The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

THE MATTER OF JOHN G. O'DAY, SR., PETITIONER

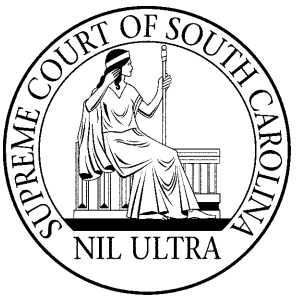
Petitioner was indefinitely suspended from the practice of law. *In the Matter of John G. O'Day, Sr.,* 351 S.C. 221, 569 S.E.2d 337. Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P.O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
July 8, 2020



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 27
July 8, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

None

UNPUBLISHED OPINIONS

None

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5722-State v. Herbie V. Singleton, Jr.	Pending
5723-Shon Turner v. MUSC	Pending
5725-In the Matter of Francis A. Oxner	Pending
5726-Chisolm Frampton v. S.C. Dep't of Natural Resources	Pending
5730-Patricia Damico v. Lennar Carolinas	Denied 07/01/20
5731-Jericho State v. Chicago Title	Pending
2020-UP-077-Charlton Davis v. SCDPPPS	Pending
2020-UP-103-Deborah Harwell v. Robert Harwell	Pending
2020-UP-108-Shamsy Madani v. Rickey Phelps	Pending
2020-UP-118-State v. Samuel Lee Broadway	Pending
2020-UP-128-State v. David Scott Bagwell	Pending
2020-UP-129-State v. Montrell Deshawn Troutman	Pending
2020-UP-133-Veronica Rodriguez v. Peggy Evers	Pending
2020-UP-134-Melissa Jones v. Murray Jones (2)	Pending
2020-UP-136-State v. Eric D. McCall	Pending
2020-UP-144-Hubert Brown v. State	Pending
2020-UP-148-State v. Ronald Hakeem Mack	Pending
2020-UP-150-Molly Morphew v. Stephen Dudek	Pending
2020-UP-151-Stephen Dudek v. Thomas Ferro (Morphew 2)	Pending
2020-UP-155-Trenholm Building v. Rajarathnam S. Aluri	Pending
2020-UP-157-Thomas Thompson v. SCDPPPS	Pending
2020-UP-158-Amy Marcello v. Patrick Marcello	Pending

2020-UP-169-State v. James Alfonza Biggs, III Pending

2020-UP-182-State v. Arsenio Colclough Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5588-Brad Walbeck v. The I'On Company Pending

5641-Robert Palmer v. State et al. Pending

5659-State v. Fabian Lamichael R. Green Pending

5671-SC Lottery Commission v. George Glassmeyer Pending

5694-State v. Rickey Henley Pending

5696-The Callawassie Island v. Ronnie Dennis Pending

5697-State Farm v. Beverly Goyeneche Pending

5698-Gunjit Singh v. Simran Singh Pending

5699-PCS Nitrogen, Inc. v. Continental Casualty Co. Pending

5700-Gene Schwiers v. SCDHEC Pending

5703-David Lemon v. Mt. Pleasant Waterworks Pending

5705-Chris Katina McCord v. Laurens County Health Care System Pending

5707-Pickens County v. SCDHEC Pending

5710-Russell Carter v. Bruce Bryant Pending

5711-Carla D. Garrison v. Target Corporation Pending

5714-Martha Fountain v. Fred's Inc. Pending

2019-UP-178-Arthur Eleazer v. Leslie Hughey Pending

2019-UP-295-State v. Anthony M. Enriquez Pending

2019-UP-306-Alicia Rudick v. Brian Rudick	Pending
2019-UP-331-Rajinder Parmar v. Balbir S. Minhas	Pending
2019-UP-336-Christopher Maddaloni v. Jacqueline Pidanick	Pending
2019-UP-337-Christopher Maddaloni v. Jacqueline Pidanick	Pending
2019-UP-383-Lukas Stasi v. Mallory Sweigart	Pending
2019-UP-386-John Willie Mack, Sr. v. State of South Carolina	Pending
2019-UP-391-State v. Brian Everett Pringle	Pending
2019-UP-393-The Callawassie Island v. Gregory Martin	Pending
2019-UP-396-Zachary Woodall v. Nicole Anastasia Gray	Pending
2019-UP-399-Tracy Pracht v. Gregory Pracht (2)	Pending
2019-UP-401-Stow Away Storage v. George W. Sisson (2)	Pending
2019-UP-415-David Deen v. Deborah Deen	Pending
2019-UP-416-Taliah Shabazz v. Bertha Rodriguez	Pending
2020-UP-001-State v. Guadalupe G. Morales	Pending
2020-UP-003-State v. Shane Alexander Washington	Pending
2020-UP-004-Emory J. Infinger and Assoc. v. N. Charleston Com. Ctr.	Pending
2020-UP-014-Ralph Williams v. Patricia Johnson	Pending
2020-UP-017-State v. Emory Warren Roberts	Pending
2020-UP-018-State v. Kelvin Jones	Pending
2020-UP-020-State v. Timiya R. Massey	Pending
2020-UP-026-State v. Tommy McGee	Pending

2020-UP-030-Sunset Cay v. SCDHEC	Pending
2020-UP-031-State v. Alqi Dhimo	Pending
2020-UP-038-State v. Vance Ross	Pending
2020-UP-072-State v. Brenda L. Roberts	Pending

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

First Citizens Bank and Trust Company, Inc.,
Respondent,

v.

Ronald D. Taylor and Ted D. Smith, Defendants,

Ex Parte: Smith Family, LLC, WHS Properties, LLC,
and Wanda H. Smith, Appellants.

Appellate Case No. 2017-001700

Appeal From Greenville County
Charles B. Simmons, Jr., Circuit Court Judge

Opinion No. 5739
Submitted February 18, 2020 – Filed July 8, 2020

AFFIRMED

Randall Scott Hiller, of Greenville, for Appellants.

Joey Randell Floyd and Chelsea Jaqueline Clark, both of Bruner Powell Wall & Mullins, LLC, of Columbia, for Respondent.

THOMAS, J.: Smith Family, LLC, WHS Properties, LLC, and Wanda H. Smith (Appellants) appeal a master-in-equity's order based on First Citizens Bank and Trust Company, Inc.'s initiation of supplemental proceedings to collect on an order of judgment, arguing the master erred in (1) adjudicating a Statute of Elizabeth (SOE) claim as part of supplementary proceedings; (2) adjudicating facts without the opportunity for Appellants to present evidence; (3) not ruling on whether the subject property was exempt; (4) granting a motion to join Appellants; and (5) finding subject matter jurisdiction to add parties. We affirm.

FACTS

On May 22, 2008, Ronald Taylor and Ted Smith[1] executed a note in favor of First Citizens in exchange for a $52,526.07 loan. Taylor and Smith failed to make the required payments, and on July 28, 2014, First Citizens filed an action against them. By order filed October 1, 2015, the circuit court entered a judgment of $74,843.23 against Taylor and Smith. Taylor and Smith appealed to this court, which affirmed. *First Citizens Bank & Trust Co. v. Taylor*, Op. No. 2016-UP-471 (S.C. Ct. App. filed Nov. 9, 2016).

After an execution was issued on October 27, 2015, and a *nulla bona* return was made to the execution, the matter was referred to the master, and First Citizens filed a petition for supplemental proceedings. The master held a hearing on January 23, 2017.

Smith testified he "lived off of" his social security income and had no other sources of income or bank accounts. Smith admitted his wife owned an LLC, Smith Family, LLC, that had one bank account at United Community Bank (UCB). Taylor similarly testified he had no bank accounts and "lived off of" his social security income. First Citizens moved for additional discovery, which the master granted.

First Citizens issued subpoenas and motions to compel, seeking documents regarding Smith Family, LLC. Smith, on behalf of himself and Appellants, moved to quash as to the UCB account belonging to Smith Family, LLC. After a hearing

[1] Ted Smith is married to Wanda H. Smith, one of the appellants.

and based on documents provided by UCB, the master denied the motion to quash by order filed May 22, 2017. On May 24, 2017, Smith and Mrs. Smith were deposed.

In his deposition, Smith testified he had an accounting degree and an MBA, was 69 years old, and had worked in banking and the building business until 2008. He asserted he set up between fifteen and twenty LLCs during his business career, and he had three primary companies at the time he quit in 2008.

Smith admitted he used the UCB account for personal use, such as to pay bills. He also admitted he was a signatory on the account. At the time of his deposition, the UCB account had a balance of $380,000.

Smith testified he was a realtor and a broker-in-charge of two real estate companies. He admitted he transferred his personal funds into the Smith Family, LLC, including the following four deposits of his money into the UCB account:

1) March 23, 2016: Inheritance of $15,789.27.[2]
2) July 14, 2016: Real estate commission for $16,800.
3) August 17, 2016: Real estate commission for $20,250.
4) October 27, 2016: Compensation for managing a project known as the "Easley Building" of $28,187.49.

These deposits totaled $81,026.76.

Smith also admitted Mrs. Smith purchased silver from the account in February 21, 2016, for $135,374. The Smiths also purchased gold using money from the account. Smith estimated they owned approximately $300,000 in gold and silver at the time of the depositions. Smith acknowledged his money was "mixed in with" the Smith Family, LLC money.

Mrs. Smith testified in her deposition that she majored in Art in college, worked for a few years in administrative/retail jobs, worked for fifteen years for her father's construction company, and then became a stay-at-home mother to the Smiths' two children. She testified that throughout the forty-two years of their

[2] $15,664.27 distribution from his mother's estate plus $125 payment from the personal representative.

marriage, she never worked for any of her husband's businesses. According to Mrs. Smith, she and Smith are now retired, although Smith looks for real estate deals. Smith always handled the family finances, and Mrs. Smith was only aware of one BB&T bank account.

As to Smith Family, LLC, Mrs. Smith testified her husband managed it; she did not know where it banked; she did not know what assets it held; she was unaware of whether there were corporate records and that the LLC had been subpoenaed; and she knew nothing about the purchase of gold and/or silver. She further testified Smith had full and exclusive control of all bank accounts of the LLC. Smith acknowledged she was the sole owner of the LLC and Smith was the sole manager; however, she insisted the money in the LLC was solely hers although she did not know where it came from. During cross-examination, she testified the money came from earnings she saved while working "since [she] was a teenager."

Mrs. Smith testified WHS Properties, LLC (WHS), one of the appellants in this case, was her company, but she admitted Smith organized it in 2008. Mrs. Smith testified WHS owned a shopping center that had been sold; the proceeds were transferred to Smith Family, LLC; and WHS was now "closed." She admitted Smith suffered financial hardships during the recession in 2008 and 2009.

Following the depositions, First Citizens moved to join Appellants as parties. First Citizens also moved to execute on funds held by Appellants. The master entered a consent order prohibiting Smith Family, LLC from selling, disposing of, or otherwise transferring the gold and silver.

A hearing on the motions to join the parties and execute on the funds was held on June 23, 2017. First Citizens argued Rhino Realty 1, Fund 1, LLC, changed its name to WHS Properties, LLC, in 2008 when Smith closed most of his businesses. First Citizens argued the judgment was obtained in 2015; the funds were transferred into the Smith Family, LLC account in 2016; and the purchases of gold and silver were made in 2016. At the time of the hearing, Smith Family, LLC was actively engaged in a project with a church, which obligated Smith Family, LLC to build a building. According to First Citizens, Smith was not retired; rather, he was actively involved in developing property. Furthermore, First Citizens argued, the SOE applied because property was transferred to a third-party, the Smith Family, LLC, to avoid the judgment. The master granted the motion to add the parties during the hearing and took the other issues under advisement.

By written order filed July 5, 2017, the master granted the motion to add the parties. The master found Smith's deposits totaling $81,026.76 of his personal funds into the Smith Family, LLC, bank account constituted "transfers without valuable consideration" or in the alternative, fraudulent transfers made with the actual intent of defrauding creditors. Thus, the master ordered Appellants to pay First Citizens $81,026.76 toward its judgment against Smith. The master declined to seize or proceed against other assets owned by Appellants, "based upon substantive due process rights of these parties . . . [, finding] such relief is more appropriately sought through [First Citizens] bringing an independent action against them."

Appellants moved to reconsider, and First Citizens moved to compel payment. By order filed August 7, 2017, the master denied the motion to reconsider and held the motion to compel in abeyance, stating "[i]n the event that Smith Family, LLC has not paid the money . . . this Court will schedule and hear [the motion to compel] as soon thereafter as reasonably possible." Appellants filed a motion for supersedeas with the master and filed a notice of appeal with this court. By order filed September 6, 2017, the master required Appellants to transfer $125,000 in gold to First Citizens, after its verification, to be held in a safety deposit box until Appellants paid the $81,026.76 by December 31, 2017. The master retained jurisdiction over the motion for supersedeas. First Citizens moved to hold Appellants in contempt when they failed to comply with the September 6, 2017 order by allegedly tendering only $91,438.76 worth of gold. By order filed October 20, 2017, the master ordered Smith to liquidate the gold within fifteen days and pay First Citizens by check to be held by the clerk of court. The master held in abeyance First Citizen's request for fees for authentication and transportation of the gold. According to First Citizens, the funds are being held by the court during the pendency of the appeal.

STANDARD OF REVIEW

"A clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth." *Oskin v. Johnson*, 400 S.C. 390, 396, 735 S.E.2d 459, 463 (2012). "An action to set aside a conveyance under the Statute of Elizabeth is an equitable action, and a de novo standard of review applies." *Id.* at 397, 735 S.E.2d at 463. "On appeal from an action in equity, [the appellate court] may find facts in accordance with its view of the preponderance of

the evidence." *Walker v. Brooks*, 414 S.C. 343, 347, 778 S.E.2d 477, 479 (2015). "However, this broad scope of review does not require this court to disregard the findings at trial or ignore the fact that the [master] was in a better position to assess the credibility of the witnesses." *Laughon v. O'Braitis*, 360 S.C. 520, 524-25, 602 S.E.2d 108, 110 (Ct. App. 2004).

"The interpretation of a statute is a question of law." *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) (citing *CFRE, L.L.C. v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). "This Court may interpret statutes, and therefore resolve this case, 'without any deference to the court below.'" *Brock v. Town of Mount Pleasant*, 415 S.C. 625, 628, 785 S.E.2d 198, 200 (2016) (quoting *CFRE*, 395 S.C. at 74, 716 S.E.2d at 881).

LAW/ANALYSIS

1. Supplementary Proceedings[3]

Appellants argue the master erred in adjudicating the SOE claim as part of a supplementary proceeding and making factual findings without the opportunity for Appellants to present evidence, which Appellants argue violated their rights to due process. Appellants maintain the master erred by adding them as parties to a supplementary proceeding, arguing First Citizens was required to file a separate action, including pleading the SOE, conducting discovery, and affording Appellants a trial.

There is clear authority to reach assets of a judgment debtor in the hands of a third party; however, the issue in this case is whether the supplementary proceedings met the statutory requirements governing the procedure to reach the assets, and whether this supplementary proceeding provided due process to Appellants. "If a judgment is unsatisfied, the judgment creditor may institute supplementary proceedings to discover assets." *Johnson v. Serv. Mgmt., Inc.*, 319 S.C. 165, 167, 459 S.E.2d 900, 902 (Ct. App. 1995), *aff'd*, 324 S.C. 198, 478 S.E.2d 63 (1996). "Supplementary proceedings are equitable in nature." *Ag-Chem Equip. Co. v. Daggerhart*, 281 S.C. 380, 383, 315 S.E.2d 379, 381 (Ct. App. 1984). "Proceedings supplementary to execution . . . provid[e] for examination of the judgment debtor for the purpose of discovering property out of which the judgment

[3] Like Appellants did in their brief, we combine the first two arguments.

against him may be satisfied . . . ." *Lynn v. Int'l Bhd. of Firemen & Oilers*, 228 S.C. 357, 362, 90 S.E.2d 204, 206 (1955).

South Carolina Code Section 15-39-410 provides the court "may order any property of the judgment debtor, not exempt from execution, *in the hands either of himself or any other person or due to the judgment debtor*, to be applied toward the satisfaction of the judgment . . . ." S.C. Code Ann. § 15-39-410 (2005) (emphasis added). Our code also provides a judgment creditor with the ability to "arrest" funds in the hands of a third party if alleged by a creditor to belong to the judgment debtor and to hold the funds until the true ownership is decided. S.C. Code Ann. §§ 15-39-310 to -320 (2005); *see Deer Island Lumber Co. v. Virginia-Carolina Chem. Co.*, 111 S.C. 299, 303, 97 S.E. 833, 834 (1919) (describing the ability to arrest funds). Section 27-23-10(A), the SOE, provides as follows:

> Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, and execution which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken . . . to be clearly and utterly void . . . .

S.C. Code Ann. § 27-23-10(A) (2007). Finally, however, Section 15-39-460 provides:

> If it appears that a person or corporation alleged to have property of the judgment debtor or indebted to him claims an interest in the property adverse to him or denies the debt such interest or debt shall be recoverable *only in an action against such person or corporation by the receiver.*

S.C. Code Ann. § 15-39-460 (2005) (emphasis added).

Appellants cite *Wannamaker v. Bryant*, 165 S.C. 107, 110, 162 S.E. 779, 780 (1932) (quoting *Palmetto Bank & Trust Co. v. McCown-Clark Co.*, 143 S.C. 98, 103, 141 S.E. 155, 156 (1928)), in which our supreme court held the court had no authority to "summarily dispose of the issue of ownership, or to order property claimed by another to be applied towards the satisfaction of an execution against the judgment debtor." First Citizens argues *Wannamaker* is distinguishable.

In *Wannamaker*, a wife transferred real estate to her husband to avoid a creditor. *Id.* at 108, 162 S.E. at 779. The creditor filed an action against the husband and the wife to set aside the deed, alleging a fraudulent conveyance. *Id.* Thereafter, the creditor filed "proceedings supplementary to the execution." *Id.* The husband was not made a party to the supplementary proceedings. *Id.* At the hearing in the supplementary proceedings, the trial court found the transfer had been made "to keep the bank from getting the property." *Id*. The trial court ordered the property was subject to the satisfaction of the creditor's judgment. *Id.* at 108−09, 162 S.E. at 779−80. On appeal, our supreme court reversed, recognizing the husband had not been made a party to the supplemental proceedings. *Id.* at 110, 162 S.E. at 781. The court noted its judgment was "without prejudice to the right of the [creditor] to proceed with his action to set aside the deed . . . ." *Id.* at 111, 162 S.E. at 781.

Appellants also rely on *Palmetto Bank & Trust Co. v. McCown-Clark Co.*, 143 S.C. 98, 141 S.E. 155 (1928). In *Palmetto Bank*, the corporate judgment debtor was named as the beneficiary on a life insurance policy of one of its individual owners. *Id.* at 100, 141 S.E. at 155. The corporation denied ownership of the funds, stating the individual owner had paid the premiums on the policy, and maintained the proceeds belonged to the owner's wife. *Id.* After supplementary proceedings, the circuit court granted judgment in the creditor's favor. *Id.* at 101, 141 S.E. at 155. Our supreme court reversed, finding as follows:

> It appears manifestly intended by the [statutes] that *a third person claiming property rights* which have not been passed upon in the original action under which the execution is issued should not be deprived either of his day in court or of the right of trial in the form prescribed by law for a regular judicial procedure. No provision appears that either expressly or by implication gives authority to the court to summarily dispose of the issue of

> ownership, or to order property claimed by another to be applied towards the satisfaction of an execution against the judgment debtor. Nor can an appearance and return to such a rule, when made in obedience to the order of the court, be given effect as consent to a mode of trial not authorized by the provisions of the statutes. On the other hand, it must also be recognized that no limitation is imposed upon the discretion of the circuit judge in keeping the property within the control of the court, by forbidding its transfer or other disposition.

Id. at 103, 141 S.E. at 156 (emphasis added). The court in *Palmetto Bank* relied on *Deer Island*, quoting: "It is true the issue of ownership may not be finally determined, except the Deer Island Lumber Company shall be heard." *Id.* (quoting *Deer Island*, 111 S.C. at 302, 97 S.E. at 834). However, in *Deer Island*, the third party (Deer Island Lumber) claiming ownership over the funds alleged to belong to the judgment debtor moved to intervene in the supplementary proceedings. *Deer Island*, 111 S.C. at 302, 97 S.E. at 833. The judgment debtor appealed a temporary injunction restricting a bank from releasing the funds. *Id.* The circuit court appointed a receiver and granted the motion to intervene. *Id.* On appeal, our supreme court affirmed. *Id.* at 305, 97 S.E. at 834.

First Citizens distinguishes *Palmetto Bank*, arguing Appellants did not claim ownership of the deposits made by Smith, the judgment debtor. Instead, Smith's uncontradicted deposition testimony stated the funds at issue were his own. Furthermore, in *Wannamaker*, the husband was not made a party to the supplementary proceedings. *Wannamaker*, 165 S.C. at 108, 162 S.E. at 779. In this case, Appellants were joined and had the opportunity to participate in the proceedings. The court in *Palmetto Bank* prohibited a summary disposition of the issue of ownership, which is not the case here. *See Palmetto Bank*, 143 S.C. at 103, 141 S.E. at 156. Finally, in *Deer Island*, the court permitted a motion to intervene, implying a continuation of the supplementary proceedings, rather than a separate action, could be used to determine ownership of the funds as long as the third party alleging ownership had the opportunity to be heard. *Deer Island*, 111 S.C. at 302, 97 S.E. at 833.

In this case, Appellants had the opportunity to dispute the funds belonged to Smith, and Smith's own testimony was that the funds at issue were his funds deposited

into Smith Family, LLC's account. Appellants were on notice and participated throughout the proceedings, during discovery, depositions, hearings, and judicial review. Appellants could have presented rebuttal evidence and had every opportunity to be heard. *See Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review."). As the master found in his order denying Appellants' motion for reconsideration,

> In terms of Smith Family, LLC's ability to present evidence and testimony, this Court notes that depositions were taken in conjunction with the Supplemental Proceedings, and Counsel for Smith Family, LLC participated in the depositions. Moreover, [Appellants' counsel] presented this Court with his arguments and had the opportunity to present evidence at the Motions hearing on June 23, 2017, if Smith Family, LLC wanted to present evidence. However, in light of the prior sworn testimony at the January 23, 2017 Supplemental Proceedings hearing, the admissions by Ted D. Smith in his deposition, along with the deposition testimony of Wanda H. Smith, it is difficult to imagine what, if any, evidence or testimony that Smith Family, LLC and/or Ted D. Smith could have presented to dissuade this Court from finding the deposit of Ted D. Smith's personal funds into the bank account of Smith Family, LLC as being fraudulent transfers.

We affirm, finding the master did not err in applying either the SOE or section 15-39-410 in a supplementary proceeding and there was no due process violation.[4]

[4] Without citation to authority, Appellants summarily address the master's findings that the transfers were fraudulent conveyances. We decline to address this issue. *See Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) ("Issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal.").

2. Exemption

Appellants argue the master erred in finding the funds were transferred in violation of the SOE without determining if they were exempt from execution under section 15-39-410. Appellants maintain the master only has authority over non-exempt property and section 15-41-30 provides a minimum exemption of $10,000, which was not considered by the master.

Appellants did not raise this issue to the master at the hearing, the master did not rule on it, and Appellants raised it for the first time in their motion for reconsideration. Thus, it is not preserved for appellate review. *See Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) ("[A] party cannot use a Rule 59(e)[, SCRCP] motion to advance an issue the party could have raised to the [trial] court prior to judgment, but did not."); *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial.").

3. Subject Matter Jurisdiction and Joinder of Appellants

Appellants argue the master lacked subject matter jurisdiction to add parties to an order for discovery of property supplemental to execution of judgment; thus, the master erred in granting the motion for joinder. We disagree.

"Whether a court has subject matter jurisdiction is a question of law we review de novo." *Deborah Dereede Living Tr. dated Dec. 18, 2013 v. Karp*, 427 S.C. 336, 346, 831 S.E.2d 435, 441 (Ct. App. 2019). "[S]ubject matter jurisdiction refers to a court's constitutional or statutory power to adjudicate a case." *Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007). "Stated somewhat differently, 'subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong.'" *Id.* (quoting *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005)). "It is well-settled that issues relating to subject matter jurisdiction may[ ]be raised at any time." *Bardoon Props., NV v. Eidolon Corp.*, 326 S.C. 166, 168, 485 S.E.2d 371, 372 (1997).

A master's authority to determine issues referred to him by the circuit court is a question of subject matter jurisdiction, which "may be raised at any time, including on appeal." *Normandy Corp. v. S.C. Dep't of Transp.*, 386 S.C. 393, 403, 688 S.E.2d 136, 141 (Ct. App. 2009). "Pursuant to Rule 53, SCRCP, a master has no power or authority except that which is given to him by the order of reference." *Bunkum v. Manor Props.*, 321 S.C. 95, 98, 467 S.E.2d 758, 760 (Ct. App. 1996). "When a case is referred to a master, Rule 53(c)[, SCRCP] gives the master the power to conduct hearings in the same manner as the circuit court, unless the order of reference specifies or limits his powers." *Smith Cos. of Greenville, Inc. v. Hayes*, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993). Rule 69, SCRCP provides that "proceedings supplementary to and in aid of a judgment . . . shall be as provided by law[,]" and authorizes a judgment creditor to "examine any person . . . in the manner provided . . . for obtaining discovery."

In this case, the circuit court's order of reference ordered Taylor and Smith to appear before the master "TO SHOW CAUSE why [their] property should not be applied towards satisfaction of the Judgment" and referred the case to the master with the authority to "entertain and rule upon all motions necessary to dispose of this matter, to include but not limited to, motions to dismiss, motions to appoint Receiver, motions to continue the matter, and motions to sell all or certain property of judgment debtor in satisfaction of [First Citizen's] debt and has authority to enter a Final Order."

We find the master acted within his subject matter jurisdiction in joining Appellants in the supplementary proceedings, in applying the SOE and section 15-39-410 in determining the ownership of the funds, and in ordering the sale of the gold and silver to satisfy the judgment. The type of procedure used, whether a supplementary proceeding or a new action, does not affect the master's power to hear this type of case. *See Gentry*, 363 S.C. at 100, 610 S.E.2d at 498 (noting "subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong").

CONCLUSION

Based on the foregoing, the master's order is

AFFIRMED.

HUFF and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Public Interest Foundation, and William B. DePass, Jr., individually, and on behalf of all others similarly situated, Appellants,

v.

The City of Columbia, Richland County, and Fairfield County, Respondents.

Appellate Case No. 2017-000617

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 5740
Heard March 17, 2020 – Filed July 8, 2020

AFFIRMED

James G. Carpenter and Jennifer J. Miller, both of Carpenter Law Firm, PC, of Greenville, for Appellants.

Burnet Rhett Maybank, III and James Peter Rourke, both of Nexsen Pruet, LLC, of Columbia, for Respondent the City of Columbia.

Ray E. Jones and Walter Hammond Cartin, both of Parker Poe Adams & Bernstein, LLP, of Columbia, for Respondents Richland County and Fairfield County.

LOCKEMY, C.J.: The South Carolina Public Interest Foundation and William DePass, Jr. (collectively, Appellants) appeal the grant of summary judgment in favor of the City of Columbia, Richland County, and Fairfield County (collectively, Respondents). The circuit court found the inclusion of residential student dormitories in a multi-county industrial and business park and the granting of special source revenue credits (tax credits) to the dormitories does not violate the South Carolina Constitution or various statutory provisions. We affirm the circuit court's order of summary judgment.

FACTS

In 2003, Richland and Fairfield counties entered into an agreement governing the development of the I-77 Corridor Regional Industrial Park (the Park). The Park was developed under section 4-1-170 of the South Carolina Code (Supp. 2019)[1] and article VIII, section 13(D) of the South Carolina Constitution,[2] and it received tax incentives. The City of Columbia joined the agreement in 2014 by passing ordinances that allowed private developers to construct multi-story student dormitories as part of the Park.

Appellants filed a complaint for a declaratory judgment, alleging article VIII, section 13(D) of the South Carolina Constitution and the enabling statute, section 4-1-170, did not authorize Respondents to include residential dormitories in a multicounty business and industrial park. The parties filed cross-motions for summary judgment.

The circuit court granted summary judgment in favor of Respondents. The circuit court found private dormitories are not residential, may be placed within an industrial or business park, and are commercial establishments that fall within the intent of the constitutional and statutory provisions. The court noted the dormitories are taxed as commercial properties and not "legal residences" under

[1] § 4-1-170 (providing counties may develop industrial or business parks by agreement).

[2] S.C. Const. art. VIII, § 13(D) (providing "[c]ounties may jointly develop an industrial or business park with other counties within the geographical boundaries of one or more of the member counties").

the constitution because the dormitories are not owner-occupied. The court stated the dormitories are engaged in commercial "business" activity by leasing and providing specific dormitory-related services.

ISSUE ON APPEAL

Does the inclusion of student dormitories in a business or industrial park and the granting of tax credits to the dormitories violate the South Carolina Constitution and enabling statutes?

STANDARD OF REVIEW

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Rule 56(c), SCRCP, provides that summary judgment shall 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." "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc*., 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011).

In this case, no material facts are disputed because the parties stipulated the facts. Therefore, we need not determine whether there are genuine issues of fact; instead, we are only concerned with the resolution of the questions of law. *See S.C. Pub. Interest Found. v. Greenville County*, 401 S.C. 377, 385, 737 S.E.2d 502, 506 (Ct. App. 2013).

LAW/ANALYSIS

Richland and Fairfield Counties argue Appellants lack standing. As Appellants's claims fail on the merits, we decline to address the question of standing. *See Bodman v. State*, 403 S.C. 60, 69, 742 S.E.2d 363, 367 (2013) (electing not to address standing when the party's claims will fail on the merits).

This appeal centers on the meaning of "industrial or business" in the application of the statute. Appellants contend the student dormitories are residential and do not

fall within the definition of "industrial or business." We hold these dormitories are commercial enterprises that fall within the definition of "business."

The South Carolina Constitution provides for the establishment of industrial or business parks as follows:

> (D) Counties may jointly develop an *industrial or business park* with other counties within the geographical boundaries of one or more of the member counties. The area comprising the parks and all property having a situs therein is exempt from all ad valorem taxation. The owners or lessees of any property situated in the park shall pay an amount equivalent to the property taxes or other in-lieu-of payments that would have been due and payable except for the exemption herein provided. The participating counties shall reduce the agreement to develop and share expenses and revenues of the park to a written instrument which is binding on all participating counties.

S.C. Const. art. VIII, § 13(D) (emphasis added). The correlating statutory provision provides:

> (A) By written agreement, counties may develop jointly an *industrial or business* park with other counties within the geographical boundaries of one or more of the member counties as provided in Section 13 of Article VIII of the Constitution of this State. The written agreement entered into by the participating counties must include provisions which:
> (1) address sharing expenses of the park;
> (2) specify by percentage the revenue to be allocated to each county;
> (3) specify the manner in which revenue must be distributed to each of the taxing entities within each of the participating counties.

S.C. Code Ann. § 4-1-170(A) (Supp. 2019) (emphasis added).

When a statute is unambiguous we must apply the statute as it is written. *See, e.g.*, *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Whe[n] 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.").

"Whe[n] a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning." *Berkeley Cty. Sch. Dist. v. S.C. Dep't of Revenue*, 383 S.C. 334, 345, 679 S.E.2d 913, 919 (2009) (quoting *Lee v. Thermal Eng'g Corp.*, 352 S.C. 81, 91-92, 572 S.E.2d 298, 303 (Ct. App. 2002)); *see also Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 144, 750 S.E.2d 65, 71 (2013) (relying on *Black's Law Dictionary* and *Merriam-Webster's Collegiate Dictionary* to provide the meaning of a word not defined in the statute).

Black's Law Dictionary defines "business" as "[a] commercial enterprise carried on for profit." *Business*, *Black's Law Dictionary* (11th ed. 2019). *The American Heritage College Dictionary* defines "business" as a "[c]ommercial, industrial, or professional dealings" and as a "[c]ommercial enterprise or establishment." *Business*, *The American Heritage College Dictionary* (3d ed. 1997).

Here, the parties stipulated the dormitories "engage in the continuous activity of letting beds to students through the entering of a lease or other contractual arrangements between the student and the developer or property manager." We hold this type of activity is commercial, not residential, in nature. The dormitories engage in continuous commercial activity, are not owner-occupied, and are zoned commercially. The dormitories are classified as commercial properties because they involve the operating and leasing of off-campus accommodations for college students and the provision of specific services, including security, property management, and planned recreational activities. Because the word "business" in its ordinary meaning refers to commercial enterprises or activities, we find the dormitories satisfy the "business" requirement, and their inclusion in the industrial or business park does not violate the South Carolina Constitution or section 4-1-170.

Appellants contend this court must consider sections 4-29-10 and 4-29-68 of the South Carolina Code (1986 & Supp. 2019) in our analysis; however, we find these sections do not undermine our conclusion. Appellants argue the definition section

of section 4-29-10 states that a "project" in an industrial or business park can be a residential or mixed-use development but must consist of at least 2,500 acres of land. S.C. Code Ann. § 4-29-10 ("'Project' means any land and any buildings and other improvements on the land including . . . residential and mixed use developments of two thousand five hundred acres or more . . . ."). While we agree the dormitories do not contain at least 2,500 acres, because they are commercial—not residential—properties, this definition is satisfied here. Further, section 4-29-68, a lengthy statute repeatedly referencing the permissible purposes of "projects," does not conflict with our finding that these developments satisfy the definition of "project" in 4-29-10 because they are commercial.

CONCLUSION

For the foregoing reasons, we affirm the circuit court's grant of summary judgment in favor of Respondents.

AFFIRMED.

MCDONALD and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Martha "Linda" Lusk, Ph.D., Appellant,

v.

Jami L. Verderosa, Respondent.

Appellate Case No. 2017-002564

Appeal From Oconee County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 5741
Submitted June 1, 2020 – Filed July 8, 2020

AFFIRMED AS MODIFIED

Candy M. Kern-Fuller and Peter Andrew Rutledge, both of Upstate Law Group, LLC, of Anderson, for Appellant.

Jeffrey Carl Kull and Wesley Brian Sawyer, both of Murphy & Grantland, PA, of Columbia, for Respondent.

THOMAS, J.: Martha "Linda" Lusk, Ph.D., argues the trial court erred in granting summary judgment on her tortious interference with contract cause of action by ruling a school administrator's contract could effectively never be tortiously interfered with pursuant to section 59-24-15 of the South Carolina Code (2020) and the supreme court's response to a certified question in *Henry-Davenport*

v. School District of Fairfield County, 391 S.C. 85, 705 S.E.2d 26 (2011). We affirm as modified.

FACTS

Lusk was previously an assistant principal at West-Oak Middle School (West-Oak) in the School District of Oconee County (School District).[1] Starting in the 2009-2010 school year, Jami L. Verderosa became the principal at West-Oak and was Lusk's supervisor for several years.[2]

Lusk alleged Verderosa engaged in a campaign to attack her reputation by making false statements and by increasing her workload. In March 2012, Verderosa placed a disciplinary letter in Lusk's personnel file after a parent complained about comments Lusk made to their child. Lusk filed a formal grievance with the School District, seeking the removal of the letter of reprimand from her personnel file, but the School District denied her grievance. After her grievance was denied, Lusk claimed Verderosa continued to issue reprimands against her until the spring semester of the 2012-2013 school year.

In May 2013, the Superintendent decided to transfer Lusk to Code Academy (Code), a different school within the School District, for the next school year.[3] Lusk agreed to remain in her position as assistant principal at West-Oak until July 1, 2013, the start of the next school year. However, Lusk sent an email complaining about the School District, which contained confidential information, to an uninvolved staff member at the school. Because some of the School District's complaints about Lusk were her repeated errors in sending communications to the wrong recipients and inability to handle sensitive matters, the Superintendent placed Lusk on paid administrative leave for a week and then relocated her to Code as of May 6, 2013. Lusk continued to receive the same salary she was making at West-Oak, and her job description did not change until July 1, 2013, which was the first day of the 2013-2014 school year. Also, as an accommodation to Lusk, the

---

[1] Lusk has been employed by the School District for more than 30 years and was awarded teacher of the year numerous times.

[2] Lusk had also applied for the position as principal.

[3] Lusk's contract with the School District stated "all assignments are tentative and may be changed by the administration upon notice to and consultation with the Employee in accordance with Board policy."

School District kept her salary for the 2013-2014 school year at the same level as that for her position as assistant principal at West-Oak even though her official job description changed to teacher for the 2013-2014 school year. Since the 2013-2014 school year, Lusk has been employed by the School District as an adult education teacher.

In 2014, Lusk filed an administrative charge against the School District before the United States Equal Employment Opportunity Commission (EEOC) relating to her demotion to an adult education teacher. Lusk alleged the School District retaliated against her for filing the grievance relating to the first letter of reprimand she received from Verderosa. Lusk also claimed she was discriminated against based on her age. Verderosa was not a party to the EEOC proceeding. The EEOC administrative charge was dismissed because it was not timely filed.

Lusk then filed an action in the Oconee County Court of Common Pleas on February 24, 2016, asserting claims for defamation and tortious interference with contract. Verderosa filed a motion for summary judgment.

A hearing on Verderosa's motion for summary judgment was held on November 1, 2017. The court filed its order on November 14, 2017, granting Verderosa's motion for summary judgment. The trial court found Lusk's cause of action for defamation was barred by the two-year statute of limitations.[4] The court found Lusk's cause of action for tortious interference with contract failed because her contractual rights were not breached. This appeal follows.

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of 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 for summary judgment purposes, the evidence and all the inferences that can be

[4] Lusk has not appealed this decision; thus, the judgment concerning the cause of action for defamation is now final.

reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Medical Univ. of S.C. v. Arnaud*, 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004). Our supreme court has established "[t]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 357-58, 650 S.E.2d 68, 71 (2007) (quoting *Baughman v. Amer. Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991)).

LAW/ANALYSIS

Lusk argues the trial court erred in granting summary judgment on her tortious interference with contract cause of action by ruling, in effect, that a school administrator's contract could effectively never be tortiously interfered with pursuant to section 59-24-15 of the South Carolina Code (2020) and the supreme court's response to a certified question in *Henry-Davenport v. School District of Fairfield County*, 391 S.C. 85, 705 S.E.2d 26 (2011). We disagree.

"The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Dutch Fork Dev. Grp. II, LLC v. SEL Props., LLC*, 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012).

Section 59-24-15 of the South Carolina Code (2020), "Rights of certified education personnel employed as administrators," provides:

> Certified education personnel who are employed as administrators on an annual or multi-year contract will retain their rights as a teacher under the provisions of Article 3 of Chapter 19 and Article 5 of Chapter 25 of this title but *no such rights are granted to the position or salary of administrator*. Any such administrator who presently is under a contract granting such rights shall retain that status until the expiration of that contract.

(emphasis added).

In *Henry-Davenport*, our supreme court was asked to answer the following certified question:

> Does South Carolina law, pursuant to S.C. Code Ann. § 59-24-15, afford a certified educator employed as an administrator rights as available under the Teacher Employment and Dismissal Act when she is denied a hearing to contest her administrative demotion and salary reduction?

Id. at 86, 705 S.E.2d at 27.

In deciding the answer was "no," the court held:

> Pursuant to section 59-24-15, while a certified educator who is employed as an administrator on an annual or multi-year contract retains her rights as a teacher under the Teacher Act, those rights are not granted to the position or salary of administrator.

391 S.C. at 89, 705 S.E.2d at 28. The court found *Johnson v. Spartanburg County School District 7*, 314 S.C. 340, 444 S.E.2d 501 (1994), had been legislatively overruled by section 59-24-15:

> The legislature enacted section 59-24-15 after the *Johnson* decision, and the plain language of the statute directly contradicts the holding in *Johnson*. The statute plainly states that an administrator has no rights in her "position or salary," and the legislature made no exception or distinction concerning the administrator's status as a certified educator.

Id. at 89, 705 S.E.2d at 28.

In *Johnson*, the court determined an assistant principal, despite holding an administrative rather than a teaching position, was protected under South

Carolina's Teacher Employment and Dismissal Act (the Teacher Act[5]). 314 S.C. at 342-43, 444 S.E.2d at 502.

In this case, the trial court found:

> At the time of her transfer, [Lusk] had an annual administrative contract for the 2012-2013 school year and was assigned to serve as the Assistant Principal at West-Oak. Based on South Carolina Code § 59-24-15 and the Supreme Court's holding in *Henry-Davenport*, [Lusk] had no rights to either her position or salary as administrator. As such, even though she was transferred to a different school in May 2013, before the end of the 2012-2013 school year, her contract was not breached.

The court noted Lusk claimed she could recover for tortious interference from the time she was transferred in May 2013 until the end of that school year on June 30, 2013, and she based her claim on the last sentence of section 59-24-15, which states: "Any such administrator who *presently* is under a contract granting such rights shall retain that status until the expiration of that contract."[6] (emphasis added). However, the court held:

> [T]his statutory language does not preserve [Lusk's] claim relating to the last two months of the 2012-2013 school year. This statutory language preserved the rights to the position and salary of an administrator only to those public school employees who had administrative contracts when the statute was enacted in 1998 but only

---

[5] *See* S.C. Code Ann. §§ 59-25-410 to -530 (2020).

[6] The trial court noted in a footnote that "it is undisputed that the School District continued to pay [Lusk] the same salary for the remaining two months of the 2012-2013 school year even after she was transferred to the different school." The School District also kept paying her at the same level as that for her position as assistant principal at West-Oak for the 2013-2014 school year, which was after her transfer to the position of adult education teacher at Code. Lusk testified her salary was reduced from approximately $96,000 per year to $74,000 per year beginning with the 2014-2015 school year.

> until that contract expired. *See Henry-Davenport v. School District of Fairfield County*, 832 F.Supp.2d 602, 609 (D.S.C. 2011) (interpreting the last sentence to mean that if "an administrator had rights under a contract to continue as an administrator when the statute was enacted, the statute states the administrator retained those rights until the contract expired.") (emphasis added). Therefore, [Lusk] has failed to show that her transfer to a different school resulted in a breach of contract. Under South Carolina law, a public school administrator does not have the right to either the position or salary of an administrator. Instead, an administrator retains only the rights of a teacher. Because [Lusk] remains employed as a teacher at the School District, her contractual rights were not breached.

On appeal, Lusk argues the trial court erred in its determination that the last sentence of section 59-24-15 only amounted to a "grandfathering" clause. She argues "in the *Henry-Davenport* case, the issue involved was that '[t]he respondents challenged their demotions, arguing they were 'dismissed or nonrenewed as principals' and, as such, 'were entitled to a full, adversarial hearing as provided' by section 59-25-460 of the Teacher Act.'" She states "[a]t no point did Judge Perry hold the last sentence of S.C. Code Ann. § 59-24-15 was merely a 'grandfathering' provision and nothing more," and "[t]here are no other cases discussing the last paragraph of S.C. Code Ann. § 59-24-15 nor any cases interpreting S.C. Code Ann. § 59-24-15, as applied to the remaining term of the contract for the existing academic year."

Lusk argues this case is similar to *Todd v. South Carolina Farm Bureau Mutual Insurance Company*, 287 S.C. 190, 193, 336 S.E.2d 472, 473 (1985), in which the court determined the question of whether an employer's actions precipitated an employee's dismissal was a question of fact for a jury. Thus, Lusk asserts the trial court erred in granting Verderosa's motion for summary judgment because there was a question of fact as to whether Lusk's contract was tortiously interfered with for the remaining term of the 2012-2013 school year.

Lusk also argues on appeal that the trial court erred in finding she could not sustain a cause of action for tortious interference with contract because she remained as a

teacher with the School District and, therefore, her contract had not been "breached." Lusk argues she was put on administrative leave for the remainder of the 2012-2013 school year as a result of Verderosa's actions and she was prohibited from returning to the school she had worked at since before Verderosa arrived at the School District. Therefore, Lusk asserts that whether Verderosa proximately caused the School District to abandon its administrator relationship with Lusk was a question for the jury to determine and was not appropriate for summary judgment.

Based on our review of the record, we find Lusk's own actions precipitated the District's decision to place her on administrative leave for the remaining two months of the 2012-2013 school year, and Lusk failed to prove the first element of a cause of action for tortious interference with contract—the existence of a valid contract guaranteeing her a right to the position and salary of an administrator. *Henry-Davenport* held a public school administrator does not have the right to either the position or salary of an administrator and retains only the rights of a teacher. 391 S.C. at 89, 705 S.E.2d at 28. Thus, the trial court did not err in granting summary judgment to Verderosa on the cause of action for tortious interference with contract.

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED AS MODIFIED.[7]

HUFF and MCDONALD, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jermaine Marquel Bell, Appellant.

Appellate Case No. 2017-001500

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

Opinion No. 5742
Heard March 10, 2020 – Filed July 8, 2020

REVERSED

Appellate Defender David Alexander and Appellate Defender Sarah Elizabeth Shipe, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia; and Solicitor Randy E. Newman, Jr., of Lancaster, for Respondent.

GEATHERS, J.: Jermaine Bell appeals his conviction of murder, for which he was sentenced to life imprisonment. Bell argues the circuit court erred in allowing the

decedent's husband and daughter to testify regarding statements purportedly made by the decedent indicating that she believed Bell was stealing from her. We reverse.

FACTS

The decedent, Judy Lindsay, and her common law husband, Mitchell Mayfield, lived in Chester County. Judy and Mayfield had one son, two daughters, and several grandchildren. Their youngest daughter, Jessica, lived at home with Judy, Mayfield, and Jessica's children. The family was well known in their neighborhood, and people would often gather to socialize on the family's front porch. One such person was Jermaine Bell, who was friends with Jessica and her brother. The family had a unique relationship with Bell, as they often ran him off or told him not to come around, only to invite him over later or allow him back, oftentimes after he procured sodas or other drinks for the family.

During the weekend of Judy's death, Bell, who was transient, spent the night of Friday, September 11, 2015, on the family's couch. On Saturday, September 12, 2015, Bell was gone before anyone else woke up. That same day, Judy and Jessica attended a funeral before Judy went to church to sing with the choir. After returning from church, Judy changed into a pair of pants and a t-shirt. Judy joined Jessica, who had been drinking alcohol,[1] on the porch to smoke a cigarette. Mayfield also joined them on the porch before going to bed around 11:00 or 11:30 p.m.[2] At some point, Jessica telephoned Bell and invited him to join them on the porch. When Bell arrived, Jessica gave him a shot of liquor.

After socializing on the porch for a while, Jessica called her cousin and asked him to take her to get something to eat. When she returned about fifteen to twenty minutes later, Judy and Bell were still on the porch, and Bell was still drinking. Upon finishing her food, Jessica smoked a cigarette and went to bed around 12:30 or 12:45 a.m. As Jessica was heading to bed, Judy indicated that she was going to stay on the porch until she finished her cigarette. Bell was still on the porch with Judy when Jessica went to bed.

---

[1] Judy and Mayfield did not drink alcohol.

[2] Prior to going to bed, Mayfield and Judy got into an argument over whether Mayfield would attend a church event with her on Sunday and what he would wear. When Mayfield did go to bed, one of the couple's grandchildren slept in the bed with him.

On Sunday, September 13, 2015, Mayfield woke up around 5:00 or 6:00 a.m. As part of his usual morning routine, Mayfield made himself some coffee, emptied his trash, and burned his trash in a burn barrel. Mayfield did not see Judy that morning, but assumed she was sleeping in the room with Jessica. However, while he was burning his trash, Mayfield noticed Judy's socks, shoes, and scarf were strewn around the yard. Believing that the grandkids had thrown Judy's clothes into the yard, Mayfield woke Jessica up and told her to get up and have the kids clean the yard.[3] Jessica asked Mayfield if he knew where Judy was, and Mayfield responded that he did not but indicated that Jessica should get up and try to locate Judy.

After waking up, Jessica went outside and began panicking when she could not find Judy. Jessica started calling family members to ask if they had seen Judy. Additionally, Jessica tried to call Bell because she knew he was the last person to see Judy. When that proved unsuccessful, Jessica and a family friend drove to Herman "Bo" Weldon's house, where Bell was supposedly staying, but no one answered the door. However, while on the porch, Jessica spotted the black shoes Bell had been wearing the night before and noticed that they were covered in mud. At some point, Jessica finally got a hold of Bell and asked if he knew what happened to Judy, to which Bell responded, "Ask Mango.[4]" Thereafter, Jessica returned home to continue looking.

When Mayfield and Jessica went back into the yard, Mayfield noticed what appeared to be drag marks. He attempted to follow the drag marks but could not follow them once they led into the tall grass. Mayfield then looked around the neighbor's yard and found one of Judy's shirts and her keys. At that point, Mayfield informed Jessica that he was calling the police.

Around 9:35 a.m., Officer John Kelly of the Chester County Sheriff's Office was dispatched to investigate a reported missing person. Officer Kelly arrived on the scene at 9:41 a.m. and was met by Mayfield and Jessica, who explained that Judy was last seen on the porch with Bell. Mayfield took Officer Kelly to the side of the house where he found Judy's clothes. Once in the yard, Officer Kelly noticed the drag marks, noting that they went through the dirt, around the back side of the house, and into the next-door neighbor's yard. Mayfield then offered to show Officer Kelly

---

[3] On cross-examination, Jessica was presented with her earlier statement in which she indicated that she had woken herself up around 7:00 a.m. and subsequently roused Mayfield.

[4] "Mango" is Mayfield's nickname.

where he had found Judy's shirt and keys, but Officer Kelly decided to call for detectives and a dog. Officer Kelly taped off the crime scene and continued talking with Mayfield and Jessica.[5] At some point, Mayfield pointed out that Bell was walking down the street towards the crime scene, and Officer Kelly made contact with him. Bell gave detectives his version of the night's events, indicating that he left the house after Judy went to bed around 12:30 or 1:00 a.m. Bell then agreed to be interviewed, and a detective placed him in a squad car and transported him to the Chester County Sheriff's Office.[6] Prior to the interview, Bell consented to a buccal swab.

Around 10:55 a.m., Officer Randy Clinton of the York County Sheriff's Office's K-9 Division received a call in reference to using a bloodhound to track a missing person. Officer Clinton arrived on scene and "scented" the dog off a pair of Judy's socks. The dog led Officer Clinton through Judy and Mayfield's yard, past their neighbor's house, around a fence and rosebush, past Judy's shirt and keys, and to the backyard of an abandoned house. The dog continued to lead Officer Clinton to the back side of a tin storage shed behind the abandoned house. Officer Clinton then found Judy's naked body lying face down behind the storage shed.

Following the discovery of Judy's body, the South Carolina Law Enforcement Division (SLED) was contacted to assist on the case. Thereafter, three SLED agents arrived on scene at 1:31 p.m. While on the scene, the SLED agents collected or marked multiple pieces of evidence, including Judy's orange t-shirt and several footwear impressions. Additionally, the agents took a buccal swab from Mayfield. After spending most of the day on site, law enforcement cleared the scene and took down the crime scene tape around 7:20 p.m.

After clearing the murder scene, law enforcement investigated several other locations, including Weldon's house. Once there, officers collected a pair of black Coogi shoes based on Jessica's tip that they were the same shoes Bell had worn the night before. However, by the time officers found the shoes, they were wet and appeared to have been washed. Meanwhile, at the crime scene, Mayfield and his

---

[5] The crime scene comprised Judy and Mayfield's house, their next-door neighbor's house, and an abandoned house on the other side of their neighbor.

[6] Law enforcement also had the grandchildren who were present at the house on the night of the murder sent to Safe Passage for a forensic interview. However, the grandchildren were not able to provide any information regarding Judy's death.

sister[7] were walking around the yard to see if they could find any more items. Mayfield testified that while walking near the location where Judy's body was found, the two found a plastic bag filled with Judy's underwear and a missing ashtray. Upon finding the bag, Mayfield contacted law enforcement, and SLED agents arrived back on scene around 8:27 p.m. The items were then turned over to law enforcement, who did not find any latent fingerprints on the plastic bag or its contents.

During Bell's interview at the Chester County Sheriff's Office, SLED Agent Lee Boan used several interview tactics in an attempt to gain information, including telling Bell that Judy had died of a heart attack and claiming that officers had matched Bell's DNA to evidence on scene. Despite Agent Boan's tactics, Bell maintained his innocence throughout the interview. However, during this interview and a follow-up interview conducted on September 15, 2015, Bell offered several inconsistent statements.

First, Bell claimed that he spent the night of Judy's death at two different houses before finally conceding that he spent the night on Weldon's porch. Second, Bell claimed that on the night of the murder, he stepped off the porch and walked directly down the road. Bell then indicated that he had gone into the side yard to urinate before leaving. Finally, officers asked Bell what he was wearing the night of the murder, and Bell indicated that he had worn a black shirt, jeans, and Coogi shoes. Bell further claimed that he had slept in his clothes and had not showered or changed before walking to the crime scene and agreeing to be interviewed. Despite these claims, Bell was not wearing the same clothes during the interview and ultimately claimed that he did change clothes and shower.

On September 14, 2015, Dr. Kim Collins conducted Judy's autopsy. Dr. Collins noted that Judy had an abrasion on her forehead and the area from Judy's collarbone up had a reddish-purple discoloration resulting from bruising. Dr. Collins indicated that such discoloration was consistent with manual strangulation, and swabs of Judy's neck area were taken to test for touch DNA. As she continued, Dr. Collins discovered blood in Judy's mouth resulting from Judy biting into the deep muscle of her tongue, scratches on the inside of her lips resulting from the pressure placed onto her teeth from her lips, and pinpoint hemorrhages on her inner lips resulting from ruptured blood vessels in her mouth. Additionally, Dr. Collins found hemorrhages in Judy's eyes as a result of ruptured blood vessels. Turning to the neck

[7] Mayfield testified that his sister used to work for a police department and he asked her if she thought it was ok to look around the scene after the tape was removed.

area, Dr. Collins discovered more hemorrhages in Judy's strap muscles, further indicating that the hemorrhages extended down through several layers of muscle.[8] Dr. Collins also found a massive amount of hemorrhaging on the deep tissue in the back of Judy's neck. Dr. Collins explained, "that's a lot of squeezing through the skin[,] through the underlying fat, through all those strap muscles and then to cause hemorrhage in the back of all these structures around the esophagus, that's very deep in the back of the neck." Based on the bruising and hemorrhaging in Judy's neck, Dr. Collins determined Judy's cause of death to be homicide by manual strangulation and opined that Judy was strangled with "a great deal of force."

Dr. Collins further noted multiple areas of abrasion and bruises to different parts of the body. One such abrasion was a long, linear scratch from Judy's armpit area down to her thigh.[9] Dr. Collins also found a large area of abrasion on the left knee and an area of abrasion on the left buttock. Additionally, Dr. Collins found a large area of bruising on the inner aspect of the left arm near the elbow and similar bruising on the right arm, further indicating that the bruises were noticeable despite Judy's darkly pigmented skin. Dr. Collins opined that the bruising around Judy's armpits was consistent with being dragged and, after considering the knee abrasions, law enforcement concluded that Judy's body was dragged face down.

Dr. Collins also performed a sexual assault examination on Judy's body. Dr. Collins determined that Judy had an abrasion to her pubic area, a tear and scraping to the tissue on the outside of the vagina, and hemorrhaging in the tissue around the rectum. However, Dr. Collins did not find any injuries inside the vagina nor did she discover anything suggesting the presence of bodily fluids.

Bell was arrested on October 2, 2015, and the Chester County Grand Jury indicted him for murder on February 16, 2016. Bell's trial was conducted on June 26 through June 30, 2017. At trial, Bell twice objected to the admission of testimony at issue on appeal. First, Bell raised the following objection to Mayfield's testimony:

---

[8] Dr. Collins explained that such hemorrhages do not always appear when a victim has been strangled but their presence suggests a significant amount of pressure on the neck.

[9] Officers theorized that this abrasion occurred as Judy was being dragged past the rose bush.

> **State:** "Now, getting closer to the time of September 2015, had any other problems arose regarding the defendant, Jermaine Bell, between you and your wife, Judy?"
>
> **Mayfield:** "No. Now, at a point in time they - - Judy had told me Jermaine was stealing."
>
> **State:** "Someone was stealing?"
>
> **Defense:** "Objection, Your Honor."
>
> **State:** "Goes to the state of mind, Your Honor."
>
> **Defense:** "404-B."
>
> **Court:** "I'm going to give her a little leeway on it, I will overrule the objection. Go ahead."

Mayfield went on to testify that Judy believed Bell was stealing glasses, money, cigarettes, and clothes from her. However, Mayfield also testified that they had no proof that Bell was stealing and they never reported it to the police.

Similarly, Bell raised the following objection to Jessica's testimony:

> **State:** "Had she ever explained to you about anything that he had done?"
>
> **Jessica:** "Yeah, stealing stuff from her."
>
> **Defense:** "Objection, Your Honor, same as before, 403."[10]
>
> **State:** "Goes to the state of mind, Your Honor."
>
> **Court:** "Overruled."

[10] We note the circuit court likely interpreted "same as before" to mean that Bell was objecting under Rule 404(b), SCRE, which he invoked in objecting to Mayfield's testimony regarding Judy's statements.

Jessica went on to testify that Judy believed Bell was stealing her glasses and underwear but indicated that no one had confronted Bell or called the police about the issue. Notably, the circuit court did not provide a rationale in overruling either objection.

Following the testimony of Mayfield and Jessica, the State presented several witnesses who saw Bell on the night of the murder or the following morning. First, Detective Brian Sanders testified without objection regarding a statement given by one of Jessica's friends. According to the friend, she had driven over to the house around 12:30 a.m. on the night of the murder to pick Jessica up so they could go out. She claimed that she blew the horn, nobody came to the door, the lights were off, the TV was on, and the front door was open. She further claimed that Bell came walking from a house across the street and indicated he did not know the location of Jessica or Judy when asked.

Second, Weldon testified that he woke up around 7:00 a.m. on September 13, 2015, to find Bell sleeping on the couch on his porch. Weldon walked to the store to buy cigarettes and shared one with Bell when he returned. Weldon claimed that he and Bell did not really talk but that Bell kept going back and forth to the road.

Next, Mayfield's nephew, Darkarious Woods, testified that he was driving by Judy and Mayfield's house around 1:00 or 1:30 a.m. on the night of the murder. Woods claimed that he saw Bell coming from the side yard between the house neighboring Judy's and the abandoned house behind which Judy's body was found. According to Woods, Bell walked up to his car and asked if it was new. Woods explained that he found this question odd because Bell had previously washed his car multiple times. Woods further testified that Bell seemed "jittery" during their conversation.

Finally, Ervin Chalk testified that he had known Bell for a year or two and that Bell lived in the abandoned house across the street from his. Chalk indicated that on the day of the murder, he and Bell had attended the same birthday party at Chalk's aunt's house. Chalk claimed that Bell was drinking at the party, was wearing a blue and white striped shirt, and had left around 10:00 or 11:00 p.m. Chalk testified that he went to a club after leaving the party but on his way home around 3:30 a.m., he saw Bell walking in the direction of Weldon's house and wearing the same blue and white striped shirt he had worn to the party.

The State then presented several experts.[11] First, the State offered Jessica Stowe as an expert in forensic serology. Stowe explained that while looking at oral, vaginal, and rectal swabs from Judy's body, she detected the presence of P30, a protein found in high concentrations in male seminal fluid. However, Stowe testified that she could not identify any spermatozoa from the swabs. Stowe forwarded the swabs testing positive for P30 to SLED's DNA section but the record does not reveal whether the P30 samples underwent DNA analysis or what results, if any, were obtained. Additionally, Stowe explained that she scraped and swabbed the underarms of Judy's orange t-shirt for touch DNA. Stowe also forwarded these swabs to SLED's DNA section.

Following Stowe, the State offered Lilly Gallman as an expert in DNA analysis. Gallman testified that the swabs taken from Judy's neck contained a mixture of DNA from two individuals and indicated that Judy and Bell could not be excluded as contributors to the mixture. Gallman explained that the probability of selecting an unrelated individual who could have contributed to the mixture was one in ten.[12] Gallman testified that she also conducted a YSTR-DNA test on the swabs, further explaining that a YSTR-DNA test focuses only on the Y-chromosome. Gallman indicated that the YSTR test from the swabs "matched" Bell's Y-DNA and the probability of randomly selecting an unrelated male individual having a matching DNA profile was one in 8,600.[13] Furthermore, Gallman asserted that the Y-DNA "matched" Bell's DNA profile to a reasonable degree of scientific certainty.

After testing the swabs from Judy's neck, Gallman tested the swabs taken from the underarms of Judy's shirt. Gallman determined that these swabs contained a mixture of DNA and that Judy and Bell could not be excluded as contributors to the mixture. Gallman indicated that the probability of selecting an unrelated individual

---

[11] These experts included SLED Agent Melinda Worley, an expert in shoe wear impression. However, Agent Worley testified that she was not able to conclude that Bell's black Coogi shoes made the prints on scene nor was she able to conclude that Bell's shoes did not make the prints on scene.

[12] Gallman explained that the statistical frequency of the DNA was high because she was only able to analyze two out of sixteen loci on the chromosome.

[13] Gallman explained that all males sharing the same paternal lineage would share the same Y-DNA. Therefore, any such male would be a match under the YSTR-test. However, Bell stipulated that his brother was working on the night of the murder and was not present at the home of the victim.

who could have contributed to the mixture was one in 960.[14] Gallman then performed a YSTR test on the underarm swabs and determined the swabs "matched" Bell's Y-DNA and the probability of randomly selecting an unrelated male individual having a matching DNA profile was one in 8,600. Conversely, Gallman determined that, to a reasonable degree of scientific certainty, Mayfield could be excluded as a contributor to the neck and shirt swabs under both the standard DNA and Y-DNA tests. However, Gallman testified that she analyzed Judy's fingernail clippings and determined that Bell could be excluded as a minor DNA contributor but Mayfield could not.

During its closing arguments, the State made the following references to the testimonies of Mayfield and Jessica:

> Now I'm going to talk about that bag and the ashtray that was found. Remember, they were saying that Mitchell Mayfield and Jessica, that some of their mother's items had been missing and she believed that [Bell] was stealing from them, Judy did, and so did Jessica.
>
> . . .
>
> [Jessica] said Judy believed the defendant was stealing some of her personal items; glasses, underwear[,] ashtray. I'm going to tell you something, after I got this case it was already too late, but I even went back over here to see this area for myself. I wish someone had gone back and looked even a little harder, you might have found a pair of glasses in there. I submit to you this defendant had his own little spots to hang out[,] to put stuff, to hide stuff. Her clothing could be anywhere in this area. He knows the woods, he knows the back trail, he knows the abandoned houses, he knows every single corner of that.
>
> . . .

[14] Gallman testified that she was only able to analyze four out of sixteen loci on the chromosome.

> Whoever killed Judy knew where to hide her body. Abandoned home, overgrown. . . . This was his hiding place, that's where the underwear was, that's where the ashtray was.
>
> . . .
>
> [Judy] probably confronted [Bell] about her stolen items, maybe she was just sick of it, unfortunately we will never know because he killed her. Maybe it was a sexual rejection . . . .

Ultimately, the jury found Bell guilty of murder, and the circuit court sentenced Bell to life imprisonment. Bell then moved for a new trial, but the motion was denied. This appeal followed.

ISSUE ON APPEAL

Did the circuit court err in allowing Mayfield and Jessica to testify regarding Judy's statements indicating she believed Bell was stealing from her?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wharton*, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). As such, "[appellate courts are] bound by the [circuit] court's factual findings unless they are clearly erroneous." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

"A [circuit court] has considerable latitude in ruling on the admissibility of evidence . . . ." *State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). Accordingly, "[t]he admission of evidence is within the discretion of the [circuit] court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the conclusions of the [circuit] court either lack evidentiary support or are controlled by an error of law." *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).

"The improper admission of hearsay is reversible error only when the admission causes prejudice." *State v. Hughes*, 419 S.C. 149, 155, 796 S.E.2d 174, 177 (Ct. App. 2017) (quoting *State v. Weston*, 367 S.C. 279, 288, 625 S.E.2d 641,

646 (2006)). Additionally, "[a circuit court]'s decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." *State v. Sweat*, 362 S.C. 117, 129, 606 S.E.2d 508, 514 (Ct. App. 2004). Finally, "[i]f there is any evidence to support the admission of[] bad act evidence, the [circuit court]'s ruling will not be disturbed on appeal." *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

LAW/ANALYSIS

Bell argues the circuit court erred in allowing Mayfield and Jessica to testify regarding Judy's statements indicating she believed Bell was stealing from her because 1) the statements constituted inadmissible hearsay and did not fall within the "Then Existing Mental, Emotional, or Physical Condition" exception to the rule against hearsay; 2) the risk of unfair prejudice stemming from the statements outweighed their probative value; and 3) the statements constituted evidence of prior bad acts precluded by Rule 404(b), SCRE.

Prior bad acts and Rule 404(b)[15]

Bell argues the circuit court erred in allowing Mayfield and Jessica to testify regarding Judy's statements because the statements constituted evidence of prior bad acts and were thus inadmissible under Rule 404(b). The State argues the statements did not constitute evidence of prior bad acts but, rather, constituted evidence of the suspicion of prior bad acts. We agree with Bell.

Pursuant to Rule 404(b), SCRE,

[15] Bell's remaining arguments are unpreserved for appellate review because they were not raised to and ruled upon by the circuit court or were not raised with sufficient specificity. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue . . . must have been raised to and ruled upon by the [circuit] court to be preserved for appellate review."); *State v. Patterson*, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (indicating an "[a]ppellant is limited to the grounds raised at trial"); *see also State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) ("The objection should be addressed to the [circuit] court in a sufficiently specific manner that brings attention to the exact error."); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("[T]o preserve [a legal issue], []it must be clear that the argument has been presented on that ground.").

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

In other words, "evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person." *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). Our courts have explained that, "[p]roof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged." *State v. Lyle*, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). Thus, the effect of such evidence "is to predispose the mind of the juror to believe the [defendant] guilty, and thus effectually to strip him of the presumption of innocence." *Id*. Consequently, "[t]o be admissible, the bad act must logically relate to the crime with which the defendant has been charged." *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). Moreover, "[i]f the defendant was not convicted of the prior crime, *evidence of the prior bad act must be clear and convincing*." *Id*. (emphasis added).

At the outset, the State argues the statements did not constitute evidence of prior bad acts but, rather, constituted evidence of a belief or suspicion of prior bad acts. We disagree for the following reasons. First, Judy's belief that Bell was stealing was, at minimum, evidence of two things: 1) Judy believed her property was stolen or lost; and 2) something led Judy to believe Bell was responsible. Thus, we find the State elicited Judy's belief that Bell was stealing to demonstrate that Bell had previously stolen from her. *Cf. Smalls v. State*, 422 S.C. 174, 185–86, 810 S.E.2d 836, 842 (2018) (finding that after the officer indicated on cross-examination that a prior burglary involving a stolen gun had not been solved, the State's question asking whether the defendant had burglarized the house "did not serve any legitimate purpose" but "was an improper effort to introduce evidence that Smalls committed another crime"). Second, in its closing argument, the State portrayed Judy's belief as conclusive evidence that Bell had been stealing from her and asserted that the prior thefts were evidence of Bell's possible motives. Notably, evidence of motive is one of the five exceptions to the rule precluding the admission of prior bad acts evidence. *See* Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts . . . may[] be admissible to show motive . . . .").

Finally, if this court were to accept the State's distinction between evidence of prior bad acts and evidence of the *belief* of prior bad acts, such a distinction would swallow Rule 404(b)'s preclusion of prior bad acts evidence. Pursuant to the State's position, Rule 404(b) would not preclude evidence of a belief of prior bad acts, thus, the State would not need to invoke an exception to the rule to have such evidence admitted. Moreover, under the State's position, evidence that a defendant committed an unconvicted prior bad act would require proof of the act by clear and convincing evidence, but evidence *that someone believes* a defendant committed an unconvicted prior bad act would not be subject to the same evidentiary burden. *See Fletcher*, 379 S.C. at 23, 664 S.E.2d at 483 ("If the defendant was not convicted of the prior crime, *evidence of the prior bad act must be clear and convincing*." (emphasis added)). If this court were to sanction such a distinction, the State could bypass the rule, as well as 404(b) scrutiny when invoking an exception to the rule, by simply having witnesses testify that they believe a defendant committed a prior bad act rather than putting forth direct evidence of the prior bad act in question. Thus, we conclude that Mayfield's and Jessica's statements constitute evidence of prior bad acts, and we will scrutinize the circuit court's admission of the statements accordingly.

In *State v. Fletcher*, our supreme court found that the circuit court erred in allowing the State to present evidence of prior bad acts in a homicide by child abuse case. 379 S.C. at 25, 664 S.E.2d at 483–84. At trial, the State called one of the defendant's friends and coworkers to testify regarding two events involving the child victim. *Id*. at 21, 664 S.E.2d at 481. Both co-defendants objected to the testimony, arguing there was not clear and convincing evidence establishing who committed the acts in question. *Id*. at 21, 664 S.E.2d at 481–82. The circuit court overruled the objection and allowed the witness to testify. *Id*. at 21, 664 S.E.2d at 482. The witness testified that on one occasion, he had gone to the co-defendants' house and heard a baby crying. *Id*. After going upstairs, he found the child sitting in a walker in the attic and profusely sweating. *Id*. On another occasion, the witness indicated he had gone to the co-defendants' house and found the child handcuffed by his feet to the co-defendants' bed. *Id*. at 22, 664 S.E.2d at 482.

On appeal, our supreme court found that, "there is simply not clear and convincing evidence in the record that Fletcher committed the prior bad acts testified to by [the witness]." *Id*. at 24, 664 S.E.2d at 483. The court explained that, "[a]lthough [the witness] testified he saw [the child] handcuffed to the bed and in the walker in the attic, there was no evidence whatsoever introduced at trial that Fletcher was either the person who placed [the child] in the attic[] or that he

handcuffed him to the bed." *Id*. Ultimately, the court held that the circuit court erred in admitting the witness's testimony, concluding "there is simply no evidence, let alone clear and convincing evidence[,] that Fletcher was the perpetrator of the prior bad acts against [the child]."[16] *Id*. at 25, 664 S.E.2d at 483–84.

Here, we find the circuit court abused its discretion in allowing Mayfield and Jessica to testify regarding Judy's statements because there is no evidence, let alone clear and convincing evidence, demonstrating that Bell had previously stolen Judy's property. *See Goodwin*, 384 S.C. at 601, 683 S.E.2d at 507 ("An abuse of discretion occurs when the conclusions of the [circuit] court either lack evidentiary support or are controlled by an error of law." (quoting *Pagan*, 369 S.C. at 208, 631 S.E.2d at 265)). Mayfield and Jessica both testified that Judy believed Bell was stealing from her but indicated that the family had no proof of this, had not called the police, and had not confronted Bell about the alleged thefts. Assuming some of Judy's property had been stolen, we find this case is similar to *Fletcher* because neither Mayfield's nor Jessica's testimony could definitively establish that Bell was the perpetrator of the thefts. *See Fletcher*, 379 S.C. at 25, 664 S.E.2d at 483–84 ("[T]here is simply no evidence, let alone clear and convincing evidence[,] that Fletcher was the perpetrator of the prior bad acts . . . ."). Moreover, unlike the acts in *Fletcher*, there is no evidence, beyond her statements of belief, that Judy's property had in fact been stolen. There is no evidence in the record indicating that the clothes in the bag Mayfield testified he found are the same clothes Judy alleged were stolen.

---

[16] Consistent with the holding in *Fletcher*, our courts have routinely held that a circuit court errs by admitting evidence of prior bad acts when the defendant cannot be established as the perpetrator of the bad acts by clear and convincing evidence. *See State v. Cutro*, 332 S.C. 100, 106, 504 S.E.2d 324, 327 (1998) ("[H]ere, the evidence is insufficient to establish that appellant was the actor in Parker's death or Asher's injuries[,] and we hold the trial judge erred in admitting this evidence."); *State v. Pierce*, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997) ("The State failed to offer any proof that appellant inflicted these injuries. Thus, this testimony is inadmissible under *Lyle*[,] and the trial court erred in admitting it."); *State v. Conyers*, 268 S.C. 276, 281, 233 S.E.2d 95, 97 (1977) ("There was very little evidence, however, to establish that appellant poisoned her first husband other than the fact that she was his wife and he had some life insurance. This evidence alone was insufficient to establish the identity of appellant as the actor in poisoning her first husband. The admission of this testimony was clearly prejudicial and requires that a new trial be granted.").

Additionally, neither Mayfield nor Jessica testified that Judy believed Bell had stolen the ashtray found in the bag. Accordingly, we do not find clear and convincing evidence demonstrating that Bell was the perpetrator of the alleged thefts. *See id*. at 23, 664 S.E.2d at 483 ("If the defendant was not convicted of the prior crime, *evidence of the prior bad act must be clear and convincing*." (emphasis added)). Thus, the circuit court erred in admitting the evidence of prior bad acts.

Harmless error

The State argues that any error in admitting Mayfield's and Jessica's testimonies was harmless beyond a reasonable doubt. We disagree.

An "[e]rror is harmless when it 'could not reasonably have affected the result of the trial.'" *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Thompson*, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003) (quoting *Mitchell*, 286 S.C. at 573, 336 S.E.2d at 151). Accordingly, "our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but *whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict*." *State v. Tapp*, 398 S.C. 376, 389–90, 728 S.E.2d 468, 475 (2012) (emphasis added). In other words, an error is harmless "when guilt has been conclusively proven by competent evidence *such that no other rational conclusion can be reached*." *State v. Kirton*, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008) (emphasis added).

In *State v. King*, our supreme court found the erroneous admission of prior bad acts evidence constituted reversible error. 334 S.C. at 514–15, 514 S.E.2d at 583–84. King was accused of the murder of his father-in-law. *Id*. at 507–09, 514 S.E.2d at 579–81. At trial, King's ex-wife testified regarding prior incidents in which King had stolen items from her. *Id*. at 511, 514 S.E.2d at 582. On appeal, the supreme court found the circuit court erred in admitting the prior bad acts evidence because the evidence was "not admissible under any theory." *Id*. at 513, 514 S.E.2d at 583.

In concluding that the error was not harmless, the supreme court determined that all of the evidence in the record was circumstantial. *Id*. at 514, 514 S.E.2d at 583. The court further found that, "[w]hile this circumstantial evidence pointed to

appellant's guilt, especially the blood evidence, the evidence *was not overwhelming*." *Id*. (emphasis added). The court explained that "[t]he admission of this testimony allowed the State to insinuate to the jury that appellant had a drug problem[,]" and "[t]he [State]'s questions eliminated many legitimate reasons why appellant would need money." *Id*. "This improper evidence suggested to the jury that appellant was guilty of committing the charged crimes because of his criminal propensity to commit crimes and his bad character." *Id*. at 514, 514 S.E.2d at 583–84. Additionally, the court noted that "[t]he State *continuously stressed this improper testimony in its closing argument*." *Id*. at 514–15, 514 S.E.2d at 584 (emphasis added). "Therefore, it [wa]s *impossible* under these circumstances *to conclude the improper evidence did not impact the jury's verdict*." *Id*. at 515, 514 S.E.2d at 584 (emphases added). Finally, the court determined that the "improper testimony permeated the trial and the jury likely used this evidence to infer that since appellant had previously stolen from his ex-wife, he probably committed these crimes against his father-in-law also." *Id*.

We find the case at bar is strikingly similar to *King*. Here, like in *King*, all of the evidence in the record was circumstantial. Additionally, while we are cognizant of the fact that this circumstantial evidence pointed to Bell's guilt, such evidence was not overwhelming.[17] Given this evidentiary context, we find Mayfield's and Jessica's

---

[17] In asserting that the error was harmless, the State relies heavily on Gallman's testimony indicating the touch DNA taken from Judy's neck and the underarms of her shirt "matched" Bell's Y-DNA. However, we note that a "match" is only part of the equation in DNA analysis. "After determining that two DNA samples match, forensic analysts estimate the statistical frequency of such matches in a reference population. The purpose of the statistical estimates is to provide meaning to the match by showing the likelihood that an unrelated person in the reference population would match by chance." William C. Thompson, *Evaluating the Admissibility of New Genetic Identification Tests: Lessons from the "DNA War"*, 84 J. Crim. L. & Criminology 22, 61 (1993); *see also State v. Phillips*, Op. No. 27978 (S.C. Sup. Ct. filed June 3, 2020) (Shearouse Adv. Sh. No. 22 at 29–30) ("Random match probability is the likelihood that another randomly chosen person—unrelated to the suspect—will have a DNA fragment identical to the fragment the analyst found in the touch sample."). Crucially, "[o]ne very important thing to understand about touch DNA is that in many cases . . . the DNA analyst is not able to obtain a full DNA profile from the 'touch' sample." *Phillips*, (Shearouse Adv. Sh. No. 22 at 28). Therefore, "[t]he probability of a random match in any given case depends on the

statements regarding Judy's belief were highly prejudicial. First, like the testimony in *King*, the statements tended to establish Bell's criminal propensity by painting him as a thief. *See id*. at 514, 514 S.E.2d at 583–84 ("This improper evidence suggested to the jury that appellant was guilty of committing the charged crimes because of his criminal propensity to commit crimes and his bad character."); *Lyle*, 125 S.C. at 416, 118 S.E. at 807 ("[The] effect [of bad acts evidence] is to predispose the mind of the juror to believe the [defendant] guilty, and thus effectually to strip him of the presumption of innocence."). Second, the statements allowed the State to insinuate to the jury that Bell was a pervert. *See King*, 334 S.C. at 514, 514 S.E.2d at 583 ("The admission of this testimony allowed the State to insinuate to the jury that appellant had a drug problem."). Because Judy's body was found unclothed and with injuries to the vaginal and rectal areas of her body, the insinuation that Bell was a pervert tended to suggest that Bell was capable of and likely engaged in a sexually charged attack. In turn, this allowed the State to compensate for the absence of any

---

size of the fragment the analyst can obtain from the touch sample." *Id*. at 30. "Thus, the more complete the fragment, the less likely another person could randomly match it. The *smaller the fragment*, on the other hand, *the more likely some other person will also have the identical fragment*, and would then be a 'random match.'" *Id*. (emphases added). Here, the State's DNA expert testified that when examining the DNA sample from Judy's neck, the expert was only able to analyze two out of the chromosome's sixteen loci. Similarly, when analyzing the DNA sample from Judy's underarms, the State's expert was only able to analyze four of the chromosome's sixteen loci. The expert further testified that the probability of selecting an unrelated individual with a matching DNA profile ranged from *one in ten* to *one in 960*. Additionally, the expert testified that the probability of randomly selecting an unrelated male individual with a matching Y-DNA profile was *one in 8,600*. We do not find that the statistical frequencies associated with Bell's DNA and Y-DNA tests were so low as to suggest that Bell's guilt was the only rational conclusion to be drawn from the evidence. *See, e.g.*, *Thompson*, 352 S.C. at 556–57, 575 S.E.2d at 80 ("The expert further opined that only *one in thirty-two quadrillion* persons have the same genetic marker as Thompson." (emphasis added)). Rather, a jury could have reasonably determined that the statistical frequencies did not reliably identify Bell as the source of the DNA or Y-DNA on Judy's neck and shirt. *See State v. Dinkins*, 319 S.C. 415, 418, 462 S.E.2d 59, 60 (1995) ("The jury should be allowed to make its own determination as to whether it believes the [DNA] statistics are reliable. The jury is free to believe or disbelieve the experts and the statistics.").

evidence connecting Bell to the sexual injuries. Third, the statements allowed the State to establish potential motives for the killing despite Bell's friendly relationship with Judy and her family. In fact, in its closing argument, the State relied on Judy's belief as evidence of Bell's potential motive, asserting that Bell may have killed Judy after she confronted him about the alleged stolen items or after rejecting Bell's sexual advances.

But perhaps the most prejudicial effect was the establishment of a connection between Bell and the bag of Judy's underwear Mayfield testified he found on the scene. During the trial, law enforcement testified that they did not find any latent fingerprints on the bag or its contents, nor did they find anything that would directly tie Bell to the bag. However, despite the lack of proof that Bell was stealing, Mayfield's and Jessica's testimonies tied Bell directly to the bag of underwear. Because the bag was purportedly found near the location of Judy's body, this connection tended to place Bell at the scene and suggested that he was familiar with the area in which the body was found. Moreover, in its closing argument, the State again used the statements against Bell, consistently asserting that the items in the bag were the ones Judy believed Bell had stolen, that Bell in fact stole these items, and that Bell had "hiding spots" behind the abandoned house.

Ultimately, we find the statements that Judy believed Bell was stealing from her, which could not be proven or disproven, had the same prejudicial effect as evidence that would have conclusively established that Bell was stealing. In other words, even if Judy was mistaken in her belief that Bell was stealing, her statements would have still prejudiced him as if he had been. Furthermore, these statements were extremely prejudicial because they provided possible motives for the murder, connected Bell to the bag of underwear and Judy's injuries, and demonstrated Bell's criminal propensity. Moreover, because the State continuously stressed the improper statements in its closing argument, "it is impossible under these circumstances to conclude the improper evidence did not impact the jury's verdict." *King*, 334 S.C. at 515, 514 S.E.2d at 584; *see also Phillips*, (Shearouse Adv. Sh. No. 22 at 39) ("If there were any possibility we might find the error of admitting the [testimonies] harmless, the assistant solicitor extinguished that possibility with her incorrect statements in her closing argument."). Therefore, we find the error in admitting Mayfield's and Jessica's testimonies concerning the alleged prior bad acts was highly prejudicial and requires that Bell's conviction be reversed.

CONCLUSION

Based on the foregoing, Bell's conviction is

REVERSED.

LOCKEMY, CJ., and HEWITT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

DD Dannar, LLC, Appellant,

v.

SC LAUNCH!, Inc., Respondent.

Appellate Case No. 2017-002029

Appeal From Greenville County
Robin B. Stilwell, Circuit Court Judge
Perry H. Gravely, Circuit Court Judge[1]

Opinion No. 5743
Submitted May 8, 2020 – Filed July 8, 2020

AFFIRMED

Emily Irene Bridges and Natalma M. McKnew, of Fox Rothschild LLP, of Greenville, for Appellant.

Robert Yates Knowlton, Sr. and Elizabeth Halligan Black, of Haynsworth Sinkler Boyd, PA, of Columbia, for Respondent.

GEATHERS, J.: In this declaratory judgment action, Appellant DD Dannar, LLC (Dannar), seeks review of the circuit court's order granting summary judgment to

[1] After the Honorable Robin B. Stillwell issued an order granting summary judgment to Respondent, the Honorable Perry H. Gravely conducted a hearing on Respondent's motion for attorney's fees and subsequently issued an order granting the motion.

Respondent SC LAUNCH!, Inc. (SCL). Dannar argues the circuit court erred by concluding that the parties' financing agreement was not extinguished upon Dannar's full repayment of SCL's business loan to Dannar. Dannar also argues the circuit court erred by concluding that the relocation fee referenced in the financing agreement was not an unenforceable penalty. We affirm.

FACTS/PROCEDURAL HISTORY

In 2006, the South Carolina Research Authority (SCRA) formed the SC Launch program to advance applied research, product development, and commercialization programs and to strengthen the state's knowledge economy to create high-paying jobs.[2] The program partners with SCRA and the research foundations of the University of South Carolina, the Medical University of South Carolina, and Clemson University to support high-potential companies with grant funding and services.

The program is administered through SCL, a South Carolina non-profit 501(c)(3) corporation, and makes seed investments in anticipation of financial returns. Specifically, according to SCL's executive director, Harry Hillman, the program

---

[2] In 1983, the General Assembly created SCRA "to enhance the research capabilities of the state's public and private universities, to establish a continuing forum to foster greater dialogue throughout the research community within the State, and to promote the development of high technology industries and research facilities in South Carolina." S.C. Code Ann. § 13-17-10, -20 (2017). SCRA created the SC Launch program in accordance with the requirements of sections 13-17-87 and -88 of the South Carolina Code (2017). Section 13-17-87 requires a division of SCRA (the South Carolina Research Innovation Centers (SCRIC)) to establish three Research Innovation Centers to operate in conjunction with the state's research universities for the purposes of, *inter alia*, promoting the development of high technology industries in the state and maximizing the use of innovation center funds for partnerships between the public and private sectors to generate professional research and development jobs in the state. § 13-17-87(A)–(B). Section 13-17-88 establishes within each of the SCRIC's "a target program of excellence reflecting the basic research currently undertaken at each center and serving as the focal point of the state's applied research and development in each of the program areas of excellence." § 13-17-88(A). Section 13-17-88 also establishes an Industry Partnership Fund at the SCRA or an SCRA-designated affiliate for the acceptance of contributions for funding the programs.

> supports advanced technology and knowledge-based businesses with seed capital that fills gaps in funding from individual investors, angel investment groups, lenders, private equity firms, and other sources. Funding from SC Launch is supplemental; it is not intended to replace funding from other sources. Returns from SC Launch investments help fund continuing SC Launch programs and investments.

An average of twelve companies per year are selected for an initial round of funding, and additional "follow-on funding" may be awarded under certain circumstances. SCL staff members dedicate significant time and energy into developing and mentoring the companies admitted into the program. SCL refers to these companies as "Client Companies."

On April 14, 2011, SCL loaned $200,000 to Dannar, which "designs and manufactures an alternatively powered multi-purpose maintenance vehicle called the Mobile Power Station for use in the government sector." Previously, Dannar had been unsuccessful in obtaining private investment for its business. The parties entered into a Financing Agreement setting forth the terms of the loan, and Dannar executed a promissory note (the Note), committing to pay back the $200,000, plus interest, by April 14, 2014. The Financing Agreement included a provision in which Dannar agreed that it would not relocate its business, principal office, or principal place of business outside of the state or locate more than one-half of its employees outside the state for a period of five years from the date of the agreement unless Dannar paid a $200,000 relocation fee to SCL. This five-year period did not expire until April 14, 2016.

In late 2012, Dannar began seeking additional funding from other states, including Indiana. According to Mark Housley, SCL's Upstate Regional Manager, during his involvement with Dannar, the company's principal, Gary Dannar, told Housley that Mrs. Dannar was unhappy living in Greenville and wanted to return to her home state of Indiana. In March 2013, Dannar applied to SCL for follow-on funding, but SCL denied the request.

In late April 2013, Mr. Dannar met with Hillman to discuss repaying the loan early. During the meeting, Mr. Dannar acknowledged that his company "would not be moving forward were it not for the support of and investment made by [SCL]." The next day, Dannar paid the balance due on the loan. In late June 2013, SCL

became aware of a public announcement by Dannar and the Muncie-Delaware County, Indiana Economic Development Alliance indicating that Dannar was relocating its corporate headquarters and assembly facility to Muncie, Indiana. Subsequently, on July 23, 2013, Dannar entered into a Redevelopment Agreement with Delaware County, Indiana, in which the county agreed to issue economic development bonds and loan the $150,000 proceeds to Dannar by August 1, 2013. The county also agreed to place $500,000 into an escrow account for (1) improvements to a facility to be used by Dannar and (2) the purchase of equipment and furniture.

In September and November 2013, SCL sent letters to Dannar requesting payment of the relocation fee. On November 25, 2013, Dannar's counsel "denied that Dannar had relocated under the [Financing] Agreement." In letters dated December 13, 2013, and September 19, 2014, counsel likewise assured SCL there had been no relocation. SCL responded that it would agree not to pursue the relocation fee "if Dannar would confirm by affidavit that it had in fact not relocated."

On January 7, 2015, Dannar filed this action pursuant to the Uniform Declaratory Judgments Act,[3] seeking an order declaring that (1) once Dannar paid the balance due on the loan, the Relocation Provision was "no longer in full force and effect[,] and[] therefore, [Dannar] was not . . . obligated to pay the Relocation Fee"; (2) Dannar had not violated the Relocation Provision; or (3) the relocation fee is an unenforceable penalty. In response to SCL's motion to dismiss, Dannar withdrew the complaint and obtained leave to file a supplemental complaint. On April 28, 2015, Dannar filed its supplemental complaint, stating that Dannar intended to relocate its business to Indiana and as of April 1, 2015, it had relocated a majority of its assets and inventory to Indiana. The supplemental complaint also stated that Dannar took the following actions in Indiana: (1) entered into building and property leases, (2) established utility and communications services, and (3) hired two employees. Moreover, Dannar stated that it retained one employee in South Carolina and recanted the original complaint's allegations that Dannar had not relocated.

On June 2, 2015, SCL filed an answer and counterclaim for breach of contract. The parties later filed cross-motions for summary judgment, and the circuit court granted summary judgment to SCL, awarding SCL $200,000 plus prejudgment interest. In its order, the circuit court noted that the parties agreed there were "no genuine issues as to any material fact in this case" and the court's sole task was to

[3] S.C. Code Ann. §§ 15-53-10 to -140 (2005 & Supp. 2019).

construe the Financing Agreement. The court concluded that Dannar's repayment of the Note did not extinguish its remaining obligations under the Financing Agreement, including its obligations under the Relocation Provision. The court also concluded that the relocation fee did not constitute an unenforceable penalty. Subsequently, the Honorable Perry H. Gravely granted SCL's motion for attorney's fees and expenses. This appeal followed.

ISSUES ON APPEAL

1. Did Dannar's repayment of the Note extinguish all of its obligations under the Financing Agreement?

2. Was the Relocation Provision an unenforceable penalty?

STANDARD OF REVIEW

This court reviews the grant of a summary judgment motion under the same standard applied by the trial 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). Rule 56(c), SCRCP, provides that summary judgment shall 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." 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 Estate Mgmt., Inc.*, 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019).

LAW/ANALYSIS

I. Effect of Note Repayment

Dannar argues the circuit court erred by concluding that full repayment of the Note did not extinguish all of Dannar's obligations under the Financing Agreement. We disagree.

"The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties." *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000) (quoting *Chan v. Thompson*, 302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct. App. 1990)). "In determining the intention of the parties, a court first looks to the language of the contract and if the language

is clear and unambiguous, the language alone determines the contract's force and effect." *Id.* at 146–47, 538 S.E.2d at 675. The terms the parties have used must "be taken and understood in their plain, ordinary and popular sense." *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). Further, "[t]he parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof." *Abel v. S.C. Dep't of Health & Envtl. Control*, 419 S.C. 434, 441, 798 S.E.2d 445, 448 (Ct. App. 2017) (quoting *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 502 (Ct. App. 2007)).

The Relocation Provision in section 3.3 of the Financing Agreement, provides,

> A. Company Relocation. The Company acknowledges that funds are made available to it under this Agreement in whole or in part for the purpose of economic development for the State of South Carolina and particularly for generating professional research and development jobs in South Carolina. Accordingly, the Company agrees for thereafter period of five years from the date of this Agreement, not to (a) move or relocate the Company Business or the Company's principal office or principal place of business outside the State of South Carolina, and (b) not to have more than one-half, based on payroll expenses, of the Company's total employees, or senior management employees, or employees engaged principally in professional research and development, employed at locations outside of the State of South Carolina (any of which shall be deemed a "Company Relocation"), unless the Company has paid SC Launch a Relocation Fee as set forth below.
>
> B. Relocation fee. The "Relocation Fee" will be an amount equal to the aggregate amount of all funds advanced by SC Launch to the Company. SC Launch will continue to retain any Securities or other interests it holds in the Company after payment of such fee[,] and this Agreement will continue in full force and effect. The parties acknowledge that the costs to SC Launch, including both tangible and intangible costs, of a Company

> Relocation are not susceptible to precise measurement. The parties hereby agree that the Relocation Fee is not a penalty, but rather, a good-faith estimate of the amount necessary to compensate SC Launch for its actual costs in connection with a Company Relocation.
>
> C. Costs and fees. Should SC Launch, at its sole option, elect to employ the services of any attorney at law to represent it in the enforcement of the Company's obligations under this Section 3.3, the Company will reimburse SC Launch the reasonable fees and expenses of said attorneys and any court costs.

Further, section 7.10, which governs termination of the Financing Agreement, states,

> Except as otherwise specifically provided herein, the provisions hereof, including all covenants, shall continue in full force and effect until the repurchase or redemption by the Company of all securities of the Company held by SC Launch or its successors or assigns, and *payment of fees, including the Relocation Fee to the extent applicable*, and performance of all other obligations owed SC Launch hereunder.

(emphasis added).

In its Supplemental Complaint dated April 27, 2015, Dannar admitted that as of April 1, 2015, it had "relocated a majority of its assets and inventory from South Carolina to Indiana." Dannar also admitted that it had "hired two employees in Indiana and retained one employee in South Carolina." Because Dannar took these actions on or before April 1, 2015—over a year before the April 14, 2016 expiration of the five-year prohibition on relocation—Dannar was obligated to pay the relocation fee in accordance with section 3.3 of the Financing Agreement. Further, section 7.10 states that the Financing Agreement continues in full force and effect until Dannar (1) pays all fees, including the relocation fee, (2) repurchases or redeems all of the company's securities held by SCL, and (3) performs all other obligations owed to SCL. Therefore, we affirm the circuit court's conclusion that Dannar's repayment of the Note did not extinguish its remaining obligations under the Financing Agreement.

II. Penalty

Appellant asserts the circuit court erred by concluding that the relocation fee referenced in the Financing Agreement was not an unenforceable penalty. We disagree.

The circuit court concluded that within the context of SCL's funding of high-risk startups with tax-incentivized contributions and its mentoring services, the Relocation Fee was reasonable:

> Given the context and the relationship of the parties at issue, SC Launch disputes that the traditional law pertaining to whether a liquidated damages provision constitutes an unenforceable penalty applies to this situation. People or entities providing financing and services to a high risk, start-up business normally insist on receiving substantial equity in the company, seats on the board of directors, involvement in management, and other valuable consideration. *SC Launch's request for a commitment to remain in this State for five years or pay a fee in order to obtain state tax incentivized funds and services is modest consideration in this context*, and this situation is differ[ent] in character from the liquidated damages provisions often seen in construction and other commercial contracts that are analyzed by the courts as to whether they constitute an unenforceable penalty. This context and relationship is important, but I need not reach this issue because, even applying traditional liquidated damages law in this case, I conclude that the Relocation Provision is valid and enforceable.

(emphasis added). The circuit court also concluded that the costs involved with mentoring a client such as Dannar and the costs of lost jobs, wages, and tax revenues resulting from a client's premature relocation justified SCL's inclusion of the Relocation Provision in the Financing Agreement.

We disagree with SCL's argument that the Relocation Provision is not subject to the traditional liquidated damages analysis. Nonetheless, we believe the Relocation Provision is enforceable under this analysis. "South Carolina law allows parties to prospectively set an amount of damages for breach through the inclusion

of a liquidated damages provision." *ERIE Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011). "The question of whether a sum stipulated to be paid upon breach of a contract is liquidated damages or a penalty is one of construction and is generally determined by the intention of the parties." *Moser v. Gosnell*, 334 S.C. 425, 431, 513 S.E.2d 123, 126 (Ct. App. 1999). "The determination does not necessarily depend upon the language used in the contract." *Id.* "Rather, the determination depends upon the nature of the contract in light of the circumstances, and the attitude and intentions of the parties." *Id.*

Specifically,

> whe[n] the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance, the stipulation is for liquidated damages; and whe[n] the stipulation is not based upon actual damages in the contemplation of the parties, but is intended to provide punishment for breach of the contract, the sum stipulated is a penalty.

ERIE, 393 S.C. at 460–61, 713 S.E.2d at 321 (quoting *Tate v. Le Master*, 231 S.C. 429, 441, 99 S.E.2d 39, 45–46 (1957)). Further,

> [i]n order to determine whether the sum named in a contract as a forfeiture for noncompliance is intended as a penalty or liquidated damages, *it is necessary to look at the whole contract, its subject-matter, the ease or difficulty in measuring the breach in damages and the magnitude of the stipulated sum*, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach.

Id. at 462, 713 S.E.2d at 322 (emphasis added) (quoting *Foster v. Roach*, 119 S.C. 102, 107, 111 S.E. 897, 899 (1922)).

"Whe[n] . . . the sum stipulated is plainly disproportionate to any probable damage resulting from breach of contract, the stipulation is an unenforceable penalty." *Foreign Acad. & Cultural Exch. Servs., Inc. v. Tripon*, 394 S.C. 197, 204, 715 S.E.2d 331, 334 (2011) (quoting *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 172, 568 S.E.2d 361, 363 (2002)). This is so despite the characterization the

stipulated sum is given in the contract language itself. *See Benya v. Gamble*, 282 S.C. 624, 630, 321 S.E.2d 57, 61 (Ct. App. 1984) ("*Irrespective of its terminology*, a stipulation will be held to constitute a penalty 'whe[n] the sum stipulated is so large that it is plainly disproportionate to any probable damage resulting from [a] breach of the contract.'" (emphasis added) (second alteration in original) (quoting *Tate*, 231 S.C. at 442, 99 S.E.2d at 46)).

However, the burden is on the party contesting the characterization set forth in the parties' contract to show that a specified sum is actually a penalty. *See Rental Unif. Serv. of Greenville, S.C., Inc. v. K & M Tool & Die, Inc.*, 292 S.C. 571, 573, 357 S.E.2d 722, 724 (Ct. App. 1987) (noting that the contract being examined by the court expressly stated that the provision was for "liquidated damages" and acknowledging that although the designation was "not necessarily conclusive of the issue of whether the sum specified in the contract is either liquidated damages or a penalty, the designation is indicative of the intention of the parties and must be accepted as the true expression of their intention *until it is shown that the provision is for a penalty*." (emphasis added) (citation omitted)); *see also Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004) ("Whe[n] an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." (quoting *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)).

Moreover, "[w]here there is no evidence [that] enables the court to find the amount of damages anticipated by the parties, it cannot say that a provision is for a penalty rather than for liquidated damages *by reason of the fact that the amount is disproportionate to the actual damages*." *Benya*, 282 S.C. at 631, 321 S.E.2d at 62 (emphasis added) (quoting 25 C.J.S. *Damages* § 108 at 1057 (1966)). Finally, even "[i]f a clause is held to be a penalty, the plaintiff may still recover any actual damages that can be proved to have resulted from the breach." *Tripon*, 394 S.C. at 204, 715 S.E.2d at 334.

Here, we acknowledge that at first glance, the relocation fee ($200,000) seems excessive when compared to the amount of the loan ($200,000), which Dannar fully repaid with interest. We further acknowledge the admission of SCL's executive director, Harry Hillman, that as a general rule, it was SCL's practice to set the relocation fee at the same amount as the principal amount of the loan. However, the very essence of the contract was SCL's objective to create high-paying jobs for South

Carolinians and to further develop South Carolina's economy.[4] Section 3.3.A of the Financing Agreement begins with Dannar's acknowledgement that SCL was making the loan "for the purpose of economic development for the State of South Carolina and particularly for generating professional research and development jobs in South Carolina." Consistent with this language, SCL's damages included the lost opportunity to fund another startup that would stay in South Carolina long enough to provide high-paying jobs for South Carolina residents, grow the tax base, and strengthen the state's knowledge economy. The very nature of this lost opportunity makes it difficult to monetize, but we conclude the cost would far exceed the amount of the relocation fee, $200,000.

Further, section 3.3.B of the Financing Agreement begins with notice to Dannar that the relocation fee will "be an amount equal to the aggregate amount of all funds advanced by SC Launch to the Company." This section also states,

> SC Launch will continue to retain any Securities or other interests it holds in the Company after payment of such fee[,] and this Agreement will continue in full force and effect. The parties acknowledge that the costs to SC Launch, including both tangible and intangible costs, of a Company Relocation are not susceptible to precise measurement. The parties hereby agree that the Relocation Fee is not a penalty, but rather, a *good-faith estimate of the amount necessary to compensate SC Launch for its actual costs in connection with a Company Relocation*.

(emphasis added). According to Hillman, the Relocation Provision and relocation fee are standard provisions in every financing agreement with its respective client companies, and these provisions are critical to the continued success of the SCL

[4] We reject Appellant's argument that the state's loss of jobs resulting from a loan recipient's relocation is not a loss to SCL. Although SCL is a non-profit corporation, we view it as an extension of state government with a mission to carry out SCRA's enabling legislation. SCRA is a government agency established by our legislature to, *inter alia*, promote the development of high technology industries and research facilities in South Carolina pursuant to specific legislation, §§ 13-17-10, -20. SCRA formed the SC Launch program to, *inter alia*, strengthen South Carolina's knowledge economy and create high-paying jobs in the state, and the program supports advanced technology and knowledge-based businesses. *See supra* pp. 2–3.

program. When a business supported by SCL departs South Carolina before making any significant economic impact on the state, SCL loses the benefit of its bargain, the expected high-paying jobs, resulting tax revenue, and additional benefits to the local economy.

Accordingly, when Dannar relocated to Indiana well before the expiration of the requisite five-year period, SCL lost the benefit of its bargain with Dannar. In contrast, Mr. Dannar acknowledged that his company "would not be moving forward were it not for the support of and investment made by [SCL]." This is a testament to SCL's distinction from traditional private lenders. To successfully carry out its mission to create high-paying jobs in the state, SCL provides loans to high-risk startups who may be initially unsuccessful in obtaining other financing, as was the case with Dannar, and provides the services of its staff members to mentor clients and make local contacts on behalf of their clients.

Notably, Dannar itself, having accepted financing and mentoring services from SCL, projected the benefits that its business would provide to Indiana (rather than South Carolina). In its December 15, 2012 funding application submitted to the State of Indiana, Dannar projected a $1.2 million corporate tax liability by the year 2015 in favor of Indiana. Therefore, according to Dannar's own numbers, the tax revenues South Carolina would have lost to Indiana before the expiration of the five-year relocation prohibition dwarfs the amount of the Relocation Fee, $200,000. Ironically, during the July 23, 2013 meeting concerning the Redevelopment Agreement between Dannar and Delaware County, Indiana, a member of Delaware County Council asked Mr. Dannar about the Relocation Fee in the Financing Agreement with SCL. Specifically, the member asked if Dannar would be prepared to pay the Relocation Fee to SCL, and Mr. Dannar replied, "Yes, we would be prepared to pay that back."

We note that the circuit court and SCL have relied on an opinion of the Supreme Court of Iowa in a comparable case, *City of Davenport v. Shewry Corp.*, 674 N.W.2d 79 (Iowa 2004). In *Shewry*, the City of Davenport entered into an economic development agreement with a welding company contemplating the company's building of a welding and fabrication facility, creating 60 new full-time jobs within 36 months, and retaining 186 existing jobs. *Id.* at 81. In return, the City agreed to provide up to $200,000 in grant money to the company in three phases, which were aligned with the company's progress on building the facility. *Id.* The agreement stated that the company's failure to meet the employment requirements would constitute a material breach of the agreement requiring repayment of all grant funds received. *Id.* When the company failed to meet the agreement's employment

requirements, the City filed an action seeking to recoup $150,000 in grant funds it had distributed to the company, and the trial court ultimately entered a $150,000 judgment against the company. *Id.* at 82. On appeal, the Supreme Court of Iowa affirmed the trial court's ruling that the agreement's requirement for the return of grant funds upon a material breach was not an unenforceable penalty. *Id.* at 86.

Dannar distinguishes *Shewry* on the basis that in the present case, SCL issued an interest-bearing loan that Dannar fully repaid. However, we believe this distinction is immaterial for purposes of examining the *Shewry* court's analysis of whether the disputed clause was a penalty or merely a liquidated damages clause. Like South Carolina, Iowa considers (1) whether the clause sets an amount that is unreasonably large in light of the anticipated or actual loss and (2) the difficulty of proving the loss. *Shewry*, 674 N.W.2d at 85.[5] In particular, the court stated, "The defendants' claim that the repayment provision is a penalty rests on their erroneous assumption that the City's only loss is the grant money paid to the company." *Id.* The court explained,

> This assumption ignores the fact that the [agreement] expressly recognized *two* anticipated benefits to the City from the company's performance of its contractual obligations: (1) an increased tax base; and (2) *the creation of jobs*. Although damages from a failure to realize the first benefit may be easily computed, the City's loss from the company's failure to create the jobs required by the

[5] The *Shewry* court noted that it had adopted the two-factor test set forth in the Restatement (Second) of Contracts § 356(1), cmt. b, for determining whether a purported liquidated damages provision is actually a penalty: "(1) 'the anticipated or actual loss caused by the breach'; and (2) 'the difficulty of proof of loss.'" 674 N.W.2d at 85 (quoting *Rohlin Constr. Co. v. City of Hinton*, 476 N.W.2d 78, 80 (Iowa 1991)). Although we have found no opinions of our own supreme court expressly adopting this provision of the Restatement or its comment, this court has expressly relied on it. *See Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 27, 738 S.E.2d 480, 494 (Ct. App. 2013) ("To the extent that there is uncertainty as to the harm, the estimate of the court or jury may not accord with the principle of compensation any more than does the advance estimate of the parties." (quoting Restatement (Second) of Contracts § 356 cmt. b)); *id.* ("The greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty, the easier it is to show that the amount fixed is reasonable." (quoting Restatement (Second) of Contracts § 356 cmt. b)).

> [agreement] is difficult, if not impossible, to measure. New workers earn payroll dollars that are spent in the community, generating income for other residents who then spend their earnings, and so on. We conclude *the City would have great difficulty in establishing with any degree of certainty the loss it has sustained from the company's breach of the [agreement]*.

Id. (second and third emphases added). The court also concluded that the amount of liquidated damages fixed in the agreement, which was the same as the amount of grant funds issued, was not unreasonably large in light of the anticipated or actual harm because the repayment of those funds would not cover the damages resulting from the loss of anticipated jobs. *Id.* at 85–86. We find the *Shewry* court's analysis persuasive.

Dannar maintains that the "value of uncreated jobs in South Carolina is speculative at best." Yet, the speculative nature of placing a value on lost jobs only validates the language in the Relocation Provision acknowledging that the costs to SCL of a company relocation are not susceptible to precise measurement and the specified $200,000 fee is a good-faith estimate of those costs. This is a factor courts consider when upholding a liquidated damages provision. *See Baugh*, 402 S.C. at 26, 738 S.E.2d at 494 (upholding a stipulated damages provision in a covenant not to compete and acknowledging, "the damages to be expected by competition are highly difficult to predict"); *id.* at 27, 738 S.E.2d at 494 ("To the extent that there is uncertainty as to the harm, the estimate of the court or jury may not accord with the principle of compensation any more than does the advance estimate of the parties." (quoting Restatement (Second) of Contracts § 356 cmt. b)); *id.* ("The greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty, the easier it is to show that the amount fixed is reasonable." (quoting Restatement (Second) of Contracts § 356 cmt. b)).

In any event, we note that SCRA's 2015 Annual Report on SC Launch indicates the average salary of the jobs created through the SC Launch program was $69,000. Using this number, the loss of merely three jobs would cost SCL, as a representative of the state, at least $207,000 in generated salaries, more than the $200,000 relocation fee imposed by SCL on Dannar.

Finally, Dannar highlights Hillman's admission that he "probably" referred to the Relocation Fee as a penalty or a "clawback" at some point in the past. Dannar also highlights similar references in meeting minutes and other correspondence of

SCL's Board of Directors. However, these particular references are not relevant to the parties' intent at the time they executed the Financing Agreement. No date is indicated for Hillman's probable references, and the references in meeting minutes took place years after the Financing Agreement was executed. Therefore, none of these references may be considered in determining the parties' intent underlying their agreement on the relocation fee. *See 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 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*." (emphasis added)); *Ellie*, 358 S.C. at 94, 594 S.E.2d at 493 ("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*." (emphasis added)).

Based on the foregoing, we affirm the circuit court's conclusion that the Relocation Provision's fee requirement was not a penalty.

CONCLUSION

Accordingly, we affirm the circuit court's order.

AFFIRMED.[6]

LOCKEMY, C.J., and HEWITT, J., concur.

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