its use." *Id.* at 117, 687 S.E.2d at 33.

Petitioner highlights the allegations central to his claims—that Bank of America "deceived and defrauded a frail, elderly couple by surreptitiously charging them for a product they expressly declined" and by burying the premium charge in garbled language on monthly bank statements. Petitioner argues Mr. Hughes' death and Mrs. Hughes' mental decline, "when viewed in combination with [Bank of America's] surreptitious and illegal activities," constitute extraordinary circumstances beyond Mrs. Hughes' control. The Fourth Circuit reviewed the District Court's findings on those points and concluded that a party such as Mrs. Hughes would be entitled to equitable tolling only if she has pursued her rights diligently and extraordinary circumstances external to her own conduct prevented her from commencing the action on time. *Hughes*, 697 F. App'x at 192 (citing *Raplee*, 842 F.3d at 333). The Fourth Circuit also observed that "[t]he use of equitable tolling must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes." *Id*. (citing *Lynch*, 826 F.3d at 204). This standard is consistent with what we declared in *Hooper* to be the law in South Carolina. The Fourth Circuit's affirmation of the district court's ruling on the equitable tolling issue precludes this issue from being relitigated.

IV. Motion for Sanctions–Op. No. 2021-UP-354

Two days after Petitioner filed his notice of appeal from Judge Kelly's order, Bank of America filed a motion for sanctions, seeking $76,556.02 in attorneys' fees and costs under both the FCPSA and Rule 11, SCRCP. Citing the pending appeal, the circuit court (Judge Knie) concluded Petitioner's claims "ha[d] not yet been fully adjudicated" and therefore denied Bank of America's motion for sanctions as "untimely and premature." The court of appeals reversed, holding the motion was not "untimely."

We first note the true inquiry is whether the sanctions motion was "premature," not whether it was "untimely." With respect to the FCPSA, the sanctions motion was "timely" because it was filed within ten days after Bank of America's receipt of written notice of the entry of Judge Kelly's order. *See Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 20, 20 n.11, 633 S.E.2d 722, 730, 730 n.11 (2006) (A motion for sanctions under the FCPSA must be filed within ten days after

the notice of entry of judgment.). Bank of America seeks Rule 11 sanctions in the same motion, and the Rule 11 request for relief was also timely.[5]

Nor was Bank of America's sanctions motion premature. In *Holmes v. East Cooper Community Hospital, Inc.*, we noted a motion for sanctions is a post-trial motion, and we held "the filing of a notice of appeal does not deprive the circuit court of jurisdiction to consider a timely post-trial motion." 408 S.C. 138, 160-61, 758 S.E.2d 483, 495-96 (2014) (citing *Hudson v. Hudson*, 290 S.C. 215, 215-16, 349 S.E.2d 341, 341-42 (1986)). In *Hudson*, we took the unusual step of appending an order to our opinion. In that order we stated:

> IT IS ORDERED that in the event timely post-trial motions are filed under Rule 59, simultaneously with or subsequent to the filing of a Notice of Appeal, the appellant shall notify the Clerk of this Court in writing. Upon receipt of such notice, the appeal shall be dismissed without prejudice. Any party can appeal within ten (10) days after the order disposing of the post-trial motions. A second filing fee will not be collected from a party who previously appealed.

Hudson, 290 S.C. at 216, 349 S.E.2d at 341-42 (footnote omitted).

Because "[m]otions made pursuant to the FCPSA are post-trial motions", *Holmes*, 408 S.C. at 160, 758 S.E.2d at 495, our order in *Hudson* applies when a timely sanctions motion is filed after a notice of appeal is filed. In *Holmes*, we noted the procedure set forth in the *Hudson* order would allow "all ancillary matters [to] be timely heard, and appealed, if necessary, in an efficient and wholesale manner, and not . . . in a piecemeal fashion." *Id*. at 162, 758 S.E.2d at 496.

Petitioner did not notify the clerk of the court of the filing of Bank of America's sanctions motion, which would have triggered the court of appeals' dismissal of Petitioner's appeal without prejudice and the remainder of the *Hudson*

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[5] In *Russell*, we noted the issue of the timeliness of a Rule 11 motion is different from the issue of the timeliness of a motion under the FCPSA. 370 S.C. at 20 n.11, 633 S.E.2d at 730 n.11; *see Pee Dee Health Care., P.A. v. Est. of Thompson*, 424 S.C. 520, 530, 818 S.E.2d 758, 763 (2018) ("Rule 11—unlike the FCPSA—does not contain any time limit for filing a motion for sanctions, and South Carolina appellate courts have never interpreted Rule 11 to include a specific time limit."). The distinction between the two motions as to timeliness is not an issue in this case.

procedure. Because Petitioner did not notify the clerk, the sanctions motion came before Judge Knie for hearing roughly two months after the motion was filed. Because Petitioner's appeal was pending, Judge Knie understandably refused to hear the sanctions motion. Bank of America then filed a separate appeal from that decision, and both appeals worked their way through the appellate process to this Court.

We see no reason to penalize Petitioner for not notifying the clerk of the court of appeals of the sanctions motion, as required by our order in *Hudson*. However, we take this opportunity to remind the bar of the *Hudson* procedure and the judicial economy inherent in it. If a party such as Petitioner has not notified the clerk of the appellate court of the filing of a post-trial motion, the trial court must order that party to notify the clerk of the appellate court of the post-trial motion. The appellate court must then dismiss the previously-filed appeal without prejudice, in accordance with *Hudson*.

We have reversed in part and affirmed as modified in part the result reached by the court of appeals in Petitioner's appeal from Judge Kelly's order. We remand Bank of America's sanctions motion to the circuit court for hearing. In so doing, we join in the court of appeals' pronouncement that our remand of this motion is not a decision on "the *merits* of that motion." *Hughes*, Op. No. 2021-UP-354, at 9.[6] Of course, Bank of America is not entitled to sanctions on the portion of its motion emphasizing this Court's now-overruled precedent that fraud actions do not fall within the survival statute.[7]

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[6] Petitioner argues sanctions are not warranted under either the FCPSA or Rule 11. Petitioner further argues that even if sanctions are warranted, Bank of America's demand for attorney's fees and costs of $76,556.02 incurred at the very early Rule 12(b)(6) stage is outrageous. The circuit court must resolve these issues on remand.

[7] We overrule the following cases to the extent they hold a fraud cause of action does not survive the death of the alleged victim or the alleged perpetrator: *Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117 (1941); *Brewer v. Graydon*, 233 S.C. 124, 103 S.E.2d 767 (1958); *Pamplico Bank & Tr. Co. v. Prosser*, 259 S.C. 621, 193 S.E.2d 539 (1972); *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564 S.E.2d 94 (2002); *Bennett v. Carter*, 421 S.C. 374, 807 S.E.2d

Conclusion

Although Petitioner's claim for breach of contract accompanied by fraudulent act survived Mrs. Hughes' death, the claim is barred by res judicata. Petitioner's causes of action for fraud and fraudulent concealment survived Mrs. Hughes' death, but the statute of limitations expired before this action was commenced. The federal district court ruled equitable tolling does not apply, and the Fourth Circuit affirmed. Petitioner is precluded from relitigating the equitable tolling issue in this case. We therefore reverse in part and affirm as modified in part the court of appeals' decision in *Hughes*, Op. No. 2021-UP-341. We affirm as modified the court of appeals' decision in *Hughes*, Op. No. 2021-UP-354, and we remand Bank of America's sanctions motion to the circuit court for disposition.

AFFIRMED AS MODIFIED IN PART, REVERSED IN PART, AND REMANDED.

BEATTY, C.J., KITTREDGE, FEW, and HILL, JJ., concur.

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197 (2017); *Hughey v. Mooney*, 282 S.C. 597, 320 S.E.2d 475 (Ct. App. 1984); *Brailsford v. Brailsford*, 380 S.C. 443, 669 S.E.2d 342 (Ct. App. 2008).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

William C. (Billy) Sellers, Petitioner.

Appellate Case No. 2021-000910

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Edgefield County
Eugene C. Griffith Jr., Circuit Court Judge

Opinion No. 28188
Heard March 30, 2023 – Filed January 17, 2024

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Senior Assistant Attorney General J. Anthony Mabry, of Columbia; and Solicitor Samuel R. Hubbard III, of Lexington, all for Respondent.

JUSTICE FEW: The court of appeals affirmed Billy Sellers' conviction for murder arising from the brutal killing of Johnny Hydrick. We granted Sellers' petition for a writ of certiorari to address two questions. First, did the trial court's jury instruction defining malice in part as "the intentional doing of a wrongful act without just cause or excuse" shift the burden of proof to Sellers to provide justification or excuse for his wrongful acts, or was that portion of the instruction otherwise contrary to law. Second, did the State present evidence to support the trial court instructing the jury as to Sellers' criminal liability under the doctrine of "the hand of one is the hand of all." We affirm the court of appeals.

I. Background

Johnny Hydrick—disabled from a car accident—was widely known in his hometown of Trenton, South Carolina, to keep large supplies of Oxycodone on hand to alleviate the pain associated with his disability. Hydrick often illegally sold Oxycodone to others, including Sellers. At trial, the State presented strong evidence Sellers personally murdered Hydrick in his home on October 10, 2014, during the course of burglarizing his home and robbing him of Oxycodone, guns, and cash. A pathologist testified the cause of death was "multiple blunt-force injuries" to the head "due to a beating." While the State's primary theory was Sellers personally beat Hydrick to death,[1] the State presented the alternative theory Sellers was guilty under the doctrine the hand of one is the hand of all because he and a man named "Gee" agreed to carry out the burglary and robbery, during the course of which Gee beat Hydrick to death or did so jointly with Sellers.

The jury convicted Sellers of murder. Because Sellers had a prior conviction from Florida for burglary of a dwelling while armed with a deadly weapon, "an offense that would be classified as a most serious offense" under subsection 17-25-45(C)(1) of the South Carolina Code (Supp. 2023), the trial court was required to sentence him to life in prison without the possibility of parole pursuant to subsection 17-25-45(A)(1) (2014). The court of appeals' opinion affirming the conviction is unpublished. *State v. Sellers*, Op. No. 2021-UP-254 (S.C. Ct. App. filed July 7, 2021).

[1] Because the strength of the State's evidence that Sellers personally beat Hydrick to death is not an issue on appeal, we do not discuss most of that evidence.

II. Malice Jury Instruction

Sellers contends that, by including the language "the intentional doing of a wrongful act without just cause or excuse" in the definition of malice in its jury charge, the trial court violated his due process rights by shifting the burden to him to prove he acted with just cause or excuse. We begin our discussion of Sellers' burden-shifting argument by pointing out the trial court gave the jury a thorough and complete instruction on the State's burden of proving "all of the elements, each of them, beyond a reasonable doubt." Among multiple specific references in its jury charge to the State's burden of proof, the trial court instructed the jury that "to sustain a conviction for murder the State must prove beyond a reasonable doubt . . . the defendant killed another person with malice . . . ." The trial court then defined malice "as hatred, ill will, hostility toward another person. It is the intentional doing of a wrongful act without just cause or excuse . . . ."

Under the State's clearly-articulated burden of proof and the trial court's definition of malice, *the State* was required to prove beyond a reasonable doubt that Sellers acted "without just cause or excuse." Thus, we find the trial court's jury instruction on malice could not have been reasonably interpreted by the jury as shifting the burden of proof to Sellers. *See Sandstrom v. Montana*, 442 U.S. 510, 517, 99 S. Ct. 2450, 2456, 61 L. Ed. 2d 39, 47 (1979) (analyzing whether a jury instruction violated the Due Process Clause because of improper burden shifting as whether "a reasonable jury could well have interpreted" the instruction to relieve the State of its burden of proof); *see also State v. Bell*, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991) (holding a jury instruction defining malice as "the doing of a wrongful act intentionally and without just cause or excuse" was not "an unconstitutional burden-shifting" instruction).

Sellers also argues the malice instruction was "needlessly confusing" and violated "this Court's modern pattern of disapproving of jury instructions on how the jury should interpret certain evidence." On this point, the court of appeals stated,

> We understand Sellers' argument that a reasonable jury could apply the phrase equating malice with "intentional doing of a wrongful act without just cause or excuse" in problematic ways. We are not sure what the challenged phrase adds to a malice charge and can see the wisdom in not charging it. We are also not sure how a wrongful act

> can be said to be done with malice if all that is proven is that the act was done with intent . . . . Nor are we sure how an intentional act that is justified or excusable by law could be a crime.

Sellers, Op. No. 2021-UP-254, at 2-3.

Instructing a jury on any point of law is difficult, but it can be particularly so on the principle of malice. In some cases, such as where there is evidence the defendant acted in self-defense, it is true the State must prove the defendant acted without just cause or excuse. *See State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) (holding "when a defendant claims self-defense, the State is required to disprove the elements of self-defense beyond a reasonable doubt"). Here, however, there was no evidence of self-defense or any other legal justification for the killing of Hydrick. The only question in this case was whether it was Sellers who committed the crime. Thus, like the court of appeals, we question what the phrase "without just cause or excuse" added to the jury's understanding of the legal principle of malice. While we caution our trial courts to carefully consider whether to include any phrase in a jury instruction, however, we do not believe the phrase "without just cause or excuse" in this case could have caused the jury to be confused, nor could have improperly guided the jury on how to interpret specific evidence. We find no error.

In his brief to the court of appeals, Sellers argued for the first time the trial court did not connect the phrase "the intentional doing of a wrongful act" to an act that proximately caused Hydrick's death. He argued the jury instruction could thus lead the jury to conclude the State proved malice merely by showing Sellers engaged in the "wrongful act" of buying or selling drugs, burglarizing Hydrick's home, or robbing Hydrick, unless Sellers showed "just cause or excuse" for those acts. "There was," counsel wrote in his brief to this Court, "a variety of . . . unlawful or wrongful acts that this jury instruction impermissibly called upon [Sellers] to show 'just cause or excuse' for . . . ." At oral argument before this Court, Sellers argued for the first time—in connection with the hand of one is the hand of all—the instruction permitted the jury to find the State proved Sellers' malice merely by showing another person committed one of these wrongful acts.

Neither of these arguments is preserved for appellate review, however, as neither argument was presented to the trial court. *See State v. Field*, 429 S.C. 578, 582, 840 S.E.2d 548, 550 (2020) ("As we have repeatedly held, 'A party need not use the exact

name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. A party may not argue one ground at trial and an alternate ground on appeal.'" (quoting *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003))).

III. The Hand of One is the Hand of All Jury Charge

Ordinarily, the State convicts a defendant of a crime by proving that he personally committed the criminal act. As discussed above, the State's primary theory in this case was Sellers committed the murder by personally beating Hydrick to death. Under the doctrine we refer to in South Carolina as "the hand of one is the hand of all," the State proves the defendant guilty by proving he had a mutual plan or agreement with another person to commit one crime, and during the course of committing that initial crime, the other person committed a second crime they had not agreed to commit. *State v. Harry*, 420 S.C. 290, 299, 803 S.E.2d 272, 276 (2017); *see also Butler v. State*, 435 S.C. 96, 97-98, 866 S.E.2d 347, 348 (2021) ("Under the theory the 'hand of one is the hand of all,' when two people join together to commit a crime, and during the commission of that crime one of the two commits another crime, both may be criminally liable for the unplanned crime if it was a natural and probable consequence of their common plan to commit the initial crime."). In this case, the State's alternative theory was that Sellers and Gee mutually planned to burglarize Hydrick's home and rob him of Oxycodone, guns, or cash, and while the two of them were carrying out those initial crimes, either Gee beat Hydrick to death or the two of them mutually beat Hydrick to death.

In most cases in which the State attempts to convict a defendant of murder under the hand of one doctrine, the factual scenario involves a gunshot, not a beating. In such a typical case, two or more people agreed to commit the initial crime, and during the course of that crime a person who is not the defendant shot and killed a victim. This typical scenario is that one of them—not both of them—fired the shot that killed the victim. In cases where the evidence is clear the other person—not the defendant—fired the fatal shot, the hand of one doctrine clearly applies and the trial court will instruct the jury on the doctrine without hesitation. In many cases, however, the evidence is not clear as to one of three points: (1) whether there was a mutual plan or agreement, (2) whether the person who might have fired the fatal shot was part of that plan or agreement, or (3) whether the other person in the plan or agreement is the person who fired the fatal shot. If the evidence is unclear as to any one of these

points, it can be quite difficult for the trial court to determine whether to instruct the jury on the hand of one doctrine.

As to the first point, the trial court must determine whether there is any evidence the defendant had a mutual plan or agreement with another person to commit an initial crime. In *Harry*, for example, the propriety of the hand of one jury instruction depended on whether the State presented evidence the defendant agreed with the others in his group to use illegal force if that force became necessary to retrieve his television. *Compare* 420 S.C. at 300, 803 S.E.2d at 277 (majority concluding "the evidence yielded a reasonable series of inferences . . . that Petitioner devised a plan to retrieve, by force if necessary, his television from Victim" and, "The State therefore presented sufficient evidence that Petitioner was engaged in a scheme to commit an illegal act, the result of which was Victim's shooting death"), *with* 420 S.C. at 301, 803 S.E.2d at 278 (Hearn, J., dissenting) (concluding "the record contains no evidence of an illegal plan").

As to the second point, the trial court must determine whether there is any evidence the other person who might have fired the fatal shot was a person included in the mutual plan or agreement to commit the initial crime. In *State v. Washington*, 431 S.C. 394, 848 S.E.2d 779 (2020), for example, there was evidence another person—Kinloch—joined together with the defendant to harass and assault Manigault (the initial crime), and there was evidence another person—not the defendant—fired the shot that killed Manigault. 431 S.C. at 406-07, 848 S.E.2d at 785-86. But there was no evidence Kinloch fired the shot, 431 S.C. at 409, 848 S.E.2d at 787, and there was no evidence the other person who might have fired the shot was part of the agreement to commit the initial crime, 431 S.C. at 407, 848 S.E.2d at 786. This Court found the hand of one jury instruction should not have been given because "there was no evidence Kinloch shot Manigault," 431 S.C. at 409, 848 S.E.2d at 787, and "Kinloch is the only possible person who could fall into the category of Petitioner's accomplice," 431 S.C. at 407, 848 S.E.2d at 786.

The third point requires the trial court to determine whether there is evidence the defendant fired the fatal shot *and* evidence the person with whom the defendant had a mutual plan or agreement is the person who fired the fatal shot. In *Barber v. State*, 393 S.C. 232, 712 S.E.2d 436 (2011), for example, three witnesses testified the defendant shot two victims, killing one. 393 S.C. at 234-35, 712 S.E.2d at 438. However, the trial court also instructed the jury it may find the defendant guilty on the alternative "hand of one" theory that one of his co-defendants was the gunman.

393 S.C. at 235, 712 S.E.2d at 438. The defendant argued on appeal there was no evidence a co-defendant was the person who fired the fatal shot, and thus the trial court erred by charging the hand of one theory. *See* 393 S.C. at 237, 712 S.E.2d at 439 (stating "the question is whether there is any evidence that another co-conspirator was the shooter").

Barber is the classic example of this third type of case because there was evidence the defendant fired the shot, but the question was whether there was also evidence the other person fired the shot. This is the scenario in which we said the "alternate theory of liability may only be charged when the evidence is equivocal on some integral fact." 393 S.C. at 236, 712 S.E.2d at 439. In other words, *Barber* requires the trial court to determine whether—in addition to evidence the defendant fired the shot—there is any evidence the person with whom he agreed to commit the initial crime fired the shot. By stating the evidence must be "equivocal," we simply meant the evidence must support both alternative theories as to which person was the shooter. If all the evidence indicates the defendant was the only shooter, the hand of one theory must not be charged.

This case is unlike *Harry*, *Washington*, and *Barber* because determining whether it was proper to charge the hand of one doctrine here requires addressing all three points—whether there was evidence (1) Sellers mutually agreed with Gee to burglarize Hydrick's home and rob him, (2) Gee participated with Sellers in the burglary and the robbery, and (3) Gee administered a fatal blow to Hydrick during the beating.

We turn, therefore, to the testimony and evidence the State introduced at trial, and begin with the testimony of several inmates Sellers met while incarcerated at the Edgefield County jail awaiting trial. Dennis Amerson testified he did not know Sellers before meeting him during "rec" time when they were let out of their cells for one hour a day. Sellers told Amerson he and two of his friends were "scrapping metal" across the street from Hydrick's house earlier on the day the murder occurred. Sellers told Amerson he tied up the victim and beat him, and that some pills and other items were stolen from the victim. As to the stolen items, Sellers told Amerson "they had got [sic] rid of them."

Phillip Griffin testified he and Sellers were cellmates beginning with Griffin's arrest on November 21, 2014, and Sellers started talking about the charges against him. At first, Griffin testified, Sellers denied he committed the crime. As they continued

talking, however, "His story would change a little bit and he kind of started putting himself involved in the case." Griffin testified Sellers' story "got to the point to where he told me that he actually went out there to commit a robbery," and then "him and a friend . . . drove down Highway 19 to go to the guy's house and they was [sic] going to pull a lick and rob him." Griffin then explained "pull a lick" meant, "They were going to rob him or steal." Sellers told Griffin he knew Hydrick "just got his prescriptions filled and [Sellers] was gonna [sic] go get his pills. If he had any money, [Sellers] wanted it too." Griffin then summarized what Sellers told him,

> They were in his van and they drove down 19 and went close to his house, like an abandoned lot about a hundred, a hundred and fifty yards away from where Johnny lived and that's where they parked and they went to his house. They parked there. They went to his house and they taped him up and was asking him where the pills were and they were pistol-whipping him until he told them where the pills were.

When asked whom Sellers said he was with, Griffin testified Sellers said "a guy named Gee."

Wesley Brown testified he and Sellers were cellmates after Brown was arrested in January 2015. Sellers initially told Brown he had an alibi. Brown testified that after he told Sellers the supposed alibi witness was a close friend of Brown's, "I guess he lightened up a little bit, like he felt like he could trust me a little more." As they continued to talk, Sellers described committing the crime with "some other person" he did not name. Sellers told Brown, "We did it with a .38." Brown also testified Sellers told him that sometime after Hydrick's murder "a guy named Gee" was using Sellers' phone and "while he was using [Sellers'] phone, he was putting text messages or something in his phone, I mean, I guess to make it look like [Sellers] did it."

The State called Jeremy Hembree, an investigator with the Aiken Department of Public Safety, who testified he performed a "phone extraction" to download all the data from Sellers' phone on November 6, 2014, one week after the Edgefield County Sheriff's Department arrested Sellers for Hydrick's murder. Investigator Hembree testified Sellers' phone records showed multiple calls the evening of the murder to a contact in Sellers' phone named Gee. Investigator Hembree testified, however, that

when he did another phone extraction of Sellers' phone just before trial, the "Gee" contact had been deleted, along with all calls and text messages to and from Gee.

We find this evidence supports the trial court's decision to charge the hand of one doctrine to the jury. First, Sellers' statement to Griffin was specific that he and Gee agreed to jointly enter Hydrick's home for the purpose of robbing him. This statement is supported by the fact Sellers made phone calls to Gee just before the crime and deleted Gee's contact information from his phone after he was arrested.

Second, Sellers' statement to Griffin was specific that he and Gee jointly tied up Hydrick and pistol-whipped him to accomplish the robbery. This statement is further supported by Sellers' telling Brown "we" did it with a .38 caliber pistol and his telling Amerson "they" had gotten rid of the items stolen from Hydrick. Thus, there is evidence Gee was part of Sellers' criminal plan.

Finally, as to the third point, unlike in *Barber* and other cases, the State was not required to offer evidence Gee killed Hydrick *instead* of Sellers doing so. Rather, the evidence they jointly beat Hydrick supports the State's position that either one or both of them could have administered the fatal blow or blows. Therefore, the *Barber* idea of "equivocal" evidence—which we applied in *Barber* because the shooting must have been done by one but not both of the co-defendants—is not applicable here. In addition, Sellers told Griffin that when Sellers left Hydrick's home, Hydrick was still alive. This statement clearly supports an inference it was Gee who delivered the final or fatal blows to Hydrick after Sellers left the crime scene.

Thus, if the jury believed Griffin's testimony about what Sellers told him, or if it believed Amerson's and Brown's testimony, then it could find Sellers guilty based on Gee's actions beating Hydrick during the burglary and robbery the two of them agreed to commit without speculating and without having to rely on finding evidence to be not credible. *See Washington*, 431 S.C. at 411, 848 S.E.2d at 788 (reversing because the hand of one charge "invited the jury to speculate"); 431 S.C. at 409, 848 S.E.2d at 787 (holding "an alternate theory of liability may not be charged to a jury 'merely on the theory the jury may believe some of the evidence and disbelieve other evidence'" (quoting *Barber*, 393 S.C. at 236, 712 S.E.2d at 438)).

IV. Conclusion

Because the trial court repeatedly instructed the jury on the State's burden of proof, the phrase "intentional doing of a wrongful act without just cause or excuse" did not shift the State's burden of proof or confuse the jury. Because the State presented evidence Sellers agreed with Gee to commit the burglary and robbery and evidence both Sellers and Gee beat Hydrick during the course of the two initial crimes, the hand of one jury instruction was supported by the evidence.

AFFIRMED.

BEATTY, C.J., KITTREDGE, JAMES, JJ., and Acting Justice Stephanie P. McDonald, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ex Parte: DeBordieu Colony Community Association, Inc., Appellant,

In Re: The Belle W. Baruch Foundation, Plaintiff,

v.

The State of South Carolina, Defendant,

Of Which The Belle W. Baruch Foundation is the Respondent.

Appellate Case No. 2020-001166

Appeal From Georgetown County
Paul M. Burch, Circuit Court Judge

Opinion No. 6043
Heard October 10, 2023 – Filed January 17, 2024

REVERSED

Brian C. Duffy, Julie Lauren Moore, Robert Lewis Wehrman, and Patrick Coleman Wooten, all of Duffy & Young, LLC, of Charleston, for Appellant.

George Trenholm Walker, Thomas P. Gressette, Jr., and Jennifer Sue Ivey, all of Walker Gressette & Linton, LLC, of Charleston, for Respondent.

HEWITT, J: DeBordieu Colony Community Association, Inc. (DeBordieu) is a private coastal community in Georgetown County. DeBordieu sought intervention as a matter of right or, alternatively, permissive intervention in a lawsuit brought to determine the rightful titleholder to roughly 8,000 acres of marshlands abutting DeBordieu's southern boundary. The circuit court denied intervention under both theories.

Precedent and Rule 24(a) of the South Carolina Rules of Civil Procedure set a liberal standard for intervention. Denying intervention here was inconsistent with that standard. For that reason, as explained below, the order denying DeBordieu's motion to intervene is reversed.

FACTS

The Belle W. Baruch Foundation (Baruch) was created by the Last Will and Testament of Belle W. Baruch. It owns approximately 8,000 acres of "high ground" in Georgetown County.

The marshland over which Baruch claims title is adjacent to Baruch's high ground. Baruch claims it owns this marshland under the original King's Grant.

DeBordieu's southern boundary creates the northern boundary of the disputed marshland. DeBordieu's members have a history of using the marshland for shellfish harvesting, crabbing, wade fishing, and similar recreational activities. In the early 1970s, DeBordieu created a system of creeks and canals allowing its members access to the marshland and to the Atlantic Ocean. DeBordieu has periodically dredged its canals to maintain its access to the marshland for recreational purposes.

Baruch began this case by filing a declaratory judgment action against the State. Baruch claimed it holds fee simple title to the marshlands and sought an order declaring it the rightful owner.

The State answered, asserted its status as the presumptive titleholder of all marshlands, and counterclaimed that the public held a prescriptive easement over the marshlands. The State alternatively claimed that the property had been dedicated to the public.

DeBordieu filed a timely motion to intervene, opposed Baruch's claim of fee simple title over the marshlands, and asserted its own claim for a prescriptive easement.

The State consented to DeBordieu's intervention. Baruch objected. The circuit court denied DeBordieu's motion after a hearing. This appeal followed.

ISSUE

Did the circuit court err in denying DeBordieu's motion to intervene?

STANDARD OF REVIEW

We review circuit court decisions regarding intervention under the abuse of discretion standard. *In re Horry Cnty. State Bank,* 361 S.C. 503, 507, 604 S.E.2d 723, 725 (Ct. App. 2004) (citing *S.C. Tax Comm'n v. Union Cnty. Treasurer,* 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App.1988)). As precedent notes, the term "abuse of discretion" is "an old unfortunate statement" and is really just shorthand for describing that "the appellate [c]ourt is simply of the opinion that there was commission of an error of law in the circumstances." *State v. Wallace*, 440 S.C. 537, 541 n.2, 892 S.E.2d 310, 312 n.2 (2023) (quoting *Barrett v. Broad River Power Co.*, 146 S.C. 85, 96, 143 S.E. 650, 654 (1928)). An error of law includes failing to consider all of the factors relevant to a particular decision. *See e.g.*, *Burke v. Republic Parking System, Inc.*, 421 S.C. 553, 560-61, 808 S.E.2d 626, 629 (Ct. App. 2017) (finding the circuit court's failure to weigh all relevant factors in its order was an abuse of discretion).

INTERVENTION OF RIGHT

Our supreme court has articulated a broad view of the Rule 24(a)(2) standard, explaining:

> We interpret the rules to permit liberal intervention particularly [when] . . . judicial economy will be promoted by the declaration of the rights of all parties who may be affected. Accordingly, we must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of Rule 24(a)(2).

Berkeley Electric Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d, 712, 714 (1990).

Rule 24(a)(2) requires a court to grant intervention:

> [W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he [or she] is so situated that the disposition of the action may as a practical matter impair or impede his [or her] ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24(a)(2), SCRCP. The motion to intervene must also be timely. *Berkeley Electric*, 302 S.C. at 189, 394 S.E.2d at 714.

DeBordieu easily satisfies three of the four requirements listed above. First, it is undisputed that DeBordieu timely filed its motion. Second, through its counterclaim for a prescriptive easement, DeBordieu is unquestionably claiming "an interest" in the disputed property. Third, barring DeBordieu impairs or impedes DeBordieu's ability to protect its claimed interest.

The "impairment" factor is not designed to be a difficult standard. As described in *Berkeley Electric*, "a party need not prove that it would be bound in a res judicata sense by the judgment, only that it would have difficulty adequately protecting its interests if not allowed to intervene." *Id.* at 190, 394 S.E.2d at 715. Baruch's complaint advertises the purpose of this suit as adjudicating its rights to the marshlands; a court order adjudicating Baruch's claimed rights would necessarily be incomplete unless it also adjudicated DeBordieu's claim. It would be inconsistent with our liberal application of Rule 24, and contrary to the mandate of judicial economy, to deny DeBordieu intervention in a suit that is meant to determine the rightful property owner of a parcel over which DeBordieu claims an easement.

Intervention as a matter of right also requires that DeBordieu's interest not be adequately represented by existing parties. Rule 24(a)(2), SCRCP. This, too, is a "minimal" burden and "the applicant need only show that the representation of his interests 'may be' inadequate." *Berkeley Electric*, 302 S.C. at 191, 394 S.E.2d at 715 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). Here, we consider:

> (1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge,

> experience, or perspective on the proceedings that would otherwise be absent.

Id. at 191, 394 S.E.2d at 715 (applying *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)).

It is true that DeBordieu and the State similarly claim that if Baruch owns the disputed marshlands, the marshlands are encumbered by the State's and/or DeBordieu's prescriptive easements. It is inaccurate, however, to categorize those easement claims as the same interest in the property. The State claims a prescriptive easement on behalf of the public. DeBordieu claims a prescriptive easement only on behalf of its members. Though the circuit court found that "[DeBordieu] does not assert, nor could it, that its so-called prescriptive easement is exclusive, hence preventing others from access over these tidelands," that requirement is not consistent with the current governing law.

Our supreme court clarified the test for a prescriptive easement in *Simmons v. Berkeley Electric Co-op., Inc.*, stating "[i]n order to establish a prescriptive easement, the claimant must identify the thing enjoyed, and show his [or her] use has been open, notorious, continuous, uninterrupted, and contrary to the true property owner's rights for a period of twenty years." 419 S.C. 223, 233, 797 S.E.2d 387, 392 (2016). Exclusivity is not a requirement to make a prescriptive easement claim. The State's and DeBordieu's easement claims are independent of one another, and are different claims requiring different proof. *See Cleland v. Westvaco Corp*., 314 S.C. 508, 511, 431 S.E.2d 264, 266–67 (Ct. App. 1993) (noting an unsuccessful argument for public rights did not necessarily defeat an individual claim for an easement); *see also Nelums v. Cousins*, 304 S.C. 306, 308, 403 S.E.2d 681, 682 (1991) (finding a plaintiff's prescriptive easement claim was asserted independent of use by others). The fact that the claims are materially different amply demonstrates the State would not make all of DeBordieu's arguments.

ARGUMENTS AGAINST INTERVENTION

Having explained our finding that the standard for intervention is satisfied, we address Baruch's arguments offered against intervention.

Baruch first argues that DeBordieu may not intervene because it only claims an easement and does not claim to own the marshlands. We do not see how any statute or precedent supports this being a meaningful distinction.

The statute authorizing Baruch to file this lawsuit against the State invites participation by "[a]ny person claiming *an interest* in tidelands . . . for the purpose of determining the existence of *any right, title, or interest* . . . as against the State." S.C. Code Ann. § 48-39-220(A) (Supp. 2023) (emphasis added). An easement "gives no title," but an easement is still "property or an interest in land." *S.C. Pipeline Corp. v. Lone Star Steel Co.*, 345 S.C. 151, 153, 546 S.E.2d 654, 656 (2001). DeBordieu does not claim a property interest against *the State*. Even so, we do not see any reason to read the statute as trumping Rule 24, which allows anyone claiming "an interest" in the property at the center of the action to participate.

In fact, examples abound in precedent where adjoining landowners who did not claim to own the land in question participated in the very same kind of disputes. *See, e.g.*, *Hoyler v. State et al.*, 428 S.C. 279, 833 S.E. 845 (Ct. App. 2019) (granting the intervention of adjoining landowners in a declaratory judgment brought under the marshland statute where the petitioning landowner disputed the neighbors' claims to access the marsh); *see also Lowcountry Open Land Tr. v. State*, 347 S.C. 96, 552 S.E.2d 778 (Ct. App. 2001) (allowing the intervention of an adjoining landowner who sought to wharf over the marsh in action for declaratory judgment and quiet title). DeBordieu's participation may prolong the litigation by adding an additional party, but trying to keep them out of the case seems to have already done that. Again, Rule 24 is meant to promote judicial economy by declaring "the rights of all parties who may be affected." *Berkeley Electric*, 302 S.C. at 189, 394 S.E.2d at 714.

We also consider the practical effect of denying the motion to intervene. This case was not brought as a quiet title action, which would have required notice to and service upon all parties known to have an interest in the property, and service on unknown parties by way of publication. *See* S.C. Code Ann. §§ 15-67-30 to - 40 (2005). Baruch brought its suit as a declaratory judgment. We note this to punctuate a declaratory judgment's statutory requirement that "[a]ll persons" be made parties if they have a claim or interest that would be affected and that "no declaration shall prejudice the rights of persons not parties to the proceeding." S.C. Code Ann. § 15-53-80 (2005). A judgment that is valid as against the State, but not against anyone else claiming an interest in the marshlands would not be an efficient use of judicial resources. It certainly would not give Baruch the *full* rights of fee simple ownership, because it would not be binding on anyone who was not a party to the declaratory judgment. *See Wilmington, C. & A. R. Co. v. Garner*, 27 S.C. 50, 2 S.E. 634, 635 (1887) ("[T]itle ordinarily carries with it the

right to possession, which right is a conclusion of law inferred from the title in fee . . . ."); *see also Rowe v. City of Columbia*, 300 S.C. 447, 388 S.E.2d 789 (1989) (holding a non-party to a declaratory judgment action was not bound by the declaratory judgment).

The final argument we address against intervention is Baruch's contention that because it has not been adjudicated to own the marshlands and has not attempted to exclude anyone from them, DeBordieu's claim to an easement is not ripe. That argument is contrary to the tenants of property law. *See Wilmington*, 27 S.C. 50, 2 S.E. at 635. (emphasis in original) ("An averment by a plaintiff that he [or she] has the legal title to certain real property as owner in fee-simple, it seems to us, in the absence of any opposing right, set up by way of defense, would in itself *prima facie* be an averment of the right to possession . . . .").

DeBordieu claims it possesses an easement. If Baruch holds title, and DeBordieu's claim is valid, then DeBordieu would be a dominant estate holder over Baruch. Baruch claims neither DeBordieu nor the public have a prescriptive easement over the marshlands. The law does not require an easement holder to idly sit, waiting to be ejected, before making a claim. Indeed, the claim of an easement is undoubtedly a hostile act towards the subservient landowner, and Baruch's denial of any easement is functionally a backdoor ejectment. *See, e.g.*, *Pittman v. Lowther*, 363 S.C. 47, 51–52, 610 S.E.2d 479, 481 ("It is enough if [the property owner] asserts [his or her rights] to the other party by an overt act, which, if the easement existed, would be a cause of action. Such an assertion interrupts the would-be dominant owner's impression of acquiescence … it shows that acquiescence was not a fact." (quoting *Garrett v. Mueller,* 144 Or.App. 330, 339, 927 P.2d 612, 617 (1996))); *see also, e.g., Chisolm v. Caines,* 67 F. 285, 290 (C.C.D.S.C. 1894) (ejecting certain duck hunters from a portion of the disputed marshlands). Not only is there a live controversy between Baruch and DeBordieu, but DeBordieu is a real party in interest by the mere fact that it claims an interest in the marshlands. *Kiawah Resort Assocs., L.P. v. Kiawah Island Cmty. Ass'n, Inc*., 421 S.C. 538, 552, 808 S.E.2d 521, 528 (Ct. App. 2017) ("A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a 'real party in interest.'" (quoting *Ex parte Gov't Emp.'s Ins. Co. v. Goethe*, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007))).

CONCLUSION

For these reasons, the order denying DeBordieu's motion to intervene is

REVERSED.

WILLIAMS, C.J., and VERDIN, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Susan Brooks Knott Floyd, Respondent,

v.

Elizabeth Pope Knott Dross, Appellant.

Appellate Case No. 2020-001354

Appeal from Berkeley County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. 6044
Heard September 13, 2023 – Filed January 17, 2024

REVERSED AND REMANDED

John William Fletcher, of Barnwell Whaley Patterson & Helms, LLC, and Joshua Steven Whitley, of Smyth Whitley, LLC, both of Charleston, and Todd Maurice Hess, of Wesley Chapel, North Carolina, for Appellant.

George Trenholm Walker and Charles P. Summerall, IV, both of Walker Gressette & Linton, LLC, of Charleston, for Respondent.

GEATHERS, J.: In this declaratory judgment action, Appellant Elizabeth Pope Knott Dross (Betsy) seeks review of the circuit court's order granting partial summary judgment to Respondent Susan Brooks Knott Floyd (Susan). Betsy argues the circuit court erred by concluding that Susan had an express easement over the

roads on Betsy's property in order to access Susan's property. We reverse the circuit court's order and remand for further proceedings in this case.

FACTS/PROCEDURAL HISTORY

In 2004, Benjamin Franklin Knott (Father) executed a will granting each of his daughters, Susan and Betsy, approximately one-half of a 371-acre tract of land (the Unified Tract) near Huger in Berkeley County (Susan's Parcel and Betsy's Parcel). The Unified Tract was subject to a conservation easement (the Conservation Easement) that Father had previously given to Wetlands America Trust, Inc., a non-profit organization affiliated with Ducks Unlimited, Inc. and dedicated to the conservation of natural areas.[1]

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[1] The South Carolina Conservation Easement Act of 1991 allows property owners to create a conservation easement in the same manner as other easements. S.C. Code Ann. § 27-8-30(A) (2007). A conservation easement is defined as "a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations" for any of the following purposes:

> (a) retaining or protecting natural, scenic, or open-space aspects of real property;
>
> (b) ensuring the availability of real property for agricultural, forest, recreational, educational, or open-space use;
>
> (c) protecting natural resources;
>
> (d) maintaining or enhancing air or water quality;
>
> (e) preserving the historical, architectural, archaeological, or cultural aspects of real property.

S.C. Code Ann. § 27-8-20(1) (2007). Section 27-8-20(2) defines a "holder" as

> (a) a governmental body empowered to hold an interest in real property under the laws of this State or the United States; or

The only direct road frontage for the Unified Tract was Cainhoy Road, west of, and adjacent to, the area that would become Betsy's Parcel upon Father's death. There was also indirect access to the Unified Tract from Charity Church Road, east of the Unified Tract, through a parcel adjacent to the Unified Tract that Susan already owned at the time Father executed his will in 2004 (the Access Parcel).

Conveniently, the Access Parcel was adjacent to the half of the Unified Tract that would become Susan's Parcel upon Father's death. The Access Parcel fronted Charity Church Road and provided vehicular access to the Unified Tract.[2] Father had conveyed the Access Parcel to Susan in 1996, but Susan sold almost all of this property in 2007 to WH Land Company, LLC for $4,000,000; Susan retained ten acres bordering the part of the Unified Tract that would later become Susan's Parcel. Although this resulted in Susan's Parcel and the adjacent ten acres becoming landlocked,[3] Susan retained an easement over the part of the Access Parcel that she sold.

Father died on November 18, 2009, and Susan and Betsy received deeds of distribution to their respective parcels on January 11, 2011. Subsequently, in 2015, Susan agreed to terminate her easement over the Access Parcel in favor of its owner—WH Land Company, LLC. Approximately three years later, Susan asked Betsy if she could use Betsy's Parcel to access Susan's Parcel. According to Susan, Betsy rejected Susan's request. Susan has also claimed that she

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> (b) a charitable, not-for-profit or educational corporation, association, or trust the purposes or powers of which include one or more of the purposes listed in subsection (1).

S.C. Code Ann. § 27-8-20(2) (2007). In the present case, Father executed the Conservation Easement in 1998. The Conservation Easement refers to the Unified Tract as the "Protected Property."

[2] Susan admitted that she had vehicular access to the Unified Tract through the Access Parcel, but she qualified her admission by stating that the access was not available when hazardous road conditions occurred.

[3] Property is landlocked when it is "[s]urrounded by land, with no way to get in or out except by crossing the land of another." *Landlocked*, Black's Law Dictionary (11th ed. 2019).

> requested access from Betsy to reach [Susan's] Parcel to undertake activities in furtherance of the Conservation Easement purposes, including: (1) to preserve and protect the "Whiskey Still Dam" from erosion in order to maintain a large Cypress Pond[,] which is one of the "conservation values" on [Susan's] Parcel identified in the Baseline Report;[4] and (2) to harvest some timber on [Susan's] Parcel.

According to Betsy,

> The road system on Betsy's Parcel is fragile. Part of it is built on a water embankment. When heavy rains are present in the area [or] when property owners upstream of Betsy's Parcel release water from their land, part of the road system on Betsy's Parcel washes over with water and becomes impassable. [Betsy and her] husband have invested considerable time, effort, and money maintaining these roads so that they are passable under fair-weather conditions. If [they] had not, part of the road system would have completely washed away.

On September 20, 2019, Susan filed the present action. In her amended complaint, Susan sought a judgment declaring, *inter alia*, that (1) she had "an appurtenant easement and right to use Duck Pond Road crossing over Betsy's [P]arcel for all activities permitted under the Conservation Easement" and (2) Betsy was required to "provide Susan at all times with the key or code to Betsy's locked gate." Susan claimed that she had an express easement over Betsy's Parcel purportedly created by the language in section 4 of the Conservation Easement, which states, in pertinent part:

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[4] The "Baseline Report" referenced by Susan is actually entitled the "Baseline Documentation Report" (the Report). The Report documents "the specific conservation values of the Protected Property on the date of" the Conservation Easement's execution. The Report was represented by the parties to the Conservation Easement to provide "an accurate representation of the Protected Property and the condition of the same as of the" Conservation Easement's execution date. The Conservation Easement also provided that the Report was "intended to serve as an objective informational baseline for monitoring compliance with the terms of" the Conservation Easement.

RESERVED RIGHTS

> Notwithstanding any provision to the contrary contained in this Easement, the Grantor *reserves for himself, his heirs, successors and assigns* the "Reserved Rights" set forth in this Section.
>
> 4. The exercise of all Reserved Rights will be in full accordance with all applicable local, state and federal laws and regulations, as well as in accordance with the intent and Purpose of this Easement. Grantor hereby agrees to give written notice to the Grantee prior to constructing any new buildings or extracting any minerals pursuant to the Reserved Rights contained herein.
>
> . . . .
>
> 4.3 Roads. The right to maintain and replace existing roads at the same location with roads of like size and composition. The right to construct new roads to the New Structures using permeable materials (e.g.[,] sand, gravel, crushed stone). Grantor shall use existing roads whenever possible for access to the New Structures. The right to widen existing roads for utility rights-of-way. *The right to use roads for all activities permitted under this Easement.* Maintenance of roads shall be limited to normal practices for non-paved roads, such as the removal of dead vegetation, scraping and crowning, necessary pruning or removal of hazardous trees and plants, application of permeable materials necessary to correct erosion, placement of culverts, water control structures, and bridges, and maintenance of roadside ditches.

(emphases added).

Susan's amended complaint also asserted claims for "Reformation of Deeds of Distribution," "Easement Implied By Prior Use," "Easement By Necessity," and an injunction preventing Betsy from locking out Susan "or otherwise impeding her

right to use that portion of Duck Pond Road crossing over Betsy's Parcel to access Susan's Parcel for all activities permitted under the Conservation Easement."

Betsy filed an answer and counterclaim, seeking a judgment declaring that Susan had "no easement of any kind over Betsy's Parcel and [did] not otherwise have any rights regarding Betsy's Parcel." Subsequently, Susan filed a motion for partial summary judgment as to her express easement claim and Betsy's counterclaim. After conducting a hearing on the motion, the circuit court granted partial summary judgment to Susan, concluding,

> Pursuant to the unambiguous terms of the governing Conservation Easement, including the expressly reserved rights in Section 4.3 thereof, Susan, as owner of approximately half of the Conservation Easement Property, has the right to use the roads crossing over Betsy's Parcel to access Susan's Parcel for all activities permitted under the Conservation Easement[.]

Specifically, the circuit court ordered, "[T]his partial summary judgment is granted pursuant to the First Cause of Action for Declaratory Judgment in Susan's Amended Complaint, and the [c]ourt hereby denies Betsy's Counterclaim to the extent it requests a Declaratory Judgment that Susan has no right to use the roads crossing over Betsy's Parcel." The circuit court later denied Betsy's Rule 59(e), SCRCP, motion. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err by concluding that the Conservation Easement's disputed language was unambiguous?

II. Did the circuit court err by concluding that the Conservation Easement's language expressly created a right for Susan to use the roads on Betsy's Parcel to access Susan's Parcel?

III. Did the circuit court err by granting partial summary judgment to Susan when there was evidence that Susan's conduct was not equitable?

IV. Does the circuit court's construction of the Conservation Easement produce an unreasonable result?

V. Does the Conservation Easement Act preclude Susan's claims?

STANDARD OF REVIEW

This court reviews the grant of a summary judgment motion under the same standard applied by the circuit court pursuant to Rule 56(c), SCRCP. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Summary judgment must be granted when "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." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

Likewise, "[o]n appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Id.* Further, "[w]hen a circuit court grants summary judgment on a question of law, this [c]ourt will review the ruling de novo." *Wright v. PRG Real Est. Mgmt., Inc.*, 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019).

LAW/ANALYSIS

Betsy's issues I, II, and IV all assign error to the circuit court's interpretation of section 4 of the Conservation Easement. Accordingly, we will combine these issues for purposes of our analysis. For the reasons that follow, we agree with Betsy's argument that the language in section 4 did not create a right for Susan to access Susan's Parcel via the roads on Betsy's Parcel.

"An easement is a right to use the land of another for a specific purpose." *Snow v. Smith*, 416 S.C. 72, 84, 784 S.E.2d 242, 248 (Ct. App. 2016). "An easement may be established by express grant or by express reservation in a deed or other instrument." 12 S.C. Juris. *Easements* § 6 (citing *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 419, 143 S.E. 2d 803, 806 (1965)); *see also Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009) ("An easement may be created by reservation in a deed.").

"A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." *Binkley v. Rabon Creek Watershed*

Conservation Dist. of Fountain Inn, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) (quoting 28A C.J.S. *Easements* § 57 at 235 (1996)). Further, deeds may be construed using the rules of contract interpretation. *See S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001) (applying the rules of contract construction to a restrictive covenant in a deed).

> Common sense and good faith are the leading touchstones of the construction of a contract[,] and contracts are to be so construed as to avoid an absurd result. Where one construction would make a contract unusual or extraordinary and another, equally consistent, would make the contract reasonable, fair[,] and just, the latter construction will prevail.

McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct. App. 2005) (quoting *Georgetown Mfg. & Warehouse Co. v. S.C. Dep't of Agric.*, 301 S.C. 514, 518, 392 S.E.2d 801, 804 (Ct. App. 1990)).

Further, "[w]hen a deed is unambiguous, any attempt to determine the grantor's intent when reserving the easement must be limited to the deed itself, and using extrinsic evidence to contradict the plain language of the deed is improper." *Snow*, 416 S.C. at 85, 784 S.E.2d at 248. "The determination of the grantor's intent when reviewing a clear and unambiguous deed is . . . a question of law for the court." *Id.* (quoting *Proctor v. Steedley*, 398 S.C. 561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012)). "[T]his court must construe unambiguous language in the grant of an easement according to the terms the parties have used." *Id.* (alteration in original) (quoting *Plott v. Justin Enters.*, 374 S.C. 504, 513–14, 649 S.E.2d 92, 96 (Ct. App. 2007)). "In determining the grantor's intent, *the deed must be construed as a whole and effect given to every part if it can be done consistently with the law*. The intention of the grantor must be found within the four corners of the deed." *Proctor*, 398 S.C. at 573, 730 S.E.2d at 363 (quoting *Windham*, 381 S.C. at 201, 672 S.E.2d at 582–83).

"As a general rule, to constitute a grant of an easement, any words clearly showing the intention to grant an easement are sufficient." *Ten Woodruff Oaks, LLC v. Point Dev., LLC*, 385 S.C. 174, 180, 683 S.E.2d 510, 513 (Ct. App. 2009) (quoting 25 Am. Jur. 2d *Easements and Licenses* § 15 at 512 (2004)). "Whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so as to carry out that intention."

Id. at 181, 683 S.E.2d at 513 (quoting *Smith v. Comm'rs of Pub. Works of City of Charleston*, 312 S.C. 460, 466, 441 S.E.2d 331, 335 (Ct. App. 1994)). "If the language is uncertain or ambiguous in any respect, all the surrounding circumstances, including the construction [that] the parties have placed on the language, may be considered by the court, to the end that the intention of the parties may be ascertained and given effect." *Id.* (quoting 25 Am. Jur. 2d *Easements* § 18 at 516 (2004)). "Whether the language of a contract is ambiguous is a question of law to be determined by the court from the terms of the contract as a whole. In making this determination, the court must examine the entire contract and not merely whether certain phrases taken in isolation could be interpreted in more than one way." *State Accident Fund v. S.C. Second Inj. Fund*, 388 S.C. 67, 75, 693 S.E.2d 441, 445 (Ct. App. 2010) (per curiam) (citation omitted)).

As we previously stated, section 4 of the Conservation Easement provides, in pertinent part:

> **RESERVED RIGHTS**
>
> Notwithstanding any provision to the contrary contained in this Easement, the Grantor *reserves for himself, his heirs, successors and assigns* the "Reserved Rights" set forth in this Section.
>
> 4. The exercise of all Reserved Rights will be in full accordance with all applicable local, state and federal laws and regulations, as well as in accordance with the intent and Purpose of this Easement. Grantor hereby agrees to give written notice to the Grantee prior to constructing any new buildings or extracting any minerals pursuant to the Reserved Rights contained herein.
>
> . . . .
>
> 4.3 Roads. The right to maintain and replace existing roads at the same location with roads of like size and composition. The right to construct new roads to the New Structures using permeable materials (e.g.[,] sand, gravel, crushed stone). Grantor shall use existing roads whenever possible for access to the New Structures. The right to widen existing roads for utility rights-of-way. *The*

> *right to use roads for all activities permitted under this Easement.* Maintenance of roads shall be limited to normal practices for non-paved roads, such as the removal of dead vegetation, scraping and crowning, necessary pruning or removal of hazardous trees and plants, application of permeable materials necessary to correct erosion, placement of culverts, water control structures, and bridges, and maintenance of roadside ditches.

(emphases added). The purpose of section 4 as a whole is for the Protected Property's owner to reserve the right to use the property in various ways as against the Conservation Easement's holder, Ducks Unlimited.[5] For example, subsections 4 and 12 reserve the rights to hunting and harvesting timber, respectively. Thus, we view the reserved right to use the roads set forth in subsection 3 as comparable to an easement by reservation in a deed. *See Sandy Island Corp.*, 246 S.C. at 419, 143 S.E.2d at 806 ("A reservation of an easement in a deed by which lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the lands.").

Accordingly, the language of section 4.3 grants to Father (and his heirs, successors, and assigns) an easement by reservation over the roads on the Protected Property as against Ducks Unlimited. Therefore, we disagree with Susan's assertion that this easement as against Ducks Unlimited translates into her own easement as against Betsy. In support of this assertion, Susan argues: (1) the Conservation Easement envisioned that the Unified Tract would be subdivided because section 4.1 reserves the right to subdivide the Unified Tract into two parcels; (2) "there would be no need for the owner of property to reserve a right to use the roads on the owner's property," as Father did in section 4.3; and (3) therefore, the "reasonable interpretation . . . of this reserved right [section 4.3] is that it was to allow access over the other half of the Conservation Easement Property *to gain access to the interior half once it was subdivided*." (emphasis added).

First, the nature of a conservation easement imposes restrictions on a property owner's use of his own land in order to conserve natural areas. *See* S.C. Code Ann. § 27-8-20 (2007) ("As used in this chapter, unless the context otherwise requires: (1) 'Conservation easement' means a nonpossessory interest of a holder in real property *imposing limitations or affirmative obligations*, the purposes of which include one

[5] As we previously stated, the Conservation Easement refers to the Unified Tract as the "Protected Property."

or more of the following: (a) retaining or protecting natural, scenic, or open-space aspects of real property; (b) ensuring the availability of real property for agricultural, forest, recreational, educational, or open-space use; (c) protecting natural resources; (d) maintaining or enhancing air or water quality; (e) preserving the historical, architectural, archaeological, or cultural aspects of real property." (emphasis added)). The Conservation Easement executed by Father recognizes these "voluntary restrictions."

It logically follows that, despite Susan's argument to the contrary, the property owner who creates a conservation easement needs to expressly reserve the right to engage in certain activities on the property if he wishes to clearly exclude those activities from the broadly-worded restrictions on the property's use in other provisions of the conservation easement. Therefore, there is no reason to assign another, more limited purpose to section 4.3 (i.e., to access Susan's parcel).

Further, Susan's argument is inconsistent with her assertion that the language in the Conservation Easement is clear and, thus, the court may not look to outside evidence. Nothing in section 4 expressly states that the purpose of subsection (3) was to provide access to a future subdivided, "interior" (i.e., landlocked) parcel. In fact, nothing in the language of the Conservation Easement or the Report indicates that access to any future subdivided parcel would be impeded. Even considering the fact that Father's 2004 will effectively subdivided the Unified Tract into Betsy's Parcel and Susan's Parcel is looking to evidence outside of, and postdating, the language of the 1998 Conservation Easement. And to support her assertion regarding the purpose of section 4.3, Susan must reference outside evidence showing that there was only one way to access the Unified Tract when Father executed the Conservation Easement in 1998 and that a future subdivision of the tract into two parcels would necessarily render one of the parcels landlocked. Therefore, Susan's argument that the purpose of section 4.3 was to *allow access* to the Protected Property's *interior* half is not supported by the Conservation Easement's plain language.

Moreover, Susan's argument is inconsistent with a reading of section 4 as a whole. *See Proctor*, 398 S.C. at 573, 730 S.E.2d at 363 ("In determining the grantor's intent, *the deed must be construed as a whole and effect given to every part if it can be done consistently with the law*." (quoting *Windham*, 381 S.C. at 201, 672 S.E.2d at 582–83)).[6] Applying Susan's interpretation of section 4.3 would produce an

[6] Susan effectively concedes that reading section 4 as a whole is the correct way to interpret the language in section 4.3 by her assertion that section 4.1 (reserving the

unreasonable result because this provision is merely a subset of section 4, which reserves *several* rights belonging to the owner of the Protected Property. *See McCune*, 364 S.C. at 248, 612 S.E.2d at 465 ("Common sense and good faith are the leading touchstones of the construction of a contract and contracts are to be so construed as to avoid an absurd result." (quoting *Georgetown Mfg. & Warehouse Co.*, 301 S.C. at 518, 392 S.E.2d at 804)). If Susan has the right to use the roads on *Betsy's* parcel pursuant to section 4.3, it logically follows that she must have all of the other owner's reserved rights set forth in section 4 as to Betsy's Parcel. Yet, to allow Susan to have all of the reserved rights set forth in section 4 as to Betsy's property would devalue Betsy's ownership interest in her parcel. *See Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism*, 377 S.C. 86, 96, 659 S.E.2d 151, 156 (2008) ("Absent an easement or a license, a landowner generally enjoys no right to use the land of another."); *see also Floyd v. Chapman*, 838 S.E.2d 99, 104 (Ga. Ct. App. 2020) ("The term 'property' includes not only the land possessed, but also the rights of the owner in relation to that land. The owner has the rights to possess, use[,] and dispose of the property and the corresponding right to exclude others from using the property." (quoting *Pope v. Pulte Home Corp.*, 539 S.E.2d 842, 843 (Ga. Ct. App. 2000))). Rather, once Susan and Betsy received the deeds to their respective parcels, they held all of the rights set forth in section 4 as to only their own respective parcels as against only Ducks Unlimited.

Susan states that she "is asking the [c]ourt to affirm only her express right to use the roads to access Susan's Parcel to protect conservation values and exercise reserved rights on Susan's Parcel, not on Betsy's Parcel. Susan is not asking to exercise proprietary rights associated with Betsy's Parcel." However, all of the rights reserved in section 4, including the right to use the roads, are proprietary rights. And, as we previously stated, there is no reason to attribute a special purpose, such as access to a subdivided parcel, to just one of the reserved rights separate and apart from the others when the plain language does not call for that. Section 4.3 allows use of the roads "for all activities permitted under" the Conservation Easement. It does not reference access to any part of the Unified Tract. Further, consistent with existing property law allowing a property owner to exclude others from his property,[7] section 2.2 of the Conservation Easement clearly limits access rights to

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right to subdivide the Unified Tract into two parcels) has a bearing on the meaning of section 4.3.

[7] *See Inlet Harbour*, 377 S.C. at 96, 659 S.E.2d at 156 ("Absent an easement or a license, a landowner generally enjoys no right to use the land of another."); *Floyd*, 838 S.E.2d at 104 ("The term 'property' includes not only the land possessed, but also the rights of the owner in relation to that land. The owner has the rights to

the whole Unified Tract (or both future subdivided parcels) to the grantee (Ducks Unlimited) and its agents:

> 2.2 Right of Entry and Access. At reasonable times and upon reasonable notice, the Grantee shall have the right to enter the Protected Property for the purposes of inspecting same to determine compliance herewith. The right of entry and access herein described does not extend to the public *or any person or entity other than the Grantee, its agents, employees, successors, and/or assigns*.

(emphasis added).

Additionally, section 4.21 reserves the right to grant easements provided they do not permit a use inconsistent with the Conservation Easement's purpose:

> 4.21 Easements and Rights of Passage. The right to grant easements or rights of passage across or upon the Protected Property if such rights are (i) used exclusively by an adjacent property owner and not in connection with an industrial activity or a commercial activity of a type and nature not permitted by this Easement[;] (ii) required or convenient in connection with the permitted utilities on the Protected Property; or (iii) required or convenient in connection with the uses of the Protected Property permitted by this Easement.

Expressly addressing the right to grant easements in subsection 21 of section 4 further demonstrates that Father did not intend for subsection 3 to address access to a future subdivided parcel—subsection 21 gave Father and his successors all the authority needed to grant an easement over any part of the Unified Tract for any purpose consistent with the Conservation Easement's purpose. *See Proctor*, 398 S.C. at 573, 730 S.E.2d at 363 ("In determining the grantor's intent, *the deed must be construed as a whole and effect given to every part if it can be done consistently with the law*." (quoting *Windham*, 381 S.C. at 201, 672 S.E.2d at 582–83)); *Ten Woodruff Oaks, LLC*, 385 S.C. at 181, 683 S.E.2d at 513 ("Whether a grant in a written

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possess, use and dispose of the property and the corresponding right to exclude others from using the property." (quoting *Pope*, 539 S.E.2d at 843)).

instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so as to carry out that intention." (quoting *Smith*, 312 S.C. at 466, 441 S.E.2d at 335)).

Even if we were to consider the language of section 4.3 to be ambiguous such that we may consider evidence outside of the Conservation Easement's plain language, we would still conclude that Father did not intend to grant an express easement over Betsy's Parcel to access Susan's Parcel. First, the introductory language at the beginning of section 4 states, "the Grantor *reserves for himself, his heirs, successors[,] and assigns* the 'Reserved Rights' set forth in this Section." (emphasis added). Admittedly, to determine the specific identity of those who qualify as one of Father's "heirs, successors[,] and assigns," as set forth in the introductory language at the beginning of section 4, requires looking beyond the language of the Conservation Easement itself. Susan claims that she is a successor in title to Father, but she cannot establish this fact without reference to the deed of distribution conveying the subdivided parcel, consisting of 189.35 acres, to her.

Further, the language in this deed immediately following the property description clearly indicates that Susan may qualify as a successor in title to Father as to only the 189.35 acres set forth in the property description, not the full Unified Tract: "TOGETHER with all and singular, the Rights, Members, Hereditaments[,] and Appurtenances to the *said* Premises/Property belonging, or in anywise incident or appertaining." (emphasis added). It logically follows from the plain language of *this* provision that (1) as to the deed granting Susan's Parcel to Susan, the rights and appurtenances granted to Susan attach to only that property granted to *her* as described in that deed and (2) the identical language in the deed granting Betsy's Parcel to Betsy does not grant *Susan* the rights and appurtenances to Betsy's Parcel because Susan is not listed as a grantee in that deed. *See Smith*, 312 S.C. at 468, 441 S.E.2d at 336 (stating that the phrase "all and singular, the rights, members, hereditament[s,] and appurtenances to the said premises belonging, or in anywise incident or appertaining[,]" which followed a deed's property description, showed an intent "to grant all rights essential to the enjoyment of *the premises conveyed*" (alteration omitted) (emphasis added) (quoting *Brasington v. Williams*, 143 S.C. 223, 238–39, 141 S.E. 375, 380 (1927))). To allow Susan to have all of the reserved rights set forth in section 4 as to Betsy's Parcel would render meaningless the language in Betsy's deed granting her all rights essential to the enjoyment of the property conveyed.

In other words, the rights that passed from Father to Susan attach only to Susan's Parcel, not Betsy's Parcel. Susan has no rights in Betsy's Parcel or any improvements such as roads on her property, and the Conservation Easement's language does not convey any new rights to any person who is not the owner of the property over which the Conservation Easement lies. *See Smith*, 312 S.C. at 465, 441 S.E.2d at 335 ("An easement is the right of one person to use the land of another for a specific purpose."). The references to "Grantor" in the Conservation Easement include Father's successors in title only to the extent of the acreage received by each respective successor.[8]

Additionally, the evidence shows that there was more than one access point for the Unified Tract *when Father executed the 1998 Conservation Easement*, i.e., Cainhoy Road and Charity Church Road (through the Access Parcel that he had conveyed to Susan in 1996). *See Ellie, Inc. v. Miccichi*, 358 S.C. 78, 94, 594 S.E.2d 485, 493 (Ct. App. 2004) ("In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered."). [9] This belies Susan's claim that Father's reserved right to subdivide the

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[8] The term "Grantor" is defined in the Conservation Easement's first paragraph:

> THIS GRANT DEED OF CONSERVATION EASEMENT (this "Easement") is made as [o]f this __ day of December, 1998, by BENJAMIN FRANKLIN KNOTT, an individual, (*together with his heirs, personal representatives, successors, and assigns hereinafter collectively referred to as "Grantor"*,) and WETLANDS AMERICA TRUST, INC., a non-profit corporation organized under the laws of the District of Columbia, One Waterfowl Way, Memphis, Tennessee 38120, "Grantee" . . . .

(emphasis added).

[9] *See also Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977) ("The purpose of all rules of contract construction is to determine the parties' intention. The courts, in attempting to ascertain this intention, will endeavor to determine the situation of the parties, as well as their purposes, *at the time the contract was entered into*. The court should put itself, as best it can, in the same position occupied by the parties *when they made the contract*. In doing so, the court is able to avail itself of *the same light [that] the parties possessed when the agreement was entered into* so that it may judge the meaning of the words and the

Unified Tract (in section 4.1) would inevitably render one of the two resulting parcels (Susan's Parcel) landlocked—in 1998, Susan already owned the adjacent parcel fronting Charity Church Road. *See Landlocked*, Black's Law Dictionary (11th ed. 2019) (indicating that property is landlocked when it is "[s]urrounded by land, with no way to get in or out except by crossing the land of *another*" (emphasis added)).

The fact that Susan's Parcel became landlocked through her own conveyances *after* Father executed the Conservation Easement is irrelevant to Father's intent when he executed the Conservation Easement in 1998. *Cf. DD Dannar, LLC*, 431 S.C. at 26–27, 846 S.E.2d at 892 (holding that references to a relocation fee as a penalty or a "clawback" were not relevant to the parties' intent at the time they executed a financing agreement because no date was indicated for some of the references and the other references took place years *after* the agreement was executed).

Based on the foregoing, the circuit court erred in interpreting section 4.3 of the Conservation Easement to give Susan an express easement over Betsy's Parcel to access Susan's Parcel. Therefore, we reverse the circuit court's order granting partial summary judgment to Susan. In light of this disposition, we need not address Betsy's issues III and V. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

CONCLUSION

Accordingly, we reverse the partial summary judgment and remand for further proceedings in this case.

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correct application of the language." (emphases added) (citation omitted)); *U.S. Bank Tr. Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 205 (Ct. App. 2009) ("To give effect to the parties' intentions, the court will endeavor to determine the situation of the parties and their purposes at the time the contract was entered."); *cf. DD Dannar, LLC v. SC LAUNCH!, Inc.*, 431 S.C. 9, 26–27, 846 S.E.2d 883, 892 (Ct. App. 2020) (holding that references to a relocation fee as a penalty or a "clawback" were not relevant to the parties' intent at the time they executed a financing agreement because no date was indicated for some of the references and the other references took place years *after* the agreement was executed). In her brief, Susan concedes that evidence pertaining to Father's intent at the time he executed the Conservation Easement is the only relevant evidence.

REVERSED AND REMANDED.

THOMAS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Benjamin Jerome Blake, Appellant.

Appellate Case No. 2018-001943

Appeal From Hampton County
Kristi F. Curtis, Circuit Court Judge

Opinion No. 6045
Heard December 7, 2021 – Filed January 17, 2024

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Ambree Michele Muller, both of Columbia; and Isaac McDuffie Stone, III, of Bluffton, for Respondent.

MCDONALD, J.: Benjamin Jerome Blake appeals his convictions for attempted murder, assault and battery of a high and aggravated nature (ABHAN), and possession of a weapon during the commission of a violent crime, arguing the

circuit court erred in allowing the State to question him about an unrelated prior bad act and in failing to conduct a proper *Batson*[1] analysis. We affirm.

Facts and Procedural History

On November 7, 2015, Blake shot at Jeantaviene "Chabby" Dobson but missed. The errant shot struck Dobson's pregnant sister, Tiffany Lakes. A Hampton County Grand Jury indicted Blake for three counts of attempted murder and possession of a weapon during the commission of a violent crime. At Blake's subsequent jury trial, Blake and three family witnesses testified Blake was at the hospital on the morning of November 7 and later at his mother's house recovering from a sickle cell episode on the night of the shooting.[2] The jury rejected this alibi testimony and found Blake guilty of attempted murder as to Dobson and guilty of the lesser included offense of ABHAN as to Lakes and her unborn child. Blake was also convicted on the accompanying weapons possession charge. The circuit court sentenced Blake concurrently to fifteen years for attempted murder, fifteen years on the two ABHAN counts, and five years on the weapons charge.

Analysis

I. Batson Challenge

Blake argues the circuit court erred in in failing to conduct the third step of the *Batson* analysis when considering the State's explanations for using four of its five peremptory challenges to strike black jurors. Blake contends the State's reasons for the strikes were pretextual and asserts at least one of the strikes amounted to purposeful racial discrimination. We find no abuse of discretion.

"The trial court's findings regarding purposeful discrimination are accorded great deference and will be set aside on appeal only if clearly erroneous." *State v.*

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[1] *Batson v. Kentucky*, 476 U.S. 79, 92–95 (1986) (holding racial discrimination in jury selection violates the Equal Protection Clause of the Fourteenth Amendment and outlining the process for a challenge).

[2] Although Blake testified he had medical records to prove he was at the hospital with a sickle cell crisis on the day of the shooting, he did not provide any such records to his attorney and claimed he was unaware that he needed them for court.

Weatherall, 431 S.C. 485, 493, 848 S.E.2d 338, 343 (Ct. App. 2020) (quoting *State v. Blackwell*, 420 S.C. 127, 148, 801 S.E.2d 713, 724 (2017)). "This standard of review, however, is premised on the trial court following the mandated procedure for a *Batson* hearing." *State v. Cochran*, 369 S.C. 308, 312, 631 S.E.2d 294, 297 (Ct. App. 2006). "[W]here the assignment of error is the failure to follow the *Batson* hearing procedure, we must answer a question of law." *Id.* "When a question of law is presented, our standard of review is plenary." *Id.* at 312–13, 631 S.E.2d at 297.

"Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019). In *Batson*, the United States Supreme Court found the Equal Protection Clause of the Fourteenth Amendment prohibits the prosecution from striking potential jurors on the basis of race. 476 U.S. at 89; *see also State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001) ("The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender."). The Court subsequently held a criminal defendant may not exercise peremptory strikes in a racially discriminatory manner, explaining that "denying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror." *Georgia v. McCollum*, 505 U.S. 42, 48 (1992). And, in *J.E.B. v. Alabama ex rel. T.B.*, the Court held litigants may not strike potential jurors solely on the basis of gender. 511 U.S. 127, 143 (1994). The Court found, "Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." *Id.* at 140. "The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" *Foster v. Chatman*, 578 U.S. 488, 499, (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478, (2008)).

Trial courts conduct a three-step inquiry when evaluating "whether a party executed a peremptory challenge in a manner which violated the Equal Protection Clause." *State v. Inman*, 409 S.C. 19, 26, 760 S.E.2d 105, 108 (2014). Our supreme court summarized the inquiry in *State v. Giles*:

> First, the opponent of the peremptory challenge must make a prima facie showing that the challenge was based on race. If a sufficient showing is made, the trial court

> will move to the second step in the process, which requires the proponent of the challenge to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the opponent of the challenge has proved purposeful discrimination. The ultimate burden always rests with the opponent of the challenge to prove purposeful discrimination.

407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014).

"Under *Batson*, once a prima facie case of discrimination has been shown by a defendant, the State must provide race-neutral reasons for its peremptory strikes. The trial judge must determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination." *Flowers*, 139 S. Ct. at 2241; *see also State v. Cochran*, 369 S.C. at 314, 631 S.E.2d at 297–98 ("Once a peremptory challenge is opposed, the trial court must, upon request, conduct a *Batson* hearing and adhere to the procedures set forth in *Purkett v. Elem*, 514 U.S. 765, 767 (1995), and adopted by our Supreme Court in *State v. Adams*, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996))."

Our supreme court has further explained:

> We likewise find, based on a harmonization of *Batson*, *Purkett* and *Miller-El*,[3] that in order for the explanation provided by the proponent of a peremptory challenge at the second stage of the *Batson* process to be legally sufficient and not deny the opponent of the challenge, as well as the trial court, the ability to safeguard the right to equal protection, it need not be persuasive, or even plausible, but it must be clear and reasonably specific such that the opponent of the challenge has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty to assess the plausibility of the reason in light of all the evidence with

[3] *Miller-El v. Dretke*, 545 U.S. 231 (2005).

> a bearing on it. Reasonable specificity is necessary because comparison to other members of the venire for purposes of a disparate treatment analysis, which is often used at the third step of the *Batson* process to determine if purposeful discrimination has occurred, is impossible if the proponent of the challenge provides only a vague or very general explanation. The explanation given may in fact be implausible or fantastic, as noted in *Purkett*, but it may not be so general or vague that it deprives the opponent of the challenge of the ability to meet the burden to show, or the trial court of the ability to determine whether, the reason given is pretextual. The proponent of the challenge must provide an objectively discernible basis for the challenge that permits the opponent of the challenge and the trial court to evaluate it. The trial judge need not proceed to step three of the Batson process when no constitutionally permissible reason has been proffered at step two.

Giles, 407 S.C. at 21–22, 754 S.E.2d at 265.

While "[s]tep two of the analysis is perhaps the easiest step to meet as it does not require that the race-neutral explanation be persuasive, or even plausible[,]" step three "requires the court to carefully evaluate whether the party asserting the *Batson* challenge has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent." *Inman*, 409 S.C. at 26–27, 760 S.E.2d at 108. "During step three, the party asserting the *Batson* challenge should point to direct evidence of racial discrimination, such as showing that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race." *Id.* at 27, 760 S.E.2d at 108–09. "In doing so, the party proves that the 'originally neutral reason was . . . a pretext because it was not applied in a neutral manner.'" *Id.* at 27, 760 S.E.2d at 109 (quoting *State v. Oglesby*, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989)).

Here, the State used four of its five peremptory challenges to strike black jurors. The impaneled jury was composed of six black jurors and six white jurors. At the conclusion of jury selection, Blake made a *Batson* motion noting, "The State struck all black jurors, Your Honor. My client is a black male, I think that is [a] due

process violation, Your Honor, and I would ask that you elicit race neutral reasons for that being done."

When the circuit court addressed the State, the assistant solicitor responded:

> Thank you, Your Honor. I did also seat a number of black jurors, both male and female. The first black juror that I struck[,] number 18, he was a black male. He had a history of traffic charges, i.e., not following the rules and he seemed a little jokey and laughey during qualifications. The second person that I struck was number 73, a black female, college student. I do not have a good experience with college students. Those jurors, I find them a little young and liberal and she was also very attractive, batting her eyelashes. And I thought perhaps she would take pity on the Defendant. Again, the next strike was juror 130, black female, also a college student. Again, I find college students to be liberal, I have not had a good experience with them on [juries]. And then finally number 4, number 164, a black female. I was informed that she actually knows a number of people in the Fairwood Apartments which is the incident location. I don't know what she has heard on the street, it has been three years, the streets talk. And that could swing either way but I just, just looking for a fair trial[,] I struck her.

In response, Blake asserted:

> Yes, Your Honor. Number 18 is 31-years-old, Judge. The fact that he is jokey and laughey, I just don't see that [as] a race neutral reason. He was no more social or less social. You had a chance to observe the jurors during voir dire as the Defense and the State did. He was no more, the behavior was nothing to be noted. That is obviously a pretextual reason. In regards to number 73, Your Honor, I would like to point out that number 73 is 25-years-old, Your Honor. And this batting eye-lashing

> thing sounds like shucking and jiving which we have already got case law on. So I mean, that is certainly not a race neutral reason. In regards to number 130, let me turn to that. She is 21-years-old, Judge. And we have other young people that are servers in such that, she readily put on the jury who would not have the maturity of a college student or the intelligence [sic] perhaps to get into college. The fact that they put the Wild Wing server on, of course she may not be interested in higher education, I think that belittles the statement that she made to the Court and I believe that was obviously pretextual and they were all emotional[ly] motivated, Your Honor. And I would ask that you strike a new jury.

The circuit court denied Blake's motion, stating:

> I am going to deny your motion, [counsel]. I do find that these are race neutral reasons. The history of traffic charges, and two being college students, the Wild Wing server who was seated and is 19-years-old is not a college student. And number 164, I do find that it has a race neutral reason given her potential knowledge of or having heard something about these events from the folks that live in that area. So thank you, your motion is respectfully denied.

Blake satisfied *Batson*'s first step by making the necessary prima facie showing that the challenges were based on race—four of the State's five peremptory challenges were used to strike black jurors, and Blake is also black. In addressing the second step of the *Batson* inquiry, the State explained its reasons for each of the four strikes. Blake then properly argued the State's explanations for striking jurors 18, 73, and 130 were pretextual. In denying Blake's motion, the circuit court addressed the reasons the State provided for striking each of the four challenged jurors and considered whether the reasons were pretextual based on Blake's claim that the State sat at least one similarly situated white juror. This is exactly what the third step of the *Batson* procedure necessitates. *See Giles*, 407 S.C. at 18, 754 S.E.2d at 263 ("If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the

opponent of the challenge has proved purposeful discrimination. The ultimate burden always rests with the opponent of the challenge to prove purposeful discrimination.").

As to the specifics of each of the four strikes, once the State explained that it struck Juror 164 because she knew and was familiar with several people from the apartment complex in the area of the shooting, Blake made no further argument as to Juror 164. And, Blake did not challenge the State's first reason for striking Juror 18—his history of traffic offenses. However, Blake did argue the "jokey and laughey" behavior referenced by the State was not a proper basis for a strike. *But see State v. Wilder*, 306 S.C. 535, 538, 413 S.E.2d 323, 325 (1991) ("A Solicitor may strike veniremen based on their demeanor and disposition."). Thus, the circuit court clearly acted within its discretion in accepting the State's race-neutral reasons for striking Jurors 18 and 164.

As for Jurors 73 and 130, while Blake makes a strong argument that the age of the college students matches the young age of the seated white Wild Wing server, youth was not the primary reason the assistant solicitor gave to support the State's striking of the two college students. The assistant solicitor was quite specific in her reasoning, explaining she found college students to be liberal, she had "not had a good experience with them" as jurors, and she was concerned the juror "batting her eyelashes" might take pity on Blake. *See Wilder*, 306 S.C. at 538, 413 S.E.2d at 325 (holding a party may strike a potential juror "based on their demeanor and disposition"); *People v. Perez,* 29 Cal.App.4th 1313, 1328, 35 Cal.Rptr.2d 103, 111 (1994) (finding limited life experience of prospective jurors who were college students justified prosecutor's exercise of peremptory challenges, rather than the prospective jurors' Hispanic origin). Mindful of our standard of review, we find the circuit court did not abuse its discretion in accepting the solicitor's explanations for striking the two college students. Still, as to Juror 73, while we fail to see how batting one's eyelashes equates to the clearly repugnant reference to "shucking and jiving," we acknowledge striking a juror because of her physical appearance could suggest purposeful discrimination in other contexts. *See State v. Tomlin*, 299 S.C. 294, 299, 384 S.E.2d 707, 710 (1989) (reversing defendant's conviction upon finding trial court failed to inquire into the State's explanation that the juror was struck because he "shucked and jived," which demonstrated the prosecutor's subjective intent to discriminate and clearly violated *Batson*)), *holding modified by State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996). But Blake did not challenge the strike on the basis of Juror 73's gender; thus, we need not further examine this

aspect of the strike. *See Shuler*, 344 S.C. at 615, 545 S.E.2d at 810 (referencing prohibition of strikes based on race or gender."); *but see Wilder*, 306 S.C. at 538, 413 S.E.2d at 325 (noting a proper strike may be based on "demeanor and disposition.").

Notably, the jury impaneled here was composed of six black jurors and six white jurors. *See Shuler*, 344 S.C. at 621, 545 S.E.2d at 813 ("[T]he composition of the jury panel is a factor that may be considered when determining whether a party engaged in purposeful discrimination pursuant to a *Batson* challenge."). Other than as discussed above, Blake failed to provide examples of seated jurors similarly situated to those the State excused. Accordingly, we find no error in either the circuit court's conducting of the *Batson* procedure or its finding that Blake did not demonstrate purposeful discrimination.

II. Opening the Door

Blake next argues the circuit court erred in allowing the State to cross-examine him about an unrelated domestic violence incident during which an investigator saw Blake dragging Dobson's older sister—the mother of Blake's child—from the woods by her hair.

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of 'a manifest abuse of discretion accompanied by probable prejudice.'" *State v. Dennis*, 402 S.C. 627, 635, 742 S.E.2d 21, 25 (Ct. App. 2013) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006)). An appellate court "will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion." *State v. Hawes*, 423 S.C. 118, 135, 813 S.E.2d 513, 522 (Ct. App. 2018) (quoting *State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012). Similarly, "[w]hether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge." *State v. Page*, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *State v. Makins*, 433 S.C. 494, 500–01, 860 S.E.2d 666, 670 (2021).

Pretrial, Blake questioned whether the State intended to introduce evidence of prior bad acts. The State responded:

> The only conviction that I see on his record is a 2014 public disorderly conduct[,] which does not fall under the rules to use against him. As far as prior bad acts, I do not intent to get into any, unless he should open the door[.] I do intent to ask some of the witnesses if they know what the relationship between Mr. Blake and Mr. Dobson is without getting into the details. They had some problems together. They did not get along, not going to go into the details of why they didn't get along. But any prior difficulties are animus between the parties, without getting into the details, are appropriate things to address with witnesses when we have an attempted homicide. It goes to motive and identity. And, again, not going into the details so it is not a 404(b) analysis. It is just a relevance analysis.

During his direct examination, Blake testified he has a one-year-old son (Nephew)[4] with Dobson's older sister, Delisha, but admitted he was also seeing another woman while in that relationship. Blake further testified that in April 2015, Dobson shot out the back window of Blake's car, likely because he was "running around with Delisha." Although Blake initially reported the incident to law enforcement and gave a statement, he chose not to pursue the charges. Defense counsel asked Blake about the April shooting and Blake's resolution of his conflict with Dobson:

> Q. Eventually did y'all have a discussion about that?
>
> A. Yes, sir. We came to a conclusion to wash off the situation.

[4] Blake's son was born on February 3, 2017; the child's birthdate is relevant because Blake claimed he and Dobson had settled their differences for the sake of the child prior to the shooting for which Blake was being tried. But the offenses for which Blake was on trial occurred on November 7, 2015—more than a year before Nephew's birth.

Q. Did you explain to him [Dobson] that, you know, you needed to see your baby?

A. Yes, sir.

Q. He's the uncle?

A. Yes, sir.

Q. So there, the better problem to start with. But whatever the problem was in [Dobson's] mind, did you believe it was solved?

A. Yes, sir.

At the conclusion of his direct examination, Blake was asked whether he thought "there would be anything wrong with a child spending time with his father" and whether that would be a normal thing to happen in society. Blake agreed there would be nothing wrong with that and it would indeed be normal.

On cross-examination, Blake conceded his problems with Dobson had nothing to do with Blake's fathering of Nephew and admitted the child was not born until 2017, nearly two years after Dobson shot at Blake's car and some fifteen months after the shooting that injured Lakes and her baby.

Defense counsel again asked on redirect about Blake's relationship with Delisha and its relevance to the animus with Dobson:

Q. Okay. And the truth is, you've been running around with Delisha for years?

A. Yes, sir.

Q. And her brother knew that?

A. Yes, sir.

Q. Okay. And is that what he was mad about?

A. Could have been.

Q. Okay. But there shouldn't have been any problems in November?

A. No, sir.

The State requested re-cross and inquired:

Q. [Defense counsel] asked you if [Dobson] could have possibly been mad about you running around on his sister, Lisha Dobson, right?

A. Yes ma'am. He did.

Q. Right. And so you said, yeah, that's probably what he was mad about, correct?

A. I said could have been.

Q. Could have been? So it could have been something else, too, right?

A. Like?

Q. I'm glad you asked me. It could have been when Investigator Michael Thomas found you dragging her out of the woods by her hair, correct?

Blake immediately objected, and the circuit court excused the jury. Referencing his pretrial inquiry regarding whether the State intended to ask about prior bad acts, Blake emphasized the solicitor's response that she did not intend to raise such unless Blake opened the door. Blake argued the State misled the court, there was no evidence to support the investigator's allegation, and the State was trying to offer extrinsic evidence to prove a point from another witness. However, the State countered that Blake opened the door when he testified Dobson could have been

angry that Blake was running around on Delisha and declined to marry her. The solicitor noted, "[Blake] himself asked me like what else is there. He was there. He knows. This is proper cross-examination. This explores the relationship between the parties and the motive that [Dobson] had and Mr. Blake has in shooting [Dobson]." After hearing further arguments, the circuit court asked,

> Tell me, [counsel] how you didn't open the door when you asked all manner of questions about the reason [Dobson], wasn't he upset with you because you were running around on his sister and had a baby with his sister while [you were] in another relationship. How does that not open the door?

The parties further discussed the prior incident, including who witnessed it and its timing. The circuit court then allowed the question but cautioned, "I'm not giving free rein on this. This is for a very narrow purpose."[5]

Once the jury returned, the solicitor asked, "All right. So [Mr. Blake], the last question to you was that [Dobson]'s problem with you could not have possibly arisen from how you treated his sister and you at one point were pulling her by her hair from the wood line?" Blake responded:

> A. How would he know how I am treating his sister? How [does] he know what our personal life, what we have going on?
>
> Q. Okay.
>
> A. Second, do you have a statement or proof of me dragging Delisha by her hair? You got me on camera doing that to her? Somebody seeing me do that to her? Did she write, tell you that I did that to her?

[5] During this discussion, the State noted it also planned to present rebuttal testimony from the investigator who witnessed the hair dragging incident; however, the circuit court declined to allow such testimony.

During the redirect following this inquiry, Blake's counsel emphasized the State had shown Blake no statement, video, or police report to support its questioning.

"When an accused takes the stand, he becomes subject to impeachment, like any other witness." *Hawes*, 423 S.C. at 135, 813 S.E.2d at 522 (quoting *State v. Major*, 301 S.C. 181, 183, 391 S.E.2d 235, 237 (1990)). Had the State initially sought to question Blake about "dragging [Delisha] out of the woods by her hair," without Blake's own testimony, such would have been inadmissible under Rules 403 and 404. But because Blake testified Dobson previously shot at him, implied he was clueless as to exactly why he and Dobson had problems, and indicated the two men had resolved their differences for the sake of a baby who had not yet been born, the circuit court did not abuse its discretion in concluding Blake opened the door for the State's question addressing a possible reason for the enmity between the two men. *See State v. Culbreath*, 377 S.C. 326, 333, 659 S.E.2d 268, 272 (Ct. App. 2008) (reiterating "a defendant may open the door to what would be otherwise improper evidence through his own introduction of evidence or witness examination").

The State was permitted to respond to Blake's incomplete—and demonstrably false—explanation regarding his conflict with Dobson by eliciting testimony to show Blake's problems with Dobson did not begin with Dobson shooting at him. To the contrary, the prior shooting was merely one incident in the ongoing conflict between the two men, going at least as far back as Blake's assault on Dobson's sister. *See State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) ("Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." (quoting *State v. Albert*, 277 S.E.2d 439, 441 (N.C. 1981))). The State sought to question Blake about the prior assault in an effort to discern the true source of the hostile relationship only after Blake introduced evidence of Dobson's prior act of shooting at Blake and the purported resolution of the matter.

Finally, the State's limited cross-examination addressing the prior assault on Dobson's sister became necessary only after Blake's direct examination effort to demonstrate his good character as a peaceful and family-focused man. Blake claimed that rather than press charges against Dobson, he sought to make peace with him for Nephew's sake. This was clearly false, because Nephew had not yet been born and because Blake told others at the time of the incident that he would

"take care of it." For these reasons, we find the circuit court did not abuse its discretion in permitting the State's limited cross-examination of Blake regarding this particular conduct for the "very narrow purposes" of challenging Blake's testimony and establishing the context of his problematic relationship with Dobson. *See State v. Young*, 378 S.C. 101, 106, 661 S.E.2d 387, 389 (2008) ("[W]hen the accused offers evidence of his good character regarding specific character traits relevant to the crime charged, the solicitor has the right to cross-examine him as to particular bad acts or conduct.").

Conclusion

Blake's convictions for attempted murder, ABHAN, and possession of a weapon during the commission of a violent crime are

AFFIRMED.

WILLIAMS, C.J. and LOCKEMY, A.J., concur.