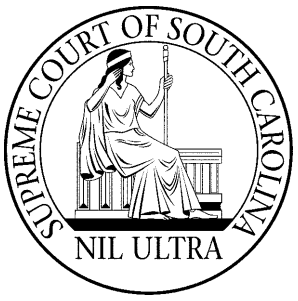

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 27
August 11, 2021
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

2020-001318 – In the Matter of Cynthia E. Collie	Pending

PETITIONS FOR REHEARING

28030 – Leisel Paradis v. Charleston County School District	Pending
28031 – SC Coastal Conservation League v. SC Department of Health and Environmental Control	Pending
28033 – Dennis J. Powell, Jr. v. Mark Keel	Denied 8/4/2021
28034 – Ashley Reeves v. SC Municipal Insurance	Pending
28042 – In the Matter of William E. Hopkins, Jr.	Pending
2021-MO-009 – Eric Ragsdale v. Mark Keel	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5827-Francisco Ramirez v. May River Roofing, Inc.	Denied 07/23/21
5829-Thomas Torrence v. SCDC	Denied 08/4/21
5830-State v. John Smart	Pending
5832-State v. Adam Rowell	Pending
5834-Vanessa Williams v. Bradford Jeffcoat	Pending
5835-State v. James Caleb Williams	Pending
5839-In the Matter of Thomas Griffin	Pending
2021-UP-013-Federal National Mortgage Assn. v. Richard C. Ivey	Denied 07/22/21
2021-UP-045-Kenneth Davis v. Cole Dunn	Denied 07/20/21
2021-UP-112-John Cross and Steven Cross v. Gregory Weaver	Pending
2021-UP-125-Rico Dorsey v. Allwaste Services, Inc.	Pending
2021-UP-147-Gavin V. Jones v. State	Pending
2021-UP-151-Elvia Stoppiello v. Williams Turner	Pending
2021-UP-158-Nathan Albertson v. Amanda Byfield	Pending
2021-UP-161-Wells Fargo Bank, N.A. v. Albert Sanders (2)	Denied 07/21/21
2021-UP-162-First-Citizens Bank v. Linda Faulkner	Denied 07/20/21
2021-UP-163-In the interest of Channon P.	Pending
2021-UP-171-Anderson Brothers Bank v. Dazarhea Monique Parson (3)	Pending
2021-UP-176-State Ethics Commission v. Charles Houston	Pending
2021-UP-191-Quality Lawn Care v. Coogler Construction	Denied 07/23/21
2021-UP-196-State v. General T. Little	Pending

2021-UP-206-Wilmington Savings Fund v. Leroy Hooks, II	Pending
2021-UP-220-State v. Johnnie L. McKnight	Pending
2021-UP-224-Charleston Cty. School Dist. v. Dr. Gerrita Postlewait	Pending
2021-UP-229-Peter Rice v. John Doe	Denied 07/20/21
2021-UP-230-John Tomsic v. Angel Tomsic	Pending
2021-UP-231-JP Morgan Chase Bank v. Fritz Timmons	Pending
2021-UP-240-Kari Pierce v. Joseph Pierce	Denied 07/22/21
2021-UP-242-G. Allen Rutter v. City of Columbia	Pending
2021-UP-245-State v. Joshua C. Reher	Pending
2021-UP-247-Michael A. Rogers v. State	Denied 07/20/21
2021-UP-249-State v. William Holmes	Pending
2021-UP-252-Betty Jean Perkins v. SCDOT	Pending
2021-UP-253-State v. Corey J. Brown	Denied 07/29/21
2021-UP-254-State v. William C. Sellars	Denied 07/26/21
2021-UP-259-State v. James Kester	Pending
2021-UP-260-Timothy L. Frady v. State	Denied 07/23/21
2021-UP-272-Angela Bain v. Denise Lawson	Pending
2021-UP-273-SCDHEC v. Davenport	Pending
2021-UP-274-Jessica Dull v. Robert Dull	Denied 08/4/21
2021-UP-277-State v. Dana L. Morton	Pending
2021-UP-279-State v. Therron R. Richardson	Pending
2021-UP-280-Carpenter Braselton, LLC v. Ashley Roberts	Pending

2021-UP-281-In the Matter of the Estate of Harriet Kathleen Henry Tims	Pending
2021-UP-283-State v. Jane Katherine Hughes	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5588-Brad Walbeck v. The I'On Company	Pending
5691-Eugene Walpole v. Charleston Cty.	Pending
5725-In the matter of Francis A. Oxner	Pending
5726-Chisolm Frampton v. SCDNR	Pending
5731-Jericho State v. Chicago Title Insurance	Pending
5735-Cathy J. Swicegood v. Polly A. Thompson	Pending
5736-Polly Thompson v. Cathy Swicegood	Pending
5749-State v. Steven L. Barnes	Pending
5751-State v. Michael Frasier, Jr.	Granted 8/6/21
5755-Stephen A. Connelly v. The Main Street America Group	Pending
5758-State v. Deshanndon M. Franks	Pending
5759-Andrew Young v. Mark Keel	Pending
5764-State Farm v. Myra Windham	Pending
5769-Fairfield Waverly v. Dorchester County Assessor	Pending
5773-State v. Mack Seal Washington	Pending
5783-SC Dep't of Commerce, Division of Public Railways v. Clemson	Pending
5784-Arrowpointe Federal Credit Union v. Jimmy Eugene Bailey	Pending
5790-James Provins v. Spirit Construction Services, Inc.	Pending

5792-Robert Berry v. Scott Spang	Pending
5794-Sea Island Food v. Yaschik Development (2)	Pending
5797-In the Interest of Christopher H.	Pending
5798-Christopher Lampley v. Major Hulon	Pending
5800-State v. Tappia Deangelo Green	Pending
5802-Meritage Asset Management, Inc. v. Freeland Construction	Pending
5805-State v. Charles Tillman	Pending
5806-State v. Ontavious D. Plumer	Pending
5807-Road LLC and Pinckney Point, LLC v. Beaufort County	Pending
5808-State v. Darell O. Boston (2)	Pending
5820-State v. Eric Dale Morgan	Pending
5821-The Estate of Jane Doe 202 v. City of North Charleston	Pending
2019-UP-331-Rajinder Parmar v. Balbir S. Minhas	Granted 8/6/21
2020-UP-148-State v. Ronald Hakeem Mack	Pending
2020-UP-178-State v. Christian A. Himes	Denied 8/6/21
2020-UP-196-State v. Arthur J. Bowers	Denied 8/6/21
2020-UP-198-State v. Sidney Moorer	Granted 8/6/21
2020-UP-225-Assistive Technology Medical v. Phillip DeClemente	Pending
2020-UP-236-State v. Shawn R. Bisnauth	Denied 8/6/21
2020-UP-241-State v. Mimi Joe Marshall	Denied 8/6/21
2020-UP-244-State v. Javon Dion Gibbs	Pending

2020-UP-245-State v. Charles Brandon Rampey	Pending
2020-UP-263-Phillip DeClemente v. Assistive Technology Medical	Pending
2020-UP-269-State v. John McCarty	Pending
2020-UP-271-State v. Stewart Jerome Middleton	Pending
2020-UP-272-State v. Heyward L. Martin, III	Pending
2020-UP-275-Randall Seels v. Joe Smalls	Granted 8/6/21
2020-UP-290-State v. Phillip Wesley Walker	Denied 8/6/21
2020-UP-307-State v. Craig C. Busse	Pending
2020-UP-323-John Dalen v. State	Pending
2020-UP-336-Amy Kovach v. Joshua Whitley	Pending
2021-UP-009-Paul Branco v. Hull Storey Retail	Pending
2021-UP-029-State v. Tyrone A. Wallace, Jr.	Pending
2021-UP-086-State v. M'Andre Cochran	Pending
2021-UP-105-Orveletta Alston v. Conway Manor, LLC	Pending
2021-UP-156-Henry Pressley v. Eric Sanders	Pending
2021-UP-167-Captain's Harbour v. Jerald Jones (2)	Pending
2021-UP-182-State v. William Lee Carpenter	Pending
2021-UP-184-State v. Jody L. Ward (2)	Pending
2021-UP-204-State v. Allen C. Williams, Jr.	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Rosalind L. Sellers, Respondent.

Appellate Case No. 2021-000656

Opinion No. 28046
Submitted July 23, 2021 – Filed August 11, 2021

DISBARRED

Disciplinary Counsel John S. Nichols and Senior Assistant Disciplinary Counsel Ericka M. Williams, both of Columbia, for the Office of Disciplinary Counsel.

Rosalind L. Sellers, of Atlanta, Georgia, Pro Se.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct and consents to a three-year definite suspension or disbarment. We accept the Agreement and disbar Respondent from the practice of law in this state. The facts, as set forth in the Agreement, are as follows.

I.

Matter A

ODC mailed Respondent a notice of investigation along with a complaint received from one of Respondent's clients. Respondent failed to submit a response to the notice of investigation. A reminder letter was mailed to Respondent pursuant to *In*

re Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982), but Respondent again failed to respond. Respondent provided her initial response after receiving a phone call from ODC. Respondent then failed to respond to a letter requesting additional information and a letter reminding her that her response remained outstanding. After several attempts, ODC reached Respondent by phone. Respondent stated she was intimidated by the process but had no reason for failing to respond. ODC staff emailed Respondent copies of the information request and reminder letters, but Respondent again failed to respond.

ODC issued a notice to appear and subpoena, which required Respondent to bring her client's file to the interview. Respondent appeared and brought the client's medical records and a few additional papers. During the interview, Respondent asserted she provided all the documentation she had in her possession, but her response referenced correspondence with the insurance company and her client that she did not provide. The investigation did not reveal clear and convincing evidence of any misconduct alleged in the complaint, but Respondent acknowledges she failed to maintain a complete file in violation of Rule 1.15(a), RPC, Rule 407, SCACR. Additionally, Respondent violated Rule 8.1(b), RPC, Rule 407, SCACR, by knowingly failing to fully cooperate during the disciplinary investigation.

Matter B

Respondent's bank reported that a check was presented against insufficient funds in her trust account. ODC mailed Respondent a copy of the bank's report along with a notice of investigation, but Respondent did not submit a response. Respondent also failed to respond to a *Treacy* letter, a voicemail, and an email. ODC issued a notice to appear and subpoena. Respondent provided an incomplete response on the eve of her on-the-record interview explaining she accidentally paid an employee with a check from the trust account rather than the operating account. Respondent did not provide any operating account records with her response and failed to produce reconciliation records requested in the notice of investigation.

Respondent submitted several trust account bank statements during her interview but did not provide the other subpoenaed trust account records. Respondent testified she used trust accounting software to record her trust account transactions and maintain her client ledgers but admitted she had never reconciled her trust

account as required by Rule 417, SCACR. Respondent reported she was working with an accountant to create reconciliations and would provide them to ODC.

Respondent never produced any reconciliations despite numerous requests. ODC scheduled a second interview and subpoenaed Respondent's complete trust and operating account records for the entire history of her private practice along with her client list and internal file numbers. Respondent brought no financial records to the second interview, but weeks later, she provided some trust account check stubs, deposit records, and handwritten notes. Unfortunately, these records covered only fractions of the time period requested, and some of the check stubs were blank. Respondent failed to provide complete disbursement journals or any operating account records, trust account receipt and disbursement journals, trust account client ledgers, or list of client names or internal file numbers.

ODC obtained five years and five months of trust and operating account statements from Respondent's bank and reviewed those records in conjunction with the incomplete records Respondent provided. Some transactions were identified using the bank records, but ODC was unable to identify the following trust account transactions: eight deposits totaling $5,965.86; thirty-seven disbursements totaling $21,268.18 made to third parties normally associated with personal injury disbursements; forty-two electronic transfers to Respondent's operating account totaling $69,257.47; ten checks issued to Respondent's law firm totaling $16,674.56; three cash withdrawals totaling $6,143.90; and eight disbursements totaling $3,769.21 made to Respondent's creditors.[1] Many of the cash withdrawals and payments Respondent made to herself and her creditors were made at times when Respondent's operating account balance was very low or negative.

In addition to these problematic transactions, Respondent failed to maintain the required trust account records and properly safeguard funds in her trust account. For many clients, Respondent failed to fully disburse the funds she had in trust. For other clients, Respondent disbursed more than was deposited. Respondent sometimes failed to transfer earned attorney's fees from the trust account, leading to the commingling of her funds with her clients' funds and confusion about what amounts Respondent was owed. On at least one occasion, Respondent disbursed

[1] Included in these payments was a $60 payment to Respondent's utility company, a $465 electronic payment to Respondent's cable provider, and a $1,504.34 check to partially repay Respondent's bank for a negative balance charge on her operating account.

funds for a client before making the corresponding deposit. Respondent also issued refunds to and paid filing fees and costs for clients for whom no deposits could be identified.

II.

Respondent admits her conduct violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15(a) (prohibiting the commingling of a lawyer's funds with client funds and requiring compliance with the financial recordkeeping provisions of Rule 417, SCACR); Rule 1.15(f)(1) (requiring funds to be deposited into trust before disbursement); Rule 1.15(g) (prohibiting the use of a party's funds for the benefit of another); and Rule 8.1(b) (prohibiting a knowing failure to respond to a disciplinary inquiry). Respondent's conduct also violated the following financial recordkeeping provisions of Rule 417, SCACR: Rule 1 (requiring lawyer to maintain six years of receipt and disbursement journals, client ledgers, and monthly trial balance and reconciliation reports); Rule 2(b) (requiring records of deposit to be sufficiently detailed to identify each item deposited); Rule 2(c) (forbidding cash withdrawals from a lawyer's client trust account). Respondent further admits her conduct constitutes grounds for discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR (providing a violation of the Rules of Professional Conduct shall be grounds for discipline).

III.

In light of Respondent's pattern of mishandling funds and failure to cooperate with ODC, we accept the Agreement for Discipline by Consent and disbar Respondent from the practice of law in this state, retroactive to April 20, 2017, the date of her administrative suspension.[2]

Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of this Court showing that she has complied with Rule 30, RLDE, Rule 413, SCACR, and she shall also surrender her Certificate of Admission to the Practice of Law to the Clerk of this Court. Within thirty days of the date of this opinion, Respondent shall pay or enter into a reasonable plan to repay the costs incurred in the investigation and prosecution of this matter by ODC and the

[2] *In re Admin. Suspensions for Failure to Comply with Continuing Legal Educ. Requirements*, S.C. Sup. Ct. Order dated Apr. 20, 2017 (Shearouse Adv. Sh. No. 17).

Commission on Lawyer Conduct (Commission). Within six months of the date of this opinion, Respondent shall retain a Certified Public Accountant (CPA) to review all available trust account records for at least the six-year period preceding her administrative suspension, provide documentation to the Commission confirming the CPA has been retained, and comply with all inquiries and requests from the Commission relating to this condition of discipline. Respondent shall provide the CPA with access to all records she has or can access and engage the CPA to issue a report identifying all injured parties. Within ten days of the issuance of the CPA's report, Respondent shall provide the Commission with a copy of the report and enter into a plan with the Commission to make restitution to any injured parties identified in the report. Further, Respondent shall reimburse the Lawyers' Fund for Client Protection for any payments it makes on claims by her clients and complete the Legal Ethics and Practice Program Trust Account School prior to reinstatement.

DISBARRED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kenneth William Ebener, Respondent.

Appellate Case No. 2021-000260

Opinion No. 28047
Submitted July 21, 2021 – Filed August 11, 2021

PUBLIC REPRIMAND

Disciplinary Counsel John S. Nichols and Senior Assistant Disciplinary Counsel Ericka M. Williams, both of Columbia, for the Office of Disciplinary Counsel.

S. Jahue Moore, Esquire, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct and consents to the imposition of a confidential admonition or a public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

I.

Matter A

Respondent was hired by Superior Closing and Title Services, LLC (Superior Closing) to serve as the closing attorney for a home purchase by C.W. The mortgage loan was funded by 1st Choice Mortgage, and the closing took place on February 3, 2009. Respondent was paid $200 by Superior Closing for the work associated with the closing. Subsequent to the closing, 1st Choice Mortgage sold the loan to Wells Fargo Bank. On December 8, 2010, Wells Fargo Bank notified 1st Choice Mortgage that a problem existed with the closing of the loan and made a demand that 1st Choice Mortgage repurchase the loan, citing a problem with the title.

It was discovered that the purchase was a straw purchase by C.W., who never made a payment on the loan. Respondent represents, and ODC does not dispute, that Respondent was unaware of the straw purchase. The closing statement for the transaction showed a down payment by C.W. in the amount of $11,598.16. At the closing, a copy of a $12,000 cashier's check made payable to Superior Closing was shown to Respondent and 1st Choice Mortgage as the source of the down payment. The cashier's check was never cashed by the bank or otherwise negotiated and the funds were not deposited into Superior Closing's account as represented on the closing statement. 1st Choice Mortgage repaid Wells Fargo Bank over $39,000 to settle its claim.

Respondent signed a Certification Addendum to the HUD-1 Settlement Statement in which he certified that everything on the settlement statement was a true and accurate account of the transaction, when Respondent should have known the representations regarding the cashier's check were untrue.

Respondent and Superior Closing were named as defendants in a lawsuit filed by 1st Choice Mortgage. Respondent testified at trial and acknowledged he learned after the closing that the settlement statement falsely represented that Superior Closing had received the funds. Respondent acknowledges that the settlement statement is inaccurate as it incorrectly shows the down payment funds as having been received by Superior Closing. Respondent represents that the settlement statement was prepared by Superior Closing, and Respondent acknowledges that he failed to properly supervise the preparation of the settlement statement and the disbursement of the proceeds. On June 19, 2014, a jury rendered a verdict against Respondent for $3,000 in actual damages and against Superior Closing for $3,000 in actual damages, with no punitive damages awarded against either Respondent or Superior Closing. Following post-trial motions, the circuit court entered a

judgment notwithstanding the verdict and revised the judgment for actual damages to $39,739 against Respondent, Superior Closing, and one other defendant associated with Superior Closing. No punitive damages award was entered against any of those three defendants. A satisfaction of that judgment as to Respondent and Superior Closing was filed on June 19, 2014.

Respondent admits his conduct in this matter violated the following Rules of Professional Conduct in Rule 407, SCACR: Rule 4.1 (truthfulness in statements to others); Rule 5.3(c) (lawyer responsible for misconduct of non-lawyer who lawyer supervises); 8.4(d) (conduct involving dishonesty or misrepresentation); and 8.4(e) (conduct prejudicial to the administration of justice).

Matter B

Respondent represented a client in a domestic matter, and on March 7, 2014, a final decree of divorce was filed. The divorce decree provided that Respondent's client would be responsible for the preparation of a qualified domestic relations order (QDRO) dividing the client's pension plan between the parties with both parties being equally responsible for the costs for the preparation of the QDRO. The order further provided that preparation of the QDRO should begin within thirty days of the date of the decree. Respondent agreed to assist his client with the preparation of the QDRO. After various inquiries from opposing counsel regarding the status of the QDRO, Respondent advised opposing counsel of the cost for preparation and requested payment from the opposing party. Respondent received verification that the opposing party had paid their half of the preparation fee for the QDRO on June 14, 2016. Respondent represents that he began preparation of the QDRO on July 5, 2016. After sending various drafts for approval, the final QDRO was filed with the family court on March 1, 2018.

Respondent admits his conduct in this matter violated the following Rules of Professional Conduct in Rule 407, SCACR: Rule 1.3 (diligence) and Rule 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal).

II.

Respondent admits his conduct constitutes grounds for discipline under Rule 7(a)(1), Rule 413, SCACR (violation of the Rules of Professional Conduct). Respondent further consents to the imposition of a confidential admonition or a

public reprimand as set forth in Rule 7(b), RLDE, and agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (Commission). As a condition of discipline, Respondent agrees to complete the Legal Ethics and Practice Program Ethics School within nine months of the imposition of any sanction.

III.

We find Respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand Respondent. Within thirty days of the date of this opinion, Respondent shall pay or enter into a reasonable payment plan with the Commission to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission. Within nine months of the date of this opinion, Respondent shall complete the Legal Ethics and Practice Program Ethics School.

PUBLIC REPRIMAND.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Darren S. Haley, Respondent.

Appellate Case No. 2021-000059

Opinion No. 28048
Submitted July 21, 2021 – Filed August 11, 2021

PUBLIC REPRIMAND

Disciplinary Counsel John S. Nichols and Deputy Disciplinary Counsel Carey Taylor Markel, both of Columbia, for the Office of Disciplinary Counsel.

Darren S. Haley, of Greenville, Pro Se.

PER CURIAM: By order of the Grievance Committee of the North Carolina State Bar dated May 14, 2019, Respondent was reprimanded for violating the North Carolina Rules of Professional Conduct.[1] The order was forwarded to this Court by the Office of Disciplinary Counsel (ODC) on January 19, 2021.

[1] The order states that in 2017, Respondent submitted a motion in Mecklenburg County Superior Court seeking to be admitted *pro hac vice* in North Carolina to represent a client in a criminal matter. In the motion, Respondent failed to reveal that in 2005, this Court suspended him from the practice of law for thirty days and that in 2006, reciprocal discipline was imposed in Virginia, where he is also licensed to practice law. *See In re Haley*, 366 S.C. 363, 622 S.E.2d 538 (2005) (publicly reprimanding Respondent for a lack of diligence and communication and failing to consult with his client). The order concluded Respondent violated Rules 3.3(a) (false statement of fact to a tribunal); 8.4(c) (conduct involving dishonesty); and 8.4(d) (conduct prejudicial to the administration of justice) of the North Carolina Rules of Professional Conduct. Respondent was reprimanded for the violations.

Thereafter, pursuant to Rule 29(b), RLDE, ODC and Respondent were notified by letter of the Clerk of this Court that they had thirty days to inform the Court of any claim that imposition of the identical discipline in South Carolina is not warranted. Respondent did not respond to the Clerk's letter.

We find a public reprimand is the appropriate sanction to impose as reciprocal discipline, as none of the reasons set forth in Rule 29(d), RLDE exist to justify different discipline in this matter.

PUBLIC REPRIMAND.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Magistrate Jerry Fletcher Rivers of Florence County Magistrate's Court, Respondent.

Appellate Case No. 2021-000305

Opinion No. 28049
Submitted June 21, 2021 – Filed August 11, 2021

DEFINITE SUSPENSION

Disciplinary Counsel John S. Nichols and Deputy Disciplinary Counsel Carey Taylor Markel, both of Columbia, for the Office of Disciplinary Counsel.

Jerry Fletcher Rivers, of Florence, Pro Se.

PER CURIAM: In this judicial disciplinary matter, Respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21 of the Rules for Judicial Disciplinary Enforcement (RJDE) contained in Rule 502 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct, consents to the imposition of up to a six-month definite suspension, and agrees to complete anger management counseling. We accept the Agreement, suspend Respondent from office for six months, and require Respondent to complete anger management counseling. The facts, as set forth in the Agreement, are as follows.

I.

On May 14, 2020, the Chief Magistrate for Florence County scheduled a meeting with the magistrates and clerks to discuss the Covid-19 safety plan for re-opening

magistrates' courts to the public in accordance with this Court's April 30, 2020 Order concerning Statewide Evictions and Foreclosures. During the meeting, Respondent began asking questions repeatedly, speaking in a loud voice and challenging the Chief Magistrate's Covid-19 safety plan for reopening. As the meeting continued, Respondent became visibly agitated, reading aloud portions of the April 30, 2020 Order and challenging the Chief Magistrate's implementation plan. At one point during the meeting another magistrate in attendance told Respondent to follow the Chief Magistrate's direction. Due to Respondent's continued disruptions, the Chief Magistrate apologized to the other meeting attendees and adjourned the meeting prematurely without completing the agenda.

After the meeting concluded, Respondent exited the meeting room and confronted the magistrate who suggested he follow the Chief Magistrate's directions. Respondent expressed his displeasure and told the other magistrate not to disrespect him again. Respondent then returned to the meeting room where the Chief Magistrate had begun to gather her personal belongings. When the Chief Magistrate turned to leave the room, she was startled to see Respondent, who was hitting his hands together and loudly requesting that going forward the Chief Magistrate should show him respect. The Chief Magistrate grew concerned for her physical well-being. The following day, she reported the incident to the Office of Disciplinary Counsel.

Approximately a month later, Respondent told a Florence County clerk that the Chief Magistrate "does not know who she is dealing with and she will regret doing this," in reference to the complaint submitted to Disciplinary Counsel. Thereafter, Respondent was placed on interim suspension. *In re Rivers*, S.C. Sup. Ct. Order dated July 10, 2020.

II.

Respondent admits he acted inappropriately during the May 14, 2020 meeting; during his interaction with his fellow magistrate and the Chief Magistrate after the meeting; and when he spoke to the clerk the following month. Respondent recognizes that his concerns regarding Covid-19 do not excuse his behavior and that his disruptive behavior reflected poorly on his professional judgment and temperament.

Respondent acknowledges that his conduct violates the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 2 (providing a judge shall avoid impropriety and the appearance of impropriety) and Canon 3C(1) (providing a judge shall diligently discharge administrative duties and cooperate with other judges and court officials in the administration of court business). Respondent also concedes that his misconduct constitutes grounds for discipline under Rule 7(a)(1), RJDE, Rule 502, SCACR (establishing that a violation of the code of Judicial Conduct shall be a ground for discipline). Respondent consents to the imposition of up to a six-month suspension and requests that the sanction be imposed retroactively. Disciplinary Counsel does not oppose that request.

III.

We accept the Agreement for Discipline by Consent and suspend Respondent from office for six months retroactive to July 10, 2020, the date of his interim suspension. Further, Respondent shall complete anger management and comply with all requirements set forth in this opinion prior to resuming the performance of his judicial duties. Respondent must submit his choice of counselor to the Commission on Judicial Conduct prior to beginning counseling. Respondent should complete at least fifteen hours of anger management counseling; however, should Respondent's chosen counselor determine that more than fifteen hours of counseling are necessary, Respondent shall complete the number of hours recommended by the counselor. After completion of his counseling, Respondent shall provide proof of completion to Court Administration and the Commission on Judicial Conduct, and Respondent's counselor shall submit a report to the Commission on Judicial Conduct detailing Respondent's treatment and progress. Failure to comply with and complete anger management counseling will be grounds for further discipline. Within thirty days, Respondent shall pay or enter into a reasonable payment plan to repay the costs incurred in the investigation of this matter by Disciplinary Counsel and the Commission on Judicial Conduct.

DEFINITE SUSPENSION.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

United Services Automobile Association, Respondent,

v.

Belinda Pickens, Appellant.

Appellate Case No. 2020-000439

Appeal from Richland County
Robert E. Hood, Circuit Court Judge

Opinion No. 28050
Heard May 25, 2021 – Filed August 11, 2021

AFFIRMED

Richard C. Alexander and Terence Covington Wise, both of Shelly Leeke Law Firm, LLC, of North Charleston, and Thomas J. Rode, of Thurmond Kirchner & Timbes, PA, of Charleston, for Appellant.

John Robert Murphy and Wesley Brian Sawyer, both of Murphy & Grantland, PA, of Columbia for Respondent.

JUSTICE HEARN: This case requires us to determine whether Section 38-77-340 of the South Carolina Code (2015) permits a named driver exclusion that precludes uninsured motorist (UM) coverage to a passenger injured in an accident involving an unknown driver. We hold that it does.

FACTS

After sustaining injuries in a vehicle driven by her son, Kevin Simms, Appellant Belinda Pickens sought UM coverage through her policy with Respondent United Services Automobile Association (USAA). At the time of the accident, Pickens's policy covered five vehicles, including the 1997 Chevrolet involved in the accident. The policy included liability, personal injury protection (PIP), UM, and underinsured motorist (UIM) coverage.[1] Pickens also executed a named driver exclusion titled, "VOIDING AUTOMOBILE INSURANCE WHILE NAMED PERSON IS OPERATING CAR."

The named driver exclusion stated in part:

> In consideration of the continuation of this policy in force by the Company at the rate applicable because of this endorsement, it is hereby agreed that with respect to such insurance as is afforded under this policy, including any obligation to defend, the Company shall not be liable for damages, losses or claims arising out of the operation or use of the automobile described in the policy or any other automobile to which the terms of the policy are extended, whether or not such operation or use was with the express or implied permission of its owner, while said automobile is being driven or operated by the following named person:
>
> KEVIN S. PICKENS[2]

Pickens signed and dated the exclusion and indicated Simms had obtained his own policy of insurance. Pickens's declarations page also contained a provision that stated, "***COVERAGES EXCLUDED WHEN ANY VEHICLE OPERATED BY KEVIN SIMMS***."

---

[1] Coverage included limits of $100,000 per person for bodily injury, $200,000 per accident for bodily injury, and $50,000 per accident for property damage for liability, UM, and UIM coverage.

[2] The parties agree they intended to list Kevin Simms as the excluded driver.

USAA denied Pickens's claim and initiated a declaratory judgment action asserting she was not entitled to UM coverage because Simms, the excluded driver, was operating the vehicle at the time of the accident. Both parties filed motions for summary judgment. Pickens asserted that section 38-77-340 applied solely to liability insurance. USAA argued the endorsement excluding all forms of coverage was expressly authorized by section 38-77-340, and to allow Pickens to recover UM in this case would create a "perverse incentive" for policyholders to exclude all members of their households.[3]

After a hearing on the cross-motions for summary judgment, the circuit court granted USAA's motion and denied Pickens's. Citing the court of appeals' decision in *Nationwide Insurance Co. of America v. Knight*, 428 S.C. 451, 835 S.E.2d 538 (Ct. App. 2019), *aff'd*, Op. No. 28028 (S.C. Sup. Ct. filed May 12, 2021) (Shearouse Adv. Sh. No. 16), the circuit court held the excluded driver endorsement was not limited to liability coverage, but also applied to UM coverage, particularly given that UM was not sold as standalone coverage. The circuit court further held that to permit Pickens to recover UM limits after having signed an exclusion naming Simms as an excluded driver would violate public policy. Lastly, the circuit court found *Knight* was applicable, and section 38-77-340 permitted the exclusion of UM coverage. Pickens appealed to the court of appeals, and this Court certified the case for its review pursuant to Rule 204(b), SCACR.

ISSUE

Did the circuit court err by interpreting section 38-77-340 to exclude Pickens's claim for uninsured motorist coverage as a matter of law?

STANDARD OF REVIEW

When parties file cross-motions for summary judgment, the issue is decided as a matter of law. *Neumayer v. Philadelphia Indem. Ins. Co.*, 427 S.C. 261, 265, 831 S.E.2d 406, 408 (2019) (citing *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011)). "Further, the interpretation of a statute is a question

[3] The parties also entered into a stipulation and agreement, noting, *inter alia*, the exclusion form should have listed Kevin Simms rather than Kevin Pickens as Pickens's excluded resident relative, Pickens was a passenger in her 1997 Chevrolet covered by her policy, and Simms was operating the vehicle at the time Pickens was injured.

of law, which we review de novo." *Neumayer*, 427 S.C. at 265, 831 S.E.2d at 408 (citing *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)).

DISCUSSION

Pickens argues section 38-77-340 applies only to liability coverage, and any exclusion permitted by the statute excludes coverage in relation to the named driver and not the policyholder.[4] USAA contends section 38-77-340 allows exclusions on all forms of coverage under a liability policy, including UM coverage. Further, USAA asserts the exclusion voids all coverage while the named driver operates the covered vehicle. We agree with USAA.

Section 38-77-340, titled "Agreement to exclude designated natural person from coverage," states in full:

> Notwithstanding the definition of "insured" in Section 38-77-30, the insurer and any named insured must, by the terms of a written amendatory endorsement, the form of which has been approved by the director or his designee, agree that coverage under such a policy of liability insurance shall not apply while the motor vehicle is being operated by a natural person designated by name. The agreement, when signed by the named insured, is binding upon every insured to whom the policy applies and any substitution or renewal of it. However, no natural person may be excluded unless the named insured declares in the agreement that (1) the driver's license of the excluded person has been turned in

[4] Pickens also asserts the policy language of the exclusion refers to only liability coverage. USAA contends that argument is unpreserved. While it is arguable whether Pickens actually raised this argument during the hearing before the circuit court, it is clear the court did not rule on the policy exclusion's language. Accordingly, because Pickens did not file a Rule 59(e), SCRCP motion, it is unpreserved. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appeal review . . . . Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.").

> to the Department of Motor Vehicles or (2) an appropriate policy of liability insurance or other security as may be authorized by law has been properly executed in the name of the person to be excluded.

S.C. Code Ann. § 38-77-340 (2015).

In *Knight*, this Court held section 38-77-340 did not prohibit the exclusion of UIM coverage. Op. No. 28028 (S.C. Sup. Ct. filed May 12, 2021) (Shearouse Adv. Sh. No. 16 at 20). There, Knight, individually and as representative of her deceased husband's estate, attempted to recover UIM limits under her policy through Nationwide. *Id.* at 20-21. However, Knight had executed an exclusion naming her husband as an excluded driver and providing "all coverages in your policy are not in effect while Danny Knight is operating any motor vehicle." *Id.* at 20. When Knight's husband died in a motorcycle accident, she attempted to recover UIM coverage under her insurance policy, but Nationwide denied the claim, relying on the named driver exclusion. *Id.* at 20-21. Knight argued the General Assembly intended that section 38-77-340 allow exclusions for *only* liability coverage, not UIM. *Id.* at 26. This Court disagreed, noting that freedom of contract affords parties the ability to enter into such exclusions, and section 38-77-340 permits the exclusion of UIM coverage. *Id*. at 26-27.

Like Knight, Pickens entered into an agreement with USAA naming Simms as an excluded driver. Pickens also verified that Simms had sufficient coverage under his own, separate policy as required by statute. *See* S.C. Code Ann. §§ 38-77-140, -150 (2015). We hold the reasoning expressed in *Knight* applies equally here: where the parties agree to exclude coverage when a named driver is operating a vehicle, that exclusion extends to all forms of coverage in the policy. The exclusion at issue specifically applies to "such insurance as is afforded under this policy," and provides that USAA will not be liable when Simms is operating a vehicle described in the policy. Accordingly, USAA's denial of UM coverage to Pickens did not violate section 38-77-340.

We recognize that subsection 38-77-150(A) requires all insurance policies to include UM coverage: "No automobile insurance policy or contract may be issued or delivered unless it contains a provision by endorsement or otherwise, herein referred to as the uninsured motorist provision, undertaking to pay the insured all sums which he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which may be no less than the

requirements of Section 38-77-140." S.C. Code Ann. § 38-77-150(A) (2015). However, excluding a named driver from all forms of coverage—even mandatory coverage—is permitted by section 38-77-340 and therefore does not violate section 38-77-150. Indeed, liability coverage is also mandatory, and Pickens does not suggest that it cannot be excluded under section 38-77-340.

Pickens also argues that to allow USAA to exclude UM coverage here defeats the purpose of UM, particularly if the uninsured motorist at fault in this case was an unknown driver rather than Simms.[5] We believe section 38-77-340 expressly answers that argument by stating: "The agreement, when signed by the named insured, *is binding upon every insured to whom the policy applies* and any substitution or renewal of it." S.C. Code Ann. § 38-77-340 (2015) (emphasis added). Ultimately, under this outcome, the statute's purposes—providing the named insured the opportunity to pay lower premiums when a bad driver would otherwise be included within the policy and protecting the motoring public by requiring the excluded driver to either surrender his driver's license or be insured under his own policy—are accomplished. *See Nationwide v. Knight*, Op. No. 28028 (S.C. Sup. Ct. filed May 12, 2021) (Shearouse Adv. Sh. No. 16 at 25-26); *Lincoln Gen. Ins. Co. v. Progressive N. Ins. Co.*, 406 S.C. 534, 541, 753 S.E.2d 437, 441 (Ct. App. 2013)

---

[5] Pickens relies on the Court's holdings in *Nationwide Mutual Insurance Co. v. Erwood* and *Unisun Insurance Co. v. Schmidt* for the proposition that UM is personal and portable, and coverage should be evaluated from Pickens's perspective rather than be dependent on whether Simms was insured. *Erwood*, 373 S.C. 88, 644 S.E.2d 62 (2007); *Schmidt*, 339 S.C. 362, 529 S.E.2d 280 (2000). Although those cases hold that a policyholder's UM coverage could not be limited simply because she was a passenger on her husband's motorcycle—a vehicle not covered under her policy—when she was injured (*Erwood*, 373 S.C. at 90-92, 644 S.E.2d at 63-64) and that a permissive passenger could not lose her status as an insured for purposes of UM coverage when a non-permissive driver was behind the wheel (*Schmidt*, 339 S.C. at 368, 529 S.E.2d at 283), those cases did not involve an agreed-upon named driver exclusion and are therefore inapposite. Similarly, while Pickens insists this Court's decision in *Lovette* stands for the proposition that the named driver statute is intended to apply to those other than the named insured, that case is distinguishable because the policyholder listed himself as the excluded driver, and the Court held insurance would never have existed under the driver's own policy. *Lovette v. U.S. Fidelity & Guar. Co.*, 274 S.C. 597, 600-01, 266 S.E.2d 782, 784 (1980).

(citing *Lovette*, 274 S.C. at 600, 266 S.E.2d at 783). As the circuit court noted, no liability coverage would have been afforded to a third party had Simms been at fault, and thus, it would violate public policy to allow Pickens to recover UM when she was the person who executed the exclusion yet knowingly allowed Simms to drive her vehicle.

CONCLUSION

For the foregoing reasons, we affirm the circuit court.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

William D. Lewis, Appellant.

Appellate Case No. 2019-001815

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

Opinion No. 28051
Heard March 2, 2021 – Filed August 11, 2021

AFFIRMED

Clarence Rauch Wise, of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General Mark Reynolds Farthing, of Columbia; Solicitor Kevin Scott Brackett, of York, all for Respondent.

JUSTICE HEARN: William Lewis, the former Sheriff of Greenville County, asks us to hold the 1829 statute under which he was convicted for misconduct in office relating to a sexual affair with an employee, void for vagueness. Specifically, he

asserts that Section 8-1-80 of the South Carolina Code (2019),[1] is unconstitutional because it proscribes "official misconduct, corruption, fraud, or oppression" without defining those terms, and he also claims he was entitled to a directed verdict. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Will Lewis was elected sheriff of Greenville County in the 2016 general election after defeating the fourteen-year incumbent, Steve Loftis, in the primary election. Lewis hired Savannah Nabors, age twenty-two, with whom he had previously worked at a local law firm, to be his administrative coordinator during the transition period before being sworn into office. Nabors managed Lewis's scheduling, responded to emails, answered phone calls, and accompanied him to luncheons, meetings, and other business events. Nabors—whose starting salary was $62,000—was hired with no law enforcement experience and without the submission of a résumé or an interview. Nevertheless, she was provided with numerous benefits, including a new 2017 Ford Explorer equipped with a special "police package," an assigned parking place close to Lewis, a cell phone, an iPad, and a computer. Her receipt of a new Ford Explorer was particularly unusual because civilian employees typically were not provided with vehicles. In addition to her salary being more than double the starting salary of a new deputy, she received other "perks" at Lewis's direction, including participating in the BMW Performance Driving School, repelling and shooting with the SWAT team, and being fitted with a custom bulletproof vest. Basically, Nabors travelled with Lewis nearly everywhere he went, and at one point, Lewis told his deputies that Nabors was "off limits" to them.

---

[1] Although minor amendments have been made to the statute, it is essentially the same as it was originally enacted nearly two hundred years ago:

> Any public officer whose authority is limited to a single election or judicial district who is guilty of any *official misconduct*, habitual negligence, habitual drunkenness, *corruption, fraud, or oppression* shall be liable to indictment and, upon conviction thereof, shall be fined not more than one thousand dollars and imprisoned not more than one year.

In February 2017, Nabors told Lewis she was having marital difficulties and that she and her husband planned to divorce. Later that same evening, Lewis advised Nabors she would be accompanying him to an out-of-town meeting to discuss the budget with county officials. He indicated the meeting would be in either Atlanta or Charlotte, and asked her which she preferred. Ultimately, Nabors accompanied Lewis, another individual from the sheriff's office, and three county officials to Charlotte for budget discussions on March 7-9, 2017. This was the first time the sheriff's office had met outside Greenville to discuss the budget. Lewis picked up Nabors from her house, and the two drove to Charlotte together. Upon arriving, Lewis placed a bottle of liquor in her luggage and told her that he would retrieve it later.[2] Once all six individuals arrived in Charlotte, the group had appetizers and drinks at the hotel bar, and then went downtown for more drinks.

While the exact details of the events were disputed at trial, both Lewis and Nabors stated a sexual encounter occurred once the two arrived back at the hotel later that first night. Nabors contended Lewis went to her room to retrieve his liquor bottle so they could have a "nightcap." According to Nabors, Lewis sat next to her on a couch, placed his arm around her, and tried to kiss her. The next thing she remembered was waking up in bed with Lewis on top of her engaging in sexual intercourse. Nabors testified she went to his room afterwards but returned sometime after 7:00 a.m. Conversely, Lewis testified the encounter was consensual, and that it was Nabors who moved toward him until they kissed. Lewis stated after they had sex, he immediately regretted it and returned to his room alone for the rest of the night.

The following day consisted of morning and afternoon budget meetings. Nabors did not attend the morning session, but joined the group in the afternoon meeting. However, she never took notes even though Lewis testified that was her responsibility and part of the reason for her attending. Later that evening, the group again had dinner and drinks. According to Nabors, Lewis left the group at one point, walked to CVS, and returned with a bottle of lubricant that he displayed to her, asking, "Which room, yours or mine?" Nabors responded, "Neither."

---

[2] Lewis contended he placed a bottle of Jack Daniels on top of her travel bag because he did not think it would be best for a sheriff to be seen with it. Conversely, Nabors testified he placed it inside her bag, and the State argued he did so in order to have a reason to visit her room later that night.

Nabors testified that Lewis again came to her room after texting her at 3:55 a.m. Upon opening the door, Lewis entered, apologized, and asked to stay with her because he did not want to be alone. Nabors testified she allowed Lewis to stay in her bed and at some time during the night, she woke up to Lewis digitally penetrating her. Lewis denied purchasing lubricant or going to her room the second night,[3] and he contended nothing sexual happened other than the consensual encounter the first night. The group left Charlotte the next morning and returned to Greenville.

Over the course of the next six weeks, Nabors testified that Lewis acted appropriately at times but on other occasions, he continued to pursue a relationship with her. At one point, Lewis wanted to retrieve a pressure washer he had loaned Nabors, so she arranged for him to pick it up when she would not be home. To give him plenty of time to retrieve the washer, Nabors testified she drove to Chick-Fil-A. Lewis called her, and although he asked her where she was, when she looked in her rearview mirror, she saw him directly behind her in the drive-through line. As Lewis proceeded to follow Nabors home, she began recording their conversation. During that conversation, Lewis asked Nabors to join him in Reno for a sheriff's conference. However, Lewis stated that while the department would pay for two plane tickets, it would only pay for one hotel room, so Nabors would have to share a room with him. Nabors hedged, explaining it would not look good "on paper" for the two of them to share a room. Eventually, Lewis told Nabors he wanted her to join him in Reno so the two could "roll around in the bed together," sit around, and drink on "company time." After Nabors indicated she preferred their relationship to be nonsexual, Lewis responded that was "fine" but there would have to be changes, including her not accompanying him to meetings and other places for work. Nabors tendered her resignation on April 24, 2017.

---

[3] In response to Lewis's outright denial, the State introduced as impeachment evidence a portion of his deposition taken in a civil case filed by Nabors that was eventually settled. There, Lewis stated he did not recall whether he had purchased lubricant. At trial, his response shifted to a complete denial, and he indicated he went to CVS to buy Advil because he always suffered headaches when he stayed at a hotel. Lewis also denied texting Nabors at 3:55 a.m. despite phone records indicating a text to her from his phone stating, "Me." On cross-examination, Lewis speculated that Nabors may have sent the text herself because his phone was linked to her iPad.

In August of 2017, Nabors detailed the Charlotte trip in a personal blog and accused Lewis, although not specifically by name, of improprieties. Thereafter, she filed a civil lawsuit accompanied with several of the previously recorded conversations. Lewis held a press conference in October 2017 and admitted to the affair, but denied allegations of assault, rape, or stalking, maintaining the encounter was consensual.

Following a SLED investigation, Lewis was indicted in April 2018 for common law misconduct in office and obstruction of justice. Lewis filed a motion to quash the indictments, arguing they did not sufficiently place him on notice of the charges against him. In February and March of 2019, Lewis was indicted for statutory misconduct of a public officer and perjury, and superseding indictments for the two prior charges were also issued. Lewis sought to have these indictments quashed as well, contending they were vague and that the terms listed in section 8-1-80 were undefined, leaving a public official to speculate as to the prohibited conduct. The trial court held a hearing in June of 2019 and quashed one count each of the misconduct charges as being repetitive but upheld the remaining five counts. The court did not expressly rule on the constitutionality of section 8-1-80.

The State elected to pursue one count each of common law misconduct in office and misconduct by a public officer under section 8-1-80. At trial, Lewis renewed his objections to the indictments before the jury was sworn, and after the State rested, he argued both offenses were vague and overly broad and that there was no evidence of fraud. The court denied Lewis's motion. During the charge conference and ensuing jury instructions, Lewis objected to the terms of section 8-1-80 as being vague and overly broad. Ultimately, the jury acquitted Lewis of common law misconduct in office, but found him guilty of statutory misconduct of a public officer. The trial court sentenced Lewis to the maximum one-year imprisonment but granted his motion for an appeal bond approximately two weeks later. Lewis filed his appeal in this Court because of the substantial constitutional issue presented. *See* Rule 203(d)(1)(A)(ii), SCACR.

ISSUES

I. Is Section 8-1-80 unconstitutionally vague when the statute does not define "official misconduct," "corruption," "fraud," or "oppression"?

II. Did the trial court err in failing to quash the indictment charging statutory misconduct of a public officer?

STANDARD OF REVIEW

This Court's review of whether a statute is constitutional is limited. *State v. Simmons*, 430 S.C. 1, 9, 841 S.E.2d 845, 849 (2020), *reh'g denied* (May 22, 2020). Further, statutes are presumed constitutional and will not be set aside unless the party challenging the provision demonstrates "its repugnance to the constitution is clear beyond a reasonable doubt." *In re Stephen W.*, 409 S.C. 73, 76, 761 S.E.2d 231, 232 (2014).

In criminal cases, the appellate court sits to review errors of law only. *State v. Baker*, 411 S.C. 583, 588, 769 S.E.2d 860, 863 (2015). Finally, on appeal from the denial of a directed verdict, an appellate court views all facts in the light most favorable to the nonmoving party. *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *Id.*

DISCUSSION

I. Constitutionality of Section 8-1-80

Lewis contends section 8-1-80 is unconstitutionally vague because it does not define the terms listed, encourages arbitrary enforcement, and fails to put a reasonable person on notice of what conduct is prohibited. Conversely, the State argues Lewis does not have standing to challenge the statute on vagueness grounds because the terms in section 8-1-80 clearly apply to his conduct.[4] Additionally, the State asserts the terms employed have recognized legal meanings, thereby adequately informing public officials of prohibited conduct. The State further contends the statute is not unconstitutionally overbroad because the provision does not implicate private conduct or speech. We agree with the State.

[4] As a threshold concern, the State contends Lewis's constitutional argument is not preserved for review because the trial court did not expressly rule on the issue. We disagree, as both parties and the trial court were well aware that the basis of Lewis's objections concerned the statute's failure to define the conduct giving rise to criminal liability.

Section 8-1-80 provides for the criminal liability of any public officer who is guilty of *official misconduct*, habitual negligence, habitual drunkenness, *corruption, fraud, or oppression* and authorizes the imposition of a fine of up to $1000 and imprisonment of no more than one year, exactly as it did when enacted in 1829. S.C. Code Ann. § 8-1-80 (2019) (emphasis added).[5] While the italicized terms are undefined, when analyzing a statute for vagueness, the inquiry focuses on two independent grounds: whether the provision "fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015); *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) ("Vagueness may invalidate a criminal law for either of two independent reasons."). Simply because a statute uses undefined terms or could have been drafted more precisely does not render it unconstitutionally vague. *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973) ("Words inevitably contain germs of uncertainty."). Instead, to satisfy due process concerns, a statute must be sufficiently definite to enable a person of common intelligence to not have to guess as to its meaning. *State v. Green*, 397 S.C. 268, 280, 724 S.E.2d 664, 670 (2012) (upholding our criminal solicitation of a minor statute in the face of a vagueness challenge because a person of "common intelligence would not have to guess at what conduct is prohibited by the statute"). Further, when a provision is sufficiently clear as to the conduct it proscribes, "the speculative danger of arbitrary enforcement [will] not render the ordinance void for vagueness." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 503 (1982).

Additionally, "'one to whose conduct the law clearly applies does not have standing to challenge it for vagueness' as applied to the conduct of others." *In re Amir X.S.*, 371 S.C. 380, 391, 639 S.E.2d 144, 150 (2006) (quoting *Vill. of Hoffman Estates,* 455 U.S. at 495); *Centaur, Inc. v. Richland Cty.*, 301 S.C. 374, 382, 392 S.E.2d 165, 170 (1990) (stating an operator of an adult bookstore did not have standing to challenge whether a county ordinance regulating sexually oriented businesses was unconstitutionally vague because the ordinance clearly applied to the operator's business). Stated differently, a litigant is barred from raising a facial challenge based on vagueness when his conduct clearly falls within the province of the statute. *S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 507, 757 S.E.2d 388, 393 (2014) ("[W]hen raising a claim of unconstitutional vagueness, the litigant

[5] Habitual negligence and habitual drunkenness were not issues in this case and therefore not charged to the jury.

must demonstrate that the challenged statute is vague *as applied to his own conduct,* regardless of its potentially vague application to others.").

We hold that section 8-1-80 contains terms with settled legal meanings,[6] and the statute clearly applies to the conduct at issue here. The State theorized that Lewis hired Nabors at an excessive salary and groomed her in order to pursue an affair. Throughout trial, evidence painted a picture of corruption and misconduct that predates our statutory misconduct statute.[7] The linchpin of the State's case was that

---

[6] We have noted, "[i]n ascertaining the meaning of language used in a statute, we presume the General Assembly is 'aware of the common law, and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense.'" *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) (quoting *State v. Bridgers,* 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997)). Accordingly, we find the definitions contained in Black's Law Dictionary instructive. *See* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "corruption" as "[a] fiduciary's or official's use of a station or office to procure some benefit either personally or for someone else, contrary to the rights of others; an act carried out with the intent of giving some advantage inconsistent with official duty or the rights of others"); *id.* (defining "official misconduct" as "[a] public officer's corrupt violation of assigned duties by malfeasance, misfeasance, or nonfeasance"); *id.* (defining "fraud" as "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment" and noting it can be criminal, especially "when the conduct is willful"); *id.* (defining "oppression" as "[t]he act or an instance of unjustly exercising authority or power so that one or more people are unfairly or cruelly prevented from enjoying the same rights that other people have" or "[a]n offense consisting in the abuse of discretionary authority by a public officer who has an improper motive, as a result of which a person is injured").

[7] As the Ninth Circuit has aptly recognized, this pattern of behavior in exchange for sexual gratification dates back centuries, and was also even portrayed in one of William Shakespeare's most famous plays—*Measure for Measure*. *See People of the Territory of Guam v. Camacho*, 103 F.3d 863, 867 (9th Cir. 1996) ("Official misconduct can be criminal when advantages other than money accrue to the public servant in the wrongful exercise of office. That sexual gratification should be prominent among these other advantages is not merely characteristic of our society; it reflects a long tradition in the misuse of authority. The most famous play in English on the subject, Shakespeare's *Measure for Measure,* turns on officeholder

Lewis utilized the public fisc to curry sexual favors with Nabors and then threatened consequences when his advances were rejected. To prove this, the State relied on Lewis's own recorded words, where, upon learning Nabors would not continue a sexual relationship with him, he replied: "I mean they'll [sic] be some changes. I mean we'll have to make some changes."

We also find meritless Lewis's reliance on harmless hypotheticals which arguably implicate the statute. Rather than considering, for example, whether using a government-issued cell phone for all personal as well as business calls would qualify as "official misconduct" or "corruption," our inquiry is focused solely on whether Lewis's conduct clearly falls within the statute. We note that the United States Supreme Court, in addressing a federal circuit's use of "unproblematic hypotheticals" as a means of finding a law governing child pornography unconstitutionally vague, stated:

> [T]he Eleventh Circuit's error is more fundamental than merely its selection of unproblematic hypotheticals. Its basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague. That is not so. Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.

United States v. Williams, 553 U.S. 285, 305–06 (2008). Accordingly, regardless of whether one could envision close cases that might sufficiently tip the scale to carry the vagueness challenge across the constitutional finish line, Lewis's argument concerning other, innocuous conduct which could come within the sweep of the statute is unavailing where the conduct here clearly falls within that prohibited by section 8-1-80.[8]

Angelo's attempt to secure the seduction of the innocent Isabella. Angelo's feigned use of his power to pardon Isabella's brother in order to get her consent is official misconduct.").

[8] Lewis also contends the trial court erred in declining to direct a verdict on the issue of fraud, which is one of the grounds listed in section 8-1-80. Importantly, Lewis did not challenge the sufficiency of the evidence as to the other three grounds charged to the jury—official misconduct, corruption, or oppression. We note that although the concurrence characterizes the alleged error in terms of the trial court's

failure to define the meaning of fraud to the jury, the lens through which we view Lewis's assignment of error is whether there was sufficient evidence to support the jury's verdict. Following the State's case, defense counsel argued the statutory misconduct in office charge should not go to the jury, and after argument from both parties, the trial court concluded:

> I think there's evidence that goes beyond mere conjecture or suspicion, and that evidence, either direct or circumstantial, or some combination of both which reasonably intends [sic] to prove the guilt of the defendant, or from which that guilt might be logically and reasonably deduced, if that evidence is taken in the light most favorable to the State, so as to your second motion, I must respectfully deny that motion also.

During the charge conference, the trial court asked the parties more specifically about fraud, and Lewis's counsel responded that there was no evidence of a misrepresentation. The State countered by reciting evidence of what it believed was fraud, and the trial court agreed to charge fraud to the jury. We believe counsel's argument, as understood by the trial court, was in the context of the sufficiency of the evidence. Further, in his brief before this Court, Lewis requests we enter a judgment of acquittal based on the State's failure to prove fraud and argues the case should not be remanded for a new trial, which would be the appropriate remedy for an erroneous jury charge. The relief requested by Lewis therefore bolsters our view that the error alleged involved the sufficiency of the evidence rather than a faulty jury instruction. Because we believe the jury's verdict was amply supported on other grounds submitted to the jury without objection—official misconduct, corruption, and oppression—any error in submitting the ground of fraud would not affect the integrity of the verdict. *See Griffin v. United States*, 502 U.S. 46, 50, 112 S. Ct. 466, 469, 116 L. Ed. 2d 371 (1991) (affirming a conviction based on an indictment alleging multiple grounds in a conspiracy charge where one of the grounds was valid despite no evidence supporting the remaining basis). In *Griffin*, the Supreme Court noted, "[i]t was settled law in England before the Declaration of Independence, and in this country long afterwards, that a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds—even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action." *Id.* at 49. Indeed, Justice Scalia noted precedent dating back to the eighteenth century where Lord Mansfield, Chief Justice of the King's Bench,

II. Sufficiency of the Indictment

Lewis also contends the indictment for misconduct of a public officer does not sufficiently notify him of the basis of the charge. He repeats his argument that the terms listed in section 8-1-80, which were also listed in the indictment, are overly vague and therefore do not indicate what conduct Lewis was called upon to defend at trial. Further, Lewis asserts while the indictment sufficiently alleges the "who," "what," and "where" of the offense, it is not specific as to the "when" and "how." Specifically, Lewis argues the indictment does not specify how he "misused public resources," and the timeframe is overly broad. Conversely, the State asserts the indictment, when viewed with a practical eye, should be upheld, especially considering that misconduct by a public official can be committed in various ways. We agree with the State.

The indictment at issue alleged:

> William D. Lewis did, on or about January 3, 2017, through April 17, 2018, commit the crime of Misconduct of a Public Officer. During the above listed dates, William D. Lewis was the Greenville County Sheriff who is a public officer whose authority is limited to the single election district of Greenville County, South Carolina. William D. Lewis

---

explained, "that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad." *Id.* (quoting *Claassen v. United States,* 142 U.S. 140, 146 (1891) (other citations omitted)). While Lord Mansfield may have applied the rule to multiple count indictments, Justice Scalia discussed how its application evolved into other contexts, including "the analogous situation at issue here: a general jury verdict under a *single* count charging the commission of an offense by two or more means." *Id.* at 50. That is precisely what we have here: a single count before the jury alleging four grounds supporting a violation of section 8-1-80. While the concurrence accurately explains the dichotomy between a challenge to the sufficiency of the evidence, *see Griffin*, versus one raising legal issues, *see Yates v. United States*, 354 U.S. 298, 312 (1957) (*overruled on other grounds by Burks v. United States*, 437 U.S. 1, 8 (1978)), because we view Lewis's argument as challenging the sufficiency of the evidence, we reject the concurrence's reasoning as to why *Griffin* does not apply. Therefore, we need not address whether the trial court was correct in submitting fraud to the jury.

> committed the crime of misconduct of a public officer by performing acts of official misconduct, habitual negligence, corruption, fraud, or oppression. To wit:
>
> Count One
>
> William D. Lewis did, from the date he took office through April 24, 2017, misuse public resources and abuse the power and authority of his office for the corrupt purpose of pursuing or facilitating an adulterous relationship.

The primary purpose of an indictment is threefold: to put the defendant on notice of the elements of the offense; to allow him to decide whether to plead guilty or stand trial; and to enable the trial court to know what judgment to pronounce following a conviction. *Evans v. State*, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005). The indictment must list the offense with "sufficient certainty and particularity." *State v. Gentry*, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). Importantly, "[i]n determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances." *Id.* at 103, 610 S.E.2d at 500. Further, "one is to look at the 'surrounding circumstances' that existed pre-trial, in order to determine whether a given defendant has been 'prejudiced,' i.e., taken by surprise and hence unable to combat the charges against him." *State v. Baker*, 411 S.C. 583, 589, 769 S.E.2d 860, 864 (2015) (quoting *State v. Wade,* 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991)). "[W]hether the indictment could be more definite or certain is irrelevant." *Gentry*, 363 S.C. at 103, 610 S.E.2d at 500. Notably, the threshold for an indictment to be valid is generally not high. *See United States v. Bates*, 96 F.3d 964, 970 (7th Cir. 1996), *aff'd,* 522 U.S. 23 (1997) ("Facial sufficiency is not a high hurdle. Indictments need not exhaustively describe the facts surrounding a crime's commission nor provide lengthy explanations of the elements of the offense.").

Statutory misconduct by a public officer, like the common law crime, is an offense that is "versatile [in] nature." *State v. Hess*, 279 S.C. 525, 528, 309 S.E.2d 741, 743 (1983). This practical consideration factors into the analysis of whether the indictment sufficiently alleged how Lewis violated section 8-1-80. The indictment identified Lewis as the sheriff, listed the timeframe ("from the day he took office through April 24, 2017"), and narrowed the allegations ("misuse [of] public resources and abuse [of] the power and authority of his office for the corrupt

purpose of pursuing or facilitating an adulterous relationship"). While Lewis argues any set of facts could qualify as the "misuse of public resources," this term was connected to those impermissible acts that served the "corrupt purpose" of advancing his illicit affair with an employee. While it may have been preferable for the State to have articulated the precise acts that demonstrated the "misuse [of] public resources," or the "abuse [of] power and authority of his office," we agree with the State that it was not required to go so far as to list the specific theory as to how Lewis committed statutory misconduct. *See generally State v. Hammonds*, 30 S.W.3d 294, 300 (Tenn. 2000) ("[A]n indictment need not allege the specific theory or means by which the State intends to prove each element of an offense to achieve the overriding purpose of notice to the accused."). Instead, the indictment satisfied all three considerations required by our jurisprudence, and it is clear from the record that Lewis was not surprised and certainly not ambushed at trial by the allegations against him. Additionally, even if the indictment was questionable, further specificity was available by reviewing the discovery materials.[9] Accordingly, the trial court did not err in declining to quash the indictment.

CONCLUSION

For the foregoing reasons, we affirm Lewis's conviction for misconduct of a public officer.

AFFIRMED.

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

---

[9] While this Court is required to view the sufficiency of an indictment through a practical lens, we caution that discovery may not always be sufficient to uphold an otherwise questionable indictment. *See, e.g.*, *State v. Wright*, 999 P.2d 1220, 1226 (Or. Ct. App. 2000) (noting while discovery generally is sufficient to cure imprecision in charging instruments, there are exceptions, especially when "given the nature or complexity of the crime, or the sheer volume of potential discovery, discovery cannot, as a practical matter, cure the imprecision of the charging instrument").

JUSTICE FEW: Will Lewis's central issue on appeal is his challenge to the vague and undefined nature of the statutory crime of misconduct in office. He makes this challenge in each of the three issues he raises to this Court. The majority addresses the challenge as it relates to Lewis's first and second issues: the constitutionality of section 8-1-80 of the South Carolina Code (2019) and the sufficiency of the indictment. I agree with the majority's disposition of these issues, which it addresses in Sections I and II of the majority opinion, respectively. However, Lewis also challenges—his strongest point in my view—the trial court's failure to give the jury meaningful requirements, elements, or standards by which the jury could determine whether Lewis's conduct—outrageous and disgusting, to be sure—was criminal. The majority avoids addressing this third issue by invoking a rule of procedural default. *See supra* note 8. I would address the merits of Lewis's third issue and hold the trial court erred in failing to define fraud as a factual basis for convicting Lewis of misconduct in office.

There are three reasons this Court should not invoke the rule of procedural default the majority employs to avoid addressing Lewis's third issue. First, the rule has never been applied in a criminal case in this State. For my second and third reasons, this is not the time to start. Second, we hardly discussed it. The State raised it only in passing, literally on the last page of text in its forty-eight page brief, in a parenthetical to its citation of a civil case which is not the case mentioned by the majority. The State made no argument as to how this civil rule applies in a criminal case or why this case should be the first one in which we ever do so. The State's reference to the civil case in its brief was so quick that defense counsel—one of the most experienced criminal appellate lawyers in South Carolina—did not realize the State raised it and did not address it among several other issue preservation points he made in his reply brief. Importantly, we did not discuss the procedural default rule the majority invokes with either party at oral argument.

Third, and most importantly, I believe the majority applies the rule of procedural default incorrectly. The majority characterizes Lewis's third issue as a challenge to the sufficiency of the State's evidence. The case cited by the majority—again, not the case summarily cited by the State in its brief—supports the majority's finding of procedural default *only* if the majority is correct that Lewis's third issue relates only to the sufficiency of the evidence. I read Lewis's brief and interpret counsels' oral arguments differently. I understand the third issue to be a legal challenge to the trial court's refusal to define fraud for the jury. If I am correct Lewis raises a point of law, then the question of procedural default is not controlled by *Griffin v. United*

States, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991), as the majority contends, but is controlled by *Yates v. United States*, 354 U.S. 298, 312, 77 S. Ct. 1064, 1073, 1 L. Ed. 2d 1356, 1371 (1957).[10] *Yates* requires we address the merits, as I will not trouble my reader to explain in detail here. I will let it suffice to refer to the *Griffin* Court's explanation that the point of law it finds is applicable to factual insufficiency does not apply to legal errors,

> Petitioner cites no case, and we are aware of none, in which we have set aside a general verdict because one of the possible bases of conviction was neither unconstitutional as in *Stromberg*,[11] nor even illegal as in *Yates*, but merely unsupported by sufficient evidence.

502 U.S. at 56, 112 S. Ct. at 472, 116 L. Ed. 2d 371 at 380. The Court then discussed *Turner v. United States*, 396 U.S. 398, 420, 90 S. Ct. 642, 654, 24 L.Ed.2d 610, 625-26 (1970), pointing out the "general rule" *Turner* recites and upon which the lower courts in *Griffin* relied depends on "insufficiency of proof," and upheld the distinction between *Turner* and the "legal error" basis of *Yates*. 502 U.S. at 58-59, 112 S. Ct. at 474, 116 L. Ed. 2d at 382. The Court stated there is "a clear line that will separate *Turner* from *Yates*, and it happens to be a line that makes good sense." 502 U.S. at 59, 112 S. Ct. at 474, 116 L. Ed. 2d at 382. The Court explained,

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however,

---

[10] *Yates* was overruled on other grounds. *Burks v. United States*, 437 U.S. 1, 8-10, 98 S. Ct. 2141, 2145-47, 57 L. Ed. 2d 1, 7-9 (1978).

[11] The Supreme Court was referring to *Stromberg v. California*, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931).

> when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence . . . .

502 U.S. at 59, 112 S. Ct. at 474, 116 L. Ed. 2d at 382-83.

Griffin, therefore, was controlled by *Turner*, but *Griffin* upheld *Yates*. This case—in my view—is controlled by *Yates*. The majority's reliance on *Griffin* in this case is error and is contrary to *Yates*.

Turning to the merits, I agree with Lewis the misconduct in office statute—section 8-1-80—is so vague as to "simply provide[] no guidance as to what constitutes the crime." Appellant Br. 8. "To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling v. United States*, 561 U.S. 358, 402-03, 130 S. Ct. 2896, 2927-28, 177 L. Ed. 2d 619, 656 (2010) (alteration in original) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L. Ed. 2d 903, 909 (1983)); *see also Toussaint v. State Bd. of Med. Exam'rs*, 303 S.C. 316, 320, 400 S.E.2d 488, 491 (1991) ("A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that [women and] men of common intelligence must necessarily guess as to its meaning and differ as to its application." (citing *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322, 328 (1926))).

Lewis makes his challenge to the vagueness of section 8-1-80 in all three sections of his brief. In his "Question 1," which the majority addresses in Section I, he argues "an overly broad statute may simply delegate to the discretion of law enforcement officers or prosecutors the actual implementation of the social harm the statute is designed to prohibit." In his "Question 2," which the majority addresses in Section II, he argues the indictment for violating the statute "did not inform Mr. Lewis of the specific act . . . he committed so that he could properly prepare a defense to refute the allegations." I agree with the majority's disposition of these two issues.

In his "Question 3," however, Lewis makes the legal point I discussed above. He argues "the trial judge . . . gave the jury no guidance" as to what conduct violated the statute. Appellant Br. 23. Here, however, Lewis goes beyond the statute and argues the trial court failed to define for the jury the operative terms—the factual

premises—in the State's case against him: official misconduct, corruption, fraud, and oppression. As Lewis concedes, the trial court made at least a summary effort to define official misconduct, corruption, and oppression. Lewis's argument is the trial court made no effort to define "fraud." By failing to define fraud, Lewis argues, the trial court left the crime of which he was charged undefined, "with[out] sufficient definiteness that ordinary [jurors] can understand what conduct is prohibited," *Skilling*, 561 U.S. at 402, 130 S. Ct. at 2927, 177 L. Ed. 2d at 656, so that jurors "of common intelligence must necessarily guess as to [the crime's] meaning and [might] differ as to its application," *Toussaint*, 303 S.C. at 320, 400 S.E.2d at 491.

I agree. In civil cases, we require trial courts to go to great lengths to define the nine elements of fraud. *See, e.g.*, *Mishoe v. Gen. Motors Acceptance Corp.*, 234 S.C. 182, 193, 107 S.E.2d 43, 49 (1958) (listing nine elements) (quoting *Flowers v. Price*, 190 S.C. 392, 395, 3 S.E.2d 38, 39 (1939)). It is absurd to suggest that when fraud becomes the basis for a crime, it is no longer necessary to define the term. Rather, the need is heightened in a criminal case to give the jury meaningful requirements, elements, or standards by which it must judge the defendant's conduct. As the Supreme Court of the United States stated, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2299, 33 L. Ed. 2d 222, 227-28 (1972).

The question then becomes whether the trial court's error in refusing to define fraud is reversible. I have no doubt the error prejudiced Lewis as to the State's fraud theory of misconduct in office. *See State v. Stukes*, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) (stating "the charge must be prejudicial to the appellant to warrant a new trial" (citing *State v. Curry*, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013))). In the charge conference the trial court conducted at the conclusion of the evidence, Lewis raised the question of whether the evidence satisfied the legal definition of fraud.[12]

[12] Here is the point at which counsel could have been more clear with the trial court as to the basis for his argument. Counsel stated, "It's back again to the problem involving the statutory language. I don't think all of them remotely apply in this case. And there just aren't good definitions for a lot of them. I don't see how fraud is in this case." To me, read in context, counsel is arguing the proper definition of

The trial court then asked the State, "Tell me about fraud." The State responded, "I intend to argue . . . that everything he did with Savannah Nabors, from hiring her at her salary, providing the perks that he did, was all a fraud perpetrated on the taxpayers . . . of Greenville all the way through the trip to Charlotte." In his closing argument to the jury, the Solicitor argued Lewis was guilty of "fraud in that he has this money that's given to him for one purpose and then he's using it for another, not wanting to tell anybody about it." These arguments correctly paint Lewis as a fraud, in the term's colloquial sense, but they do not satisfy the legal definition of criminal fraud. If the trial court had defined fraud for the jury, in my opinion, the jury could not have convicted him of misconduct in office on the basis of the State's fraud argument. As Lewis points out in his brief, what the State argues here might be breach of trust, but it is not fraud. To prove fraud under a proper legal definition, the State was required to prove numerous additional facts, such as Lewis made a false representation to get the money, the County relied on the falsity in giving him the money, and Lewis did it all with criminal intent.

Even prejudicial error is not reversible, however, if it is harmless beyond a reasonable doubt. *See State v. Simmons*, 423 S.C. 552, 566, 816 S.E.2d 566, 574 (2018) ("If a review of the entire record does not establish that the error was harmless beyond a reasonable doubt, then the conviction shall be reversed."). In other words, if there was overwhelming evidence Lewis was guilty of misconduct in office on one of the State's other theories, we should not reverse the conviction. The Solicitor laid out the State's case in compelling terms in other sections of his closing argument, without relying on his argument Lewis committed fraud. The majority summarizes the argument in reaching its conclusion "the statute clearly applies to the conduct at issue here." I agree. In my view, the irrefutable facts that Lewis hired the inexperienced Nabors at an absurdly high salary, showered her with perks and favors that bore no relationship to her work-related responsibilities (particularly the new Ford Explorer with "police package"), aggressively used those undeserved benefits to pressure her into a sexual relationship, openly threatened to withdraw the benefits if she did not give in to his sexual advances, and did all this at the expense of taxpayers, leaves no doubt whatsoever Lewis is guilty of the crime misconduct in office.

---

fraud, if charged to the jury, requires a finding there was no fraud. I cannot dispute, however, counsel left room for the majority's conclusion he was discussing the sufficiency of the evidence.

I concur in result.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Angela D. Keene, Individually and as Personal Representative of the Estate of Dennis Seay, Deceased, and Linda Seay, Respondents,

v.

CNA Holdings, LLC, Petitioner.

Appellate Case No. 2019-000816

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
D. Garrison Hill, Circuit Court Judge

Opinion No. 28052
Heard June 11, 2020 – Filed August 11, 2021

AFFIRMED

Richard C. Godfrey, Kirkland & Ellis LLP, of Chicago, IL; C. Mitchell Brown, Allen Mattison Bogan, and Blake Terence Williams, Nelson Mullins Riley & Scarborough, LLP, of Columbia, all for Petitioner.

Bert Glenn Utsey III, Clawson Fargnoli & Utsey, LLC, of Charleston; Theile Branham McVey and John D. Kassel, Kassel McVey, of Columbia; Kevin W. Paul, Dean Omar

Branham Shirley, LLP, of Dallas, TX; Chris Panatier, Simon Greenstone Panatier, PC, of Dallas, TX, all for Respondents.

JUSTICE FEW: For eighty-two years, this Court struggled to correctly apply sections 42-1-400 and -410 of The South Carolina Workers' Compensation Law, which are collectively referred to as the "statutory employee doctrine." The resulting body of jurisprudence is confusing, often conflicting, and always difficult for the workers' compensation commission and the circuit court to apply. This difficulty has become particularly apparent in the modern economy in which subcontracting work a company could do with its own employees is such an important and legitimate business practice. Today, following our more recent decisions on the statutory employee doctrine, we apply the doctrine in light of the General Assembly's original purpose for enacting it: "to prevent owners and contractors from subcontracting out their work to avoid liability for injuries incurred in the course of employment." *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201 n.1, 482 S.E.2d 49, 50 n.1 (1997). We find the circuit court and the court of appeals correctly determined the injured worker in this case was not the statutory employee of the defendant.

I. Facts and Procedural History

Hystron Fibers Incorporated hired Daniel Construction Company in 1965 to build a polyester fiber plant in Spartanburg, South Carolina. When the plant began operating in 1967, Hystron retained Daniel to provide all maintenance and repair workers at the plant. Hystron soon became Hoechst Fibers Incorporated. Pursuant to a series of written contracts, Hoechst paid Daniel an annual fee and reimbursed Daniel for certain costs. The contracts required Daniel to purchase workers' compensation insurance for the workers and required Hoechst to reimburse Daniel for the workers' compensation insurance premiums.

Dennis Seay was employed by Daniel. Seay worked various maintenance and repair positions at the Hoechst plant from 1971 until 1980. The manufacture of polyester fibers required the piping of very hot liquid polyester through asbestos-insulated pipes. Seay's day-to-day tasks involved maintaining and repairing pumps, valves, condensers, and other equipment in the piping network, all of which exposed him to

asbestos. He eventually developed lung problems, which were later diagnosed as mesothelioma, a cancer caused by inhaling asbestos fibers.

Seay and his wife filed this lawsuit against CNA Holdings—Hoechst's corporate successor[1]—claiming Hoechst acted negligently in using asbestos and in failing to warn of its dangers. After Seay died from mesothelioma, his daughter—Angie Keene—took over the lawsuit as personal representative of his estate. Keene amended the complaint to add survival and wrongful death causes of action.

Throughout the litigation, CNA Holdings argued Seay was a statutory employee and the Workers' Compensation Law provided the exclusive remedy for his claims. The circuit court disagreed and denied CNA Holdings' motion for summary judgment. A Spartanburg County jury awarded Seay's estate $14 million in actual damages and $2 million in punitive damages. The trial court denied CNA Holdings' motion for judgment notwithstanding the verdict, again finding Seay was not a statutory employee. The court of appeals affirmed. *Keene v. CNA Holdings, LLC*, 426 S.C. 357, 376, 827 S.E.2d 183, 193 (Ct. App. 2019).[2]

II. Analysis

When our General Assembly enacted the original "Workmen's Compensation Act" in 1936[3]—now officially named The South Carolina Workers' Compensation Law[4]—it included the statutory employee doctrine, now found in sections 42-1-400

---

[1] Hoechst Fibers Incorporated later became Hoechst Fibers Industries. After Seay left in 1980, the company became Hoechst Celanese, then Celanese, then CNA Holdings.

[2] The court of appeals considered other grounds on which CNA Holdings challenged the jury verdict. *See* 426 S.C. at 376-87, 827 S.E.2d at 193-99. CNA Holdings does not raise any of those other issues to this Court.

[3] Act No. 610, 1936 S.C. Acts 1231.

[4] The General Assembly changed the name of the Act in 1982 to The South Carolina Workers' Compensation Law, and provided, "All references in this title to 'workmen's compensation' shall mean 'workers' compensation.'" Act. No. 303, 1982 S.C. Acts 2027; S.C. Code Ann. § 42-1-10 (2015).

and -410 of the South Carolina Code (2015). Section 42-1-400—the section applicable in this case—provides,

> When any person, in this section . . . referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section . . . referred to as "subcontractor") for the execution or performance by . . . such subcontractor of . . . any part of the work undertaken by such owner, the owner shall be liable to pay to any work[er] employed in the work any compensation under this title which he would have been liable to pay if the work[er] had been immediately employed by him.

At the time of the original Act, it was feared employers would reject the new expense of insuring workers and find ways to avoid that expense by contracting out "part of [their] trade, business or occupation" to a subcontractor. As we stated on our first review of the statutory employee doctrine in 1939, "It is easily conceivable that [an employer] may let a part of the work to be done to others who are financially irresponsible, and that the employee . . . who is injured while doing the work is left without remedy." *Marchbanks v. Duke Power Co.*, 190 S.C. 336, 363, 2 S.E.2d 825, 836 (1939).

Our General Assembly enacted the statutory employee doctrine—as did the legislatures of most states across the country[5]—"to forestall evasion of the act by those who might be tempted to subdivide their regular operations among subcontractors, thus escaping direct employment relations with the workers . . . ." Lex K. Larson et al., LARSON'S WORKERS' COMPENSATION LAW § 70.05 (2020); *see also id.* § 70.04 ("The purpose of this legislation was to protect employees of irresponsible and uninsured subcontractors . . . ."); Grady L. Beard, et al., THE LAW OF WORKERS' COMPENSATION INSURANCE IN SOUTH CAROLINA, Statutory

[5] *See* Lex K. Larson et al., LARSON'S WORKERS' COMPENSATION LAW § 70.01 (2020) (stating, "Four-fifths of the states have adopted 'contractor-under' statutes, imposing on the general employer compensation liability . . . to the employees of contractors . . . under it").

Employers: Liability of Owners 43 (6th ed. 2012) (explaining the General Assembly enacted the statutory employee doctrine because "it would not be fair to relieve the owner of compensation to employees doing work which was a part of his trade or business by permitting such owner to sublet or subcontract some part of said work"). As we stated in *Glass*, the purpose of the statutory employee doctrine "is to prevent owners and contractors from subcontracting out their work to avoid liability for injuries incurred in the course of employment." 325 S.C. at 201 n.1, 482 S.E.2d at 50 n.1.

In the early years of interpreting the predecessor statutes to sections 42-1-400 and -410, this Court viewed the scope of an employer's "trade, business or occupation" quite broadly. *Marchbanks* itself is a good example. Duke Power Company hired Coln—a contractor—to paint 170 metal power poles in the City of Greenville for one dollar apiece. 190 S.C. at 338, 2 S.E.2d at 826. Duke Power hired a contractor to paint the poles approximately every two years. *Id.* The plaintiff was an employee of Coln, not Duke Power. *Id.* In the course of his work painting the poles, the plaintiff came into contact with a hot wire he later claimed was defective. 190 S.C. at 357, 2 S.E.2d at 834. The plaintiff sued Duke Power and Coln in circuit court for negligence in causing his injuries. *Id.* We affirmed the circuit court's finding the plaintiff was Duke Power's statutory employee, stating,

> [I]t is difficult to see how the power company could carry on its business if its lines of wires were not kept in sound condition, or how this could be done if the posts to which they are attached were not kept in safe and sound condition. Evidently it was necessary to this end that the poles be "protected from the weather," and the appellant was engaged about this work. . . . Surely it cannot be seriously argued that the unfortunate employee was not engaged in work "which is a part of the trade, business or occupation" of the power company which it was undertaking to have performed.

190 S.C. at 365-66, 2 S.E.2d at 837.

In *Boseman v. Pacific Mills*, 193 S.C. 479, 8 S.E.2d 878 (1940)—an appeal from the industrial commission[6]—the claimant was an employee of a contractor whom Pacific Mills hired to paint a water tower at its Granby Plant in Columbia. 193 S.C. at 480, 8 S.E.2d at 878. While the claimant and a co-worker were painting the tank, it caught fire and exploded, burning both men to death. *Id.* We stated, "The only question for our consideration . . . is whether the deceased . . . was performing work which was a part of the trade, business or occupation of the Pacific Mills." 193 S.C. at 481, 8 S.E.2d at 879. Finding the claimant was the statutory employee of Pacific Mills, we stated,

> The tank was an integral part of the mill business. . . . The very nature of the work done by the mill, that of the manufacture of cotton into cloth, especially required the best of protection against fire. Hence, this tank was particularly necessary and essential in the operation and carrying on of the business of the mill. It, therefore, follows that the painting of the tank was such a part of the trade, business or occupation of the Pacific Mills . . . .

193 S.C. at 483, 8 S.E.2d at 880.

We continued for decades to interpret the phrase "trade, business or occupation" broadly to include any work we deemed necessary to the owner's business. In *Bell v. South Carolina Electric & Gas Co.*, 234 S.C. 577, 109 S.E.2d 441 (1959), we applied our broad interpretation to maintenance and repair workers. Relying on *Marchbanks*, *Boseman*, and other cases, we stated, "The defendant Power Company is . . . engaged in the manufacture and transmission of electricity and uses poles and wires in its business and the repair and maintenance of such poles and wires . . . are part of its business, trade and occupation." 234 S.C. at 580-81, 109 S.E.2d at 442.

From *Bell* in 1959 to *Glass* in 1997, most of our decisions were consistent with this broad view of "trade, business or occupation." In its brief, CNA Holdings correctly characterizes these cases as, "A long line of South Carolina decisions [that] have

---

[6] The 1936 Act created the South Carolina industrial commission to hear claims under the Act. Act No. 610, 1936 S.C. Acts 1231, 1255. The General Assembly renamed the commission the workers' compensation commission in 1986. Act. No. 399, 1986 S.C. Acts 2716, 2718.

held that maintenance workers are statutory employees of manufacturing businesses." CNA Holdings argues "the Court of Appeals cast aside all of these cases, which provide significant, direct support for [our] position that Seay's maintenance work was an important, necessary, integral, and essential part of [our] manufacturing business." While we disagree the court of appeals "cast aside" anything, we do agree that its decision in this case cannot be reconciled with the broad view we took of an employer's "trade, business or occupation" in those early cases. If the infrequently-performed work the subcontracted employees performed in *Marchbanks*, *Boseman*, and *Bell* qualified for statutory employee status, it is difficult to imagine the regular—daily, in fact—maintenance and repair work Seay and his co-workers performed at Hoechst does not also qualify.

The reality, however, is that none of our recent jurisprudence on this question is consistent with the broad interpretation of "trade, business or occupation" in our original cases. Shortly after *Bell*, even as we viewed the scope of a company's "trade, business or occupation" broadly in most of our cases, we began a series of cases in which we narrowed our original view. In *Bridges v. Wyandotte Worsted Co.*, 243 S.C. 1, 132 S.E.2d 18 (1963), *overruled on other grounds by Sabb v. South Carolina State University*, 350 S.C. 416, 422-23 n.2, 567 S.E.2d 231, 234 n.2 (2002), we said, "It is especially difficult to lay down any hard and fast rule with regard to such activities as repair and maintenance," because "[t]he practices of different concerns operating in the same field often vary." 243 S.C. at 11, 132 S.E.2d at 23. Our point was that different business managers make legitimate choices about the scope of their company's business based on circumstances the manager deems important to the company. We illustrated the point with an example from LARSON'S WORKMEN'S COMPENSATION LAW. "For example," we stated, "activities which would be unusual and out of the ordinary in a small business might be a normal activity for a large concern." *Id.* (citing Arthur Larson & Lex K. Larson, LARSON'S WORKMEN'S COMPENSATION LAW § 49.12 (1st ed. 1952)).

The defendant in *Bridges* owned an electric transmission line at its plant at Conestee. 243 S.C. at 4, 132 S.E.2d at 19. Ordinarily, "The defendant regularly employed a crew of men who maintained the electrical system, two of whom were experienced and competent electricians in the handling of electrical work on energized, or so-called 'hot' electrical lines." 243 S.C. at 5, 132 S.E.2d at 19. In other words, the defendant's management made a business decision to have its own employees handle the work of maintaining and replacing electric transmission lines. On the day the plaintiff was injured, however, "due to the excessive amount of overtime that its men

had already worked, the defendant . . . contracted with . . . an electrical contractor," the plaintiff's immediate employer, "to do the work." 243 S.C. at 5, 132 S.E.2d at 20. Despite the temporary change, we honored the original business decision, stating, "The maintenance and repair of its electrical system was, therefore, made a part of the work done by the defendant in the prosecution of its business of manufacturing woolen goods." 243 S.C. at 12, 132 S.E.2d at 23. The fact the work was performed on one occasion by a contractor did not change the defendant's business decision to include maintenance and repair of its electrical system as a part of its business. We held the employees of the contractor were statutory employees. *Id.*

The next case in the series—ironically—involved Daniel, which by then had become Daniel International Corporation. *Wilson v. Daniel Int'l Corp.*, 260 S.C. 548, 197 S.E.2d 686 (1973). Daniel contracted to build an industrial plant in Georgetown. 260 S.C. at 551, 197 S.E.2d at 687. Daniel had three options for getting the concrete it needed to build the plant: purchase concrete from an outside source, get concrete made by Daniel employees from its concrete division, or have Daniel employees mix concrete onsite. 260 S.C. at 553, 197 S.E.2d at 688. Because it decided a "purchase from an outside source . . . was the most economical," Daniel chose not to use its own employees. 260 S.C. at 553-54, 197 S.E.2d at 688. In finding the injured employee of the concrete supplier was not a statutory employee, we relied primarily on our finding he worked for the seller of material. 260 S.C. at 553-54, 197 S.E.2d at 688-89. However, our recognition of the importance of corporate decision making is inescapable. If Daniel had not chosen—for economic reasons—to use a contractor for this particular job, its own employees would have been doing the work.

In *Glass*, we recognized that not all work "necessary" for the owner to "carry on its business"—the standard we used in *Marchbanks* and *Boseman*—was "part of his . . . business" under section 42-1-400. *Glass* arose after the Medical University of South Carolina negotiated the settlement of a dispute with Dow Chemical Company over cracking in exterior panels installed on a building at its campus in Charleston. 325 S.C. at 200, 482 S.E.2d at 50. Dow agreed to settle the dispute by removing the old panels and replacing them. *Id.* To carry out the settlement, Dow hired a supervising contractor, who hired a removal contractor, who hired River City Rigging to provide welders. *Id.* We specifically recognized that "where repairs are major, specialized, or of the sort which the employer is not equipped to handle with its own work force, they are not part of the business." 325 S.C. at 202, 482 S.E.2d at 51 (citing Arthur

Larson & Lex K. Larson, THE LAW OF WORKMEN'S COMPENSATION § 49.16(e) (2nd ed. 1996)). Applying that principle to the facts of *Glass*, we stated, "Here, the major task of dismantling the outer walls . . . and of completely replacing facade panels required technical knowledge that was highly specialized. Additionally, Dow was completely unable to handle the repairs with its own work force because its immediate employees were not trained in construction." 325 S.C. at 202, 482 S.E.2d at 51. In finding the injured employee of the concrete supplier was not a statutory employee, we relied primarily on our finding that the employees' "activities were not related to the basic operation of Dow's business," but "stemmed simply from Dow's desire to avoid litigation costs." *Id.* We recognized, however, that corporate managers often choose not to make major or otherwise specialized repairs part of their business.

Three years after *Glass*, we decided the first of two cases from the transportation industry, whose applicability beyond the transportation context became a significant issue in this case at the court of appeals. In *Abbott v. The Limited, Inc.*, 338 S.C. 161, 526 S.E.2d 513 (2000), a truck driver delivering goods to a retail store "was injured when he slipped and fell while unloading boxes on Retailer's premises." 338 S.C. at 162, 526 S.E.2d at 514. The circuit court dismissed the employee's tort action under the statutory employee doctrine and the court of appeals affirmed. *Id.* The court of appeals held that when work is "an important part . . . [or] . . . a necessary, essential, and integral part" of the business of the employer, the worker is the statutory employee of the business. *Abbott v. The Ltd., Inc.*, 332 S.C. 171, 174, 503 S.E.2d 494, 496 (Ct. App. 1998) (citations omitted), *rev'd*, 338 S.C. 161, 526 S.E.2d 513. The court of appeals stated,

> We agree with the trial court that the prompt and efficient delivery of goods for the purpose of stocking its retail stores is an integral and essential part of [the retailer]'s business. [The retailer] could not operate a retail business without stock. Because [the truck driver]'s work was at least 'important' to [the retailer]'s business, the trial court properly deemed him a statutory employee.

332 S.C. at 174-75, 503 S.E.2d at 496.

We reversed, explaining, "The fact that it was important to Retailer to *receive* goods does not render the delivery of goods an important part of Retailer's business." 338 S.C. at 163, 526 S.E.2d at 514.

Three years after *Abbott*, we decided the second transportation case, *Olmstead v. Shakespeare*, 354 S.C. 421, 581 S.E.2d 483 (2003). We held "*Abbott* is not limited to receipt of goods cases, but applies equally to delivery of goods cases as long as the transportation of goods is *not the primary business* of the company to whom or from whom goods are being delivered." 354 S.C. at 425, 581 S.E.2d at 485 (emphasis added).

In this case, the court of appeals recognized this Court changed its interpretation of the statutory employee doctrine from *Bridges* through *Wilson* and *Glass*, culminating in *Abbott* and *Olmstead*. Addressing the parties' argument over whether this Court intended *Abbott* and *Olmstead* to apply outside the transportation context, the court of appeals stated "the logic employed by the court in *Abbott* and *Olmstead* brought new clarity to the abundance of case law on this issue and this logic is binding in the present case." *Keene*, 426 S.C. at 370, 827 S.E.2d at 190. The court of appeals continued,

> In sum, the analysis in *Abbott* and *Olmstead* is true to the legislative intent underlying section 42-1-400, which seeks to determine whether the type of work performed by the worker is the same type of work "the owner" has established as its business, and its logic applies across all trades, businesses, and occupations, allowing each case to be decided on its own facts.

426 S.C. at 370, 827 S.E.2d at 190-91.

We agree with the court of appeals. Looking back on *Bridges*, *Wilson*, *Glass*, *Abbott*, and *Olmstead*, the concepts we discussed in those cases are relevant to the analysis of this case and all statutory employee cases. In each case, we acknowledged things have changed since the time of *Marchbanks* and *Boseman*. In *Bridges*, we put value on the business decisions of management. 243 S.C. at 12, 132 S.E.2d at 23. In *Wilson*, we honored Daniel's decision to remove the provision of concrete from the scope of its business even though Daniel's own employees did the same work on other jobsites. 260 S.C. at 553-54, 197 S.E.2d at 688. In *Glass*, we recognized that

"major" repairs, "specialized" work, and jobs "of the sort which the employer is not equipped to handle with its own work force" are "not [necessarily] part of the business" of the owner. 325 S.C. at 202, 482 S.E.2d at 51. In *Abbott*, we held that just because work is *important to* a business does not mean the work is *part of* the business. 338 S.C. at 163, 526 S.E.2d at 514. In *Olmstead*, we clarified that "*Abbott* represents a change in this state's jurisprudence on what activity constitutes 'part of [the owner's] trade, business or occupation' under section 42-1-400," and we "overrule[d] all prior cases to the extent they are in conflict with our holding in *Abbott*," 354 S.C. at 426-27, 581 S.E.2d at 486 (first alteration in original). The trend away from *Marchbanks* and *Boseman*—and the broad view of an employer's "trade, business or occupation" those opinions represented—was firmly established by this Court by the time this case reached the court of appeals.

CNA Holdings argues the decisions of the circuit court and the court of appeals in this case refusing to apply the statutory employee doctrine "conflict with the public policy favoring inclusion under the Workers' Compensation Law." The applicable public policy, however, is to ensure that workers are covered under the Workers' Compensation Law. *Glass*, 325 S.C. at 201 n.1, 482 S.E.2d at 50 n.1; Larson et al., *supra*, §§ 70.04, 70.05. It does not matter to the fulfillment of this policy who provides the coverage. Here, Hoechst contracted out the maintenance and repair work to a sophisticated international construction company—Daniel Construction—not to a financially irresponsible subcontractor without the capacity to insure its workers. But Hoechst went further—to its credit—and mandated through contract that the maintenance workers would be insured. The decisions of the circuit court, the court of appeals, and now this Court, in no way frustrate the policy of the statutory employee doctrine or the Workers' Compensation Law.

It is also important to note that the public policy at issue here is not to provide civil immunity to employers like Hoechst or their corporate successors like CNA Holdings. In *Olmstead*, the court of appeals wrote "the underlying rationale" of favoring coverage for workers "is not as pertinent where the statutory employee definition and exclusive remedy provision are used as a shield to prevent recovery under another theory." *Olmstead v. Shakespeare*, 348 S.C. 436, 441, 559 S.E.2d 370, 373 (Ct. App. 2002), *aff'd as modified*, 354 S.C. 421, 581 S.E.2d 483. On review of that statement, this Court "decline[d]" to "adopt[] a different standard of review for cases in which the workers' compensation statute is used as a shield to liability." 354 S.C. at 427, 581 S.E.2d at 486. We decline again to do so today. Certainly, when the public policy behind the statutory employee doctrine leads to a

finding that a worker is a statutory employee, the collateral consequence of that finding is the claim against the owner must be filed with the workers' compensation commission. In that event, the owner collaterally enjoys immunity from tort liability. However, when the public policy favoring coverage is satisfied—as it was here—that policy has nothing to say about providing immunity to the owner. For these reasons, CNA Holdings' argument that public policy supports its position is misplaced.

The question posed by section 42-1-400 today is the same key question we addressed in *Marchbanks*: whether the work contracted out is "part of [the owner's] trade, business or occupation." Over time, we developed what we called "tests" for courts and the workers' compensation commission to use in answering the key question. *See Keene*, 426 S.C. at 368, 827 S.E.2d at 189 (reciting the "three tests" and stating they "were first articulated by our supreme court in 1988 . . . by drawing on" *Bridges*, *Boseman*, and *Marchbanks* (first citing *Olmstead*, 354 S.C. at 424, 581 S.E.2d at 485; then citing *Ost v. Integrated Prods., Inc.*, 296 S.C. 241, 245, 371 S.E.2d 796, 798-99 (1988))). While each test remains a valid consideration, today we refocus on the key question posed by the statute.

In answering the question posed by section 42-1-400—whether the work contracted out is "part of [the owner's] trade, business or occupation"—the court should focus initially on what the owner decided is part of its business. Increasingly, business managers are outsourcing work that formerly was handled as a part of the business, and they are doing so to meet the ever-increasing competitive challenges businesses face. *See* Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. Rev. 1673, 1676 (2016) ("Since the end of the Great Recession, U.S. businesses have aggressively engaged in a series of organizational changes—from classifying workers as independent contractors, to hiring subcontractors, to utilizing staffing agencies—to delegate employment-related responsibilities to outsiders."). In reality, therefore, what is or is not "part of" the owner's business is a question of business judgment, not law. If a business manager reasonably believes her workforce is not equipped to handle a certain job, or the financial or other business interests of her company are served by outsourcing the work, and if the decision to do so is not driven by a desire to avoid the cost of insuring workers, then the business manager has legitimately defined the scope of her company's business to not include that particular work.

In this case, there is no question Hoechst made a legitimate business decision to outsource its maintenance and repair work. Hoechst clearly had no intention of avoiding the cost of insuring the workers who did the work against work-related injuries. In fact, "to its credit" as we stated, Hoechst provided in its contract with Daniel that the workers must be insured and Hoechst would pay for it. Hoechst business managers considered the economic interests of the company and determined maintenance and repair was not "work which is a part of [its] trade, business or occupation." § 42-1-400. As the court of appeals summarized,

> [T]he unique facts of the present case [demonstrate] that Seay's work, while important to the manufacturing process performed by [Hoescht] employees, was not part of that process . . . . Only Daniel employees performed maintenance and repairs on the equipment in the Spartanburg plant. None of the [Hoechst] employees performed this type of work. . . . [Hoechst] contracted with Daniel because it was "a qualified, capable contractor that can do the *expert* work that [Hoechst] needed done, both in construction and maintenance. As aptly noted by the circuit court, [Hoechst] "has presented no evidence that its corporate purpose included equipment maintenance."

426 S.C. at 374-75, 827 S.E.2d at 193.

The original purpose of the statutory employee doctrine was to prevent business managers from outsourcing work for the purpose of avoiding workers' compensation costs. That purpose has nothing to do with outsourcing work for legitimate business reasons. Moreover, unlike the economy of 1936, it has become standard in the modern economy for businesses to bear the cost of insuring workers against injury. Seay's family presumably received the worker's compensation benefits Hoechst obligated through contract that Daniel must provide. The original purposes of the statutory employee doctrine are not served by making CNA Holdings an additional provider of workers' compensation benefits, because Daniel provided those benefits. The original purposes are certainly not served by granting CNA Holdings immunity for its wrongful conduct. It is not the role of courts to second-guess a legitimate business decision whose effect—far from the improper purposes the statutory

employee doctrine was designed to prevent—was actually to guarantee that the workers affected by the decision would be insured against work-related injuries.

III. Conclusion

The court of appeals correctly affirmed the circuit court's determination that Seay was not the statutory employee of Hoechst. We affirm.

AFFIRMED.

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

JUSTICE JAMES: I respectfully dissent. I would hold Mr. Seay was a statutory employee of Hoechst Celanese and would therefore reverse the court of appeals.

I disagree with the majority as to how we should read *Abbott v. The Limited, Inc.*, 338 S.C. 161, 526 S.E.2d 513 (2000) and *Olmstead v. Shakespeare*, 354 S.C. 421, 581 S.E.2d 483 (2003). I also disagree with the majority's apparent approval of a different standard for reviewing the application of the statutory employee doctrine, depending upon whether the worker invokes the doctrine to obtain workers' compensation benefits or whether the owner invokes the doctrine as a defense to civil liability.

I.

A. *Abbott* and *Olmstead*

We stated in *Olmstead* that "*Abbott* represents a change in this state's jurisprudence on what activity constitutes 'part of the owner's trade, business or occupation' under section 42-1-400." 354 S.C. at 426, 581 S.E.2d at 486. I believe any "change" recognized by the *Olmstead* Court is limited to transportation cases. That is the only reasonable way to view the *Olmstead* opinion. We specifically noted in *Olmstead* that *Abbott* involved the delivery of goods to the alleged statutory employer and that *Olmstead* involved the delivery of goods from the alleged statutory employer. *Id*. at 425, 581 S.E.2d at 485. We then held the court of appeals correctly concluded "that *Abbott* is not limited to receipt of goods cases, but applies equally to delivery of goods cases as long as the transportation of goods is not the primary business of the company to whom or from whom goods are being delivered." *Id*. I believe the limitation of *Abbott* and *Olmstead* to the transportation context is further manifested by this observation in *Olmstead*:

> *Abbott* does not change the need for this case by case analysis; *Abbott* merely establishes that transportation of goods is important to nearly all businesses, and, that transportation of goods by a common carrier alone, without something more, does not qualify as "part of [the owner's] trade, business, or occupation" under any of the three established tests for statutory employment.

Id. at 426, 581 S.E.2d at 486.

In light of our decisions in *Abbott* and *Olmstead*, it is easy to understand why the *Abbott* Court overruled the court of appeals' transportation-related decisions in *Neese v. Michelin Tire Corp.*, 324 S.C. 465, 478 S.E.2d 91 (Ct. App. 1996) and *Hairston v. Re: Leasing, Inc.*, 286 S.C. 493, 334 S.E.2d 825 (Ct. App. 1985). In *Olmstead*, we went on to "overrule all prior cases to the extent they are in conflict with our holding in *Abbott* and now in this case." *Id.* at 427, 581 S.E.2d at 486. When *Olmstead* was decided, *Marchbanks*, *Boseman*, *Bell*, *Bridges*, *Glass*, and other non-transportation cases were there for the picking to be overruled in whole or in part, but they were not.

B. Seay's Status

Regardless of whether *Abbott* and *Olmstead* are limited to transportation cases, I would hold that under the facts of this case, Seay was Hoechst's statutory employee. The three tests for determining whether a worker is a statutory employee have not changed. We must consider whether the worker's activities "(1) are an important part of the trade or business of the employer, (2) are a necessary, essential, and integral part of the business of the employer, or (3) have been previously performed by employees of the employer." *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201, 482 S.E.2d 49, 50 (1997). Perhaps the first and second tests are the same, but whatever the case, the worker's employment activities need only meet one of the three tests for the worker to be a statutory employee. Seay's activities at the Hoechst plant met the first two tests.

The majority writes that our decisions in *Marchbanks v. Duke Power Co.*,[7] *Boseman v. Pacific Mills*,[8] *Bell v. South Carolina Electric & Gas Co.*,[9] and *Glass* were consistent with a broad view of what was part of an owner's "trade, business, or occupation." The majority concedes it is hard to imagine that in light of those decisions, Seay was not a statutory employee of Hoechst. I agree, and I would stop the analysis there and hold Seay was Hoechst's statutory employee. However, the

[7] 190 S.C. 336, 2 S.E.2d 825 (1939).

[8] 193 S.C. 479, 8 S.E.2d 878 (1940).

[9] 234 S.C. 577, 109 S.E.2d 441 (1959).

majority concludes our analysis of the statutory employment issue has narrowed over the years and compels a different result, so I must go further.

The majority believes that beginning with our 1963 decision in *Bridges v. Wyandotte Worsted Co.*,[10] "we began a series of cases in which we narrowed our original view." I disagree with that statement for two reasons. First, the majority cites the following language in *Bridges* that it claims supports our evolving view: "It is especially difficult to lay down any hard and fast rule with regard to such activities as repair and maintenance," because "[t]he practices of different concerns operating in the same field often vary." 243 S.C. at 11, 132 S.E.2d at 23. In our 1939 decision in *Marchbanks*, a case dealing with maintenance of power poles, we noted the difficulty in determining whether a person is a statutory employee when we said, "it is often a matter of extreme difficulty to decide whether the work in a given case falls within the designation of the statute. It is in each case largely a question of degree and of fact . . . ." 190 S.C. at 361, 2 S.E.2d at 835 (quoting *Fox v. Fafnir Bearing Co.*, 139 A. 778, 779 (Conn. 1928)). This language from *Marchbanks* is essentially the same language we used in *Bridges*, so the cited language in *Bridges* does not, in my view, mark the beginning of a movement toward a narrower view of the statutory employee analysis.

My second disagreement with the majority's conclusion that *Bridges* signaled our movement toward a narrower view is more basic. Keep in mind there are three tests for determining whether a worker is a statutory employee. Our appellate decisions have typically required an analysis of the first two tests—whether the work performed was an important part of or necessary, essential, or integral to the owner's trade or business. There is a third test—whether the work had been previously performed by employees of the owner. Our focus in *Bridges* was upon that third test, and we noted the repair work performed on the owner's transmission lines was customarily done by the owner's regular employees; however, because those employees were overworked and needed rest, the owner contracted the work out to Collins Electric Company, the direct employer of the worker who was ultimately injured. We held the injured worker was the owner's statutory employee because the work he performed "was a part of the work ordinarily and customarily performed by the employees of the [owner] in the prosecution of the [owner's] business." *Bridges*, 243 S.C. at 12, 132 S.E.2d at 23. Consequently, *Bridges* does not represent

[10] 243 S.C. 1, 132 S.E.2d 18 (1963), *overruled on other grounds by Sabb v. South Carolina State University*, 350 S.C. 416, 422 n.2, 567 S.E.2d 231, 234 n.2 (2002).

a narrowing of our view in comparison with our earlier decisions in which we determined whether a worker's activity was an important, necessary, essential, or integral part of the owner's business.

The logic of our case-by-case approach to the statutory employee issue was evident in *Wilson v. Daniel International Corp.*, 260 S.C. 548, 197 S.E.2d 686 (1973). Daniel was building its plant in Georgetown and needed mixed concrete for construction. Daniel had three choices: (1) mix the concrete on the construction site using its own employees; (2) get concrete made by its employees from its concrete division; or (3) purchase concrete from an outside source. Daniel chose the third option and bought the concrete from Winyah. Winyah employees mixed the concrete at Winyah's plant. A Winyah worker was delivering the mixed concrete to the Daniel site when he was injured by the negligence of a Daniel employee. The worker sued Daniel for negligence, and Daniel asserted the statutory employee defense.

In its discussion of *Wilson*, the majority states "our recognition of the importance of [Daniel's] corporate decision making is inescapable." I read *Wilson* to say what it actually said: under the facts of that case, Winyah's worker was not Daniel's statutory employee because Winyah and Daniel's relationship was that of vendor-vendee and because "Winyah was not engaged in the execution or performance of any part of Daniel's work." 260 S.C. at 554, 197 S.E.2d at 689.

The majority reads *Glass* as our further recognition of and respect for the decisions of "corporate managers." In my view, we need not engage in such a nuanced reading of *Glass*. I believe *Glass* is yet another good example of the case-by-case approach. In *Glass*, facade panels installed on an MUSC building began to crack. 325 S.C. at 200, 482 S.E.2d at 50. Dow Chemical did not make or install the panels, but rather manufactured a product called Sarabond that was mixed with the mortar used in constructing the panels. MUSC claimed the Sarabond was causing the panels to crack. Dow agreed to settle the dispute with MUSC by removing the old panels and replacing them with a panel that did not contain Sarabond. As part of the settlement, Dow hired a supervising contractor, which hired a removal contractor, which hired another company to provide welders to remove the bolts and clips that held the defective panels in place. The bolts and clips were painted with lead paint, and when welders removed the bolts and clips, the bolts and clips emitted toxic lead fumes. Mr. Glass was one of the welders, and he claimed he was permanently disabled by

lead poisoning when he ingested the fumes. He sued Dow, and Dow claimed it was Glass's statutory employer and thus not liable to him in tort.

The trial court disagreed with Dow and struck the statutory employee defense, and the court of appeals affirmed. This Court granted a writ of certiorari to Dow and affirmed the court of appeals. We repeated the three tests for determining whether a worker is a statutory employee, and we again noted "no easily applied formula can be laid down for determining whether work in a particular case meets these tests, [so] each case must be decided on its own facts." *Id.* at 201, 482 S.E.2d at 51. We applied the facts to the first test and concluded replacement of the Sarabond panels was not an important part of Dow's business, as the welders' activities "were not related to the basic operation of Dow's business of manufacturing Sarabond. Instead, [the welders'] activities stemmed simply from Dow's desire to avoid litigation costs." *Id.* at 202, 482 S.E.2d at 51. Applying the second test, we held Dow's replacement of the panels with panels containing the product of another manufacturer "was not a necessary, integral, or essential part of its [manufacturing] business." *Id*. at 202-03, 482 S.E.2d at 51. In explaining this conclusion, we noted, "Regardless of how Dow determines to settle its dispute with MUSC, the manufacturing of Sarabond can continue." *Id*. at 203, 482 S.E.2d at 51. In concluding the third test did not rescue Dow's statutory employee defense, we noted "none of Dow's regular employees have ever engaged in construction work . . . ." *Id.* at 204, 482 S.E.2d at 52.

I do not read *Glass* as anything but a logical application of the three tests to the facts of that case. Therefore, I respectfully disagree with the majority that *Glass*—and *Wilson* and *Bridges* before it—signaled the beginning of our recognition of corporate decision-making as a primary consideration in determining whether a worker is a statutory employee.

The determination of whether a worker is a statutory employee depends upon the facts and circumstances of the case. "[T]here is no easily applied formula and each case must be decided on its own facts." *Abbott*, 338 S.C. at 163, 526 S.E.2d at 514. "[T]he tests established to interpret [section 42-1-400] do not eliminate the need for an individualized determination of the facts of each case in which statutory employment is alleged." *Olmstead*, 354 S.C. at 426, 581 S.E.2d at 486. In the instant case, the majority summarizes Seay's job responsibilities as "involv[ing] maintaining and repairing pumps, valves, condensers, and other equipment in the piping network [at the Hoechst plant]." I believe it is important to note the following facts as well: the plant manufactured synthetic fibers; Seay was one of 500 Daniel employees who

worked full time at the Hoechst plant; the manufacturing equipment Seay worked on included steam lines, valves, gear boxes, condensers, and pumps, all of which were integral to the efficient operation of the plant's production of the fibers; according to Seay, if these components didn't operate, the plant wouldn't run; during the time Seay worked at the plant from 1969 through 1978, he worked as a millwright and maintained the foregoing equipment; Seay's job was so integral to the operation of the plant, about once a year, portions of the plant would shut down so Seay could perform repairs necessary to resume operations; the plant provided all supplies for Seay's work; and a Hoechst employee, known as a "lead man," provided instructions to Seay's supervisor at Daniel, who then assigned daily job duties to Seay. The totality of these circumstances satisfies two of the three tests re-enumerated in *Olmstead*: Seay's daily work activities were "an important part of [Hoechst's] business or trade," and they were "a necessary, essential, and integral part of [Hoechst's] business," the production of synthetic fibers. 354 S.C. at 424, 581 S.E.2d at 485.

Even under the narrower view approved by the majority, Seay's status as a statutory employee of Hoechst was much stronger than the employees in our prior cases in which we held the employee was a statutory employee. In that respect, Seay's status as a statutory employee does not depend upon what the majority contends is an outdated and overly broad application of the doctrine. Seay was much more than the statutory employee who painted Duke Power power poles once every two years while directly employed by a company with which Duke Power contracted to do the work (*Marchbanks*); he was much more than the statutory employee who painted a water tower at the Pacific Mills plant (*Boseman*); he was much more than the statutory employee of a power company who climbed a power pole and fell to his death (*Bell*); and he was much more than the statutory employee who repaired a transmission line owned by a plant and over which electric current traveled to power plant machinery (*Bridges*).

Finally, I do not understand how the majority's new affinity for the evolution of decision-making of business managers and the majority's new emphasis on the "modern economy" is relevant to our analysis of Seay's employment status from 1969 through 1978. That was a time frame that certainly did not fall within the period of the "modern economy." Consequently, an analysis that considers "the ever-increasing competitive challenges businesses face" in the Amazon and Uber economy is misplaced. Under the facts of this case, I would hold Seay was Hoechst's statutory employee.

II.

The majority writes that it is not adopting a different standard for reviewing the application of the statutory employee doctrine depending upon whether the worker invokes the doctrine to obtain workers' compensation benefits or whether the owner invokes the doctrine as a defense to civil liability. As the majority notes, in *Olmstead*, this Court rejected the court of appeals' conclusion that the underlying rationale of favoring workers' compensation coverage for employees "is not as pertinent where the statutory employee definition and exclusive remedy provision are used as a shield to prevent recovery under another theory." *Olmstead v. Shakespeare*, 348 S.C. 436, 441, 559 S.E.2d 370, 373 (Ct. App. 2002), *aff'd as modified*, 354 S.C. 421, 427, 581 S.E.2d 483, 486. And as noted by the majority, we declined in *Olmstead* to adopt a differing standard of review for cases in which the statutory employment theory is used as a defense to civil liability. 354 S.C. at 427, 581 S.E.2d at 486. The majority then states, "We decline again to do so today."

I have no doubt that many reading the majority opinion will believe this case signals a trend toward the application of a different standard, much in the same way the majority believes *Bridges*, *Wilson*, and *Glass* signaled the beginning of a trend away from the reasoning of *Marchbanks*, *Boseman*, and *Bell* on the issue of whether work falls within the trade, business, or occupation of an owner. The majority's comment that the "original purposes [of the statutory employee doctrine] are certainly not served by granting CNA Holdings immunity for its wrongful conduct" will be taken to heart, in spite of the majority's professed refusal to adopt a new standard.

III.

Under the facts of this case, I would reverse the court of appeals and hold Mr. Seay was a statutory employee of Hoechst.

KITTREDGE, J., concurs.

The Supreme Court of South Carolina

Re: Amendments to Rule 3.8 of the South Carolina Rules of Professional Conduct

Appellate Case No. 2019-001491

ORDER

The South Carolina Bar has proposed amending Rule 3.8 of the Rules of Professional Conduct, which are found in Rule 407 of the South Carolina Appellate Court Rules, to incorporate a modified version of amendments to the corresponding American Bar Association (ABA) Model Rule that govern a prosecutor's ethical responsibilities upon learning that a convicted defendant is likely innocent.

Pursuant to Article V, Section 4 of the South Carolina Constitution, we grant the Bar's request to amend Rule 3.8, with some modifications. The amendments, which are set forth in the attachment to this Order, are effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
August 11, 2021

Rule 3.8, RPC, Rule 407, SCACR, is amended to add new paragraphs (g) and (h), and new comments 7 through 12, which provide as follows:

(g) When a prosecutor learns of credible, material evidence or information such that there is a reasonable probability a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) make reasonable efforts to promptly disclose in writing that evidence or information to the defendant or, if the defendant is represented by counsel, to the defendant's counsel, unless a court authorizes delay; and

(2) promptly disclose in writing that evidence or information to the chief prosecutor in the jurisdiction where the conviction was obtained.

(h) When a prosecutor knows of clear and convincing evidence or information establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall make reasonable efforts to seek to remedy the conviction.

(i) A prosecutor who concludes in good faith, measured by an objective standard, that the evidence or information is not of such nature to trigger the obligations of paragraphs (g) or (h) of this Rule does not violate those paragraphs even if the prosecutor's conclusion is later determined to have been erroneous.

Comment

. . .

[7] Paragraphs (g)(1) and (2) require the prosecutor who learns of the evidence or information to promptly disclose the evidence or information to the defendant and to the chief prosecutor in the jurisdiction where the conviction was obtained. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] When no prosecutor involved in a conviction is currently employed in a prosecutor's office at the time credible, material evidence or information indicating innocence arises, the chief prosecutor has an obligation to determine in good faith whether the evidence or information has been disclosed as required under these rules or applicable law.

[9] In paragraph (g), "credible" means the evidence or information must be trustworthy or capable of persuading a trier of fact.

[10] In paragraph (g), "material" means the evidence or information is such that there is a reasonable probability that the outcome of the trial or guilty plea would have been different had the defendant known of the evidence or information at the time of trial or guilty plea.

[11] In paragraph (h), "clear and convincing" means a degree of proof that produces in the mind of the prosecutor a firm belief as to the allegations sought to be established. It does not mean clear and unequivocal.

[12] Reasonable efforts to seek to remedy a conviction under paragraph (h) may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge the defendant did not commit the offense of which the defendant was convicted.

The Supreme Court of South Carolina

In the Matter of Gregory Payne Sloan, Petitioner.

Appellate Case Nos. 2020-001438 and 2020-001533

ORDER

By opinion dated January 22, 2020, this Court suspended Petitioner from the practice of law for three years, retroactive to the date of his interim suspension on January 13, 2017.[1] *In re Sloan*, 429 S.C. 124, 838 S.E.2d 499 (2020). Petitioner had previously been administratively suspended for failing meet continuing legal education requirements. *In re Admin. Suspensions for Failure to Comply with Continuing Legal Educ. Requirements*, S.C. Sup. Ct. Order dated May 13, 2019. Petitioner filed two petitions for reinstatement, one pursuant to Rule 33, RLDE, Rule 413, SCACR, and the other pursuant to Rule 419, SCACR. After referral to the Committee on Character and Fitness (Committee), the Committee has filed a Report and Recommendation recommending the Court reinstate Petitioner to the practice of law.

We find Petitioner has met the requirements of Rule 33(f), RLDE, and Rule 419(e), SCACR. Therefore, we grant the petitions for reinstatement conditioned upon Petitioner entering into a two-year monitoring agreement with Lawyers Helping Lawyers that includes the filing of quarterly compliance reports with the Commission on Lawyer Conduct.[2]

---

[1] *In re Sloan*, 419 S.C. 42, 795 S.E.2d 856 (2017) (placing Petitioner on interim suspension).

[2] In his testimony before the Committee, Petitioner agreed to assist the Office of Disciplinary Counsel, the South Carolina Bar, Lawyers Helping Lawyers, and others by sharing his experience in connection with substance abuse and mental health continuing legal education programs. The quarterly reports filed with the Commission on Lawyer Conduct shall include information on what efforts Petitioner has undertaken to assist these organizations with substance abuse and mental health education.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
August 4, 2021

The Supreme Court of South Carolina

In the Matter of Rosalyn Kimberly Grigsby, Petitioner.

Appellate Case Nos. 2020-001125 and 2020-001402

ORDER

By opinion dated November 20, 2006, this Court suspended Petitioner from the practice of law for two years, retroactive to the date of her interim suspension on June 29, 2004.[1] *In re Grigsby*, 371 S.C. 165, 638 S.E.2d 54 (2006). Petitioner had previously been administratively suspended for failing meet continuing legal education requirements. *In re Suspensions - Commission on CLE and Specialization*, S.C. Sup. Ct. Order dated April 12, 2005. Petitioner has now filed two petitions for reinstatement, one pursuant to Rule 33, RLDE, Rule 413, SCACR, and the other pursuant to Rule 419, SCACR. The Committee on Character and Fitness has filed a Report and Recommendation recommending the Court reinstate Petitioner to the practice of law.

We find Petitioner has met the requirements of Rule 33(f), RLDE, and Rule 419(e), SCACR. Therefore, we grant the petitions for reinstatement conditioned upon the requirement that Petitioner must, for a period of two years, practice under the supervision of a regular member of the South Carolina Bar. Petitioner shall notify the Commission on Lawyer Conduct (Commission) of the name of her supervising attorney and advise the Commission within thirty days of any change.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

[1] *In re Grigsby*, 360 S.C. 48, 599 S.E.2d 455 (2004) (placing Petitioner on interim suspension).

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
August 4, 2021

The Supreme Court of South Carolina

In the Matter of Mareno Cyrus Foggie, Former Laurens County Magistrate, Respondent.

Appellate Case No. 2021-000699

ORDER

Respondent was placed on interim suspension following his arrest on a criminal charge. *In re Foggie*, S.C. Sup. Ct. Order dated July 18, 2018. The criminal charge was dismissed by the State on June 28, 2019. On June 21, 2021, an investigative panel of the Commission on Judicial Conduct determined there was no evidence of ethical misconduct and dismissed the pending disciplinary complaint against Respondent. Respondent now petitions this Court to lift his interim suspension. In its return, the Office of Disciplinary Counsel does not oppose that request.

We grant the petition, and Respondent's interim suspension is hereby lifted.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
August 4, 2021

The Supreme Court of South Carolina

In the Matter of James H. Harrison, Respondent.

Appellate Case No. 2021-000670

ORDER

Respondent has submitted a motion to resign in lieu of discipline pursuant to Rule 35, RLDE, Rule 413, SCACR, following this Court's decision in *State v. Harrison*, 432 S.C. 448, 854 S.E.2d 468 (2021). In the affidavit attached to his motion, Respondent acknowledges that Disciplinary Counsel can prove the allegations against him and states he does not desire to contest or defend against those allegations.

We grant Respondent's motion. In accordance with the provisions of Rule 35, RLDE, Respondent's resignation shall be permanent. Respondent will never again be eligible to apply and will not be considered for admission or reinstatement to the practice of law or for any limited practice of law in South Carolina.

Within fifteen days from the date of this order, Respondent shall file an affidavit with the Clerk of this Court showing Respondent has complied with Rule 30, RLDE, Rule 413, SCACR, and shall also surrender his Certificate of Admission to Practice Law to the Clerk of this Court.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
August 4, 2021

The Supreme Court of South Carolina

In the Matter of Candy M. Kern, Respondent.

Appellate Case No. 2021-000273

ORDER

Respondent has submitted a motion to resign in lieu of discipline pursuant to Rule 35, RLDE, Rule 413, SCACR. Respondent faces three separate disciplinary complaints related to her role in an illegal scheme of inducing veterans to sell their retirement or disability benefits in exchange for cash payments. The first complaint involves a federal lawsuit filed by three veterans alleging Respondent and others illegally induced the veterans to sell their retirement or disability benefits for a period of months or years in exchange for a lump sum payment. The second complaint was filed by an Arizona life insurance agent who sold to four of his clients military income stream investments that were processed by Respondent. The agent filed a complaint with Disciplinary Counsel after his clients stopped receiving payments, and the agent could not reach Respondent to inquire about the payments. In the third complaint, a South Carolina lawyer represented three veterans who had assigned their military benefits in exchange for lump sum payments in connection with Respondent's scheme. Each of the veterans defaulted on the agreement to assign their benefits because they learned the assignments were illegal. After Respondent filed suit against each of the veterans in Greenville County, the veterans' lawyer filed a complaint with Disciplinary Counsel based on her belief the transactions were void from inception pursuant to federal law.

Respondent has also been involved in several other lawsuits regarding this illegal financial scheme. In 2018, the Securities Division of the Arizona Corporation Commission (Corporation Commission) filed an enforcement action alleging the income stream investments were unregistered securities that were prohibited by federal and state law. Respondent and her law firm were named parties. On November 12, 2020, the Corporation Commission issued an order finding Respondent made, participated in, and induced offers and sales of unregistered

securities in violation of the Arizona Securities Act. The order further found Respondent acted in a reckless and unethical manner and continued to be involved in unlawful sales of securities after multiple cease and desist orders from other states found similar investments violated securities laws in those jurisdictions. The Corporation Commission found the description of Respondent's law firm's role in the investment scheme marketing materials gave confidence to investors that induced the unlawful sale of these securities and deceived the investors into a false sense of the investment's safety. The Corporation Commission ordered Respondent to pay restitution, jointly and severally with other parties, in the total amount of $2,943,438.60, plus administrative penalties in the total amount of $560,000.

Additionally, the Bureau of Consumer Financial Protection, the South Carolina Department of Consumer Affairs, and the State of Arkansas filed a complaint in the United States District Court for the District of South Carolina against Respondent, her former law partner, and their law firm alleging various violations of state and federal law in connection with selling veterans' disability benefits to investors. On January 21, 2021, the federal court signed a stipulated final order and judgment permanently restraining Respondent from: (1) brokering, offering or arranging purported sales or assignments of pensions and disability benefits, including extensions of credit related to pension or disability benefits; (2) any collection activity related to any contract purporting to sell or assign a consumer's pension or disability benefits or any alleged debt arising from the purported sale or assignment of a consumer's pension or disability benefits; and (3) engaging in any financial-services based business in the State of South Carolina—including the business of securities, commodities, banking, insurance, or real estate—unless acting in the regular course of the practice of law. The district court ordered Respondent to pay equitable monetary relief, jointly and severally with her former law partner and law firm, in the amount of $725,000. The district court also prohibited the use of customer information, ordered additional monetary provisions, and implemented reporting requirements and other compliance provisions.

Respondent's misconduct as set forth above is deemed to have been conclusively established for the purposes of our consideration of Respondent's motion to resign in lieu of discipline. Rule 35(b), RLDE, Rule 413, SCACR. In the affidavit attached to her motion, Respondent acknowledges that Disciplinary Counsel can

prove the allegations against her and states she does not desire to contest or defend against those allegations.

We find Respondent's egregious pattern of conduct violated the following Rules of Professional Conduct in Rule 407, SCACR: Rule 1.4 (failing to explain transactions to the extent necessary to permit clients to make informed decisions regarding the representation); Rule 1.5 (charging unreasonable fees); Rule 1.7 (representing investors and veterans without informed consent confirmed in writing regarding the conflict of interest); Rule 8.4(d) (engaging in conduct involving dishonesty, deceit, or misrepresentation); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice). Accordingly, we grant Respondent's motion to resign her membership in the South Carolina Bar. In accordance with the provisions of Rule 35, RLDE, Respondent's resignation shall be permanent. Respondent will never again be eligible to apply and will not be considered for admission or reinstatement to the practice of law or for any limited practice of law in South Carolina.

Within fifteen (15) days from the date of this order, Respondent shall file an affidavit with the Clerk of this Court showing Respondent has complied with Rule 30, RLDE, Rule 413, SCACR, and shall also surrender her Certificate of Admission to Practice Law to the Clerk of this Court.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
August 4, 2021

The Supreme Court of South Carolina

In the Matter of George Eugene Lafaye, IV, Respondent.

Appellate Case No. 2021-000671

ORDER

Respondent has submitted a motion to resign in lieu of discipline pursuant to Rule 35, RLDE, Rule 413, SCACR. Respondent faces a disciplinary complaint alleging he persistently failed to communicate with a client and failed to diligently handle the client's legal matter. In the affidavit attached to his motion, Respondent acknowledges that Disciplinary Counsel can prove the allegations against him and states he does not desire to contest or defend against those allegations.

We grant Respondent's motion. In accordance with the provisions of Rule 35, RLDE, Respondent's resignation shall be permanent. Respondent will never again be eligible to apply and will not be considered for admission or reinstatement to the practice of law or for any limited practice of law in South Carolina.

Within fifteen days from the date of this order, Respondent shall file an affidavit with the Clerk of this Court showing Respondent has complied with Rule 30, RLDE, Rule 413, SCACR, and shall also surrender his Certificate of Admission to Practice Law to the Clerk of this Court.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
August 4, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1, Respondent/Appellant,

v.

The Estate of Patricia Ann Owens Houck; Tammy M. Bailey; South Carolina Department of Motor Vehicles, Defendants,

Of which the Estate of Patricia Ann Owens Houck and Tammy M. Bailey are the Appellants/Respondents.

Appellate Case No. 2018-000436

Appeal from Lexington County
James O. Spence, Master-in-Equity

Opinion No. 5844
Heard January 12, 2021 – Filed August 11, 2021

REVERSED AND REMANDED

Andrew Sims Radeker, of Harrison, Radeker & Smith, P.A., of Columbia, for Appellants/Respondents.

George Benjamin Milam and Jonathan Edward Schulz, both of Bradley Arant Boult Cummings, LLP, of Charlotte, North Carolina; Michael Casin Griffin, of

Waxaw, North Carolina; and Mary R. Powers, of Brock & Scott, PLLC, of Columbia, all for Respondent/Appellant.

LOCKEMY, C.J.: In this foreclosure action, the Estate of Patricia Ann Owens Houck and Tammy M. Bailey (collectively, Mortgagors) appeal the master-in-equity's order granting their motion for partial summary judgment and finding Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1 (Deutsche Bank) liable for failing to record satisfaction of their mortgage pursuant to sections 29-3-310 to -320 of the South Carolina Code (2007).[1] Mortgagors solely argue the master erred in failing to order Deutsche Bank to pay a penalty under section 29-3-320. Deutsche Bank cross-appealed, arguing the master erred in granting Mortgagors' motion for partial summary judgment, finding its foreclosure claim was procedurally barred, and finding it was liable for failing to record satisfaction of the mortgage. In addition, Deutsche Bank argues the master erred by denying its motion for partial summary judgment as to Mortgagors' counterclaim for violation of section 37-10-102 of the South Carolina Code (2015) (the Attorney Preference Statute).[2] We reverse and remand.

FACTS/ PROCEDURAL HISTORY

---

[1] § 29-3-310 (stating that when a holder of record of a mortgage has received "full payment or satisfaction" or a legal tender has been made to him "of his debts, damages, costs, and charges secured by mortgage of real estate," it must enter satisfaction of the mortgage within three months after the mortgagor requests entry of satisfaction); § 29-3-320 (stating a holder who violates section 29-3-310 shall pay the aggrieved person "one-half of the amount of the debt secured by the mortgage, or [$25,000,] . . . whichever is less, plus actual damages, costs, and attorney's fees in the discretion of the court, to be recovered by action in any court of competent jurisdiction within the State").

[2] *See* § 37-10-102(a) (requiring mortgage lenders to "ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction").

In 1998, Houck signed a fixed-rate note (the Note) in favor of NovaStar Mortgage, Inc. (NovaStar), promising to pay $60,400 and 9.99% interest per annum in monthly installments. To secure the Note, Houck executed a mortgage (the Mortgage) on real property located at 111 Andrew Court in Gaston (the Property).[3] The Mortgage was later assigned to Deutsche Bank. The Note contained a balloon provision requiring Houck to pay the remaining balance due by the Note's maturity date of July 1, 2013.

On June 27, 2013—days before the Note matured—Mortgagors commenced an action (the 2013 Action) against NovaStar, Deutsche Bank, Ocwen Loan Servicing, LLC (the Loan Servicer), and others.[4] Mortgagors' claims against Deutsche Bank were premised upon violation of the Attorney Preference Statute. They claimed (1) that Deutsche Bank failed to comply with the attorney preference provisions of section 37-10-102 with respect to the closing of the loan subject to this case, (2) that no attorney supervised the closing of the loan, and (3) that the loan was unconscionable and induced by unconscionable conduct. Mortgagors asserted that "[f]or each violation of [section] 37-10-102," they were "entitled to damages, attorney's fees, and penalties as provided in the South Carolina Consumer Protection Code, including all available relief under [section] 37-10-105." In addition, they asserted claims against Deutsche Bank for violation of the South Carolina Unfair Trade Practices Act (the SCUTPA). *See* S.C. Code Ann. §§ 39-5-10 to -730 (1985 & Supp. 2020). These claims were premised on the same alleged violation of the Attorney Preference Statute.

Mortgagors defaulted on the Note before Deutsche Bank filed its answer. In a letter dated August 23, 2013, the Loan Servicer advised Mortgagors of potential solutions to avoid foreclosure. Deutsche Bank answered the complaint on September 26, 2013, and asserted no counterclaims. The 2013 Action proceeded to trial September 15, 2015, and a jury found for the defendants. About a year later in August of 2016, Mortgagors sent a letter by certified mail to Deutsche Bank requesting that it record satisfaction of the Mortgage and included a $40 check to

---

[3] In its foreclosure action, Deutsche Bank also sought to reform the Mortgage to include the mobile home located on the Property.

[4] According to Mortgagors' complaint, Bailey "became a debtor under the [N]ote through an assumption," but they alleged she "would not have done so if she had been aware of the balloon [provision]."

pay the fee for recording the satisfaction document. Deutsche Bank refused and returned the $40 check.

Deutsche Bank brought this action against Mortgagors in October 2016, seeking foreclosure of the Mortgage to satisfy the principal balance of $48,587.09 remaining on the Note. It alleged Mortgagors failed to make any payments on or after July 1, 2013. Mortgagors asserted defenses of res judicata, laches, unclean hands, waiver, and setoff. They admitted, however, that the "installments of principal and interest falling due from and after July 1, 2013[,] ha[d] not been paid although demand for payment thereof ha[d] been made." Mortgagors sought a declaratory judgment that Deutsche Bank held no mortgage on the Property or alternatively that any mortgage it held was unenforceable. They alleged that Deutsche Bank was liable for failing to enter satisfaction of the Mortgage within three months of Mortgagors' request pursuant to section 29-3-320 and that it violated the Attorney Preference Statute. Deutsche Bank filed a reply to the counterclaims in which it denied Mortgagors' allegations and alleged Mortgagors' claims under the Attorney Preference Statute were time-barred.

The case was then referred to the master-in-equity, and both parties filed motions for partial summary judgment. Mortgagors sought summary judgment as to Deutsche Bank's claim for foreclosure, arguing it was procedurally barred by Rule 13(a), SCRCP, and res judicata. They also sought summary judgment as to their counterclaims for declaratory judgment and violation of section 29-3-320. Deutsche Bank sought summary judgment as to each of Mortgagors' counterclaims. The master granted Mortgagors' motion and denied Deutsche Bank's motion. He ruled the Mortgage was satisfied, instructed Deutsche Bank to record satisfaction pursuant to section 29-3-320 within three months of its order, and determined that if Deutsche Bank complied, Mortgagors would be entitled to no further relief under section 29-3-320.[5] Mortgagors filed a motion to alter or amend the master's order, which the master denied. This appeal followed.

[5] The only cause of action effectively remaining after the master's grant of Mortgagors' partial motion for summary judgment was Mortgagors' counterclaim for violation of the Attorney Preference Statute.

STANDARD OF REVIEW

Upon review of an order granting summary judgment, our appellate courts "appl[y] the same standard [that] governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when 'there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001) (quoting *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991)). "We review questions of law de novo." *Ziegler v. Dorchester County*, 426 S.C. 615, 619, 828 S.E.2d 218, 220 (2019).

LAW/ANALYSIS

I. Mortgagors' Motion for Partial Summary Judgment

Deutsche Bank argues the master erred by finding its foreclosure claim was a compulsory counterclaim in the 2013 Action and that res judicata precluded it from bringing this action. It asserts the foreclosure claim did not arise from the same transaction or occurrence that gave rise to Mortgagors' claims for violation of the Attorney Preference Statute and the SCUTPA and thus did not logically relate to their claims in the 2013 Action. Deutsche Bank contends that because section 37-10-105 provided several forms of relief, Mortgagors' general request for "all available relief" under section 37-10-105 instead of a specific request for nonenforcement of the agreement was insufficient to satisfy the logical relationship test. We agree.

A. Compulsory Counterclaim

"If a compulsory counterclaim is not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action." *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 62, 566 S.E.2d 863, 865 (Ct. App. 2002); *see also* Rule 13, SCRCP ("A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, *if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim* . . . ." (emphasis added)). "By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *First-Citizens Bank & Tr. Co. of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). "Claims that arise out of separate

transactions or occurrences than the subject matter of the opposing party's claims are, instead, permissive." *Wachovia Bank, Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 330-31, 755 S.E.2d 437, 442 (2014).

When deciding whether a claim is compulsory under Rule 13(a), SCRCP, South Carolina courts apply the "logical relationship test." *See N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989) (adopting the logical relationship test). In *Carolina First Bank v. BADD, L.L.C.*, our supreme court held a defendant's inclusion of a counterclaim for civil conspiracy in its answer to the bank's foreclosure complaint was permissive when it bore "no logical relationship to either the execution or the enforceability of the guaranty agreements." 414 S.C. 289, 295, 778 S.E.2d 106, 109 (2015). The court clarified that "the civil conspiracy claim presume[d] the enforceability of the guaranty agreements because the allegations, if true, would not render the guarantees unenforceable." *Id.* at 296, 778 S.E.2d at 109. In *South Carolina Community Bank v. Salon Proz, LLC*, this court found a claim was compulsory in a foreclosure action when, if the allegation were true, "it could affect the loan's enforceability." 420 S.C. 89, 97-98, 800 S.E.2d 488, 492 (Ct. App. 2017).

The Attorney Preference Statute requires mortgage lenders in residential real estate transactions to "ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction." § 37-10-102(a). If the lender violates this provision, the borrower has a cause of action to recover actual damages and a right to recover a penalty from the lender "in an amount determined by the court" of no less than $1,500 and no more than $7,500. S.C. Code Ann. § 37-10-105(A) (2015). Additionally, subsection (C) provides,

> (C) If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108[6] at the time it was made, or was induced by unconscionable conduct, the court may . . . :

[6] S.C. Code Ann. § 37-5-108 (2015) (listing factors for courts to consider when deciding whether an agreement or transaction is unconscionable or induced by unconscionable conduct).

> (1) refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made;
>
> (2) enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result;
>
> (3) rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement; or
>
> (4) award:
>
> > (a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge;
> >
> > (b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and
> >
> > (c) attorney's fees and costs.
>
> An action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt.

S.C. Code Ann. § 37-10-105(C) (2015).

Applying the logical relationship test, we find the foreclosure claim did not arise out of the same transaction or occurrence that was the subject matter of the 2013 Action. The occurrence that gave rise to Deutsche Bank's inclusion in Mortgagors' complaint in the 2013 Action was the execution of the loan documents and the closing of the Mortgage. The occurrence that gave rise to Deutsche Bank's foreclosure action was Mortgagors' default on the Note. We acknowledge *DAV Corp.*; *BADD, L.L.C.*; and *Salon Proz, LLC* all held that a claim is compulsory in a

foreclosure action when, if the allegation were true, it could affect the enforceability of the loan.[7] However, this case differs from the foregoing cases because here the prior action was not a foreclosure action. Rather, Mortgagors' claims against Deutsche Bank in the 2013 Action were for violation of the Attorney Preference Statute and the SCUTPA. Thus, the question is whether a counterclaim for foreclosure in the 2013 Action would have affected Mortgagors' claims under the Attorney Preference Statute and the SCUTPA. Deutsche Bank's foreclosure claim was not a defense to Mortgagors' allegations in the 2013 Action, and had Deutsche Bank raised the foreclosure claim in the 2013 Action, it would not have affected Mortgagors' allegations pertaining to the violation of the Attorney Preference Statute. *See U.S. Bank Tr. Nat. Ass'n v. Bell*, 385 S.C. 364, 374-75, 684 S.E.2d 199, 205 (Ct. App. 2009) ("Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. Once the debt and default have been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of consideration, payment, or accord and satisfaction." (footnote omitted)). We therefore conclude that although Deutsche Bank could have asserted a counterclaim for foreclosure in the 2013 Action, such claim was permissive—not compulsory.

Further, although Mortgagors claimed they were not aware of the Note's balloon provision, they did not specifically request a determination that the Mortgage or the underlying obligation to repay the loan was unenforceable. Rather, they sought damages, attorney's fees, and in general terms, "penalties as provided in the South Carolina Consumer Protection Code, including all available relief" under section 37-10-105. Had the court in the 2013 Action determined that the balloon provision was unconscionable or induced by unconscionable conduct, it could have declared the entire agreement unenforceable, but such remedy was neither required nor specifically requested. *See* § 37-10-105(A), (C). The court could have instead refused to enforce only that particular term of the agreement or simply chosen to award monetary relief. *See id.*

For the foregoing reasons, we find Deutsche Bank's claim for foreclosure did not arise out of the same transaction or occurrence as the 2013 Action and was therefore not a compulsory counterclaim. Accordingly, we find the master erred

---

[7] *See DAV Corp.*, 298 S.C. at 518, 381 S.E.2d at 905; *BADD, L.L.C.*, 414 S.C. at 296, 778 S.E.2d at 109; *Salon Proz, LLC*, 420 S.C. at 97-98, 800 S.E.2d at 492.

by finding Deutsche Bank was precluded from bringing this foreclosure action, and we reverse the grant of summary judgment.

B. Res Judicata

Because we find Deutsche Bank's claim for foreclosure did not arise out of the same transaction or occurrence that was the subject of the 2013 Action, we find res judicata likewise did not bar Deutsche Bank from bringing this foreclosure action. *See Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 190, 417 S.E.2d 569, 571 (1992) ("Res judicata bars subsequent suit by the same parties on the same issues."); *id.* at 190-91, 417 S.E.2d at 571 ("[It] also bars subsequent suit by the same parties when the claims arise out of the same transaction or occurrence that is the subject of the prior suit between those parties."); *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992) (stating res judicata requires three elements: "(1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit").

II. Remaining Issues

Mortgagors argue the master erred in failing to penalize Deutsche Bank for refusing to record satisfaction. Deutsche Bank argues the master erred in concluding the preclusive effect of the 2013 Action resulted in satisfaction of the Mortgage. Our reversal of the master's grant of summary judgment is dispositive of these issues; thus, we need not address them further. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding when the appellate court's disposition of a prior issue is dispositive, it need not address remaining issues).

Finally, as to Deutsch Bank's argument the master erred in denying its motion for summary judgment, we find this issue is not appealable. *See Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003) (holding "the denial of summary judgment is not appealable, even after final judgment"); *Coastal Fed. Credit Union v. Brown*, 417 S.C. 544, 553, 790 S.E.2d 417, 422 (Ct. App. 2016) (finding the denial of summary judgment was not appealable even when accompanied by an appealable grant of summary judgment).

CONCLUSION

For the foregoing reasons, we reverse the grant of summary judgment in favor of Mortgagors and remand to the master for further proceedings. We find the denial of Deutsche Bank's motion for summary judgment is not appealable.

REVERSED AND REMANDED.

KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Daniel O'Shields and Roger W. Whitley, a Partnership d/b/a O&W Cars, Appellants,

v.

Columbia Automotive, LLC d/b/a Midlands Honda, Respondent.

Appellate Case No. 2017-000902

Appeal From Richland County
R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 5845
Heard March 1, 2021 – Filed August 11, 2021

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

C. Steven Moskos, of C. Steven Moskos, PA, and Brooks Roberts Fudenberg, of the Law Office of Brooks R. Fundenberg, LLC, both of Charleston, for Appellants.

James Y. Becker and Robert Lawrence Reibold, both of Haynsworth Sinkler Boyd, PA, of Columbia; Sarah Patrick Spruill, of Haynsworth Sinkler Boyd, PA, of Greenville; and Harry Clayton Walker, Jr., of Haynsworth Sinkler Boyd, PA, of Charleston, all for Respondent.

KONDUROS, J.: This case arises out of the sale of a 2003 Honda Civic by Columbia Automotive, LLC d/b/a Midlands Honda (Midlands) to Daniel O'Shields and Roger W. Whitley, together d/b/a O&W Cars (O&W), at the Automobile Dealer Exchange Services of America (ADESA) auction in North Carolina. After becoming aware the car had been "clipped"—reconstructed from two cars—O&W brought claims against Midlands in South Carolina for breach of contract, negligent misrepresentation, violation of the North Carolina Unfair Trade Practices Act (NCUTPA), and fraud.[1] After trial, the jury returned a verdict for O&W in the amount of $6,645 in actual damages with respect to O&W's NCUTPA claim, and $6,645 actual damages and approximately $2.38 million in punitive damages for fraud.[2] The circuit court required O&W to elect between the punitive damages award and any attorney's fees award under the NCUTPA claim, and O&W elected to recover under the NCUTPA verdict. In its orders regarding post-trial motions, the circuit court reduced the punitive damages award to $46,515; awarded attorney's fees in the amount of $21,264; and denied offer of judgment interest to O&W. O&W appeals the rulings therein and the circuit court's ruling on election of remedies. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

Sandra Gaskins bought the new 2003 Honda Civic in August 2003. In July 2004, Gaskins' daughter had an accident while driving the car, and it was deemed a total loss. Gaskins's insurer, Nationwide Mutual Insurance Company (Nationwide), bought the car and sold it at a salvage auction. An undetermined person modified the damaged car by welding the front half of the car to the back half of another car,

[1] The parties and the circuit court agreed North Carolina's substantive law would apply in the case because North Carolina was the place of the contract at issue and the location of the alleged injury. *See Lister v. NationsBank of Del., NA.*, 329 S.C. 133, 144, 494 S.E.2d 449, 155 (Ct. App. 1997) ("in contract actions, South Carolina courts apply substantive law of place where contract at issue was formed and this rule applies where contract's formation, interpretation, or validity is at issue; however, where performance is at issue, law of place of performance governs." (citing *Witt v. Am. Trucking Ass'n, Inc.,* 860 F.Supp. 295, 300 (D.S.C. 1994))).

[2] The other claims were dismissed prior to trial.

and put it back into the stream of commerce. In June of 2008, Nancy Watkins sold the car to Midlands, and the car had a clean title. In July, the car underwent a 159-point inspection at Midlands, including an oil change, and was placed in Midlands' certified preowned vehicle inventory. In August, Charles Ecklund purchased the car without knowledge of its modification.

In March 2010, Ecklund had an accident while driving the car and in having the vehicle repaired discovered it was clipped. Ecklund's wife notified Midlands of the issue by phone message. Near the end of the month, Ecklund traded the car in to Midlands. Within the next few days, Midlands placed the vehicle for sale at the ADESA auction in North Carolina under a red-light designation, which indicates the sale is "as is," but which also includes rules regarding disclosure as to certain types of defects or damage. Midlands did not notify the auction the car was clipped. An employee of the auction completed the disclosure form as power of attorney for Midlands.

O&W purchased the car for $5,200 at the auction on April 1, 2010. In late June, O&W sold the car to the White family for $6,800. In July, the Whites brought the car back to replace the timing belt and water pump, as they had discussed with Whitley, who agreed at the time of sale to provide the labor for those repairs. When the car was placed on the lift at a nearby garage, the technician was able to clearly see the car had been clipped, and indicated it was "a chopped up mess underneath." O&W refunded the purchase money to the Whites and retook possession of the car when the defect was discovered.

O&W sought to arbitrate the issue through the ADESA auction but was told the time period to seek arbitration had passed. Eventually, O&W filed the subject litigation in January of 2013. The matter proceeded to trial on April 18, 2016, in Richland County, and the jury returned a verdict for O&W for actual damages in the amount of $6,645 on each of O&W's causes of action. In a bifurcated punitive damage hearing, the jury rendered a verdict for O&W for punitive damages in the amount of $2,381,888.

Both parties filed posttrial motions. O&W moved to treble the verdict under the NCUTPA and for attorney's fees and costs. O&W also moved for offer of judgment interest under section 15-35-400 of the South Carolina Code (Supp. 2020), and for prejudgment interest. Midlands moved for judgment notwithstanding the verdict (JNOV) or in the alternative a new trial.

Midlands also filed a motion to require O&W to elect a remedy and moved for an order to reduce the punitive damages award to comply with section 1D-25 of the North Carolina General Statute and for an order to set off the judgment with the amount previously paid by Nationwide.[3] The circuit court granted Midlands' motion to require O&W to elect a remedy on May 18, 2016. On May 23, 2016, O&W moved to request reconsideration, asking the circuit court to allow it to elect a remedy after the court made its decision on the other motions, the rulings of which would impact O&W's election decision.

The circuit court heard posttrial motions on July 27, 2016. The circuit court reduced the punitive damages award to $46,515 and granted $21,264 in attorney's fees and $529.07 in costs. The court also denied O&W's motion for offer of judgment interest.

By email on August 29, 2016, the circuit court notified counsel for the parties of its decision to direct O&W to elect from the following remedies: (1) treble damages of $19,935 ($6,645 in actual damages times three) and attorney's fees of $21,264 for the NCUTPA cause of action, for a combined total of $41,199 or (2) actual damages of $6,645 and punitive damages reduced to $46,515 for the fraud cause of action, for a total of $53,160.

Without waiving its assertion it should not be required to elect between attorney's fees under the NCUTPA and actual and punitive damages on the fraud cause of action, O&W elected the first option, choosing treble damages and attorney's fees pursuant to the NCUTPA. Thereafter, O&W sought additional attorney's fees for work performed for additional time periods. This appeal followed.

LAW/ANALYSIS

I. Punitive Damages[4]

---

[3] Midlands later withdrew its motion for setoff.

[4] Midlands argues O&A waived its right to complain about the reduction in punitive damages by electing its remedy under the NCUTPA instead of its fraud cause of action. This argument is without merit. While "acts inconsistent with the continued assertion of a right may constitute waiver," O&A did not elect a

O&A contends the circuit court erred in reducing the jury's punitive damages award to $46,515 on the basis that the jury's award of $2,381,888 was excessive by constitutional standards.[5] We disagree.

"Whether a punitive damages award is unconstitutionally excessive is a question of law reviewed de novo on appeal." *Everhart v. O'Charley's Inc.*, 683 S.E.2d 728, 740 (N.C. Ct. App. 2009). When a punitive damages award is "grossly excessive," it violates the due process clause of the Fourteenth Amendment. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). *Gore* set out three "guideposts" for evaluating whether a punitive damages award is grossly excessive: "the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *Id.* at 574-75. We will address each of the *Gore* guideposts in turn.

A. Reprehensibility

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (quoting *Gore*, 517 U.S. at 575).

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic;

---

remedy of its own accord but was required to by the circuit court. *MailSource, LLC v. M.A. Bailey & Assocs., Inc.*, 356 S.C. 370, 375, 588 S.E.2d 639, 642 (Ct. App. 2003). Additionally, Midlands continued to assert its position at trial and on appeal.

[5] North Carolina law provides that "[p]unitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater." N.C. Gen. Stat. § 1D-25(b) (Westlaw through S.L. 2021-17 of the 2021 Legis. Sess.). O&A acknowledges this statutory cap on a punitive damages award.

> the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

Id. (citation omitted).

The harm in this case to the plaintiff was economic. The "target" of the conduct was ADESA auction buyers as opposed to the general consumer.[6] No evidence demonstrated other instances in which Midlands had failed to make disclosures on an ADESA auction form or sold a clipped car through its certified program, and no direct evidence established the harm to O&W was intentional.

O&W rests its reprehensibility argument on the premise that Midlands, knowingly and intentionally, put a "Frankencar" on the road with no regard to the safety of others. O&W contends it strains credulity for Midlands to claim it was unaware the car had been clipped when Midlands originally sold it to Ecklund. However, Midlands obtained the car with a clean title because Nationwide failed to have the title marked "salvage." *See* N.C. Gen .Stat. § 20-71.3 (Westlaw through S.L. 2021-17 of the 2021 Legis. Sess.) (indicating a title of a salvage, rebuilt, or reconstructed vehicle must be so branded). In the absence of notice the car was salvaged,

---

[6] "Most ADESA auctions are for licensed, registered car and specialty dealers only." ADESA, https://www.adesa.com/public-auctions (last visited June 14, 2021).

Midlands would not have been anticipating a clipped vehicle.[7] O&A asserts the damage to the car would have been obvious. However, O&A's examination of the vehicle was two years and approximately 30,000 miles after Midlands' original inspection. Once Ecklund returned the car to Midlands, Midlands did not put the vehicle back on its lot, but sold it "as is" at auction, under a red light. While it failed to disclose the damage, such disclosure requirement had only been added at the auction several months prior without notice to Midlands of the change in terms.[8] Ignorance is not an excuse for negligent conduct, but the record does not bear out a deliberate, willful, or repeated violation of the disclosure requirements.

Accordingly, we agree with the circuit court's assessment that the reprehensibility of Midlands' conduct is less than that required for such a large punitive award.

B. Amount of Actual Harm v. Punitive Damages Amount

The United State Supreme Court has declined on multiple occasions "to impose a bright-line ratio which a punitive damages award cannot exceed." *Campbell*, 538 U.S. at 424. "Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id*. at 425. "While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1." *Id*. "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where a 'particularly egregious act has resulted in only a small amount of economic damages.'" *Id*. (quoting *Gore*, 517 U.S. at 582). "The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id*.

---

[7] The mechanic who performed the original inspection on Midlands' behalf was deceased at the time of trial.

[8] The ADESA auction changed its required disclosure form approximately four months prior to the sale at issue. Under the terms of Midlands' agreement with ADESA, ADESA is to notify any auction participants in writing regarding any changes to their procedures. Midlands did not receive notice of the change to the disclosure form.

In the instant case, the punitive damages award by the jury constituted a 358:1 ratio. A reduction to the $250,000 statutory cap would result in a 37.5:1 ratio, and a reduction to the circuit court's punitive award amount would result in a 7:1 ratio. Because O&A essentially concedes the statutory cap applies, the real question is whether a 37.5:1 ratio violates due process; on its face, and under North Carolina law, not necessarily so.

In *Lacey v. Kirk*, 767 S.E.2d 632, 646-47 (N.C. Ct. App. 2014), the court upheld a 38:1 ratio when an executrix had, without basis, denied the testator's heirs their bequeathed property and accused them of murder, finding the executrix's conduct extremely reprehensible and obviously willful. In *Rhyne v. K-mart Corp.*, 562 S.E.2d 82, 94 (N.C. Ct. App. 2002), the court upheld a 30:1 and 23:1 ratio in favor of a husband and wife respectively who were violently and wrongfully detained and prosecuted by K-mart employees. In *Everhart*, 683 S.E.2d at 741, the court found a 25:1 ratio did not violate due process when the plaintiff had accidentally ingested bleach in the restaurant and the O'Charley's company policy placed the health and safety of the customer behind the corporation's need to complete paperwork in anticipation of litigation.

These cases are distinguishable from the case sub judice. In *Everhart* and *Rhyne*, the harm to plaintiffs was physical. In *Lacey*, the damage was economic, but extremely willful. In this case, as discussed under the first guidepost, the damage to plaintiff was economic and the conduct, while reckless, was not as demonstrably willful nor intended to harm as that in *Lacey*. Based on the circumstances of this case, we agree with the circuit court that the objectionable conduct in this case is more commensurate with a 7:1 ratio.

C. Criminal or Civil Penalties in Comparable Cases

"The third *BMW* 'guidepost' requires consideration of civil or criminal penalties that could be imposed for comparable misconduct, giving 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue.'" *Rhyne*, 562 S.E.2d at 94 (quoting *BMW*, 517 U.S. at 584).

The conduct for which Midlands was found liable could subject it to both civil and criminal penalties. A violation of the NCUTPA exposes the defendant to treble damages. *See* N.C. Gen. Stat. § 75-16 (Westlaw through S.L. 2021-17 of the 2021

Legis. Sess.) (stating a party injured under the NCUTPA "shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict"). A failure to disclose also constitutes a Class 2 misdemeanor. *See* N.C. Gen. Stat. § 20-71.4. (a)(2) ("It shall be unlawful for any transferor of a motor vehicle to . . . [t]ransfer a motor vehicle when the transferor has knowledge that the vehicle is, or was . . . a salvage motor vehicle, without disclosing that fact in writing to the transferee prior to the transfer of the vehicle."); *see also* N.C. Gen. Stat. § 20-71.4. (a)(2)(d) ("Violation of subsections (a) and (b) of this section shall constitute a Class 2 misdemeanor.") A Class 2 misdemeanor with no prior convictions is subject to one [to] thirty days of a community punishment that may be executed as a fine. N.C. Gen. Stat. § 15A-1340.23 (c)(1) to (2) (Westlaw through S.L. 2021-17 of the 2021 Legis. Sess.).[9] If the punishment is a fine, it shall not exceed $1,000. N.C. Gen. Stat. § 15A-1340.23 (b) (Westlaw through S.L. 2021-17 of the 2021 Legis. Sess.).

In this case, Midlands' failure to disclose constitutes a misdemeanor offense not punishable by imprisonment and with civil penalties limited to three times the amount of actual damages. This factor tends to support a punitive damages award that is closer to a trebling of the actual damages, which in this case would be in line with the circuit court's reduction to a 7:1 ratio.

In sum, based on a review of the guideposts in *Gore*, we affirm the circuit court's reduction of punitive damages based on the facts of this case to $46,515.

II. Attorney's Fees

In this case, O&W has requested a total of $476,194.12 in attorney's fees. The circuit court awarded $21,264 in fees and $529.07 in costs. The circuit court made

---

[9] In *Everhart*, the court noted the United States Supreme Court recognized conduct that subjected the defendant to imprisonment may justify a larger punitive damages award. 683 S.E.2d at 741. The criminal statute at issue in *Everhart* involved the adulteration of food and was considered a Class 2 misdemeanor. At that time this subjected the defendant to up to 60 days imprisonment. *Id*. However, the sentencing statute has been adjusted, and now, a Class 2 misdemeanor imposes a community-only sentence as opposed to imprisonment. N.C. Gen. Stat. § 15A-1340.23 (c)(1) to (2).

this reduction for several reasons and O&W raises numerous points on appeal. We will address each in turn.[10]

First, O&W argues the circuit court erred by apportioning attorney's fees between its NCUTPA and fraud claims. We agree.

Under the NCUTPA, the circuit court has the discretion to award attorney's fees if it determines "[t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit." N.C. Gen. Stat. § 75-16.1(1). In some cases, apportioning attorney's fees between claims made by the plaintiff is appropriate. "However, where all of plaintiff's claims arise from the same nucleus of operative facts and each claim [is] 'inextricably interwoven' with the other claims, apportionment of fees is unnecessary." *Whiteside Ests., Inc. v. Highlands Cove, L.L.C.*, 553 S.E.2d 431, 443 (N.C. Ct. App. 2001) (quoting *Okwara v. Dillard Dep't. Stores, Inc.,* 525 S.E.2d 481, 487 (N.C. Ct. App. 2000)). When competent evidence in the record supports a finding that claims arose from a common nucleus of operative facts, attempting to separate the fees may be unrealistic. *Id*.

In this case, the circuit court attempted to carve out hours O&W's attorneys billed for work on the fraud claim for two reasons: (1) the attorney's fees award is authorized under the NCUTPA, not the common law claim of fraud, and (2) a fair portion of hours billed related to the pursuit of punitive damages, again, something not allowed under the NCUTPA. However, North Carolina cases do not appear to limit recovery of attorney's fees in this manner, provided the nucleus of operative

---

[10] As an initial matter, the South Carolina standard of review will apply to the consideration of the attorney's fee award. *See e.g., Boswell v. RFD-TV the Theather, LLC*, 498 S.W.3d 550, 557 (Tenn. Ct. App. 2016) (holding standard of review is procedural and will governed by forum law); *Moore v. Bi-State Dev. Agency*, 87 S.W.3d 279, 285 (Mo. Ct. App. 2002) (finding the standard of review is a procedural issue and forum law governs the standard of review for uses raised on appeal). Under South Carolina law, the determination of the amount of attorney's fees awarded pursuant to a statute is addressed to the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *EFCO Corp. v. Renaissance on Charleston Harbor*, *LLC*, 370 S.C. 612, 621, 635 S.E.2d 922, 926 (Ct. App. 2006).

facts test is met. In *Okwara*, the court declined to apportion fees between the plaintiff's § 1983 claim, which provided for attorney's fees, and her common law tort claim when both arose from a common nucleus of operative facts. 525 S.E.2d at 486-87. Likewise, in *Whiteside*, the court declined to apportion fees authorized by the Sedimentation Pollution and Control Act of 1973 and plaintiff's common law actions for nuisance and trespass, finding such division both "unnecessary and unrealistic" when the claims arose from the same nucleus of facts. 553 S.E.2d at 443. More recently, in *Philips v. Pitt County Memorial Hospital, Inc.*, the court declined to apportion fees awarded to the defendant for defending a frivolous punitive damages claim when the same nucleus of operative facts gave rise to the plaintiff's punitive damages claims as well as the underlying tortious conduct. 775 S.E.2d 882, 884-85 (N.C. Ct. App. 2015).

Based on the relevant case law and facts of this case, we conclude the circuit court erred in apportioning attorney's fees between the NCUTPA claim and the fraud claim which necessarily includes the pursuit of punitive damages. The underlying conduct in the case was overlapping and the services could not reasonably and readily be separated.

Next, O&W appeals the trial court's ruling that Midlands had no longer refused to fully resolve the matter when it made a settlement offer to O&W on September 14, 2016. The NCUTPA only provides for attorney's fees when "there was an unwarranted refusal . . . to fully resolve the matter which constitutes the basis of such suit." N.C. Gen. Stat. § 75-16.1. The conduct of both the defendant and the plaintiff are relevant in determining this issue. *See DENC, LLC v. Phila. Indem. Ins. Co.*, 454 F. Supp. 3d 552, 566-67 (M.D.N.C. 2020) (evaluating both parties' conduct during settlement negotiations when determining whether the defendant unreasonably refused to resolve the matter at issue).

The settlement offer, made after the trial and rulings on posttrial motions, was based on paying O&A the actual damages amount awarded ($6,645), the attorney's fees awarded ($21,264), and the reduced punitive damages awarded ($46,515). Midlands made a mathematical error in adding these awards and offered $81,069. In response to the settlement offer, O&A noted the mathematical error and flatly declined the offer. Midlands acknowledged its mistake, indicated there may be some room to negotiate, and twice asked O&A for a counteroffer. O&A did not respond. While we understand O&A believed its claims to be worth more than the offered amount, the summary dismissal of the offer to negotiate tempers any

finding of an unreasonable refusal to resolve the case on Midlands' part. Therefore, the circuit court did not abuse its discretion in concluding Midlands was no longer unwilling to fully resolve the matter at that point. Consequently, we affirm the circuit court's finding that attorney's fees accrued after this date would be excluded from the circuit court's calculation of fees.[11]

Third, O&W maintains the circuit court erred in excluding time for travel. We agree.

The circuit court excluded some hours, with no legal citation for its decision, based on "Plaintiff's choice to use a Charleston lawyer to bring suit in Richland County, rather than bringing the action in North Carolina. While Plaintiff was free to file suit in South Carolina, the [c]ourt will not impose the extra cost of this decision on the Defendant." The purpose of the fee award is to encourage private enforcement of the NCUTPA. *See Cotton*, 380 S.E.2d at 421 ("One purpose for the statute authorizing attorneys' fees is to encourage individuals to bring valid actions to enforce the statute by making such actions economically feasible."). O&W was free to use counsel of its choice and should not be penalized for selecting a permissible forum and attorneys licensed to practice therein.

Finally, O&W claims the circuit court erred in applying a percentage reduction to effectuate a "reasonable attorney's fee" under *Hensley v. Eckerhart*, 461 U.S. 424 (1983). We disagree.

---

[11] The court also denied the final supplemental request for attorney's fees on the basis that O&A's attorneys were not expending time to "protect the judgment." *See Faucette v. Carmel Road, LLC*, 775 S.E.2d 316, 326 (N.C. Ct. App. 2015) (indicating a trial court may award attorney's fees for posttrial or appellate work by a prevailing party on an unfair trade practices claim when such work is expended in an effort to protect the judgment); *see also Cotton v. Stanley*, 380 S.E.2d 419, 422 (N.C. Ct. App. 1989) ("Fees are authorized for the prevailing party and may be awarded for all time, including appeal, reasonably expended in obtaining or sustaining the status of prevailing party."). This is an additional ground that sustains the circuit court's decision not to award those requested fees. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("[I]f convinced it is proper and fair to do so," the appellate court may rely on an additional ground to affirm the lower court's judgment.).

In North Carolina cases discussing reasonable attorney's fees, no matter the outcome, the touchstone is *Hensley*.[12] *Hensley*, a civil rights case, prompted the following discussion by the court.

> The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained." This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?
>
> . . . .
>
> If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

---

[12] *See DENC, LLC*, 454 F. Supp. 3d at 563 ("The Court may only award 'reasonable' attorneys' fees [under the NCUTPA]. Federal courts routinely apply the considerations set forth in *Hensley* . . . and North Carolina courts have cited and applied *Hensley* in a number of cases involving state statutes with fee-shifting provisions.")

. . . .

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.

Id. at 433-37.

In an attempt to synthesize this calculation process, the Fourth Circuit Court of Appeals has said:

> To determine the appropriate amount [of attorney's fees to be awarded], a district court should first identify the number of hours reasonably expended on the litigation and multiply that number by a reasonable rate. The court then should subtract fees for hours spent on unsuccessful claims unrelated to successful ones. Once the court has subtracted the fees incurred for unsuccessful, unrelated claims, it then awards some percentage of the remaining amount, depending on the degree of success enjoyed by the plaintiff.

Johnson v. City of Aiken, 278 F.3d 333, 336-37 (4th Cir. 2002) (citations omitted).

As noted in the discussion on apportionment, several more recent North Carolina state cases indicate that fees do not have to be apportioned if they arise from a common nucleus of operative facts. Nevertheless, the final step as discussed in *Hensley* and *Johnson*, means the circuit court retains discretion—after making a decision about apportionment—to reduce the amount of fees based on the partial or limited success of the litigation, whether the claims are related or not.[13]

---

[13] *Morris v. Scenera Research, LLC,* 747 S.E.2d 362, 379 (N.C. Ct. App. 2013), *aff'd in part, rev'd in part*, 788 S.E.2d 154 (N.C. 2016), cited to by O&A,

To summarize, we remand the issue of attorney's fees to the circuit court. On remand, the circuit court should not seek to apportion requested fees between the fraud and the NCUTPA claims. The circuit court may exclude fees incurred after the date of the September 2016 settlement offer. The circuit court should eliminate any redundant fees, improper cost, and paralegal fees as it had in the previous award. However, the court should not exclude fees for travel. Finally, the circuit court may—or may not—reduce the remaining amount of requested fees by a percentage it finds is appropriate to reflect reasonable attorney's fees based on the success of the litigation. This percentage may be impacted by the decision of the court regarding the election of remedies, which will be addressed in the next section.

III. Election of Remedies

O&W argues the circuit court erred in requiring it to elect between attorney's fees and punitive damages. We agree.

In *United Laboratories, Inc. v. Kuykendall*, 437 S.E.2d 374 (1993), United Labs brought both NCUTPA and common law tortious interference claims against

---

muddied the waters a bit on this issue. In it, the court "reverse[d] the business court's award of attorneys' fees and remand[ed] to the trial court for further findings of fact and conclusions of law regarding whether Morris's claims arose from a common nucleus of operative fact and, thus, whether he is entitled to all of his attorneys' fees." This truncated mandate suggests that if the claim entitling the plaintiff to attorney's fees and any additional claims arose from a common nucleus of facts, then the plaintiff should be awarded all the requested fees. The court of appeals so directed the lower court because it believed the trial court's fee reduction rested on apportionment that was made without factual findings to support such division. *Id*. at 378-79. On remand, the trial court issued an unpublished opinion stating it believed the discretion to reduce the attorney's fees to a "reasonable amount" by a percentage pursuant to *Hensley* was usurped by the court of appeals' mandate. *Morris v. Scenera Rsch., LLC*, No. 09 CVS 19678, 2017 WL 2380230 at *2 (N.C. Super. Ct. May 31, 2017). However, the court of appeals opinion cites to *Hensley* as authoritative, and *Hensley* provides for a reduction in fees based on partial or limited success even if the claims are related.

Share, a company that hired its former employee, Kuykendall, contrary to a noncompete agreement. 437 S.E.2d at 375. United prevailed on both its claims. The issue thus became whether United could recover "both punitive damages under its common law claim and untrebled compensatory damages and attorneys' fees in its unfair practices claim." *Id*. at 378.

The decision noted one purpose of the election of remedies doctrine is to "prevent double redress for a single wrong." *Id.* at 379 (quoting *Smith v. Oil Corp*., 79 S.E.2d 880, 885 (N.C. 1954)). Therefore, "a party may not recover punitive damages for tortious conduct and treble damages for a violation of Chapter 75 based on that same conduct." *Id.* However, the imposition of punitive damages and an award of attorney's fees serve entirely different purposes. *Id*. at 380. Punitive damages are designed to punish willful conduct and to deter others from committing similar acts. *Rhyne*, 594 S.E.2d at 6. The purpose of attorney's fees in Chapter 75, however, is to "encourage private enforcement" of Chapter 75. *Kuykendall*, 437 S.E.2d at 379. An award limited to attorney's fees plus treble damages will often prove inadequate to punish and deter the type of willful conduct that leads to punitive damages at common law. *Id.* Consequently, the court determined that although treble damages and punitive damages were redundant, an award of attorney's fees under the NCUTPA and punitive damages under the plaintiff's common law claim was permissible. *Id.* at 380-81.

O&W contends the enactment of section 1D-20 of the North Carolina General Statutes (Westlaw through S.L. 2021-17 of the 2021 Legis. Sess.) represents the legislature's rejection of *Kuykendall*. Contrastively, Midlands argues section 1D-20 represents the codification of *Kuykendall* in that it provides treble damages and punitive damages may not both be recovered. The statute provides that "[a] claimant must elect, prior to judgment, between punitive damages and any other remedy pursuant to another statute that provides for multiple damages." *Id*.

Section 1D-20 was enacted in 1995, and *Kuykendall* has not been abrogated or overruled. In a recent unpublished decision by the Fourth Circuit, *Driskell v. Summit Contracting Group, Inc.*, 828 F. App'x 858 (4th Cir. 2020), two of the three judges indicated section 1D-20 does not affect *Kuydendall*'s holding as to punitive damages and attorney's fees.

> Our dissenting colleague would hold that [section] 1D-20 effectively overruled [*Kuykendall*'s] 'mix-and-match

> approach' and thus blocks Driskell from recovering both awards. But that provision—which was enacted in 1995 in an act establishing standards for punitive damages, . . . has never been construed to apply to attorney's fees . . . . It's true that Driskell's request for attorney's fees is "pursuant to" REDA [the Retaliatory Employment Discrimination Act], which provides for treble damages. But we think it doubtful that the Supreme Court of North Carolina would hold that REDA's separate allowance for an award of attorney's fees is a "remedy" in the way that § 1D-20 uses that term. After all, § 1D-20's title is "Election of extracompensatory remedies," and attorney's fees are strictly compensatory in that they reimburse a prevailing plaintiff's costs. The title of a statutory subsection, while "not controlling, [ ] does shed some light on the legislative intent underlying the enactment of that provision." *State v. Fletcher*, [ ]807 S.E.2d 528, 539 (2017). And that light is (we think) sufficient here to reject the dissent's view.

Id. at 871 n.8.

While not binding precedent, we find the Fourth Circuit's majority position on this issue persuasive. *See Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (finding the reasoning of federal case law persuasive).

Additionally, South Carolina has taken a similar position on the issue. In *Austin v. Stokes-Craven Holding Corp*., 387 S.C. 22, 691 S.E.2d 135 (2010), the buyer of a truck brought an action against the dealership for multiple claims, including fraud and various statutory claims. *Id*. at 35, 691 S.E.2d at 141-42. The jury awarded actual damages, punitive damages, and attorney's fees under a combination of theories. *Id*. On appeal, our supreme court held that the buyer, Austin, could recover punitive damages, as well as attorney's fees and costs under the South Carolina Dealer's Act:

> [A] plaintiff may recover attorney['s] fees under a statutory claim in addition to punitive damages under a common law claim. The rationale for this position is that

> an award for both does not amount to double recovery for a single wrong given attorney's fees are intended to make such claims economically viable for private citizens whereas an award of punitive damages is designed to punish wrongful conduct and deter future misconduct.

Id. at 56, 691 S.E.2d at 153.

The majority further opined:

> Furthermore, given the recovery of attorney's fees under the Dealer's Act is not duplicative of the award of punitive damages, we do not believe a decision in favor of Austin would violate the election of remedies doctrine's prevention of double redress for a single wrong. As its name states, the doctrine applies to the election of "remedies" not the election of "verdicts." Thus, an award of attorney's fees and costs would merely serve to fully compensate Austin for pursuing his statutorily-authorized private right of action under the Dealer's Act, which we believe epitomizes the definition of a remedy. *See Black's Law Dictionary* 1163 (5th ed. 1979) (defining "remedy" as "[t]he means by which a right is enforced or the violation of a right is prevented, redressed, or compensated").

Id. at 57, 691 S.E.2d at 153.

Based on all of the foregoing, we conclude the circuit court erred in requiring O&W to elect between punitive damages and attorney's fees. Therefore, on remand, the final award should include actual damages, punitive damages, and attorney's fees in an amount to be determined by the circuit court.

IV. Offer of Judgment Interest

Finally, O&W maintains the circuit court erred in denying its request for interest on the offer of judgment—$280,000—to settle the case in April of 2015. The circuit court denied O&W's interest request because, while O&W made an offer of

judgment of $280,000, O&W elected recovery under the NCUTPA, and the amount of the attorney's fees award was lower than the offer to settle.[14] O&W contends the amount the jury returned in its verdict—$2.38 million—should be used to decide whether O&W was entitled to offer of judgment interest, as opposed to using the reduced punitive damages award—$46,515—the court determined was appropriate.

Section 15-35-400(B) of the South Carolina Code (Supp. 2020) provides:

> Consequences of NonAcceptance. If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror shall be allowed to recover from the offeree: (1) any administrative, filing, or other court costs from the date of the offer until judgment; (2) if the offeror is a plaintiff, eight percent interest computed on the amount of the verdict or award from the date of the offer; . . . [15]

This court recently addressed this issue in *Garrison v. Target Corp.*, 429 S.C. 324, 377, 838 S.E.2d 18, 46 (2020) (*cert. granted*, S.C. Sup. Ct. Order dated October 19, 2020). The court indicated the use of the term "determination" in the first sentence of Rule 68(b) in combination with the last phrase "eight percent interest computed on the amount of the verdict or award from the date of the offer *to the entry of judgment*" indicated the final, posttrial award was the proper amount for computing offer of judgment interest. *Id*. at 378-79, 838 S.E.2d at 47. Likewise,

---

[14] The circuit court suggested O&W may not be entitled to offer of judgment interest under North Carolina law because only a defendant may make an offer of judgment there. *See* Rule 68, NCRCP ("At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer . . . ."). However, because the issue would be procedural, not substantive, South Carolina law governs this question. *See Nash v. Tindall Corp.*, 375 S.C. 36, 39, 650 S.E.2d 81, 83 (Ct. App. 2007) (stating procedural matters are determined in accordance with the law of the forum).

[15] Rule 68 of the South Carolina Rules of Civil Procedure contains identical language.

we conclude the circuit court's analysis should have been performed using the posttrial award as opposed to the jury's verdict. However, because we reverse the circuit court's decision as to the election of remedies and remand the issue of attorney's fees, we instruct the court to reevaluate its decision as to the offer of judgment interest as may be necessary in light of the final award.

CONCLUSION

We affirm the circuit court's reduction of the punitive damages award and reverse the circuit court's determination that O&W is required to elect between its punitive damages award and attorney's fees. We remand the issue of attorney's fees to the circuit court for analysis in accordance with the directives in this opinion. Because the award of offer of judgment interest may be affected by the decisions herein, we remand that issue to the circuit court as well. Consequently, the matter is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GEATHERS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Demontay Markeith Payne, Appellant.

Appellate Case No. 2017-002014

Appeal From Barnwell County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 5846
Heard September 15, 2020 – Filed August 11, 2021

REVERSED AND REMANDED

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

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General W. Jeffrey Young, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General William Joseph Maye, all of Columbia; and Solicitor John William Weeks of Aiken, all for Respondent.

HUFF, J.: Demontay Markeith Payne appeals his conviction for murder, asserting the trial court erred in (1) failing to instruct the jury on voluntary manslaughter and

(2) refusing to tailor its self-defense instruction to include language concerning a defendant's justification in continuing to shoot until the apparent danger has ceased. Because we find, under the facts presented before the jury, Payne was entitled to a voluntary manslaughter instruction, we reverse and remand for a new trial.

FACTUAL/PROCEDURAL HISTORY

This matter stems from the shooting death of Devante Odom (Victim). Essentially, three different versions of what occurred just before and at the time of the shooting were presented to the jury. The State presented eyewitness testimony from Alicia Youmans, while Payne presented the eyewitness testimony of Alicia's sister, Tyeisha Youmans, as well as his own testimony.

Alicia stated that she knew Payne and Victim from growing up in the same neighborhood and Victim was a close friend of her brother. She testified that on the night of May 23, 2015, she was sitting outside Stacey Hartzog's home with Tyeisha, her friend Yvette, and Payne "having some girl talk" when Victim walked up "from the backside."[1] Payne had arrived at the location, driving "straight across the yard." Victim spoke to Alicia, Tyeisha, and Yvette, but he did not speak to Payne. Victim asked Alicia for two cigarettes, which she was going to give him. However, before she could retrieve them from inside the house, Victim and Payne began to argue. Alicia did not know what they were arguing about.

The argument ended when Victim walked away, and Payne got into his car. Victim walked up Wingo Estates Road toward Emerald Lane. Payne got into his car and pulled onto Wingo and drove up toward Emerald, in the same direction Victim walked. Victim made it to Emerald and was at the intersection. Alicia stated there was a streetlight at the intersection on Emerald and she could clearly see what was happening in the intersection.[2] Alicia testified that after Payne

---

[1] Alicia did not know if Victim was welcome at Hartzog's home, but she thought Payne would have been welcome there.

[2] Alicia estimated the distance between where she was and the intersection to be "about a hundred yards or so."

pulled away no one else was outside with her, as Tyeisha and Yvette had walked inside the home. Alicia then described as follows:

> Payne drove his car up to Emerald … him and [Victim] had another verbal dispute or whatever, he got out of his car, they was still arguing or whatever, and he turned to go back to his car. I'm not sure if something was said or what happened, but he — — when he turned back around to face [Victim], he began shooting at him.

Alicia stated that she observed Payne and Victim "going back and forth" before Payne exited his car, and when Payne stopped his car and exited the vehicle, he was continuing to argue with Victim. When Payne turned to go back toward his car, he never made it to the car, but turned back around and "just started firing" at Victim. Once Victim started getting shot by Payne while on the street, he attempted to run between some trailers to get away.

Alicia realized Victim had been hit when she saw him fall to the ground and he started waving his arm in the air. Alicia called 911 and told them someone had been shot and needed help. Though she did not initially identify Payne as the shooter, she did so in a subsequent call. She also indicated in her verbal and written statements to an investigator that she saw Payne start shooting at Victim. By the time Alicia walked up to Victim, more than five people had gathered around. She did not see Victim with a gun and did not see a gun on the ground in the area of Victim. Alicia testified regarding numerous street lights in the area between Hartzog's home and where the shooting took place, and she agreed it was "pretty well lit up at night."

On cross-examination, when Alicia was asked who started the argument, she replied, "I would say Mr. Payne initiated it." Alicia estimated Payne was at the location ten to fifteen minutes before Victim arrived and, during that time, his demeanor was calm. She believed that Payne started the argument because, while he was sitting with the women, he lifted his shirt to show a gun when Victim walked up to them. Alicia read her written statement into the record, which provided as follows:

> On May 23, 2015, I was sitting outside at Wingo Estates talking with … Payne when [Victim] came up walking

> and asked me for two cigarettes. As I was getting them, he and … Payne had some exchanged words. I didn't hear what they were saying. I only heard [Victim] state to … Payne you're going to have to show me you're going to kill me.
>
> [Victim] walked up the road and … Payne got into his car and drove up the road. He stopped, they exchanged words. [Payne] got out of his car swinging his arms. After that they got real close to each other, and that's when … Payne pulled out his gun and shot [Victim]. He jumped back into his car and left.

Alicia acknowledged that she did not mention a gun being in Payne's waistband or Payne showing a gun in her statement—or any subsequent statement—and agreed it would have been a very important fact to include. Alicia stated that Payne drove on Wingo, not across the yard to his residence, and he never pulled into his yard.

Brandy Williams testified she was at her parents' home on the night of May 23, 2015, when she heard seven to nine gunshots and called 911. After placing the call, she went over to the scene, where she observed two individuals next to Victim, who was lying on the ground. Williams performed CPR on Victim for thirty minutes, until EMS arrived. The Sheriff's Office arrived along with EMS. She stayed there about ten minutes after their arrival, and there was a large crowd of ten to fifteen people gathered by the time she left. She never saw a weapon on or near Victim. Williams agreed the Sheriff's Office was not there during the time she performed CPR, there were people walking back and forth around Victim's body, and the scene remained unsecure for those thirty minutes.

Investigator Andy Chavis, who was the on-call investigator at the time of the incident, testified Victim had already been taken from the scene and another officer had taped off the area when he arrived. Investigator Chavis photographed the overall scene and the evidence. He testified that six .380 caliber cartridge casings were recovered in front of a residence, with some of them in the road and a few in the yard, in an area of about six to eight feet. Investigator Chavis testified a .40 caliber cartridge casing was also found, and he stated it was located "close to where they said [Victim] was [lying]" and where he observed blood and items left by EMS. He performed a gunshot residue (GSR) test on Victim later that night at

the morgue. A .380 caliber projectile was removed from Victim's body during his autopsy. Unfortunately, Investigator Chavis' photographs were lost, and he acknowledged the location of the shell casings was just an estimate on his part. He further agreed there would be an opportunity for crime scene contamination in a crime scene that was open for thirty minutes.

Tyler Sturkie, a SLED forensic scientist in the trace evidence department, testified regarding the results of the GSR test from Victim. Particles of GSR, particles consistent with GSR, and particles associated with GSR were found on Victim's right hand. As to his left hand, particles of GSR, one particle consistent with GSR, and one particle associated with GSR were found. Sturkie testified that finding GSR meant one of three things: the individual fired a weapon; the individual was in the vicinity when a weapon was fired; or the individual touched an object that had GSR on it.

SLED Agent James Green testified as an expert in the field of firearms identification. He examined the .380 caliber cartridge cases recovered from the scene as well as a .40 S&W caliber cartridge case. Agent Green opined the .40 S&W caliber was much larger and had different class characteristics from the .380 caliber cartridge cases and was not fired from the same gun. He further testified that the .380 caliber bullet recovered from Victim could have been fired from the same gun that fired the .380 caliber cartridge casings found at the scene. Agent Green acknowledged his report provided that the .40 S&W caliber cartridge casing was "collected from beside [V]ictim's body." Victim's autopsy revealed he suffered four gunshot wounds.

Investigator Scott Peterson testified he was initially called to the scene that night to help with crowd control, but the crowd had already dispersed by the time he arrived. He met with Alicia, and he was wearing a body camera that recorded her explanation of what had occurred that night. Alicia also provided him with a written statement. Investigator Peterson testified law enforcement attempted to locate other potential witnesses to the shooting, but he had no knowledge of anybody else who saw what happened.

Tyeisha testified that she was sitting outside Hartzog's home on May 23, 2015, with Alicia, Payne, and her aunt, Yvette Walker. Payne, who had driven up to the location, was engaged in conversation with the women and his demeanor was calm. Tyeisha, who had music playing in her car for the gathering, went to her car

to change the music when she heard people "sounding like they [were] . . . arguing." She did not see Victim initially when he walked up because she was looking at her phone, but she looked up when she heard the arguing. She did not recall what was said during the argument or exchange. Tyeisha walked up to the porch to see what was happening, and Payne and Victim were still interacting, going back and forth. Tyeisha testified the two "[were not] necessarily arguing, arguing, but they [were] just having words back and forth." The exchange lasted a few minutes and ended with Victim saying he was going to walk to the top of the road, which was the intersection of Emerald and Wingo. Tyeisha did not know anything about Payne lifting his shirt to show a firearm at that time.

After Victim walked toward Emerald, Payne got in his car to leave. Tyeisha assumed Payne was going home, which was right next door to their location. Payne turned out of the yard, got on Wingo, and turned right back into his yard. By then, Victim was at the top of the road. Tyeisha stated that once Payne got into the car, she believed they "started having words again because you could tell that they [were] . . . talking back and forth." Payne walked into the road and the two men were standing on Emerald having words when Tyeisha saw Payne try to punch Victim. She observed Victim move back so he would not get hit, and Victim then pulled out a handgun. Payne then "had . . . his hands. . . like 'I guess you don't want to fight' . . . . [T]hey [were] still . . . kind of having words, because [Payne] kind of turned — — he turned around from him going back in the direction of the house." Victim was trailing behind Payne, and "they had to be still having words because [] Payne turned around and they [were] still, like, having words." Tyeisha explained that when she said Victim was trailing Payne, she meant that when Payne turned to walk in the direction of his house, Victim was coming behind him. Tyeisha testified she could tell they were still arguing as Payne was walking toward his house and Victim was following behind him because Payne turned around and faced Victim. Victim then "started firing" and Payne "started firing . . . right after that, it was consecutive." Tyeisha testified she could tell Victim fired first because she "could see it coming from . . . his direction."

In the middle of the shooting, Victim turned around and ran to get away. While he was running, Payne was shooting. Victim attempted to run between two trailers. When Payne stopped shooting, he got in his car and left. Tyeisha thought Victim had run between the trailers, but he had actually fallen on the ground. She did not

see Victim fall but heard him gasping for air, and she went to him. When she got to Victim's location, Tyeisha saw Victim's gun right beside him.

Tyeisha stated there were only a few people with Victim at that time. One person was applying pressure on his wounds, and there was another person there with her as well. There was talk of someone coming to administer CPR, but Tyeisha testified she never saw someone actually doing so. Tyeisha stayed in the area of Victim about ten to fifteen minutes before she left the scene. At that time there were about thirty people out there, and law enforcement had not yet arrived. Tyeisha testified that there was no doubt in her mind that Victim shot at Payne first.

On cross-examination, Tyeisha acknowledged testifying in an earlier hearing that she had stated one person was putting pressure on Victim's wounds "and the other was trying to do CPR." She denied that occurred, though, explaining there was someone there who "kept saying she was going to give him CPR," but she was not doing that. Tyeisha confirmed that she observed the shooting from Hartzog's front yard, about a football field length away, and she could hear Victim gasping for air from that distance. She stated that when Payne left from Hartzog's home, he drove onto the road and made a right turn into his own driveway, parking parallel to his trailer on the end closest to Emerald; he got out of his vehicle, walked onto Emerald, confronted Victim, and had words with him; Payne took a swing at Victim, at which point Victim pulled out a pistol; Payne walked back toward his car and his home, at which point Victim shot at Payne; and Payne shot back at Victim. When asked if Payne shot over his shoulder or turned around, Tyeisha stated Payne turned around. She explained that Payne was walking toward his home, the two men were still "having words," Victim was following behind Payne, Payne turned around as they were having words, and then they started shooting. Tyeisha estimated Payne was five to ten feet from his car and five to seven feet from Victim. When asked where all this occurred, she stated, "At first it was in the road and then they came back in the yard and it was on the grass a little bit." They were in the road when Payne took the swing at Victim, and the shooting happened in the yard on the grass, not far from Emerald.

Payne testified concerning his version of the events of May 23, 2015. He stated he drove to the location and, like the testimony of Alicia and Tyeisha, said he was talking to Alicia, Tyeisha and Yvette. He was sitting in a chair at the bottom of the steps, and Tyeisha was by her car. Payne was laughing and listening to the ladies

talk. He had been there for over twenty minutes when Victim walked from behind the home. Victim asked Alicia if he could buy two cigarettes. While Alicia was going into the home to get the cigarettes, Victim "said something to [Payne] that he could not quite remember." The two men "engaged in a verbal argument or exchanged words, and that was it." Payne remembered telling Victim, "I ain't worrying about it." Asked about the tone of their interaction, Payne stated he was calm but Victim "was more like, okay, okay, like, you know, I guess to like, we going to see about it, this, that, and the third." Victim never received the cigarettes. After their exchange, the women told Victim to leave.

Victim went to the top of Emerald and Wingo, standing at the edge of Payne's grandmother's yard. The women told Payne not to follow Victim, and Payne said he would not. Payne drove next door to his grandmother's home. Payne stated he drove through the yard to get next door, and at this time Victim was at the top of the road at the intersection by Payne's yard. As Payne was exiting his car, parked at the edge of their trailer, he saw Victim coming. When asked what happened next, Payne replied, "We exchanged words. After he fired, I fired back in self-defense." Payne explained that after Victim fired at him, he was "backing up shooting . . . not paying attention to where [he] was shooting." He testified he was backing up because he was "afraid for [his] life." Payne did not recall how many shots were fired, but understood from a report that Victim was hit four times. He did not see where Victim ran because he was "looking back running." Payne testified that after the exchange of gunfire, he was scared. He jumped in his car and pulled away and, when he looked to his left, he saw Victim on the ground. Payne testified he did not believe he was at fault on May 23, 2015. He stated he responded in the manner that he did because Victim fired at him, he could not have taken another course, and he had no other choice than to respond as he did. He testified there was no doubt in his mind that Victim fired at him first.

On cross-examination, Payne acknowledged he knew Victim had a gun because he could see a bulge on his side when Victim first approached Hartzog's house. He testified he did not remember what they were arguing about, and stated "I just remember him saying certain words to me and I said I wasn't going to follow him up, I wasn't worried about it." When challenged as to why the women would have to tell him not to follow Victim if he was calm, Payne replied, "Because he went to the top of the road and stayed there." Asked if he "drove straight . . . across the grass," Payne responded affirmatively. When the solicitor asked if he had not gone "down to Wingo … and … back into the driveway," Payne stated, "I don't

remember that, sir." He also stated he did not remember whether his car door was still open when he exited the vehicle and Victim started coming toward him and fired, but he thought that it was. He did not remember how many times Victim shot at him. Payne agreed with the solicitor that Victim was walking toward him as he was exiting his car, Victim started shooting at him, and Payne started "firing and backing up." The solicitor then asked how Payne backed up if he was standing at the car with the door open and Victim started shooting at him. Payne replied, "When you're backing up not looking, you can't see who you're shooting at or what you're shooting, you just know you're shooting to get someone away from you or anything that's firing at you." Payne agreed he was "backing up toward the house" and was not "paying attention where [he was] shooting." The solicitor asked Payne "When did you have the verbal confrontation with [Victim] in the middle of Emerald?" Payne stated he did not remember. He also testified he did not remember swinging at Victim in the middle of Emerald. The following colloquy then occurred:

> [Solicitor]: What were you and [Victim] arguing about when you were standing in the middle of Emerald Lane after he had walked away, after you had driven up, and after you came back together? What were the two of you arguing about then?
>
> [Payne]: I don't remember, sir.
>
> [Solicitor]: Well, did it happen or did it not happen?
>
> [Payne]: I don't remember if it happened or not. It was two years ago.

Payne testified he believed he had his gun on him when he exited the car. When asked why he was carrying a gun that night, Payne explained, "I had received threats from other individuals that . . . used to hang with him." He agreed that he received threats from people who "used to hang with [Victim]" but denied that he knew there was a problem between him and Victim. When asked if he thought there was a problem between him and Victim after they had their argument, Payne replied that Victim probably had a "hostile feeling" about him.

Former Barnwell County Sheriff's Deputy Brian Johnson testified he was the first officer to arrive at the incident location. He described the scene as chaotic with a large number of people—more than twenty—and testified "it was difficult, to say the least, to secure the scene." They had to call for additional units from Barnwell, Williston, and Blackville to control the crowd and secure everything. EMS stood by and would not enter the scene until it was secured. Chief Johnson testified Jerome Creech told him that Tyeisha Youmans was on the scene that night, and confirmed he had information on the night of the incident that Tyeisha was at the scene. He stated that Creech said he saw a female standing by Victim and another person he identified as Tyeisha, "and then the shooting started." He did not know if anyone "follow[ed] up with Jerome Creech."

At the close of evidence, defense counsel requested the trial court charge the jury that "[i]f the defendant is justified in firing the first shot, the defendant is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." He also sought a charge on voluntary manslaughter. The trial court declined to charge voluntary manslaughter, reasoning there was no factual basis that Payne acted in a sudden heat of passion or that his fear created an uncontrollable impulse to do violence. The trial court also declined to give the requested "continuing to shoot" charge, stating such was "more or less a charge on the facts." The trial court thereafter gave the jury a very limited and general self-defense charge. The jury found Payne guilty of murder, and the trial court sentenced him to thirty-five years' imprisonment.

ISSUES

1. Whether the trial court erred in failing to instruct the jury on voluntary manslaughter when (1) the undisputed evidence showed Payne and Victim were in a heated argument immediately prior to the shooting; (2) there was additional evidence that Victim pulled a gun and shot at Payne immediately prior to Payne returning fire; and (3) the trial court based its decision not to instruct the jury on the lesser-included offense on the fact that Payne testified that he did not remember the content of the argument.

2. Whether the trial court erred in failing to tailor the self-defense instruction to the evidence presented, including that if a defendant is justified in firing the first shot, the defendant is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased.

STANDARD OF REVIEW

"In reviewing jury charges for error, we must consider the [trial] court's jury charge as a whole in light of the evidence and issues presented at trial." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011) (quoting *State v. Mattison*, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010)). "To warrant reversal, a trial [court's] charge must be both erroneous and prejudicial." *State v. Otts*, 424 S.C. 150, 155, 817 S.E.2d 540, 543 (Ct. App. 2018) (quoting *State v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003)).

LAW/ANALYSIS

I. Failure to Instruct Voluntary Manslaughter

"The trial court is required to charge a jury on a lesser-included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." *State v. Williams*, 427 S.C. 148, 156, 829 S.E.2d 702, 706 (2019) (quoting *Suber v. State*, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007)). "In determining whether the evidence requires a charge on a lesser-included offense, we view the facts in the light most favorable to the defendant." *Id.*

A. General Voluntary Manslaughter Law

> Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. The sudden heat of passion, upon sufficient legal provocation, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including

> previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing.

State v. Smith, 391 S.C. 408, 412-13, 706 S.E.2d 12, 14-15 (2011) (citations omitted). "[A]n overt, threatening act or physical encounter *may* constitute sufficient legal provocation." *Id.* at 413, 706 S.E.2d at 15. "For a defendant to be entitled to a voluntary manslaughter charge, there must be evidence of both sufficient legal provocation and heat of passion at the time of the killing." *Id.* "Even when a person's passion has been sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter." *State v. Pittman*, 373 S.C. 527, 575, 647 S.E.2d 144, 169 (2007).

"To warrant the court eliminating the charge of manslaughter, there must be no evidence whatsoever tending to reduce the crime from murder to manslaughter." *State v. Starnes*, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010). "If there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge." *Id.* "Whether a voluntary manslaughter charge is warranted turns on the facts. If the facts disclose any basis for the charge, the charge must be given." *Id.* at 597, 698 S.E.2d at 608. "When determining whether the evidence requires a charge on voluntary manslaughter, the court must view the facts in the light most favorable to the defendant." *State v. Niles*, 412 S.C. 515, 522, 772 S.E.2d 877, 880 (2015).

> Where death is caused by use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation. Rather, when death is caused by the use of a deadly weapon, the opprobrious words must be accompanied by the appearance of an assault—by some overt, threatening act—which could have produced the heat of passion.

State v. Locklair, 341 S.C. 352, 360, 535 S.E.2d 420, 424 (2000) (citations omitted).

"A defendant is not entitled to a voluntary manslaughter charge merely because he was in a heat of passion." *Starnes*, 388 S.C. at 596, 698 S.E.2d at 608. Nor is he entitled to a voluntary manslaughter charge merely because he was legally provoked. *Id.* at 597, 698 S.E.2d at 608. "Moreover, there must be evidence that the heat of passion was caused by sufficient legal provocation." *Id.* Though one's fear immediately following an attack or threatening act may cause the person to act in a sudden heat of passion, the mere fact that one is afraid is insufficient, alone, to entitle a defendant to a voluntary manslaughter charge. *Id.* at 598, 698 S.E.2d at 609. "[I]n order to constitute 'sudden heat of passion upon sufficient legal provocation,' the fear must be the result of sufficient legal provocation **and** cause the defendant to lose control and create an uncontrollable impulse to do violence." *Id.* "Succinctly stated, to warrant a voluntary manslaughter charge, the defendant's fear must manifest itself in an uncontrollable impulse to do violence." *Id.* at 598-99, 698 S.E.2d at 609.

> A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear. The latter situation constitutes sudden heat of passion, but the former does not. Evidence that fear caused a person to kill another person in a sudden heat of passion will mitigate a homicide from murder to manslaughter—it will not justify it. This is the distinction between voluntary manslaughter and self-defense.

Id. at 599, 698 S.E.2d at 609. "[E]vidence of self-defense and voluntary manslaughter may coexist and . . . a charge on self-defense **and** voluntary manslaughter may be warranted" under the appropriate circumstances. *Id.*

B. Specific Voluntary Manslaughter Charge Cases

The parties cite to appellate decisions in which our courts have either found a voluntary manslaughter charge warranted or unwarranted based upon the facts of the case. We discuss several of the cases addressing the opposing determinations below.

In *State v. Gilliam*, 296 S.C. 395, 396, 373 S.E.2d 596, 597 (1988), the defendant appealed his murder conviction, asserting he was entitled to a charge on the lesser-included offense of voluntary manslaughter. There, the defendant, who had been in a previous relationship with Daisy, physically assaulted Daisy at her place of work. *Id.* The defendant was angry with Daisy because Daisy persisted in making harassing phone calls to his wife. *Id.* Daisy also taunted the defendant, provoking his attack. *Id.* A few hours after his assault on Daisy, the defendant went to the Brown Derby to look for the victim—Daisy's lover—because Daisy had told the defendant that the victim wanted to see him. *Id.* The defendant testified that he had no intention of shooting the victim. *Id.* Upon the defendant finding the victim, "[t]he two men began arguing and [the victim] made threatening statements to [the defendant]." *Id.* "[The victim] then took a gun from his pocket and shot at [the defendant] before [the defendant] could reach his own gun." *Id.* "[The defendant] shot back at [the victim], killing him." *Id.* Our supreme court determined the evidence supported a charge of voluntary manslaughter, concluding "[the defendant's] testimony that the victim threatened him and then fired at him would support a finding of sufficient legal provocation and heat of passion." *Id.* at 397, 373 S.E.2d 597.

In *State v. Lowry*, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993), our supreme court reversed the defendant's murder conviction, finding he was entitled to a charge on voluntary manslaughter under the facts of his case. There, the defendant and some friends were outside a grocery store when the victim approached the group and began berating the defendant. *Id.* at 398, 434 S.E.2d at 273. The two men argued and "bumped chests," and the defendant aimed an unloaded pistol at the victim and pulled the trigger. *Id.* One of defendant's companions broke up the fight, and the victim entered the grocery store. *Id.* After he loaded a clip of ammunition into his pistol and fired a single shot into a sign located nearby, the defendant followed the victim into the grocery store, and the two men began arguing and shouting at each other again. *Id.* "According to the State's witnesses, [the defendant] challenged the [victim] to 'take it outside,' to which the [victim] replied, 'Man, I am unarmed. Do you expect me to walk outside and let you kill me?'" *Id.* While there was some evidence that the victim spread his arms away from his body to show he had no weapon, the defendant's witnesses testified that the victim "belittled [the defendant] by telling him, 'You think you are a big man because you got a gun,'" and "then moved toward [the defendant] in a menacing fashion with his arms and hands outstretched toward [the defendant] as if to grab him." *Id.* After the victim raised his arms, the defendant shot him in the chest, the

victim fell, and the defendant cursed the victim and then shot him again, this time in the head. *Id.* In finding the defendant was entitled to a voluntary manslaughter charge, the court determined, "[h]ere, there is testimony which, if believed, tends to show that the [victim] and [the defendant] were in a heated argument and that the [victim] was about to initiate a physical encounter when the shooting occurred." *Id.* at 399, 434 S.E.2d at 274. Noting that, in order to eliminate the offense of manslaughter as a lesser-included offense, "it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter," the court "conclude[d] that the trial [court] erred in refusing to instruct the jury regarding the offense of voluntary manslaughter." *Id.*

In *State v. Wiggins*, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998), the defendant appealed his voluntary manslaughter conviction, asserting the trial court erred in submitting the issue of voluntary manslaughter to the jury. The evidence revealed the victim spoke with the defendant the day after the defendant's wife had barred the victim from a restaurant/bar attached to a motel run by the defendant and his wife. *Id.* at 540-541, 500 S.E.2d at 490-491. The defendant took the victim to speak with the defendant's wife and left. *Id.* at 541, 500 S.E.2d at 491. The victim and the defendant's wife argued, the wife stuck to her decision, and the victim angrily left the motel. *Id.* A few hours later, the victim's sister came to the motel and demanded to speak to the defendant's wife regarding the victim being barred from the premises. *Id.* According to the defendant, the sister was angry and threatened to physically attack his wife. *Id.* The defendant threatened to "kick her ass" if she tried to attack his wife, and the sister threatened to bring the family back later that night to "shut the place down." *Id.* The victim's brother and the victim arrived at the scene, and as the victim sat in his sister's car, the defendant approached the side of the car where the victim sat. *Id.* at 542, 500 S.E.2d at 491. An argument ensued between the defendant and the victim's sister, and she informed the victim the defendant had threatened to "kick her ass." *Id.* According to the sister, the defendant stated, "Yes, I said it. I'll kick both of your asses," at which point the victim responded, "We'll settle this" and then turned to exit the car. *Id.* The sister testified there was a gun clipped to the victim's back, she saw the defendant had a gun in his hand, and she had exited the car when the defendant began shooting. *Id.* The sister stated the victim was never able to pull his gun out and fire it; that after the victim was hit with the first shot, he exited the car and began running, at which point his back was to defendant; and the defendant continued firing his gun. *Id.* The sister "unequivocally stated [the v]ictim never had a gun in his hand, or pointed a gun at [the defendant], while he was sitting in

the car or before [the defendant] began shooting." *Id.* at 542-43, 500 S.E.2d at 491. The brother testified that as the victim was getting out of the car, the defendant pulled a gun from his pocket and began firing; the victim did not have a gun in his hand; the victim reached for his gun after the defendant fired the first shot; the victim staggered toward the back of the car as the defendant continued firing; after the first shot, the brother shouted for the victim to shoot the defendant, but the victim never raised his gun or fired at the defendant; and the gun fell from the victim's hand as he was being shot. *Id.* at 543, 500 S.E.2d at 492. The defendant gave a different version of the events surrounding the shooting. *Id.* He testified he was armed at the time because he was going home and it was his habit to take his gun home. *Id.* He did not think there would be a problem when the victim showed up because he believed they were on good terms. *Id.* He asked the victim to leave, but the victim ignored him or did not hear him. *Id.* He told the victim he had threatened to "whip [his sister's] ass[,] . . . but told [the v]ictim he did not mean it." *Id.* "He told [the v]ictim they did not need any problems, to which [the v]ictim responded, 'Yeah, we've got problems.'" *Id.* According to the defendant, "[the v]ictim got out of the car, took his sunglasses off with his right hand, and with his left hand pulled out a pistol." *Id.* He stated that the victim "cocked and pointed the gun at [him]," and as the victim was exiting the car, the brother yelled for the victim to shoot him. *Id.* at 543-44, 500 S.E.2d at 492. The defendant "got scared, pulled his own gun and fired." *Id.* at 544, 500 S.E.2d at 492. There was evidence the defendant fired his gun four times in rapid succession. *Id.* at 542 n.7, 500 S.E.2d at 491 n.7. An autopsy revealed the victim died of three gunshot wounds: two in the chest and one in the back. *Id.* at 544, 500 S.E.2d at 492. Our supreme court found no error in submission of the offense of voluntary manslaughter to the jury, stating as follows:

> We find there is evidence in the record which would tend to show [the defendant] acted in sudden heat of passion upon sufficient legal provocation. [The defendant] was in a heated argument with [the v]ictim and [the s]ister. He testified he was afraid for his life because [the v]ictim physically threatened him. Contrary to his argument, fear can constitute a basis for voluntary manslaughter.

Id. at 549, 500 S.E.2d at 495.

In *State v. Johnson*, 333 S.C. 62, 63, 508 S.E.2d 29, 30 (1998), our supreme court again reversed a defendant's murder conviction for failure to give a voluntary manslaughter charge. There, considering the evidence in the light most favorable to the defendant, the court noted the following facts:

> [I]n the early morning hours of December 12, 1995, [the defendant] was "hanging out" with Frank Moore, Travis Croft, and the victim . . . . According to witnesses, [the victim] had taken the keys to [the defendant's] vehicle and wouldn't give them back to him. [The victim] then went into his house, and [the defendant] left. Moore and Croft were still outside [the victim's] house 15-20 minutes later when [the defendant] returned. [The victim's] live-in girlfriend . . . testified [the defendant] knocked on their door at approximately 2:00 AM and asked to speak to [the victim]. [The victim] came to the door and he and [the defendant] "had words." [The victim] then went outside and "sort of pushed [the defendant] off the porch." According to one witness, [the victim] was the first one to throw a punch. Another witness testified that "[the victim] was getting the best of [the defendant]." Several witnesses testified that, during the fight, [the defendant] took out a gun and shot [the victim] several times; [the victim] died a short time later.

Id. at 63-64, 508 S.E.2d at 30.

The court noted our law provides that the appellate court must view the facts in a light most favorable to the defendant in determining whether the evidence requires a charge on voluntary manslaughter, and "[t]o warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *Id.* at 65, 508 S.E.2d at 31. The court further observed that in *Lowry*, it "held the defendant was entitled to a charge on voluntary manslaughter [when] the defendant and victim were in a heated argument and 'the [victim] was about to initiate a physical encounter' when the shooting occurred." *Id.* at 65-66, 508 S.E.2d at 31. The court then concluded, "Here, [the defendant] and the victim had 'had words' and were engaged in a fight at the time the shooting occurred. Under *Lowry*, it is patent [the

defendant] was entitled to a voluntary manslaughter charge." *Id.* at 66, 508 S.E.2d at 31.

In *State v. Knoten*, 347 S.C. 296, 299-300, 555 S.E.2d 391, 393 (2001), the defendant—convicted of murder in the deaths of the victim and the victim's niece—appealed the trial court's refusal to instruct the jury on voluntary manslaughter in connection with the victim's death. The defendant "gave a number of inconsistent statements to police, each more inculpatory than the last." *Id.* at 301, 555 S.E.2d 393-94. In his second signed statement, the defendant stated that he and the victim had consensual sex. *Id.* at 301, 555 S.E.2d 394. He claimed that, afterwards, the victim became agitated, armed herself with a knife, threatened the defendant, cut him on his leg, and chased him out of the apartment. *Id.* The defendant then retrieved a foot-long steel bar from the trunk of his car and reentered the apartment. *Id.* The victim "cut him again, and he hit her over the head with the metal bar," causing the victim to collapse. *Id.* Our supreme court held, "Viewing the evidence in the light most favorable to [the defendant], a charge of voluntary manslaughter was warranted here." *Id.* at 303, 555 S.E.2d 395. The court agreed with the defendant's argument that, because there was evidence the victim cut the defendant before he struck her with the pipe, the trial court should have instructed the jury on voluntary manslaughter, in particular noting in the defendant's second statement he claimed the victim cut him twice; that after the first cut he was chased out of the apartment and retrieved a metal pipe from his car; and he reentered the apartment and killed the victim after she cut him again. *Id.* at 305, 555 S.E.2d 396. Because there was evidence to support a conviction for the lesser-included offense of voluntary manslaughter, the court reversed the defendant's conviction in the slaying of the victim. *Id.* at 309, 555 S.E.2d at 398.

In *State v. Cole*, 338 S.C. 97, 102, 525 S.E.2d 511, 513 (2000), our supreme court found the trial court did not err in refusing to instruct the jury on voluntary manslaughter, determining there was no evidence of sudden heat of passion or sufficient legal provocation. There, the victim's friend attacked the defendant's friend, resulting in the defendant intervening to fight the victim's friend, and the victim then breaking up the fight. *Id.* at 99-100, 525 S.E.2d at 512. However, the victim's friend continued to behave hostilely, threatened the defendant's brother, overturned the defendant's stereo as he walked out, and promised to return. *Id.* at 100, 525 S.E.2d at 512. Once the victim and his friend went out the front door of the defendant's apartment, the defendant went out his back door; went next door to his mother's apartment where he retrieved a gun; and went out his mother's front

door and stood in his front yard, where he claimed he heard shots being fired. *Id.* The defendant fired his gun, killing the victim. *Id.* The defendant claimed "he fired toward the ground, but the cause of the victim's death was determined to be a gunshot wound to the chest." *Id.* The shooting occurred three to five minutes after the victim and the victim's friend left the defendant's apartment. *Id.* The defendant stated he fired the gun because he was scared they might be coming back, he was scared they might come into his house and kill or hurt him and his brother, and he did not know what to do and "was scared." *Id.* "[The defendant] testified that he did not intend to shoot the victim, he was just scared and wanted to frighten [the victim's friend] and the victim away." *Id.* Viewing the evidence in the light most favorable to the defendant, the court noted that the victim's friend assaulted the defendant's friend and stole his jewelry; the defendant twice fought briefly with the victim's friend and was pulled off the victim's friend by the victim; and the victim's friend pushed over the defendant's stereo, after which the victim and his friend left the defendant's apartment. *Id.* at 102, 525 S.E.2d at 513. The court found these facts did not constitute sufficient legal provocation for voluntary manslaughter and, further, "there was no evidence presented that [the defendant] was overcome by a sudden heat of passion as would produce an 'uncontrollable impulse to do violence.'" *Id.* On the contrary, the court found that "by [the defendant's] own testimony, he shot at the men to scare them away," and the defendant's "testimony appear[ed] designed to support a charge of self[-]defense, not heat of passion." *Id.* Additionally, the court determined, "[e]ven if [the defendant] had been in the heat of passion during the confrontation in his apartment, three to five minutes had passed in which he had time to go to his mother's apartment and find his gun," and that "[f]ar from passion, these actions indicate 'cool reflection.'" *Id.*

In *State v. Childers*, 373 S.C. 367, 370, 645 S.E.2d 233, 234 (2007), the defendant became upset when the victim, his former girlfriend, refused to leave her mother's house to talk to the defendant. Later that night, the defendant saw the victim, the victim's sister, and the sister's ex-husband at a turkey shoot, where a confrontation ensued. *Id.* Evidence was presented that in the following early morning hours the victim, her sister, and the sister's ex-husband were standing in the victim's mother's yard talking after the turkey shoot when the defendant "suddenly appeared in the yard and shot the victim twice, at close range, in the head." *Id.* The defendant testified, however, that after the turkey shoot, he decided to walk from a friend's home to the victim's mother's home to talk to the victim. *Id.* at 370, 645 S.E.2d at 234-35. He claimed he carried a loaded gun during the walk to protect himself from stray dogs and, as he approached the group standing in the yard, the sister's

ex-husband shot at him first. *Id.* at 370, 645 S.E.2d at 235. The defendant stated that "[h]e returned fire, and in doing so, he shot the victim." *Id.* The defendant also testified "he did not visit the victim that night with the intention of shooting anyone, but he fired because he was fired upon." *Id.* at 370-71, 645 S.E.2d at 235. The majority of the court found the trial court did not err in failing to give a jury charge on voluntary manslaughter. *Id.* at 372, 645 S.E.2d at 235-36. Two of the justices determined this court erred in concluding the defendant was entitled to a voluntary manslaughter charge based on the fact that, although the victim did not provoke the defendant, the provocation by the sister's ex-husband could be transferred to the victim under the doctrine of transferred intent. *Id.* at 373-74, 645 S.E.2d at 236. They concluded, "[The defendant's] testimony does not support the contention that the killing was in the sudden heat of passion upon sufficient legal provocation by the victim because, contrary to the Court of Appeals' decision, the overt act that produces the sudden heat of passion must be made by the victim." *Id.* One of the justices concurred in result in a separate opinion, finding the defendant's own factual scenario "is completely void of any evidence remotely supporting a charge of voluntary manslaughter," because "[v]oluntary manslaughter, by definition, requires a criminal intent to do harm to another," and "according to the defendant's story, he had no criminal intent whatsoever." *Id.* at 375, 645 S.E.2d at 237 (Toal, C.J., concurring). Finally, two justices dissented from the majority on this issue, disagreeing with the State's contention that the defendant failed to present evidence that he was "inflamed by passion" when he returned fire and noting "the jury could have found the 'heat of passion' in [the defendant's] testimony that he fired back because he was scared and feared he would be shot at again." *Id.* at 378, 645 S.E.2d at 238 (Pleicones, J., dissenting; Moore, J., concurring in dissent).

In *Starnes*, 388 S.C. at 594-95, 698 S.E.2d at 607, the defendant and the two victims, Bill and Jared, were at the defendant's home when defendant shot the victims. Prior to the shooting, the defendant, Bill, and Jared had been at the defendant's restaurant, eventually leaving to go to a local bar. *Id.* at 593, 594, 698 S.E.2d at 606, 607. There was evidence presented that, while at the bar, Bill physically attacked the defendant in the bathroom. *Id.* at 594-95, 698 S.E.2d at 606-07. Later, after the three men left the bar, Bill told the defendant to take them to Jody Fogle's house to get drugs. *Id.* However, the defendant instead dropped Bill and Jared off at his house, picked up Jody, and brought Jody back to his house. *Id.* at 595, 698 S.E.2d at 607. The defendant testified as follows: he heard Jared cussing and saw him pointing a gun at Jody; he ran into the bedroom and retrieved

his gun; as he exited the bedroom, Bill said "whoa" and pointed a gun at him; and he shot Bill and then he turned and shot Jared. *Id.* He further stated, "I was scared and I was frightened. When Jared pulled the gun on Jody, it scared me." *Id.* at 599, 698 S.E.2d at 609. On appeal, the court acknowledged "[w]hile this testimony is evidence that [the defendant] was in fear, there is no evidence [the defendant] was out of control as a result of his fear or was acting under an uncontrollable impulse to do violence," and determined "[t]he only evidence in the record [was] that [the defendant] deliberately and intentionally shot Jared and Bill and that he either shot the men with malice aforethought or in self-defense." *Id.* Accordingly, the court concluded there was no evidence of sudden heat of passion upon sufficient legal provocation and, therefore, upheld the trial court's refusal to charge the jury on voluntary manslaughter. *Id.* at 599-600, 698 S.E.2d at 609.

In *Cook v. State*, 415 S.C. 551, 553-54, 784 S.E.2d 665, 666 (2015), the defendant and the victim, who lived in the same apartment complex, exchanged words via text message one afternoon. A couple of hours later, when the defendant, his girlfriend, and his cousin returned to the apartment complex, they found the victim sitting outside on the porch. *Id.* The victim "made a series of threatening comments directed at [the defendant] echoing similar sentiments from the text messages he sent earlier that day." *Id.* at 554, 784 S.E.2d at 666. Though "[the defendant] admitted [the v]ictim's last comment was 'enough to really strike [him] in [his] heart,' [the defendant] continued up the stairs without saying anything to [the v]ictim." *Id.* (third and fourth alterations in original). After eating some watermelon inside his apartment, the defendant "placed the watermelon rinds inside a plastic bag, grabbed his gun from under the couch, and went downstairs to discard the bag." *Id.* Once downstairs, the defendant "did not have a chance to get to the dumpster because [the v]ictim was approaching him, grimacing and threatening to shoot him in 'broad daylight.'" *Id.* The defendant stated that the victim "had one of his hands in his back pocket, acting as if he had a gun and was going to pull it out and shoot [the defendant] at any moment." *Id.* At the same time, the victim's nephew was approaching the defendant from the opposite direction "as if he was about to 'jump' him," and the defendant and the victim again exchanged words. *Id.* The defendant said "he tried to keep walking down the sidewalk, but [the v]ictim kept cutting him off," and the victim continued to approach him "huffing, grimacing, and threatening to kill him." *Id.* at 555, 784 S.E.2d at 667. The defendant said, "'the dude was coming up' and 'before I knew it, I fired a shot.'" *Id.* The defendant then fired a second shot and ran. *Id.* Both shots struck the victim in the face. *Id.* The defendant testified he fired the second

shot "to make sure he was gone." *Id.* The defendant explained in his oral statement: "'I was terrified.' 'I didn't even sit there for a second. As soon as I saw him reaching I just shot.' 'I wasn't taking any chances.' 'It was either me or him, man, it really was.'" *Id.* The victim's nephew testified concerning the events, stating he observed the victim get up and walk over to the defendant, that "from there on they were just talking real softly," and he "could hardly tell it was an argument." *Id.* The defendant then "stepped back, pulled out a gun and shot [the v]ictim." *Id.* The defendant "then walked over [the v]ictim, did some kind of gesture, shot [the v]ictim again, and ran." *Id.* The victim's girlfriend testified that once the defendant came downstairs, she saw the victim approach the defendant and say "keep my name out of all this mess y'all got going on out here. I don't have nothing to do with that." *Id.* According to her, "[t]he next thing she heard was a gunshot," and "after seeing [the v]ictim fall to the ground, . . . she saw [the defendant] walk over [the v]ictim and shoot him again." *Id.*

Cook filed a petition for post-conviction relief, which was denied. *Id.* at 556, 784 S.E.2d at 667. Our supreme court subsequently granted Cook a direct appeal on the issue of whether "the trial court erred in charging the jury with the lesser-included offense of voluntary manslaughter because there was no evidence that he was acting in the sudden heat of passion." *Id.* Our supreme court agreed the trial court committed error, stating as follows:

> We do not believe the facts of this case support a finding that [the defendant] shot [the v]ictim in the sudden heat of passion. Here, [the defendant] stated he tried to walk away from [the v]ictim, but [the v]ictim kept cutting him off. The fact that [the defendant] was trying to walk away from the conflict does not suggest [the defendant] was incapable of cooling off. In addition, [the victim's nephew] testified that [the defendant] and [the v]ictim were talking softly and that he could hardly tell they were arguing. This too does not suggest that [the defendant] was acting under an uncontrollable impulse to do violence as surely if one was so enraged to kill, one would not be talking softly with the victim right before the act. Further, at no point during [the defendant's] statement does he indicate he lacked control over his actions. Accordingly, we believe the facts of this case

> suggest [the defendant] shot [the v]ictim either with malice or in self-defense.

Id. at 557, 784 S.E.2d at 668.

In *Niles*, conflicting evidence was presented regarding the shooting death of the victim when the defendant, his fiancé, and Ervin Moore met the victim to purchase marijuana. 412 S.C. at 518, 772 S.E.2d at 878. The defendant and Moore testified at trial, and their testimony was at odds as to whose idea it was to rob the victim and whether the victim or the defendant fired the first shot. *Id.* Moore testified the defendant decided to rob the victim and Moore's role in the robbery was to identify the marijuana. *Id.* at 519, 772 S.E.2d at 878-79. Moore stated that he joined the victim in the victim's vehicle, and the victim produced the marijuana for his inspection. *Id.* at 519, 772 S.E.2d at 879. As Moore returned to their vehicle, the defendant had already exited that vehicle and Moore told the defendant the victim had the drugs. *Id.* The defendant leaned into the passenger-side door of the victim's car and spoke to the victim. *Id.* Moore heard two shots, saw the defendant leap into the back seat of his own car, and heard the victim fire a weapon in response. *Id.* The defendant and the victim shot back and forth multiple times, and the defendant had the drugs that he had stolen from the victim. *Id.* at 519-20, 772 S.E.2d at 879. The defendant, on the other hand, testified Moore acted alone, with Moore going over to the victim's vehicle to purchase the drugs. *Id.* at 520, 772 S.E.2d at 879. He then saw Moore and the victim fighting in the victim's vehicle and realized Moore was robbing the victim. *Id.* According to the defendant, Moore exited the victim's vehicle with the stolen drugs and dove back into his car, the victim drew a gun and shot at them, and the defendant grabbed his gun and returned fire. *Id.* The defendant maintained he was concerned with stopping the shooter and for his fiancé's safety, testifying:

> So, while he was shooting in the car . . . I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody . . . I was just trying to get him to stop shooting. That's all I was trying to do. I didn't know if my fiancé got shot or nothing. That's the first thing that came to my head, you know.

Id. (omissions in original).

A majority of our supreme court "agree[d] with the State that there was no evidence that [the defendant] acted within a sudden heat of passion upon sufficient legal provocation, and therefore the trial court did not err in refusing to instruct the jury on the lesser-included offense of voluntary manslaughter." *Id.* at 521-22, 772 S.E.2d at 880. It found the defendant's own testimony failed to "establish that he was overtaken by a sudden heat of passion such that he had an *uncontrollable impulse to do violence*" but, rather, the defendant had testified "that he did not want to hurt the victim; that he shot with his eyes closed; that he was merely attempting to stop the victim from shooting; and that when he shot his gun, he was thinking of [his fiancé] rather than of perpetrating violence upon the victim." *Id.* at 522-23, 772 S.E.2d at 880. The majority further concluded, "Because [the defendant], by his own testimony, lacked the intent to harm the victim, we cannot see how a voluntary manslaughter charge would have been appropriate under these facts." *Id.* at 523, 772 S.E.2d at 881. The dissent, on the other hand, would have found "the unprovoked shooting by [the victim] amounted to evidence sufficient for a jury to infer that there was legal provocation," and "[the defendant's] testimony that he immediately returned fire out of fear for himself and his fiancé[] provided evidence from which a jury could find that [the defendant] was acting pursuant to an uncontrollable impulse to do violence." *Id.* at 525, 772 S.E.2d at 882 (Pleicones, J., dissenting).

Finally, neither party cites this court's 2017 opinion in *State v. Oates*, 421 S.C. 1, 803 S.E.2d 911 (Ct. App. 2017). There, the defendant—who was convicted of voluntary manslaughter—challenged the trial court's decision to give a voluntary manslaughter instruction to the jury, asserting there was no evidence of sudden heat of passion. *Id.* at 7, 803 S.E.2d at 915. The facts of that case reveal as follows.

The defendant, who had been hired by a homeowner's association to tow illegally parked cars, placed a disabling device, or "boot," on the victim's minivan. *Id.* at 8, 803 S.E.2d at 915. The victim, his brother, and his brother's neighbor approached the defendant requesting he refrain from towing the minivan. *Id.* at 7-8, 803 S.E.2d at 915. According to the defendant, he felt intimidated by the three men. *Id.* at 8, 803 S.E.2d at 915. The defendant told investigators the men were "running 'a little abruptly' and were 'hooting' and 'hollering.'" *Id.* The defendant further stated both the victim and his brother "jumped up on the truck's running board and started talking to him through the window and [the v]ictim told [the

neighbor], 'Go get my shotgun.'" *Id.* The brother instructed the defendant to take the boot off the vehicle, and the defendant told him he would call his office and they would "work this out." *Id.* The defendant "then heard 'a round being chambered' as well as [the v]ictim stating, 'You're [going to] take this off right now and I'm leaving,' to which [the defendant] responded, '[T]hat's fine.'" *Id.* (second and fourth alteration in original). The defendant stated he stalled to regain his composure. *Id.* The brother verified that the victim "pulled a gun out of his pants, ratcheted the gun, and stated, 'Nobody's going to take my car,'" and that the defendant "seemed very nervous." *Id.* The defendant indicated the brother grabbed his keys and the lock tool to release the boot, and the victim asked the defendant if he had any paperwork on his minivan, indicating "he did not want law enforcement to 'come look' for him." *Id.* at 9, 803 S.E.2d at 915. The defendant took the opportunity to open his glove box and remove his gun while he showed the victim his ledger. *Id.* at 9, 803 S.E.2d at 916. The defendant indicated he heard the brother yell something in Spanish, and the victim looked at the defendant and told him to "[c]ome get this s**t off now." *Id.* The defendant then described as follows: The victim unlocked his truck door and opened it; as the victim stepped off the running board, the defendant observed him reach back and grab his pistol with his right hand; as the defendant was exiting the truck, the victim was "already in motion and he's in draw;" and the defendant reacted. *Id.* 9-10, 803 S.E.2d at 916. He testified:

> I [exited] straight out my door stepping off of the metal running boards . . . and I was [exiting] out, and I looked and my line of sight was through him straight down to the ground. It's now or never. He's already in motion and he's in draw. Whether he's drawing it to intimidate me, to keep me to go do what he wants me to do, or if he knew I didn't have any information on his vehicle and . . . ah, bye, bye, Preston . . . regardless, he was in motion, he was in draw and I reacted.

Id. at 10, 803 S.E.2d at 916 (alterations and omissions in original). The defendant stated he "remember[ed] the very first shot," and the victim was "still a threat to [him]," so he "discharged again." *Id.* The defendant did not know how many times he pulled the trigger, but remembered two shots. *Id.*

Other witness's accounts conflicted with the defendant's. *Id.* According to the brother, the victim put his gun in his waistband after the brother told him to put it away, and the victim never pulled out his gun again. *Id.* The brother further "expressly stated there was 'no arguing, . . . no fighting, . . . no bad words' and [the v]ictim never talked to, threatened, or 'attempt[ed] to do anything to [the defendant].'" *Id.* (second alteration and omissions in original). The victim's widow also testified that the victim was directing traffic around the minivan and tow truck when the defendant shot the victim. *Id.* at 10-11, 803 S.E.2d at 916. Further, "[t]he testimony of [the v]ictim's widow, [the brother's] wife, and [the] neighbors, as well as a video from [one of the neighbor's] home surveillance camera, indicated [the v]ictim was walking or running away from [the defendant] when [the defendant] began shooting him." *Id.* at 11, 803 S.E.2d at 916. An autopsy revealed the victim had been shot six times. *Id.* at 11, 803 S.E.2d at 917.

This court disagreed with the defendant's assertion that the trial court erred in "charging the jury on the lesser-included offense of voluntary manslaughter because there was no evidence of the element of 'sudden heat of passion,' i.e., that [the defendant] was acting under an uncontrollable impulse to do violence and was incapable of cool reflection as a result of fear." *Id.* at 23, 803 S.E.2d at 923. After analyzing our supreme court's decisions in *Cook* and *Starnes*, this court held:

> In the present case . . . the jury could have reasonably inferred from the evidence that when [the defendant] shot [the v]ictim six times, he was acting under "an uncontrollable impulse to do violence" even if the jury could have drawn an equally reasonable inference that [the defendant] acted in a "deliberate, controlled manner." Admittedly, several witness accounts of the entire incident are comparable to witness accounts of the defendant and the victim "talking softly" in *Cook*. Further, [the defendant] told police that before he fired the fatal shots, he was in "conservation mode." When asked how many shots he fired, [the defendant] initially stated he remembered two shots and then compared his reaction during the incident to his reaction during a prior incident: "But I don't know when I . . . I know . . . I knew the first time on Hilton Head, I remember I emptied it . . . Well, that . . . that was a panic fire . . . the first time. *This*

> *time, I had a little bit more composure*." (emphasis added). [The defendant] also explained to police that the numerous shots fired at [the v]ictim were his attempt to disable [the v]ictim from killing [the defendant] and that he kept shooting until he saw [the v]ictim's gun slide across the road beneath him. The jury could have reasonably inferred from all of this evidence that [the defendant] was acting in a "deliberate, controlled manner."
>
> However, unlike the lack of *any* evidence of sudden heat of passion in *Cook* and *Starnes*, there is some evidence in the present case from which the jury could have reasonably inferred that [the defendant] was "incapable of cool reflection" and was acting under an "uncontrollable impulse to do violence." First, neither *Cook* nor *Starnes* involved six gunshots to the same victim as does the present case. Further, one of [the brother's] neighbors . . . was sitting in her family's car in their driveway after returning from a restaurant when she heard "a lot of people outside yelling." She testified she saw "one of the guys" stepping onto the truck's "side rail" and "they were just getting very argumentative and just going back and forth." Her husband . . . testified that as he was going into his house to obtain some personal belongings and returning to the car, he "could hear a dispute" and when he was back in the car, he heard gunshots fired in "rapid succession."

Id. at 25-27, 803 S.E.2d at 924-25 (second through sixth omissions in original) (citations omitted). This court further noted the evidence from the brother that the defendant was very nervous before the victim ratcheted his gun, and the defendant's statement that when the victim asked him about the paperwork, that was when he "got really scared." *Id.* at 27, 803 S.E.2d at 925. This court concluded: "The jury could have reasonably inferred from all of this evidence that when [the defendant] shot [the v]ictim six times, he was 'incapable of cool reflection' and was acting under an 'uncontrollable impulse to do violence' such

that there was sufficient evidence of [the defendant's] sudden heat of passion." *Id.* at 28, 803 S.E.2d at 925-26.

C. Analysis

Viewing the evidence in a light most favorable to Payne, we find the trial court erred in refusing Payne's request to charge the lesser-included offense of voluntary manslaughter. *See Niles*, 412 S.C. at 522, 772 S.E.2d at 880 ("When determining whether the evidence requires a charge on voluntary manslaughter, the court must view the facts in the light most favorable to the defendant."); *Starnes*, 388 S.C. at 596, 698 S.E.2d at 608 ("To warrant the court eliminating the charge of manslaughter, there must be no evidence whatsoever tending to reduce the crime from murder to manslaughter."); *id.* ("If there is *any evidence* from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge." (emphasis added)); *id.* at 597, 698 S.E.2d at 608 ("Whether a voluntary manslaughter charge is warranted turns on the facts. If the facts disclose any basis for the charge, the charge must be given.").

"Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *Smith*, 391 S.C. at 412-13, 706 S.E.2d at 14. We acknowledge that, under Payne's testimony alone, the evidence may be insufficient to support a jury charge of voluntary manslaughter. However, we are not limited to considering a defendant's *trial testimony* on the matter. *See Knoten*, 347 S.C. at 305-09, 555 S.E.2d at 396- 98 (noting, in spite of the State's contention the defendant was not entitled to a voluntary manslaughter charge because he recanted his confession at trial, one of defendant's statements to police that was introduced at trial supported such).

The State acknowledges there is arguably sufficient evidence of legal provocation from Tyeisha's testimony, but challenges the sufficiency of evidence of sudden heat of passion. We agree that there is clearly evidence of legal provocation, as both Tyeisha and Payne testified Victim fired his gun at Payne first during their encounter near Payne's home. *See Smith*, 391 S.C. at 413, 706 S.E.2d at 15 ("[A]n overt, threatening act or physical encounter *may* constitute sufficient legal provocation."). The question thus becomes whether there is *any* evidence Payne acted in "sudden heat of passion" when he shot Victim. *See id.* ("For a defendant to be entitled to a voluntary manslaughter charge, there must be evidence of both sufficient legal provocation and heat of passion at the time of the killing."); *id.*

("To warrant the court in eliminating the offense of manslaughter it should clearly appear that there is *no evidence whatsoever* tending to reduce the crime from murder to manslaughter." (emphasis added) (quoting *Pittman*, 373 S.C. at 572, 647 S.E.2d at 168)). "In determining whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy, as well as those existing at the time of the killing." *Id.*

Admittedly, there was testimony that the witnesses did not know what Payne and Victim argued about, Tyeisha described it as "[not] necessarily arguing, arguing, but . . . just having words back and forth," and Payne himself testified he could not recall what he and Victim argued about at Hartzog's trailer or if there was even an argument during the second encounter. Further, Payne testified, "When you're backing up not looking, you can't see who you're shooting at or what you're shooting, you just know you're shooting to get someone away from you or anything that's firing at you," and Payne agreed he was "backing up toward the house" and was not "paying attention where [he was] shooting." However, as in *Oates*, though there are some factual similarities with *Cook* and *Starnes*, we find "unlike the lack of *any* evidence of sudden heat of passion in *Cook* and *Starnes*, there is some evidence in the present case from which the jury could have reasonably inferred that [Payne] was 'incapable of cool reflection' and was acting under an 'uncontrollable impulse to do violence.'" *Oates*, 421 S.C. at 27, 803 S.E.2d at 925 (quoting *Starnes*, 388 S.C. at 598, 698 S.E.2d at 609).

In *Lowry*, our supreme court determined the defendant was entitled to a charge on voluntary manslaughter noting, "testimony which, if believed, tend[ed] to show that the [victim] and [the defendant] were in a heated argument and that the [victim] was about to initiate a physical encounter when the shooting occurred." 315 S.C. at 399, 434 S.E.2d at 274. In the case at hand, evidence was presented that: Payne and Victim engaged in a verbal argument and "exchanged words" outside Hartzog's trailer; Tyeisha described hearing arguing and stated that when she walked up to the porch to see what was happening, Payne and Victim were still interacting, "going back and forth," and they were "having words back and forth"; the exchange was such that the women at Hartzog's trailer told Victim to leave and told Payne not to follow him; Victim went to the top of the road and stayed there; Payne drove across the yard to his home as Victim walked on the street in the direction of Payne's home, at which point there was a second encounter between Payne and Victim; Victim walked toward Payne as he was exiting his car; Tyeisha

stated the two "started having words again because you could tell that they [were] . . . talking back and forth"; Alicia testified that when Payne encountered Victim again up the road, he and Victim had another verbal dispute, Payne got out of his car, they were still arguing, Payne turned to go back to his car and she "[was] not sure if something was said or what happened, but . . . when he turned back around to face [Victim], [Payne] began shooting at him" and when Payne turned to go back toward his car, he never made it to the car, but turned back around and "just started firing" at Victim; Tyeisha testified Payne tried to punch Victim and Victim then pulled out a handgun; Payne then "had . . . his hands. . . like 'I guess you don't want to fight'" and "they [were] still . . . kind of having words; Payne turned away from Victim, going back in the direction of his house; Victim trailed behind Payne, and they were still having words and arguing; Payne turned around facing Victim as they were still having words and then Victim "started firing"; Payne's response to Victim firing at him was to fire back, and Payne "started firing . . . right after that, it was consecutive"; Tyeisha could tell Victim fired first because she "could see it coming from . . . his direction"; Payne was "afraid for [his] life" during this time; although Victim turned around and ran away, Payne kept shooting; and Victim was shot four times.

As noted,

> A person may act in a deliberate, controlled manner, notwithstanding the fact that he is afraid or in fear. Conversely, a person can be acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of fear. The latter situation constitutes sudden heat of passion, but the former does not.

Starnes, 388 S.C. at 599, 698 S.E.2d at 609. Like *Oates*, we acknowledge there was evidence presented from which the jury could have reasonably inferred that Payne was acting in a "deliberate, controlled manner," however, there was also evidence presented from which the jury could have reasonably inferred Payne was acting under an "uncontrollable impulse to do violence." 421 S.C. at 26-27, 803 S.E.2d at 924-25. Specifically, there was evidence presented that Payne and Victim were in an argument outside Hartzog's trailer that was heated enough for the women to instruct Victim to leave and Payne not to follow Victim when Victim walked away; when Payne drove the very short distance to his home and exited his

vehicle, Victim approached him; an argument ensued between the two which was of enough intensity for both Tyeisha and Alicia to observe such was occurring from a significant distance away; the argument was such that Payne tried to punch Victim; Payne turned away from Victim, walking toward his home and Victim followed him, continuing the argument; Victim fired his gun at Payne first, causing Payne to return fire and shoot Victim four times, even though Victim was running away as Payne continued to fire at him; and Payne testified he was "afraid for [his] life." Additionally, Alicia testified "I'm not sure if something was said or what happened, but he — — when [Payne] turned back around to face [Victim], he began shooting at him," and when Payne turned to go back toward his car, he turned back around and "just started firing" at Victim. Accordingly, viewing the evidence in a light most favorable to Payne, there is evidence from which the jury could have reasonably inferred the lesser, rather than the greater, offense was committed such that the trial court erred in refusing Payne's request to charge voluntary manslaughter. *See Starnes*, 388 S.C. at 596, 698 S.E.2d at 608 ("If there is *any evidence* from which it could be inferred the lesser, rather than the greater, offense was committed, the defendant is entitled to such charge." (emphasis added)).

II. Failure to Charge Continuing To Shoot

We need not address the failure of the trial court to charge Payne's requested "continuing to shoot" language because the prior issue is dispositive, and whether the matter may arise on retrial will be dependent on evidence admitted, arguments raised, and whether the essence of any appropriate language is contained in the trial court's charge. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues on appeal when its determination of a prior issue is dispositive); *State v. Mekler*, 379 S.C. 12, 17, 664 S.E.2d 477, 479 (2008) (affirming this court's decision reversing defendant's conviction and granting a new trial, but finding it unnecessary to address another issue, noting whether the issue would arise on retrial and its resolution would depend upon the evidence and testimony then presented).

CONCLUSION

For the foregoing reasons, we reverse Payne's conviction and remand for a new trial.

REVERSED AND REMANDED.

WILLIAMS and GEATHERS, JJ., concur.