Judicial Merit Selection Commission

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M E D I A R E L E A S E

July 22, 2019

The Judicial Merit Selection Commission is accepting applications for the judicial office listed below:

A vacancy exists in the office formerly held by the late Honorable Tony M. Jones, Judge of the Family Court, At-Large, Seat 2. The successor will serve the remainder of the unexpired term, which expires June 30, 2025.

The Judicial Merit Selection Commission met on Friday, July 19, 2019 and voted, for the Fall 2019 screening only, to suspend Procedural Rule 6 of the Commission. This suspension will allow any candidate that has filed for a judicial vacancy seat published in the Media Release dated Monday, June 24, 2019, to withdraw their Notice of Intent, Acknowledgment, or Application, and file for Family Court, At-Large, Seat 2. If a candidate wishes to do this, the withdrawal must be in writing and received by the Commission prior to 12:00 Noon on Wednesday, July 24, 2019, and prior to filing a Notice of Intent for the Family Court, At-Large, Seat 2.

In order to receive application materials for this seat, a prospective candidate must notify the Commission in writing of his or her intent to apply. Correspondence and questions should be directed to the Judicial Merit Selection Commission as follows:

Erin B. Crawford, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
ErinCrawford@scsenate.gov
(803) 212-6689

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

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

N O T I C E

In the Matter of Richard Arden Veon, II

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 419 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on August 22, 2019, beginning at 4:15 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

July 18, 2019

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

The Supreme Court of South Carolina

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N O T I C E

In the Matter of Richard R. Kelly

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 419 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on August 22, 2019, beginning at 4:30 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

July 18, 2019

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N O T I C E

In the Matter of Charles Lee Anderson

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on August 22, 2019, beginning at 3:15 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

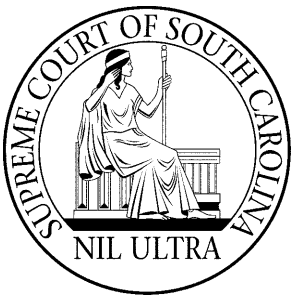
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

July 18, 2019

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.



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OF

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AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 30
July 24, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Glenn Odom, Respondent,

v.

Town of McBee Election Commission and Shilon Green, Appellants.

Appellate Case No. 2019-000147

Appeal from Chesterfield County
Roger E. Henderson, Circuit Court Judge

Opinion No. 27901
Heard May 29, 2019 – Filed July 24, 2019

AFFIRMED AS MODIFIED AND REMANDED

Martin S. Driggers, Jr., of Sweeny, Wingate & Barrow, P.A., of Hartsville, Richard E. McLawhorn, Jr., of Sweeny, Wingate & Barrow, P.A., of Columbia, and Karl S. Bowers, Jr., of Bowers Law Office, LLC, of Columbia, for Appellants.

Kathleen C. Barnes, of Barnes Law Firm, LLC, of Hampton, John E. Parker and William F. Barnes, III, both of Peters, Murdaugh, Parker, Eltzroth & Detrick, of Hampton, for Respondent.

JUSTICE JAMES: This is an appeal arising from a McBee Town Council election contest commenced by candidate Glenn Odom. The McBee Municipal Election

Commission ruled on the contest, and Odom appealed the Commission's decision to the circuit court. The circuit court ruled in favor of Odom, and the Commission and candidate Shilon Green (collectively, Appellants) appealed to this Court. We affirm the circuit court as modified, remand to the Commission, and order the Commission to proceed in accordance with our holding.

"In municipal election cases, we review the judgment of the circuit court only to correct errors of law." *Taylor v. Town of Atl. Beach Election Comm'n*, 363 S.C. 8, 12, 609 S.E.2d 500, 502 (2005). "Our review does not extend to findings of fact unless those findings are wholly unsupported by the evidence." *Id.*

"There was no right to contest an election under the common law." *Id.* at 14, 609 S.E.2d at 503. In South Carolina, the right to contest an election exists only under our constitutional and statutory provisions, and "the procedure proscribed by statute must be strictly followed." *Taylor v. Roche*, 271 S.C. 505, 509, 248 S.E.2d 580, 582 (1978); *see also* S.C. Const. art. II, § 10 ("The General Assembly shall . . . establish procedures for contested elections, and enact other provisions necessary to the fulfillment and integrity of the election process."). Statutes which are in derogation of the common law must be strictly construed. *See Doe v. Brown*, 331 S.C. 491, 496, 489 S.E.2d 917, 920 (1997).

I.

On September 4,[1] 2018, the Town of McBee held an at-large election to fill two seats on its Town Council. The five candidates for the two seats are Odom, Kemp McLeod, Donald Robinson, Sim Tyner, and Appellant Green; the two candidates with the most votes will fill the two seats. During the election, several people attempting to vote were challenged as nonresidents of McBee. This appeal centers upon votes cast by four of the challenged voters.

Section 7-13-830 of the South Carolina Code (2019) requires such challenged votes to be received, placed in an envelope, set aside, and delivered to the authority having control over the election (here, the Commission). This procedure was followed in the instant case, and the four sealed votes remain in the possession of the Commission. During a called meeting after the election, the Commission

[1] Appellants state in their brief the election was held on Wednesday, September 5. Odom states in his brief the election was held on Tuesday, September 4. The record on appeal contains nothing definitive as to the true date of the election, but during oral argument, counsel for the Commission stated the election was on September 4.

decided to not count these votes; the reasoning behind this decision is not in the record but is irrelevant to the issues before us. Not including these four votes, McLeod received 212 votes, Green received 209 votes, Odom received 208 votes, Robinson received 182 votes, and Tyner received 8 votes.

On September 6, 2018, Odom delivered a letter to the Commission in which he stated, "I would like to contest the official results" of the election. In the letter, he stated the four voters resided in McBee and were therefore qualified to vote in the election. In the letter, Odom also stated, "These contested votes will affect the outcome of the election." The clear import of his letter was that the four votes should be counted. Odom's contest letter was timely submitted pursuant to section 5-15-130 of the South Carolina Code (2004), which requires the filing of a written contest with the municipality's election commission. Section 5-15-130 further provides in pertinent part:

> [T]he Municipal Election Commission shall, after due notice to the parties concerned, conduct a hearing on the contest, decide the issues raised . . . and when the decision invalidates the election the council shall order a new election as to the parties concerned.

The Commission convened the required hearing on September 10, 2018; after a recess that day, the hearing resumed and concluded on September 25. The Commission heard testimony from Odom and the four challenged voters and heard arguments from counsel. The four challenged voters testified they were McBee residents at all appropriate times and further testified they voted for Odom. In its written decision, the Commission found the four voters were eligible to vote in the election. The Commission wrote: "Because adding the four votes to the total for Glenn Odom would have changed the outcome of the election, the Municipal Election Commission hereby invalidates the September 5, 2018 election and orders a new election as is required under S.C. Code Ann. § 5-15-130."

Odom appealed the Commission's decision to the circuit court, arguing the Commission erred in ordering a new election instead of simply counting the four votes and declaring he was a prevailing candidate. Citing section 5-15-130, the circuit court initially determined the only relief the Commission could grant was a new election. Odom filed a motion for reconsideration, arguing the circuit court erred in ordering a new election. He contended the circuit court should have adjudicated the case under section 7-13-830 and should have ordered the Commission to count the challenged votes and declare him one of the prevailing

candidates. In the alternative, Odom argued that even if section 5-15-130 solely applied, the circuit court erred in interpreting this section to require a new election.

The circuit court granted Odom's motion for reconsideration and held the Commission erred in invalidating the election and ordering a new election. The circuit court concluded, "This case involves a vote challenge, which is specifically provided for in Title 7 under § 7-13-830 and not Title 5." The circuit court ruled:

> Section 7-13-830 provides the "Procedure when voter challenged" and requires that "each ballot whose challenge was decided in favor of the voter must be removed from the envelope, mingled, and ***counted and the totals added to the previously counted regular ballot*** total . . . ." § 7-13-830 (emphasis added). This language applies to this voter challenge case and dictates that the four votes the Commission determined should have been counted are added to the previously counted ballots. The result of following this plain language is that Odom is the election winner and the Commission erred in ordering a new election rather than declaring him a winner.
>
> To apply § 5-15-130 to invalidate an election and require a new election when challenged votes are decided in favor of the voter would render § 7-13-830 meaningless because its remedy of counting the votes would never be used.

Consequently, the circuit court overturned the Commission and remanded the proceedings to the Commission to count the challenged votes and announce Odom as a prevailing candidate. Appellants appealed the circuit court's decision to this Court. At this stage, all parties concede the four votes were legally cast, and the sole issue is whether the four votes should now be unsealed and counted or whether the election should be invalidated and a new election held.

II.

The cardinal rule of statutory construction is that the court ascertain and effectuate the intent of the legislature. *Greene v. S.C. Election Comm'n*, 314 S.C. 449, 452, 445 S.E.2d 451, 453 (1994). However, we must first attempt to construe a statute according to its plain language, and if the language of a statute is plain, unambiguous, and conveys a clear meaning, "the rules of statutory interpretation are

not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 525-26, 642 S.E.2d 751, 754 (2007).

After Odom filed his letter of contest, the plain language of section 5-15-130 required the Commission to convene a hearing and "decide the issues raised" in the contest. Section 5-15-130 further plainly provides that "when the [Commission's] decision invalidates the election the council[2] shall order a new election as to the parties concerned." The "issues raised" in Odom's contest were (1) whether the four voters who cast the challenged votes were truly eligible to vote and, (2) if they were, whether their votes should be counted. However, the Commission decided only the first of those two issues when it determined the four voters were eligible to vote; instead of then deciding whether it was feasible to count the four votes—which were sealed, set aside, and available for counting—the Commission skipped that inquiry and summarily concluded that adding the four votes to Odom's total "would have changed the outcome of the election." The Commission then invalidated the election and ordered a new election "as is required under [section 5-15-130]." As we will now explain, under the facts of this case, section 5-15-130 and our case law do not require the invalidation of the election and the holding of a new election.

III.

If an irregularity occurs during the course of an election, the election must be invalidated and a new election held only if the irregularity was of the sort that renders doubtful the result of the election. *See Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 381-82, 537 S.E.2d 543, 547 (2000); *Easler v. Blackwell*, 195 S.C. 15, 19, 10 S.E.2d 160, 162 (1940). Appellants contend that because the outcome of the election would be changed by adding the four votes to Odom's total, the Commission properly determined there was an irregularity requiring invalidation of the election. While an irregularity might have occurred as a result of the Commission's initial refusal to count the four provisional ballots, that irregularity was cured when the Commission ultimately decided the votes were legally cast. Under the facts of this case, we reject the notion that the Commission's decision that

[2] Here, the Commission, not the McBee Town Council, is the body that ordered a new election. The text of the statute indicates this was not the Commission's decision to make. No party has raised this apparent irregularity. Therefore, we do not address it.

these four votes were legally cast constituted an irregularity in the conduct of this election. We also reject the notion that counting four legally cast votes would constitute an irregularity under the facts of this case.

Even if we were to conclude there was an irregularity as urged by Appellants, we hold the irregularity was not of the sort requiring invalidation of this particular election. Our conclusion is compelled primarily by the simple fact that the four provisional ballots were preserved and delivered to the Commission as required by section 7-13-830, and the votes remain available for counting. "Voters who have done all in their power to cast their ballots honestly and intelligently are not to be disfranchised because of an irregularity, mistake, error, or even wrongful act, of the officers charged with the duty of conducting the election, which does not prevent a fair election and in some way affect the result." *Taylor*, 363 S.C. at 12-13, 609 S.E.2d at 502 (quoting *Berry v. Spigner*, 226 S.C. 183, 190, 84 S.E.2d 381, 384 (1954)).

In three cases, this Court has ordered a new election when the addition of uncounted but legally cast votes or the subtraction of counted but illegally cast votes cast doubt upon the results of an election. Our holdings in these cases were fact-specific, and the facts of the instant case must guide our determination of whether section 5-15-130 requires invalidation of this election. In *Gecy v. Bagwell*, we invalidated a Simpsonville City Council election in which two candidates sought one open seat. 372 S.C. 237, 239, 245, 642 S.E.2d 569, 570, 573 (2007). A total of 858 votes were cast. *Id.* at 239, 642 S.E.2d at 570. Of that sum, two votes were illegally cast. *Id.* at 240, 642 S.E.2d at 570. The original winner received 430 votes, the original second-place finisher received 427 votes, and one vote was cast for a write-in candidate. *Id.* at 239, 642 S.E.2d at 570. The winner was required to receive a majority of the votes cast to be elected. *Id.* at 240, 642 S.E.2d at 570. With the two illegal votes being set aside, a total of 856 legal votes were cast, thereby requiring the winner to have received at least 429 votes. Because the two illegal votes had <u>not</u> been identified and separated from the legal votes, there was no way to tell for which candidate(s) the two illegal votes had been cast; it was therefore possible the winner received only 428 votes out of the 856 legal votes cast, which was exactly 50% and not a majority. *See id.* Because this would have resulted in the top finisher not receiving the required majority of the votes cast, we held the outcome of the election was in doubt, invalidated the election, and ordered a new election. *Id.* at 242-43, 642 S.E.2d at 571-72.

In *Easler v. Blackwell*, we invalidated an election for school trustees in Spartanburg County and ordered a new election. 195 S.C. at 23, 10 S.E.2d at 164.

Six candidates ran for three trusteeships. *Id.* at 18, 10 S.E.2d at 162. The candidate with the most votes would serve for three years, the candidate with the second-most votes would serve for two years, and the candidate with the third-most votes would serve for one year. *Id.* at 19, 10 S.E.2d at 162-63. A total of 690 votes were cast; the results were remarkably close, with the candidates receiving 347, 346, 346, 344, 339, and 336 votes, respectively. *Id.* at 18, 10 S.E.2d at 162. The board of canvassers sustained the validity of the election of the top three finishers despite a host of irregularities occurring during the election, including two people who were allowed to vote despite not having paid their poll tax and more than 100 voters being allowed to vote after the polls had closed. *Id.* at 17-18, 10 S.E.2d at 162. There was no way to tell for which candidate(s) the illegal votes were cast. *See id.* at 19-21, 10 S.E.2d at 162-63. We considered the closeness of the vote tally and concluded that because there was no way to determine for whom the illegal votes had been cast, the election must be invalidated and a new election held. *Id.* at 19-23, 10 S.E.2d at 162-64.

In *Broadhurst v. City of Myrtle Beach Election Commission*, three candidates were in a runoff election for two seats on Myrtle Beach City Council. 342 S.C. at 378, 537 S.E.2d at 545. Voters were permitted to vote for two candidates in the runoff. *Id.* Rachel Broadhurst finished third, 327 votes behind the first-place finisher and 212 votes behind the second-place finisher. *Id.* However, an electronic voting machine at a voting precinct malfunctioned, and it was determined that as many as 231 votes were cast at that machine. *Id.* There was no way to tell for which candidate(s) the 231 votes were cast. *Id.* There was no dispute that it was impossible for Broadhurst to have finished in first place, even if all 231 votes had been cast for her. *See id.* at 378, 537 S.E.2d at 545. We observed that while it was mathematically unlikely that Broadhurst would have received enough votes to move into second place, it was still possible. *Id.* at 382, 537 S.E.2d at 547. Therefore, we concluded the results of the election were in doubt, invalidated the election, and ordered a new city-wide runoff election including all three candidates. *Id.* at 387, 537 S.E.2d at 550.

Easler, *Gecy*, and *Broadhurst* are distinguishable from the instant case, as all three of those cases involved elections in which there was no way to tell for whom the disputed votes were cast; consequently, the only conceivable conclusion was that the results of the election were in doubt, and the only remedy in those cases was a new election. However, in the instant case, there is no dispute that the four voters were allowed to cast provisional votes. The four votes were placed in envelopes, the envelopes were sealed, and the envelopes were set aside and delivered to the Commission. The four votes are available for counting.

Appellants rely upon *Armstrong v. Atlantic Beach Municipal Election Commission*, 380 S.C. 47, 668 S.E.2d 400 (2008), for the proposition that the only relief that may be ordered in this case pursuant to section 5-15-130 is a new election. In *Armstrong*, there were two candidates for mayor of Atlantic Beach. *Id.* at 48, 668 S.E.2d at 401. Candidate Pierce won by one vote over candidate Armstrong. *Id.* Armstrong filed a protest, and the municipal election commission ordered a new election to be held after determining four voters who were not allowed to vote should have been allowed to vote. *Id.* On appeal, the circuit court upheld the election commission's order requiring a new election but ordered the filing period for candidates to be reopened. *Id.* Only Pierce, the original winner, appealed to this Court. *Id.* In affirming the circuit court's decision to order a new election, we held the one-vote spread rendered the result of the election doubtful and required a new election. *Id.* at 48-49, 668 S.E.2d at 401. Further, in reversing the circuit court's directive that the filing period be re-opened, we stated, "The only relief the Commission may order is 'a new election as to the parties concerned.' S.C. Code Ann. § 5-15-130 (2004). The circuit court does not have the authority to order any further relief." *Id*. at 49, 668 S.E.2d at 401. Appellants contend this statement makes it clear that ordering a new election is the only remedy the Commission may grant under section 5-15-130. We disagree.

Our statement that "[t]he only relief the Commission may order is 'a new election as to the parties concerned'" was made in the context of explaining that section 5-15-130 specifically provides that if a new election is ordered, the new election is restricted solely to "the parties concerned." Naturally, "the parties concerned" were the original candidates; therefore, reopening the filing period to other candidates would have been in violation of the statute. Appellants have taken the first half of the quoted passage from *Armstrong* ("[t]he only relief the Commission may order is a new election") out of context and have attempted to turn it into an unduly restrictive application of section 5-15-130.

As noted, we also held in *Armstrong* that the one-vote spread, coupled with four voters not being allowed to vote rendered the result of the election doubtful and required a new election. Some of the facts in *Armstrong* certainly resemble the facts of the instant case; however, those facts are distinguishable on a key point: in *Armstrong*, four voters "were denied the right to vote." 380 S.C. at 48, 668 S.E.2d at 401. Consequently, there were no provisional ballots to be counted once it was determined the voters should have been allowed to vote. However, in the instant case, the four voters were allowed to cast provisional votes, which were set aside and preserved and are available for counting. At the least, the issue raised by Odom

in the instant case—that the four challenged votes are identifiable and available for counting—was not raised in *Armstrong*. This is a critical distinction between *Armstrong* and the instant case; thus, we conclude our holding in *Armstrong* is inapplicable to this case.

Appellants contend nothing in section 5-15-130 contemplates the counting of the four votes that were sealed and set aside. We disagree. As we noted above, section 5-15-130 plainly requires a new election only when the Commission's decision "invalidates the election." The statute required the Commission to "decide the issues raised," and one of the issues raised by Odom's contest was whether the four votes should be counted. When the Commission decided the votes were legally cast, the Commission should have decided the votes should be counted. There is no evidence in the record and there is no provision of law to support the Commission's conclusion that a decision to count the votes would "invalidate the election," especially since the four provisional votes are available to be counted; if anything, the facts of this case, the law, and common sense all dictate the conclusion that the counting of these votes would preserve the integrity of the election process and propel the election to its legitimate end. These four voters did "all in their power to cast their ballots honestly and intelligently" and should not be disfranchised. *See Taylor*, 363 S.C. at 12-13, 609 S.E.2d at 502.

In drafting section 5-15-130 as it did, the General Assembly fulfilled its constitutional duty to preserve the integrity of the voting process. *See* S.C. Const. art. II, § 10 ("The General Assembly shall . . . establish procedures for contested elections, and enact other provisions necessary to the fulfillment and integrity of the election process."). A plain reading of the statute, as applied to the facts of this case, compels us to hold the four votes must be counted and applied to the appropriate candidate(s).

IV.

We have concluded that section 5-15-130, under the facts of this case, requires the counting of the four provisional votes and does not require a new election; therefore, we need not address Appellants' contention that the circuit court misapplied the provisions of section 7-13-830. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

V.

We affirm the circuit court's decision to remand the proceedings to the Commission. We modify the circuit court's order in two ways: first, we hold section 5-15-130, standing alone, requires the four votes to be counted; second, to the extent that the circuit court's decision can be read to order the Commission to declare Odom a prevailing candidate without the four votes first being counted, we hold the four votes must first be counted before the results of the election can be determined. We remand to the Commission and order it to unseal the four provisional votes and apply those votes to the vote totals of the candidate(s) for whom the votes were cast, with the results of the election to then be declared accordingly.

AFFIRMED AS MODIFIED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Andrew P. Neumayer, Respondent,

v.

Philadelphia Indemnity Insurance Company, Primary Colors Child Care Center, Jocelyn Knox DeMartelare, and Asia N. Partman, Defendants,

Of Whom Philadelphia Indemnity Insurance Company is the Appellant.

Appellate Case No. 2016-001710

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

Opinion No. 27902
Heard March 5, 2019 – Filed July 24, 2019

REVERSED

Phillip E. Reeves, of Gallivan, White & Boyd, PA, of Greenville, Curtis W. Dowling and Matthew G. Gerrald, both of Barnes, Alford, Stork & Johnson, LLP, of Columbia, for Appellant.

Blake A. Hewitt, of Bluestein Thompson Sullivan LLC, and Gerald Eugene Reardon, both of Columbia, for Respondent.

JUSTICE HEARN: In this case, we decide whether notice clauses in automobile insurance policies are rendered meaningless by Section 38-77-142(C) of the South Carolina Code (2015)[1]. The trial court found the clause in this policy[2] void and accordingly required the insurance company to pay the full default judgment entered against its insured. The insurer appealed, and we now reverse.

FACTS

On January 25, 2013, a bus driven by Defendant Asia Partman struck Respondent Andrew Neumayer while he was a pedestrian in Cayce, South Carolina. EMS transported Neumayer to Lexington Medical Center where he was diagnosed with a ruptured spleen, broken left ribs, left humerus fracture, left pneumothorax, and a punctured lung. After eight days in the hospital and medical costs of approximately $122,000, Neumayer was released.

Partman worked for Defendant Primary Colors Child Care Center, and in November of 2013, Neumayer filed a lawsuit against both defendants, alleging negligence against Partman and Primary Colors. The defendants did not answer or

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[1] "Any endorsement, provision, or rider attached to or included in any policy of insurance which purports or seeks to limit or reduce the coverage afforded by the provisions required by this section is void."

[2] The notice and cooperation provision at issue in this case is located under the "Business Auto Conditions" section and states:

> **2. Duties In The Event Of Accident, Claim, Suit Or Loss**
> We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:
> **a.** In the event of "accident", claim, "suit" or "loss", you must give us or our authorized representative prompt notice of the "accident" or "loss."
> * * *
> **b.** Additionally, you and any other involved "insured" must:
> * * *
> **(2)** Immediately send us copies of any request, demand, order, notice, summons or legal paper received concerning the claim or "suit".

respond in any fashion, and after a default judgment was entered, the court held a damages hearing, where it awarded Neumayer $622,500.

Over eighteen months after the entry of default, Philadelphia Indemnity Insurance Co. (Philadelphia), Primary Colors' insurance carrier, received notice that its insured was involved in a lawsuit that culminated in a default judgment. While the record is unclear as to why it took eighteen months to notify Philadelphia, it ultimately received notice when Neumayer's counsel faxed documents seeking to collect $622,500. Philadelphia declined to pay that amount, instead asserting its indemnification obligation was limited to $25,000 because South Carolina jurisprudence requires an insurer to pay only the minimum limits when it is substantially prejudiced by its insured's failure to provide notice of a lawsuit. Further, Philadelphia contended the failure to receive notice of the underlying lawsuit prevented an opportunity to investigate and defend.

Thereafter, Neumayer filed this declaratory judgment action asking the court to require Philadelphia to pay the judgment in full. Philadelphia answered and asserted a counterclaim against Neumayer and cross-claims against officials at Primary Colors, arguing that its indemnity obligation was limited to $25,000. Both parties moved for summary judgment, and after a hearing, the court found in favor of Neumayer. The circuit court framed the issue as "whether or not Philadelphia can properly reduce the available coverage to the statutory minimum through a cooperation provision in the Policy." Relying on section 38-77-142(C), the court held an insured's breach of a notice clause cannot reduce the amount of available coverage. Further, the court cited to this Court's decision in *Williams*, where we held a family step-down provision was void under section 38-77-142(C) because it purported to reduce coverage from the policy's liability limits to the minimum amounts prescribed in section 38-77-140.[3] Philadelphia appealed to the court of appeals, and we certified the case pursuant to Rule 204(b), SCACR.

ISSUE

Did the circuit court err in finding section 38-77-142(C) invalidated the notice and cooperation clause in a policy providing higher limits than statutorily required?

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[3] *Williams v. Gov't Employees Ins. Co. (GEICO)*, 409 S.C. 586, 762 S.E.2d 705 (2014).

STANDARD OF REVIEW

When cross motions for summary judgment are filed, the issue is decided as a matter of law. *Wiegand v. U.S. Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011). When reviewing an insurance policy, the general rules of contract construction apply. *B.L.G. Enterprises, Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). An insurer may impose conditions on a policy provided they do not contravene public policy or violate a provision of law. *Williams*, 409 S.C. at 598, 762 S.E.2d at 712. Further, the interpretation of a statute is a question of law, which we review de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

DISCUSSION

Philadelphia contends the circuit court's decision, if upheld, would render obsolete all notice clauses in insurance policies, provisions that have been prevalent since the inception of automobile liability insurance, thereby effecting a sea change in South Carolina insurance law. Conversely, Neumayer rejects this assertion, arguing that section 38-77-142(C) bars these clauses. We agree with Philadelphia.

In order to fully address the issue and clarify any ostensible inconsistencies in South Carolina appellate jurisprudence in this area, we examine the purpose of notice clauses and trace their history in this state. Nearly every insurance policy contains a provision requiring the insured to timely notify its insurer when a lawsuit is filed against the insured. Common sense dictates that the insurer must have notice of a claim or lawsuit in order to properly investigate and defend against it, and these clauses ensure that the insurer receives notice by imposing this obligation on the insured. *Factory Mut. Liab. Ins. Co. of Am. v. Kennedy*, 256 S.C. 376, 381, 182 S.E.2d 727, 729 (1971). Despite their apparent straightforward purpose, litigation involving notice and cooperation clauses has ensued for over a century. As early as 1907, this Court discussed a notice clause, holding that the insured's duty to "send the summons immediately to the insur[ance] company, means that these things should be done with reasonable promptness under the circumstances . . . ." *Edgefield Mfg. Co. v. Maryland Cas. Co.*, 78 S.C. 73, 81, 58 S.E. 969, 971 (1907). Subsequent cases considered the effect of these clauses. *See, e.g.*, *Walker v. New Amsterdam Cas. Co.*, 157 S.C. 381, 154 S.E. 221, 222 (1930) (discussing a policy that required the insured "give immediate written notice of any accident, and like notice of any claim or suit resulting therefrom, together with every summons or other process" to the insurer); *Brown v. State Farm Mut. Auto. Liab. Ins. Co.*, 233 S.C. 376, 380, 104

S.E.2d 673, 674 (1958) (assuming, without deciding, that the insurance policy's notice clause was a condition precedent to coverage but finding the issue of whether the insurer waived that provision is a jury question).

Courts eventually recognized the potential inequities in permitting an insurer to avoid coverage to an innocent third party merely because the at-fault party—the insured—did not inform its insurer of a lawsuit. Accordingly, many jurisdictions, including South Carolina, judicially adopted a notice-prejudice rule, whereby the insurer had the burden to show that it was substantially prejudiced by the failure of its insured to comply with the notice and cooperation provisions. *Vermont Mut. Ins. Co. v. Singleton By & Through Singleton*, 316 S.C. 5, 12, 446 S.E.2d 417, 421 (1994) ("Where the rights of innocent parties are jeopardized by a failure of the insured to comply with the notice requirements of an insurance policy, the insurer must show substantial prejudice to the insurer's rights."); *Factory Mutual*, 256 S.C. at 381, 182 S.E.2d at 729–30 ("[W]e think the sound rule to be that, in an action affecting the rights of innocent third parties under an automobile liability insurance policy, the noncompliance by the insured with policy provisions as to notice and forwarding suit papers will not bar recovery, unless the insurer shows that the failure to give such notice has resulted in substantial prejudice to its rights."); *Squires v. Nat'l Grange Mut. Ins. Co.*, 247 S.C. 58, 67, 145 S.E.2d 673, 677 (1965) (placing the burden of proof on the insurer to demonstrate substantial prejudice). This rule prevented an insurer from relying on an immaterial breach by its own insured as a defense to paying an injured third party. Throughout the latter part of the twentieth century, the notice-prejudice rule continued to gain support, and it is now clearly the majority rule. *Century Sur. Co. v. Hipner, LLC*, 377 P.3d 784, 788 (Wyo. 2016) ("A vast majority of jurisdictions now follow the modern trend and have adopted the notice-prejudice rule.").

This Court continued to require a showing of substantial prejudice even as our General Assembly extensively amended the laws governing automobile insurance. Prior to 1974, South Carolina motorists were not required to procure liability insurance before registering and operating a vehicle. S.C. Code Ann. §§ 46-135 through 46-138.2 (1962). Instead, the legislature only mandated insurance for those who incurred too many traffic violation points on their record or who caused an accident. *Id.* During this period of "voluntary insurance," we continued to adhere to the majority view that insurers could not escape liability to an innocent party when its insured failed to comply with a notice clause unless the insurer proved it was substantially prejudiced by the failure to receive timely notice. *Factory Mutual*, 256

S.C. at 381, 182 S.E.2d at 729–30 (applying the substantial prejudice requirement where the General Assembly sought to protect injured motorists, "short of compulsory insurance, by the enactment of financial responsibility and uninsured motorist statutes").

However, in 1974, the General Assembly reformed our automobile insurance laws by passing the Automobile Reparation Reform Act. *See* S.C. Code Ann. 56-11-10, et seq (repealed and recodified in section 38-77-10 (1976)). This legislation brought South Carolina in line with the growing trend towards compulsory insurance by requiring every motorist to obtain liability insurance in order to provide protection to those injured by the negligence of another. *Faizan v. Grain Dealers Mut. Ins. Co.*, 118 S.E.2d 303, 311 (N.C. 1961) (noting that many states have compulsory insurance laws); *Shores v. Weaver*, 315 S.C. 347, 354, 433 S.E.2d 913, 916 (Ct. App. 1993) (discussing the transition from voluntary to mandatory insurance). With the adoption of mandatory insurance, the question arose whether an insurer could still rely on the notice clause to defeat statutorily required coverage. The court of appeals addressed this issue in *Shores*, holding an insurer must pay the minimum limits required by law even if it could prove substantial prejudice.

In *Shores*, an innocent passenger in the insured's vehicle was severely injured in an accident. *Id.* at 349, 433 S.E.2d at 913. Shortly thereafter, the driver's insurance company was notified of the claim and assigned it to a local adjuster. The passenger's lawyer attempted to contact the adjuster, offering to settle for the policy's mandatory minimum limit of $15,000. The adjuster refused and three years later, the passenger sued the insured, who failed to forward the pleadings to his carrier. *Id.* at 349, 433 S.E.2d at 914. Approximately two more years passed and following the insured's default and a damages hearing, the court entered judgment for $250,000. Shores, the plaintiff, filed a declaratory judgment action seeking to recover the insured's policy limits, and the insurer moved for summary judgment based on the insured's failure to comply with the notice provision. *Id.* After discussing the shift from voluntary to mandatory insurance, the court held, "[I]n accordance with the public purpose of protecting innocent third parties through mandatory insurance, [the insured's] violation of a provision of the policy providing this mandatory minimal coverage did not defeat or void that coverage." *Id.* at 355, 433 S.E.2d at 917. The court's rationale was grounded on the fact that the legislature mandated minimum limits coverage to protect innocent third parties. *Id.* at 356, 433 S.E.2d at 917. In essence, a contrary holding would have permitted an insurer to deny the very coverage that the General Assembly mandated that all motorists

obtain, effectively nullifying the legislature's efforts to safeguard the public. *Id.* at 355, 433 S.E.2d at 917. Accordingly, after *Shores*, an insurer could no longer rely on a policy's notice clause to deny mandatory minimum limits coverage to an injured third party, regardless of prejudice. However, *Shores* left unanswered whether an insurer would be required to pay *more* than minimum limits when the policy at issue contained liability limits above the mandatory minimum.

The court of appeals addressed this precise question in *United Services Automobile Association v. Markosky*, 340 S.C. 223, 530 S.E.2d 660 (Ct. App. 2000). There, Markosky's bicycle collided with a motor vehicle driven by Frazier. *Id.* at 224, 530 S.E.2d at 661. Markosky sued Frazier, who failed to notify her insurance carrier, State Farm. Eventually, a default judgment was entered against Frazier, and the parties agreed that Markosky's damages were at least $65,000. The policy limits under Frazier's State Farm policy were $50,000 per person, and $100,000 per accident. *Id.* at 225, 530 S.E.2d at 661. Pursuant to *Shores*, State Farm paid the mandatory minimum limit—$15,000—but refused to pay more, citing Frazier's failure to comply with the notice provision. Thereafter, Markosky's UIM carrier, USAA, paid the remaining $50,000 and sought a judicial declaration that State Farm reimburse USAA the additional $35,000 that State Farm should have paid. *Id.* at 225, 530 S.E.2d at 662. The court of appeals agreed with State Farm, holding that the notice-prejudice rule still controlled when policies in excess of the mandatory minimum limits were involved. Accordingly, an insurer could continue to rely on its notice clause to defend against coverage above the mandatory minimum if it proved substantial prejudice.

Shortly before *Markosky*, the General Assembly again significantly reformed this State's automobile insurance laws, adding section 38-77-142, which became effective in 1999.[4] Relevant to our discussion today are subsections (B) and (C) of section 38-77-142. Subsection (B) provides, *inter alia*,

> If an insurer has actual notice of a motion for judgment or complaint having been served on an insured, the mere failure of the insured to turn the motion or complaint over to the insurer may not be a defense to the insurer, nor void the endorsement or provision, nor in any way relieve

[4] *Markosky* did not address this statute, as the accident in question occurred approximately five years before the statute's effective date.

> the insurer of its obligations to the insured, provided the insured otherwise cooperates and in no way prejudices the insurer.

Section 38-77-142(C) provides, "Any endorsement, provision, or rider attached to or included in any policy of insurance which purports or seeks to limit or reduce the coverage afforded by the provisions required by this section is void."

This Court has previously considered both sections, first addressing subsection (B) in *Cowan v. Allstate Insurance Company*[5] and later discussing subsection (C) in *Williams*. In *Cowan*, Allstate issued a policy providing liability coverage for its insured. 357 S.C. at 627, 594 S.E.2d at 276. Thereafter, a permissive user of the vehicle was involved in an accident with two other people, who then sued the insured and obtained a default judgment. In addition to failing to answer, the insured never notified Allstate, who knew about a potential claim only through a letter of representation it received from plaintiffs' counsel. *Id.* Indeed, Allstate never received notice of a lawsuit filed against its insured until the plaintiffs sought to recover their judgment a month after the entry of default. Allstate refused to pay, and the plaintiffs filed suit seeking payment. Both parties filed motions for summary judgment, and the trial court found in favor of Allstate. *Id.* at 628, 594 S.E.2d at 276.

The court of appeals affirmed, holding section 38-77-142(B) modified *Shores* and permitted Allstate to rely on its notice clause as a defense because it did not have *actual* notice of the lawsuit pursuant to the statute. *Cowan v. Allstate Ins. Co*., 351 S.C. 626, 631-32, 571 S.E.2d 715, 718 (Ct. App. 2002) rev'd, 357 S.C. 625, 594 S.E.2d 275 (2004). The court reasoned that by stating in subsection (B) that an insurer who has actual notice of a suit cannot enforce a notice clause, the General Assembly must have intended the reverse proposition to be true so that an insurer without notice could rely on its notice clause as a defense to deny a claim brought by a third party. However, this Court reversed, holding that subsection (B) did not alter the *Shores* framework and relieve insurers of their obligation to pay a judgment up to the mandatory minimum limits, regardless of prejudice.

Recently, in *Williams*, this Court addressed section 38-77-142(C), holding that subsection invalidated a family step-down provision because it purported to reduce the amount of coverage from the policy limit to the mandatory minimum limits. 409 S.C. at 603, 762 S.E.2d at 714. There, Edward and Annie Murry were killed after a train collided with their vehicle. *Id.* at 591, 762 S.E.2d at 708. The

[5] 357 S.C. 625, 594 S.E.2d 275 (2004).

Murry's were married, and both were named insureds under a GEICO policy with limits of $100,000 per person, not to exceed $300,000 per occurrence. *Id.* However, the policy also included a step-down provision, which reduced coverage to the mandatory minimum limits for injured family members. *Id.* at 592, 762 S.E.2d at 708. Both personal representatives filed a declaratory judgment seeking to determine the amount of coverage available, and the trial court ruled in favor of GEICO, finding the policy unambiguous and stating the step-down provision did not violate public policy or section 38-77-142(C). *Id.* at 593, 762 S.E.2d at 709.

This Court reversed, holding the step-down provision void under section 38-77-142(C) because it reduced the amount of coverage available under the policy. *Id.* at 608, 762 S.E.2d at 717. We acknowledged a split of authority in other jurisdictions concerning the viability of step-down provisions but agreed with those courts that found the provisions violated public policy. We agreed with the Supreme Court of Kentucky, which, in invalidating a similar provision, refused to embrace the antiquated argument that such provisions were designed to deter potential collusion between family members. *Id.* at 605, 762 S.E.2d at 715 (citing *Lewis v. West American Ins. Co.,* 927 S.W.2d 829 (Ky. 1996)). Quoting *Lewis*, this Court stated, "To uphold the family [step-down] exclusion would result in perpetuating socially destructive inequities." *Williams*, 409 S.C. at 605, 762 S.E.2d at 715.

In light of this historical framework, we turn to the issue before us. Philadelphia contends the circuit court erred by finding that section 38-77-142(C) and our holding in *Williams* expanded *Shores* to require insurers to pay up to policy limits, even if they are substantially prejudiced by their insured's failure to provide notice of a lawsuit. Additionally, Philadelphia asserts the notice clause is a condition precedent to coverage, and therefore, section 38-77-142(C) is not triggered. Conversely, Neumayer argues the notice provision is not a condition precedent and urges this Court to hold that the clause violates section 38-77-142(C). We note Philadelphia never argued in its motion for summary judgment that the notice clause was a condition precedent, and thus arguably advances a different argument on appeal than that raised to the circuit court. *See Stanley v. Atl. Title Ins. Co.*, 377 S.C. 405, 413, 661 S.E.2d 62, 66 (2008) (finding an issue unpreserved where the argument on appeal differed than raised below). However, it is not necessary that we find that notice provisions are conditions precedent to coverage because we agree with Philadelphia that the clause at issue here does not violate section 38-77-142(C) or *Williams*.

We are convinced that in enacting section 38-77-142(C) in 1999, the General Assembly did not intend to eviscerate settled law concerning notice clauses. These policy conditions balance the insurer's important interests in receiving notice of a lawsuit and an injured person's right to recover against a negligent motorist. The driving force behind the notice-prejudice rule is that there is "no sound reason…to permit a mere technical noncompliance to deprive an innocent third party of benefits to which he would otherwise be entitled." *Factory Mut. Liab. Ins. Co. of Am. v. Kennedy*, 256 S.C. 376, 381, 182 S.E.2d 727, 729 (1971). Rather than provide a "technical escape-hatch" for the insurer to deny coverage, the notice-prejudice rule balances both interests without a wholesale prohibition of these clauses. *See State ex rel. Div. of Admin., Office of Risk Mgmt. v. Nat'l Union Fire Ins. Co. of Louisiana*, 56 So. 3d 1236, 1246 (La. Ct. App. 2011) ("The function of the notice requirements is simply to prevent the insurer from being prejudiced, not to provide a technical escape-hatch by which to deny coverage in the absence of prejudice nor to evade the fundamental protective purpose of the insurance contract…."); *B.L.G. Enterprises, Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535–36, 514 S.E.2d 327, 330 (1999) ("[I]nsurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition."). Further, these clauses are routinely found in insurance policies and do not implicate the same public policy interests inherent in *Williams*. *See Harris v. Prudential Prop. & Cas. Ins. Co.*, 632 A.2d 1380, 1382 (Del. 1993) (holding an insurer must pay the mandatory minimum limit but may rely on a cooperation clause to defeat coverage in excess of that amount despite previously finding a household exclusion—similar to the provision in *Williams*—void).

Finally, the General Assembly presumably was aware of *Shores* when it amended the insurance laws. We believe the inclusion of section 38-77-142(B) demonstrates the legislature's recognition of the role notice provisions play in insurance contracts. Had the General Assembly intended to categorically prohibit the enforcement of notice clauses in all policies, it would have done so. We therefore refuse to read Section 38-77-142(C) to abolish notice and cooperation clauses in insurance contracts.

CONCLUSION

We hold the circuit court erred in ruling that section 38-77-142(C) invalidates the standard notice clause contained in this insurance policy. While *Shores* requires an insurer to provide the statutorily-mandated minimum coverage, an insurer may continue to invoke notice clauses to deny coverage above the statutory limits,

providing the insurer can prove that it was substantially prejudiced by its insured's failure to comply with the provision.[6] Accordingly, we reverse.

REVERSED.

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

[6] We note that because it is undisputed that Philadelphia did not receive notice until over *eighteen* months after the entry of the default judgment, substantial prejudice exists as a matter of law. *See Merit Ins. Co. v. Koza*, 274 S.C. 362, 364, 264 S.E.2d 146, 147 (1980) ("Here, prejudice is clearly established by the fact that a default judgment was entered against the insured.").

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

James Scott Cross, Petitioner.

Appellate Case No. 2016-001939

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Abbeville County
Frank R. Addy Jr., Circuit Court Judge

Opinion No. 27903
Heard May 3, 2018 – Filed July 24, 2019

REVERSED AND REMANDED

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

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, all for Respondent.

JUSTICE JAMES: James Scott Cross was convicted of first-degree criminal sexual conduct (CSC) with a minor and committing a lewd act on a minor. The trial court sentenced Cross to an aggregate prison term of twenty-five years. Cross appealed, and the court of appeals affirmed. *State v. Cross*, Op. No. 2016-UP-257 (S.C. Ct. App. filed June 8, 2016). We granted Cross's petition for a writ of certiorari. We reverse and remand for a new trial, holding the trial court erred in denying Cross's motion to bifurcate his trial.

I. FACTUAL AND PROCEDURAL HISTORY

A child (Minor) accused James Scott Cross of sexually abusing her when she was thirteen years old. The indicted charges arise from an incident that allegedly occurred during the afternoon of December 29, 2005. Minor claimed Cross and his wife visited Minor's parents in their home and that she and two other children went outside to play hide-and-seek with Cross in a field near her home. Cross was thirty-five years old at the time. Minor testified at trial that as it was getting dark, Cross followed her behind a tree and started to kiss her and touch her breasts and vagina. She testified Cross forced her to have vaginal intercourse and then threatened to harm her or her family if she told anyone. Minor testified she returned home immediately after the assault, went into her room, took a bath, and wrote about the assault in her diary the same evening. Her father testified that about one month later, he was looking for something in Minor's room while Minor was visiting her grandparents, picked the lock on Minor's diary, and read the incriminating entry. Minor's mother testified she gave the relevant diary pages to a county deputy who responded to the residence when she and Minor's father reported the incident to the Abbeville County Sheriff's Office on January 31, 2006. The diary pages were not accounted for at trial.

Minor was examined by a pediatrician on February 22, 2006. The pediatrician testified at trial that Minor "had basically a normal physical exam for a child." The pediatrician also testified that a sexual assault upon a thirteen-year-old female may or may not result in physical trauma. The pediatrician further testified that any minor trauma could have healed during the two months between the alleged incident and the physical examination.

In April 2006, Cross was indicted for one count of committing or attempting to commit a lewd act on a minor.[1] In 2013, Cross was indicted for first-degree CSC with a minor. The 2013 charge arose from the same allegations recited above. The offense of first-degree CSC with a minor is codified in section 16-3-655(A) of the South Carolina Code (2015); this section provides in pertinent part:

> (A) A person is guilty of criminal sexual conduct with a minor in the first degree if:
>
> . . . .
>
> (2) *the actor engages in sexual battery* with a victim who is less than sixteen years of age *and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C)* or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D).

(emphasis added). Section 23-3-430(C) of the South Carolina Code (Supp. 2018) lists twenty-three qualifying sex-related offenses, including the offense of first-degree CSC with a minor. Cross had a prior conviction for first-degree CSC with a minor, having pled guilty to that offense in 1992. This 1992 conviction allowed the State to obtain an indictment for first-degree CSC with a minor under section 16-3-655(A)(2). Otherwise, Cross would have faced a charge of second-degree CSC with a minor under section 16-3-655(B)(1), which states a person is guilty of second-degree CSC with a minor if "the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age."

Cross was tried in October 2013. During a pretrial hearing, Cross moved for his trial to be bifurcated, arguing he would be unfairly prejudiced if evidence of his 1992 conviction and his sex offender registry status were introduced to prove the prior conviction element of the CSC charge. He requested that the lewd act charge and the sexual battery element of the first-degree CSC with a minor charge be presented to the jury first, and if the jury concluded he committed sexual battery,

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[1] The lewd act statute was repealed in 2012. The crime formerly known as lewd act is now known as third-degree CSC with a minor and is codified in section 16-3-655(C) of the South Carolina Code (2015).

then evidence of the prior conviction could be presented to the jury during the next stage of the trial. Cross argued:

> There are significant credibility issues, and we're up to our eyeballs here in credibility issues. I think that the minute that the jury hears . . . that [Cross] has been previously convicted of the exact same crime, given that we're talking about a crime against a child on two occasions, I think [the jury is] going to latch on to that and they're going to feel that it -- that it shows his predilection to this type of offense. It's going to be propensity evidence as received by them.

Cross urged the trial court to perform a Rule 403, SCRE, analysis if it decided to deny his motion to bifurcate. He argued his case is distinguishable from the first-degree burglary line of cases which permit the admission of this type of evidence to prove the prior conviction element of the first-degree burglary statute.[2] Cross contended the issue was more akin to the issue in *Old Chief v. United States*, 519 U.S. 172 (1997). Cross also offered to stipulate in camera that he has a prior qualifying conviction under section 23-3-430(C), contending there was no better proof of this element of the crime than his concession. He argued his in camera admission would not hamper the State's presentation of its case.

The trial court inquired whether a Rule 403 analysis would be appropriate. Of course, Cross argued such an analysis was necessary. The State argued a Rule 403 analysis was not necessary. The trial court ruled:

> I don't know what could be more probative -- when we're dealing with an element of the crime, nothing could be more probative than the fact that there's an indictment indicating that he was convicted of or pled guilty of a crime. I don't know that you get better evidence of that in terms of proving an element that the legislature has decided to include within the . . . CSC with a minor first

[2] *See, e.g.*, *State v. Benton*, 338 S.C. 151, 155-56, 526 S.E.2d 228, 230 (2000) (concluding the probative value of admitting the defendant's prior burglary and/or housebreaking convictions is not outweighed by its prejudicial effect when proving the prior conviction element of first-degree burglary).

> [statute]. So clearly the probative value for the State is extreme. The prejudicial effect, in my opinion, can be addressed by simply explaining to the jury that they're to draw no inference from the fact that he was previously convicted of this. I have every reason to believe that this is an intelligent jury. . . . So that would be my ruling on that. I don't see the need to bifurcate, and I appreciate your position, however, your objection is noted for the record.

Minor's trial testimony on direct examination is summarized above. Minor was cross-examined in detail at trial about a statement she gave to Anderson County law enforcement regarding an incident that Minor claimed occurred between her and Cross's brother at some point close in time to the indicted incident. In that statement, Minor related that Cross's brother had performed oral sex on her while they were watching television. According to the statement, Minor related that on another occasion, the brother performed oral sex on her and then had sexual intercourse with her for fifteen or thirty minutes. Minor testified on cross-examination that these two accounts were "a lie." However, on re-direct, Minor testified she indeed had sexual intercourse with the brother at the Cross home in Anderson after the indicted incident but before her father discovered her diary. She explained her earlier inconsistency involved only the amount of time the brother's assault lasted.

After Minor's testimony and over Cross's objection, the indictment and sentencing sheet establishing the 1992 conviction were introduced into evidence. The trial court then gave the following limiting instruction to the jury:

> In this case, the State has introduced this previous conviction whereby [Cross] was convicted of criminal sexual conduct with a minor. The only reason that this conviction is being admitted . . . is that it is an element -- it is one of the elements of the underlying charge that we are trying here today. So this conviction can only be considered by you, if at all, or if you conclude that it's true as an element of the current charge of CSC with a minor first degree, and this indictment, or this conviction, can be considered by you for no other purpose whatsoever. Again, the prior conviction is only evidence of one of the elements that the State has to prove that I'll explain to you later in order to support a conviction in the case that we

> are currently trying. You cannot consider in any way, shape, or form [Cross's] prior record or this prior conviction as evidence of his guilt of the charge that we're trying or the case that we are trying today.

The State did not introduce evidence Cross was required to register as a sex offender.

Following additional witnesses in the State's case-in-chief, Cross presented several witnesses in his defense. Cross also testified and claimed Minor's allegations were simply not true. Both he and his wife testified they had not visited Minor's home on the day in question, and they denied Cross played hide-and-seek with the children. Because there was no physical evidence of sexual abuse, the trial became a credibility contest.

At the end of the trial, when charging the law of first-degree CSC with a minor, the trial court explained to the jury:

> Now, ladies and gentlemen, the fact that [Cross] has previously been convicted of criminal sexual conduct with a minor can only be considered by you as an element of the present charge of criminal sexual conduct with a minor first degree and for no other purpose. You must not consider [Cross's] prior record or his prior convictions as any evidence of guilt with respect to the charges for which [Cross] is currently on trial.

The jury found Cross guilty of both first-degree CSC with a minor and committing a lewd act on a minor. The trial court sentenced Cross to an aggregate prison term of twenty-five years. The court of appeals affirmed. *State v. Cross*, Op. No. 2016-UP-257 (S.C. Ct. App. filed June 8, 2016). We granted Cross's petition for a writ of certiorari to review the court of appeals' decision. Cross argues the trial court erred in: (1) refusing to bifurcate his trial to allow the jury to determine guilt of the underlying sexual offense and then determine if he had the requisite prior conviction to establish first-degree CSC with a minor and (2) admitting evidence of his prior conviction for first-degree CSC with a minor in violation of Rule 403, SCRE.

II. STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The appellate court reviews

a trial [court's] ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." *State v. Torres*, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Douglas*, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006). "[T]he conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had." *State v. Heath*, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958).

III. DISCUSSION

In this case, we witness a collision between the State's obligation to prove the elements of the crime charged and a proper application of the South Carolina Rules of Evidence to the introduction of evidence necessary to prove one of those elements. Of course, evidence must first be relevant for it to be admissible at trial. Rule 402, SCRE. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Nevertheless, Rule 403, SCRE, provides in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Evidence of Cross's prior conviction was undoubtedly relevant, and evidence of Cross's prior conviction had insurmountable probative value; however, the prejudicial effect of that evidence was exceedingly high.

A person commits first-degree CSC with a minor when the person: (1) engages in sexual battery with an individual under eleven years of age or (2) engages in sexual battery with an individual under the age of sixteen and the person is someone who "has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D)." S.C. Code Ann. § 16-3-655(A) (2015). Because Minor was thirteen, because there was an allegation of sexual battery, because Cross had a prior conviction for an offense listed in section 23-3-430(C), and because Cross was required to register as a sex offender, section 16-3-655(A)(2) was the basis for upgrading the charge to first-degree CSC with a minor. Otherwise, as noted above, the sexual battery allegations and Minor's age would have supported a charge of second-degree CSC with a minor under section 16-3-655(B)(1).

Because Cross's prior conviction was an element of the crime charged, evidence of that prior conviction had significant probative value. Even Cross acknowledges evidence of the conviction was admissible. However, citing Rule 403, SCRE, Cross argues the probative value of this evidence, at the time it was introduced, was substantially outweighed by the danger of unfair prejudice. Cross contends bifurcation of the trial would have allowed the State to prove this element of the crime and would have completely removed the danger of unfair prejudice. Cross requested the trial court to permit the jury to first hear evidence of the sexual battery element of the first-degree CSC with a minor charge, hear closing arguments and a jury charge, and then deliberate. If the jury concluded the State had proven Cross committed sexual battery, then evidence of the prior conviction would be presented to the jury during the second stage of the trial. The trial court refused this request.

The United States Supreme Court has reviewed the general conundrum we encounter here, but in a setting not involving a request for a bifurcated trial. In *Old Chief v. United States*, 519 U.S. 172, 174 (1997), the defendant was charged with three crimes: (1) assault with a dangerous weapon, (2) using a firearm in relation to a crime of violence, and (3) violation of 18 U.S.C. § 922(g)(1) (possession of a firearm by anyone with a prior felony conviction). At trial, the defendant argued his offer to stipulate to his prior felony conviction rendered "the name and nature of [his prior] offense"—assault causing serious bodily injury—"inadmissible under Rule 403 of the Federal Rules of Evidence, the danger being that unfair prejudice from that evidence would substantially outweigh its probative value." *Id.* at 175. The prosecution refused to accept the defendant's stipulation, and the trial court overruled the defendant's Rule 403, FRE objection, thereby allowing the jury to receive evidence of his prior assault conviction. *Id.* at 177. The United States Supreme Court found the evidence of the name and nature of the prior conviction, although relevant, was unnecessary to prove the gun possession charge and was highly prejudicial to the defendant since the prior conviction was similar to the assault charge for which the defendant was on trial. *Id.* at 186. Because of this unfair prejudice, the Court held the name and nature of the defendant's previous conviction was not admissible to prove the felony conviction element after the defendant offered to stipulate to the prior conviction. *Id.* at 191-92. The Court warned that the risk of unfair prejudice to a defendant is "substantial whenever the official record offered by the Government would be arresting enough to lure a juror into a sequence of bad character reasoning." *Id.* at 185.

This Court and the court of appeals have declined to extend the reasoning in *Old Chief* to cases in which a defendant's prior conviction constituted an element of the offense to be proven at trial. For example, in some burglary cases, a first-degree burglary charge is predicated upon one of several statutory aggravating factors, one being when the defendant has "a prior record of two or more convictions for burglary or housebreaking or a combination of both." S.C. Code Ann. § 16-11-311(A)(2) (2015).

In *State v. Benton*, 338 S.C. 151, 153, 526 S.E.2d 228, 229 (2000), the defendant was charged with burglary. The defendant's two prior burglary convictions formed the basis for an upgraded charge of first-degree burglary. The defendant offered to stipulate in camera that he had two prior burglary convictions to avoid the introduction of those convictions to the jury. The defendant argued the evidence was highly prejudicial and its introduction deprived him of due process. *Id.* at 154, 526 S.E.2d at 229. The State refused to accept the stipulation, and the trial court declined to force the State to do so, relying upon *State v. Hamilton*, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997). *Benton*, 338 S.C. at 154, 526 S.E.2d at 229. We affirmed the court of appeals' reasoning in *Hamilton* and upheld the constitutionality of the first-degree burglary statute. *Id.* at 155, 526 S.E.2d at 230. We reiterated that evidence of other crimes is admissible to establish a material fact or element of the crime charged and stated "[f]or purposes of an element of first degree burglary . . . we conclude the probative value of admitting the defendant's prior burglary and/or housebreaking convictions is not outweighed by its prejudicial effect." *Id.* at 155-56, 526 S.E.2d at 230. We held the defendant's "two prior burglary convictions were offered to prove a statutory element of the current first degree burglary charge, not to suggest [the defendant] was a bad person or committed the present burglary because he had committed prior burglaries." *Id.* at 156, 526 S.E.2d at 230. We advised—to reduce possible prejudicial effects—a trial court should (1) limit evidence solely to the prior burglary convictions without admitting particular facts about the burglaries that form the basis for the prior convictions and (2) on request, instruct the jury on the limited purpose for which the prior convictions can be considered. *Id.* at 156, 526 S.E.2d at 230-31.

Subsequently, in *State v. James*, 355 S.C. 25, 35, 583 S.E.2d 745, 750 (2003), we found the probative value of introducing evidence of seven previous convictions for burglary, when the first-degree burglary statute calls for "two or more," "was outweighed by the very great potential for prejudice . . . and crossed the line established in *Old Chief*," despite the trial court's use of a limiting instruction. Prior

convictions of burglary and housebreaking are admissible to prove the prior conviction element of the burglary statute, but the admission of that evidence is still subject to a balancing of the probative value of the evidence versus its prejudicial effect pursuant to Rule 403, SCRE. *See id.* at 34, 583 S.E.2d at 749-50 (noting "none of the relevant authorities nullify the trial judge's traditional role in weighing the probative value of evidence versus its prejudicial effect or suggest that Rule 403 is displaced by operation of section 16-11-311(A)(2)"). We also noted, "[t]he admissibility of prior convictions is always limited by the traditional rules of evidence." *Id.* at 34, 583 S.E.2d at 750.

The admissibility of Cross's prior conviction remains subject to a trial court's Rule 403 gatekeeping duty to determine whether and when that evidence should be admitted. Our holding in *James* clarifies that Rule 403 maintains its efficacy in determining whether such evidence is ultimately admissible. *See* 355 S.C. at 34, 583 S.E.2d at 749-50 (noting *Hamilton* and *Benton* do not nullify the trial court's "traditional role in weighing the probative value of evidence versus its prejudicial effect or suggest that Rule 403 is displaced by operation of section 16-11-311(A)(2)").

Again, evidence of Cross's 1992 conviction for first-degree CSC with a minor had insurmountable probative value in proving the prior conviction element of first-degree CSC with a minor. However, evidence of the 1992 conviction was in no way probative of whether Cross committed the underlying sexual battery upon Minor in 2005.[3] The danger of unfair prejudice arising from the admission of the 1992 conviction at this stage of the trial was exceedingly high, as Cross was standing trial on charges of first-degree CSC with a minor and committing a lewd act on a minor. *See State v. Brooks*, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000) ("When the prior

[3] Rule 404(b) of the South Carolina Rules of Evidence may, in certain situations, allow for the introduction of another crime, wrong, or act for reasons unrelated to the State's obligation to prove a prior conviction as an element of first-degree CSC with a minor. Rule 404(b) allows for the introduction of such other acts "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Of course, the introduction of such evidence must survive a Rule 403 analysis. In the instant case, the record reveals Rule 404(b) was not in play.

bad acts are similar to the one for which the appellant is being tried, the danger of prejudice is enhanced.").

On the surface, the evidentiary issues in this case resemble the evidentiary issues present in the first-degree burglary cases discussed above. We acknowledge that in this case, the trial court followed the instructions we encouraged in *Benton* to assist in reducing the prejudicial effect arising from the introduction of Cross's prior conviction. *See Benton*, 338 S.C. at 156, 526 S.E.2d at 230-31 (advising that to reduce possible prejudicial effects, the trial court should: (1) limit evidence to the prior burglary and/or housebreaking convictions and (2) on request, instruct the jury on the limited purpose for which the prior crime evidence can be considered); *see also* Rule 105, SCRE ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."). Nevertheless, we distinguish this case from the first-degree burglary cases because of the inherently prejudicial stigma a prior sex-related offense undoubtedly carries. This rationale is in keeping with our recognition in *James* that "[t]he admissibility of prior convictions is always limited by the traditional rules of evidence." 355 S.C. at 34, 583 S.E.2d at 750.

"[A] bifurcated proceeding is not required in a non-capital case." *Chubb v. State*, 303 S.C. 395, 397, 401 S.E.2d 159, 161 (1991).[4] "[A bifurcated trial] is not required by either the common law, the statutory law, or the constitution of this State. It has now been settled by the United States Supreme Court that a bifurcated trial is not required by the United States Constitution." *State v. Bennett*, 256 S.C. 234, 242, 182 S.E.2d 291, 295 (1971). In *Spencer v. Texas*, 385 U.S. 554, 568 (1967), the United States Supreme Court stated, "Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure."

Rule 403, SCRE, provides the trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, etc. Here, the probative value of the evidence of the prior conviction is undeniable, as the State must prove the conviction

[4] Contrary to how the dissent characterizes our reference to *Chubb*, we cite *Chubb* only for the proposition that a bifurcated proceeding is not *required* in a criminal case. We do not suggest there is a history of bifurcated trials in criminal court in South Carolina.

as an element of the crime charged. However, even evidence with such significant probative value remains subject to the application of Rule 403, and the trial court is duty-bound to determine whether the probative value of this evidence is substantially outweighed by one or more of the considerations identified in Rule 403. Evidence of the 1992 conviction is in no way probative of the threshold issue of whether Cross committed a sexual battery upon Minor in 2005. Necessarily, therefore, the question of when evidence of the prior conviction should be admitted comes sharply into focus. In this case, the integrity of Rule 403 and the obligation of the State to introduce necessary evidence are both salvaged by the application of Rule 611(a), SCRE, which provides in pertinent part: "The court *shall exercise reasonable control over the mode and order of* interrogating witnesses and *presenting evidence* so as to (1) make the interrogation and presentation effective for the ascertainment of the truth . . . ." (emphasis added). Under the facts before us, Rule 611(a) required the trial court to exercise control over the order of presenting evidence in such a way that (1) allowed the State to prove an element of the crime, and (2) at the same time guarded against a violation of Rule 403.

The dissent sees the avenue of bifurcation as our unconstitutional adoption or sponsorship of a new rule of procedure. Specifically, the dissent complains that our reliance upon Rule 611(a) is inappropriate. We respectfully disagree. Our reliance upon Rule 611(a) stems from our recognition of the practical effect that should be given to its very terms, i.e., the trial "court shall exercise reasonable control over the . . . order of . . . presenting evidence so as to (1) make the . . . presentation effective for the ascertainment of truth." This is not a disguise for a motivation on our part to change the law or adopt a new rule of procedure. It is simply a plain reading of the English language. While there are certainly other settings in which Rule 611(a) would be applicable, its applicability here is undeniable: a party seeks to introduce relevant evidence, the evidence must be admitted, the evidence has high prejudicial effect, and a party requests the trial court to exercise its responsibility to control the order of presentation of that evidence so as to eliminate that prejudicial effect.

The dissent notes the influence the Federal Rules of Evidence have had upon the drafting of the South Carolina Rules of Evidence. The dissent points out that the "Note" to our Rule 611(a) states that our Rule 611(a) is identical to Federal Rule 611(a). While the wording of the two rules is not identical, we agree the import of the two rules is identical. The dissent then states Rule 611(a) does not "permit the court to create or change procedural rules." Interestingly, Federal Rule 611(a)(1)

specifically provides a trial court should exercise reasonable control over the mode and order of presenting evidence "so as to make those *procedures* effective for determining the truth." (emphasis added). Therefore, Federal Rule 611(a)(1) plainly cites the trial court's authority to control the *procedures* inherent in the presentation of evidence. It is apparent the drafters of Rule 611(a)(1) recognized an inherently procedural component of the mode and order of presenting evidence. It is equally apparent that, contrary to the position taken by the dissent, we are changing no procedural rule and are creating no procedural rule. We are simply recognizing what has been there all along.

In *People v. Calderon*, 885 P.2d 83 (Cal. 1994), the defendant was charged with second-degree burglary. He was previously convicted of attempted robbery, and the charging information in the burglary case referenced the attempted robbery conviction as a basis for sentencing enhancement. Under California law, the prosecution was required to prove the prior conviction, not as an element of the crime charged, but solely to secure sentencing enhancement. The defendant moved for bifurcation, requesting that the burglary charge be tried first, and in the event of a guilty verdict, the issue of the prior conviction be tried second. *Id.* at 86. At play in *Calderon* was section 1044 of the California Penal Code, which—in language very similar to Rule 611(a)—provided: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." The Supreme Court of California found that section 1044 granted trial courts the general authority to bifurcate trial issues and that section 1044 "vests the trial court with broad discretion to control the conduct of a criminal trial." *Calderon*, 885 P.2d at 88.

In *State v. Wareham*, 772 P.2d 960 (Utah 1989), the Supreme Court of Utah addressed the bifurcation issue in a case somewhat similar to the case at bar. The defendant was charged with aggravated sexual abuse of a child. An element of the crime of "aggravated sexual abuse of a child," as opposed to the crime of "sexual abuse of a child" was the defendant's commission of five or more separate acts of the same nature "before or after the instant offense." *Id.* at 961 (quoting Utah Code Ann. § 76-5-404.1 (Interim Supp. 1984)). Thus, five or more such acts constituted an element of the crime charged. The Court declined to decide whether the admission of this evidence, pursuant to the charging statute, was unconstitutional on due process grounds. *Id.* at 963-65. However, the Court then observed:

> Nevertheless, the courts have traditionally, and by necessity, had the power to control the order of proof in the interests of justice, fairness, and efficiency. The imposition of a bifurcation requirement to prevent prejudice is consistent with the power of this Court to supervise the order of presentation of evidence and other procedural matters.

Id. at 965. Thus, in language markedly similar to that in Rule 611(a), SCRE, the Supreme Court of Utah clearly recognized that trial courts are required to exercise control over the method and manner of presenting proof in a criminal trial; the object of such control is clear, and that is to promote "justice, fairness, and efficiency," or in the words of Rule 611(a), to make the presentation of evidence "effective for the ascertainment of the truth."

The *Wareham* Court then prescribed the appropriate method of trying such a case. The jury would first hear evidence as to whether the defendant committed the underlying act of sexual abuse of a child. *Id.* at 965. If the jury returned a guilty verdict, the jury would then hear evidence forming the basis for the elevation of the charge to aggravated sexual abuse of a child. *Id.* The Court also stated the trial court should give a limiting instruction at the beginning of the second phase of the trial to the effect that the finding of guilt of sexual abuse must not impact its decision as to whether the defendant previously committed the acts forming the basis for the elevated charge. *Id.* The Court wisely observed that while even the second phase of the trial might not be free from all danger of prejudice, during the first phase of the trial, "the defendant will at least have had the benefit of a determination made without the crushing weight of a multitude of prejudicial charges and evidence in support thereof." *Id.* at 965-66.

We conclude the trial court had the authority to grant Cross's motion to bifurcate. We find the trial court's refusal to grant the motion was an error of law. To repeat, evidence of Cross's 1992 conviction for first-degree CSC with a minor was certainly admissible because, without that evidence, the State could not possibly prove Cross was guilty of the first-degree CSC offense as indicted. However, as we have noted, the probative value of the evidence at the point in the trial when the evidence was introduced was substantially outweighed by the danger of unfair prejudice; that prejudice would have been totally eliminated had the trial been bifurcated.

We conclude the trial court's limiting instruction did not cure the overwhelming danger of unfair prejudice arising from the introduction of Cross's 1992 conviction. In the context of a Confrontation Clause violation, we have recognized that limiting instructions are sometimes insufficient to cure the danger of unfair prejudice. *See State v. McDonald*, 412 S.C. 133, 142, 771 S.E.2d 840, 844 (2015) (rejecting the State's invitation to find a trial court's limiting instruction curative of a Confrontation Clause violation). In *McDonald*, we noted, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.* (quoting *Bruton v. United States*, 391 U.S. 123, 135 (1968)). Further, in *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932), Judge Learned Hand noted an instruction to the jury to ignore an objectionable piece of testimony is the "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." He also described some instructions for a jury to disregard evidence as a legal "placebo." *See United States v. Delli Paoli*, 229 F.2d 319, 321 (2d Cir. 1956). The outcome in this case came down to the jury's evaluation of witness credibility, and we are unwilling to assume a jury would have the ability to limit its consideration of such prejudicial evidence to the State's need to prove the prior conviction element of the crime charged.

The procedure approved by the Supreme Court of Utah in *Wareham* would allow the State to present evidence of all elements of the crime charged and would remove any unfair prejudice that arose during the unitary trial. During the first stage of the bifurcated trial, the State would offer evidence in its attempt to prove the underlying factual predicate of section 16-3-655(A)(2): did Cross commit a sexual battery upon Minor, a person less than sixteen years of age? When the State rested, Cross could offer evidence if he chose to do so. Closing arguments and the trial court's charge to the jury would follow the introduction of evidence, and the jury would deliberate. If the jury concluded beyond a reasonable doubt Cross committed a sexual battery upon Minor, the second stage of the trial would commence. During the second stage, the State—and Cross if he so chose—would offer evidence pertinent to the second element of section 16-3-655(A)(2): has Cross been previously convicted of an offense listed under section 23-3-430(C), or was he required to register as a sex offender pursuant to section 23-3-430(D)? At the beginning of the second stage, the trial court, upon request, would instruct the jury that it must not consider its initial guilty verdict as evidence Cross had been previously convicted of an offense under section 23-3-430(C) or that he was required

to register as a sex offender. If the jury found the State had proven this element beyond a reasonable doubt, Cross would stand convicted of first-degree CSC with a minor.

IV. CONCLUSION

We hold that evidence of Cross's conviction for a specific offense under section 23-3-430(C) was admissible to prove the prior-conviction element of first-degree CSC with a minor. Therefore, the State must be allowed to introduce the conviction. However, we conclude the probative value of the conviction, at the time it was introduced, was substantially outweighed by the danger of unfair prejudice to Cross. The trial court's limiting instruction did not overcome the resulting prejudice. We therefore hold the trial court erred in refusing Cross's request that the trial be bifurcated.

Our holding has no effect upon questions of admissibility of a prior conviction when introduction of such evidence is sought pursuant to Rule 404(b), SCRE, nor does our holding prohibit the introduction of a prior conviction when the defendant "opens the door" to the introduction of such evidence during what would have otherwise been the first stage of the trial.

We reverse Cross's convictions and remand for a new trial on the charges of first-degree CSC with a minor and committing a lewd act on a minor.

REVERSED AND REMANDED.

BEATTY, C.J., KITTREDGE and HEARN, JJ., concur. FEW, J., dissenting in a separate opinion.

JUSTICE FEW: The Constitution of South Carolina—article V, section 4A—requires any change to the procedural law of our State to be submitted to the General Assembly. The constitution limits the power of this Court to correcting errors of law. "The Supreme Court shall constitute a court for the correction of errors at law under such regulations as the General Assembly may prescribe." S.C. CONST. art. V, § 5; *see State v. Asbury*, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997) ("This Court's scope of review is determined by our State constitution which limits our scope of review in law cases to the correction of errors of law." (citing S.C. CONST. art. V, § 5)). In *State v. Francis*, 152 S.C. 17, 149 S.E. 348 (1929), we stated, "We think it not out of place to once again call attention to the fact that in criminal cases, even in those where men have been sentenced to death, this court, under the Constitution of this state, is absolutely limited to the correction of errors of law." 152 S.C. at 61, 149 S.E. at 364. In this case, we violate both provisions of our constitution.

There can be no "error of law" in a trial court's refusal to take a particular action if there is no provision of law that requires the court to do so. In South Carolina, there is no provision of law that even permits a circuit court to bifurcate a non-capital criminal trial. As far as the record of this case indicates—and in my own personal experience—there has never been even one bifurcated non-capital criminal trial in the history of the state courts of South Carolina. It is simply not possible for there to be an error of law when a trial court decides not to take an action the law does not require, the proponent of the action cannot demonstrate is even permitted by the law, and the history of the State indicates has never been taken. There is no error of law.

The majority relies on the Rules of Evidence as authority for bifurcating a non-capital criminal trial. Importantly, we review a trial court's evidentiary rulings for abuse of discretion. *State v. Broadnax*, 414 S.C. 468, 473, 779 S.E.2d 789, 791 (2015). The majority holds, "Rule 611(a) required the trial court to" bifurcate this criminal trial. *See supra*, slip op. at 11. The suggestion the Rules of Evidence require a bifurcated trial is unprecedented. First, we have consistently held that evidentiary rulings are discretionary. *See, e.g.*, *Broadnax*, 414 S.C. at 473, 779 S.E.2d at 791. More importantly, Rule 611(a),

upon which the majority relies specifically, clearly does not require a bifurcated trial. The majority states it is relying on "simply a plain reading of the English language." I respectfully suggest that for a "plain reading" of a rule to support bifurcation, the rule must contain the word "bifurcation." Rule 611(a) does not come close.

Nor does Rule 611(a) permit the court to create or change procedural rules. *See United States v. Colomb*, 419 F.3d 292, 297-98 (5th Cir. 2005) (explaining "the powers of the district court" pursuant to Rule 611(a) are restricted to those "found in the text of the Rule").[5] In fact, there is not one published decision in the entire Rule 611(a) jurisprudence of this Nation in which a court has been so bold to say Rule 611(a) permits a bifurcated trial, much less "requires" it.[6]

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[5] Our "Note" to Rule 611(a) indicates it was "identical" to Federal Rule of Evidence 611(a) when our rule was adopted. The federal rule has subsequently been amended, which is why it is no longer identical. *See supra*, slip op. at 12.

[6] In response to this statement, the majority has scoured the Rule 611(a) jurisprudence across the country, and now makes reference to only two cases, neither of which support the majority's use of Rule 611(a) for this novel purpose. In the California case, *People v. Calderon*, 885 P.2d 83 (Cal. 1994), the requirement of proving the prior crime was not an element of the crime, 885 P.2d at 87, and the California court specifically did not hold the trial must be bifurcated, stating "we decline to declare a judicially created rule of procedure that would require bifurcation of the determination of the truth of a prior conviction allegation in *all* trials," 885 P.2d at 91. In California—unlike South Carolina—it is apparently permissible to have "judicially created rule[s] of procedure." *Id.*

In the Utah case—*State v. Wareham*, 772 P.2d 960 (Utah 1989)—the requirement was not proving one prior crime, but "more than five separate acts" of sexual violence. 772 P.2d at 961 (quoting Utah Code Ann. § 76-5-404.1(3)(g) (Supp. 1984). More importantly, the Utah case was not decided on any basis remotely similar to our Rule 611(a). Rather, the court based its decision on its interpretation of the underlying criminal statute. *See* 772 P.2d at 966 (explaining "this case can be decided on the preferred ground of statutory construction"). Finally, the Utah court's decision was driven by its attempt to avoid finding the admission of prior crimes

Nor may Rule 403 be read to permit trial courts to bifurcate a criminal trial. Rule 403 permits only that a trial court "may" exclude relevant evidence. The majority necessarily acknowledges the evidence may not be excluded in this case, repeatedly pointing to the "insurmountable" probative value of Cross's prior conviction. In an attempt to side-step the reality the evidence must be admitted, the majority constructs another unprecedented argument that Rule 403 allows a trial court to determine "when that evidence should be admitted." Unsurprisingly, the majority cannot point to one decision in the history of Rule 403 jurisprudence anywhere in the country suggesting Rule 403 authorizes a trial court to bifurcate a trial.

The majority recites a quote from *Chubb v. State*, 303 S.C. 395, 401 S.E.2d 159 (1991), in which this Court referenced the possibility of a "bifurcated proceeding." The majority has used the quote out of context to suggest that there is a history of bifurcated trials in criminal court. *Chubb* was a post-conviction relief proceeding arising out of a burglary case. 303 S.C. at 396, 401 S.E.2d at 160. The crime occurred prior to 1985, when section 16-11-310 of the South Carolina Code (1976) required that a defendant convicted of burglary receive a life sentence unless the jury recommended mercy.[7] The "bifurcated proceeding" we referred to in *Chubb* contemplated only the possibility of a separate sentencing proceeding in which the defendant might

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violated a Utah constitutional provision that has no counterpart under South Carolina law. *See* 772 P.2d at 966 (stating "we decline to reach the issue of whether § 76-5-404.1(3)(g) is invalid on state constitutional grounds").

[7] Section 16-11-310 provided, "Any person who shall commit the crime of burglary at common law shall . . . be imprisoned . . . during the whole lifetime of the prisoner; *provided, however*, . . . the jury may find a special verdict, recommending him to the mercy of the court, ..." *See Patrick v. State*, 349 S.C. 203, 211, 562 S.E.2d 609, 613 (2002) ("Under the old statute, a conviction for burglary without a recommendation for mercy carried a mandatory life sentence."). Section 16-11-310 now contains "Definitions," and the crime of burglary is broken out into three degrees. *See* S.C. Code Ann. §§ 16-11-310 to -313 (2015).

argue to the jury for mercy. We did not refer to the type of bifurcated trial Cross requested in which the State presents evidence in two separate phases. In addition, the burglary statutes were rewritten in 1985. Act No. 159, 1985 S.C. Acts 603. There is no longer any provision permitting the involvement of the jury in sentencing for burglary. The fact we addressed only sentencing, and the 1985 revisions to the burglary statutes, render misleading any modern reference to the now-obsolete "bifurcated proceeding" we referred to in *Chubb*. *Chubb* is irrelevant to this case.

The majority also suggests the trial court abused its discretion. The idea that a trial court both committed an error of law *and* abused its discretion in the same decision is of itself unprecedented. "Discretion," however, does not permit trial courts to take action they do not have the authority under the law to take. In *State v. James*, 355 S.C. 25, 583 S.E.2d 745 (2003), and *State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000), two cases relied on by the majority for the authority to bifurcate a non-capital criminal trial, this Court struggled with balancing the necessity of introducing evidence of the prior conviction—"insurmountable probative value"—against the danger of the jury using it for propensity. In neither case did we so much as mention the possibility of a bifurcated trial. Nor have we ever mentioned the possibility of a bifurcated trial in a non-capital criminal case. Until today, there was no such thing as a bifurcated non-capital criminal trial in the history of South Carolina. To suggest that a circuit court abused its discretion by deciding not to take an action that no provision of law permits, that as far as we know has never been taken, and that we do know has never been so much as discussed by this Court as a possibility, is unprecedented, and stretches the concept of an abuse of discretion beyond its rational limits.

But even if we accept the proposition the trial court had the authority to take the unprecedented act of bifurcating a non-capital criminal trial, the trial court in this case actually exercised its discretion. When Cross asked the court to bifurcate the trial, the court conducted a hearing, considered the request in the terms Cross articulated, and *decided* not to bifurcate. The majority specifically quotes the trial court's discretionary analysis. *See supra*, slip op. at 4. The trial court stated,

> The prejudicial effect, in my opinion, can be addressed by simply explaining to the jury that they're to draw no inference from the fact that he was previously convicted of this. I have every reason to believe this is an intelligent jury . . . . I don't see the need to bifurcate.

The trial court considered the State's arguments on probative value, considered Cross's arguments as to the danger of unfair prejudice, balanced the two as Rule 403 requires, and exercised its discretion in deciding not to bifurcate. To find an abuse of discretion in this circumstance is unprecedented.[8]

If the trial court's decision not to bifurcate the trial in this case is an abuse of discretion or an error of law, then there is no discretion remaining under Rule 403. *James* and *Benton* are overruled, because the Court has changed the law. This Court has promulgated a new categorical rule of procedure requiring bifurcation of all criminal trials where a prior offense is an element of the current crime. The Court's decision today is an improper exercise in rulemaking that revolutionizes criminal and civil trial practice under the thin guise of error correction.

If we were to follow the article V, section 4A procedure for rulemaking, I would vote for it. It is regrettable, however, this Court is creating this rule without following the procedure to which we are constitutionally bound. *See* S.C. Const. art. V, § 4A ("All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court

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[8] We are fond of telling trial judges what broad discretion we give them to balance probative value and unfair prejudice under Rule 403. *See State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014) ("'A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment.'" (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003))). In this case, however, we demonstrate that this "great deference" extends only to the point of whether the supreme court disagrees.

must be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly . . . ."); *see also State v. Beaty*, 423 S.C. 26, 43, 813 S.E.2d 502, 511 (2018) (acknowledging that "this Court's authority to promulgate rules is restricted by article V, section 4A of the South Carolina Constitution").

We are not having a "collision" and we are not in a "conundrum." *See supra*, slip op. at 6, 7. Like all governmental institutions and all men and women who serve them, we simply obey—or we violate—the constitutional limits on our authority. It is that simple.

I respectfully dissent.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Crystal L. Wickersham; Crystal L. Wickersham, as personal representative of the Estate of John Harley Wickersham Jr., Plaintiffs,

v.

Ford Motor Company, Defendant.

Appellate Case No. 2018-001124

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Opinion No. 27904
Heard January 29, 2019 – Filed July 24, 2019

CERTIFIED QUESTION ANSWERED

Kathleen Chewning Barnes, Barnes Law Firm, LLC; Ronnie Lanier Crosby, Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., both of Hampton, for Plaintiffs.

Adam H. Charnes and Thurston H. Webb, Kilpatrick Townsend & Stockton LLP, of Winston-Salem, NC; Joseph Kenneth Carter Jr. and Carmelo Barone

Sammataro, Turner Padget Graham & Laney P.A., of Columbia, for Defendant.
Steve A. Matthews, Haynsworth Sinkler Boyd, P.A., of Columbia; Victor E. Schwartz, Cary Silverman, and Phil Goldberg, Shook Hardy & Bacon LLP, of Washington, D.C., all for amicus curiae the Alliance of Automobile Manufacturers, Inc.

Gray Thomas Culbreath and Jessica Ann Waller, Gallivan White & Boyd, P.A., of Columbia, for amicus curiae the Product Liability Advisory Counsel, Inc.

Frank L. Eppes, Eppes & Plumblee, P.A., of Greenville, for amicus curiae the South Carolina Association for Justice.

JUSTICE FEW: Responding to two questions certified to us by the United States Court of Appeals for the Fourth Circuit, we hold traditional principles of proximate cause govern whether a personal representative has a valid claim for wrongful death from suicide, and whether—in a crashworthiness case—a person's own actions that enhance his injuries, as opposed to those that cause the accident itself, should be compared to the tortious conduct of a defendant in determining liability.

I. Facts and Procedural History

John Harley Wickersham Jr. was seriously injured in an automobile accident. After months of severe pain from the injuries he received in the accident, he committed suicide. *See Wickersham v. Ford Motor Co.*, 194 F. Supp. 3d 434, 435-37 (D.S.C. 2016) (a complete explanation of the facts of this case). His widow filed lawsuits for wrongful death, survival, and loss of consortium against Ford Motor Company in state circuit court. She alleged that defects in the airbag system in Mr. Wickersham's Ford Escape enhanced his injuries, increasing the severity of his pain, which in turn proximately caused his suicide. She included causes of action for negligence, strict liability, and breach of warranty.

Ford removed the cases to the United States District Court for the District of South Carolina. Ford then filed a motion for summary judgment in the wrongful death suit,

arguing Mrs. Wickersham has no wrongful death claim under South Carolina law because Mr. Wickersham's suicide was an intervening act that could not be proximately caused by a defective airbag. The district court denied Ford's motion. 194 F. Supp. 3d at 448. The court ruled Mrs. Wickersham could prevail on the wrongful death claim if she proved the enhanced injuries Mr. Wickersham sustained in the accident as a result of the defective airbag caused severe pain that led to an "uncontrollable impulse" to commit suicide. Ford renewed the motion during and after trial, but the district court denied both motions.

During trial, the parties disputed the cause of Mr. Wickersham's enhanced injuries. Mrs. Wickersham alleged the defective airbag caused them, while Ford argued Mr. Wickersham caused his enhanced injuries by being out of position.

The jury returned a verdict for Mrs. Wickersham on all claims. The jury found the airbag was defective and proximately caused Mr. Wickersham's enhanced injuries and suicide. However, the jury also found Mr. Wickersham's actions in being out of position enhanced his injuries, and found his share of the fault was thirty percent. The district court entered judgment for Mrs. Wickersham, but denied Ford's request to reduce the damages based on Mr. Wickersham's fault. Ford filed motions to alter or amend the judgment, for judgment as a matter of law, and for a new trial, all of which the district court denied.

Ford appealed, and the Fourth Circuit certified the following questions to this Court.

> 1. Does South Carolina recognize an "uncontrollable impulse" exception to the general rule that suicide breaks the causal chain for wrongful death claims? If so, what is the plaintiff required to prove is foreseeable to satisfy causation under this exception—any injury, the uncontrollable impulse, or the suicide?
>
> 2. Does comparative negligence in causing enhanced injuries apply in a crashworthiness case when the plaintiff alleges claims of strict liability and breach of warranty and is seeking damages related only to the plaintiff's enhanced injuries?

II. Recovery for Wrongful Death from Suicide

In its order of certification, the Fourth Circuit acknowledged this Court might restate the certified questions. In answering the first question, we find it necessary to do so.

South Carolina does not recognize a general rule that suicide is an intervening act which breaks the chain of causation and categorically precludes recovery in wrongful death actions. Rather, our courts have applied traditional principles of proximate cause to individual factual situations when considering whether a personal representative has a valid claim for wrongful death from suicide.

In *Scott v. Greenville Pharmacy*, 212 S.C. 485, 48 S.E.2d 324 (1948), we stated,

> In every case of this character the inquiry is: Was the injury a natural and probable consequence of the wrongful act, and ought it to have been foreseen in the light of the attendant circumstances? In this case the deceased took his own life by hanging. Can it be reasonably said that his tragic end was a natural and probable consequence of the sale to him of the barbiturate capsules, and should it have been foreseen in the normal course of events?

212 S.C. at 493-94, 48 S.E.2d at 328. In *Scott*, the plaintiff brought a wrongful death action against a pharmacy, claiming her husband committed suicide after becoming addicted to barbiturate capsules the pharmacy sold him in violation of state law. 212 S.C. at 487-88, 48 S.E.2d at 325. The circuit court dismissed the case. 212 S.C. at 487, 48 S.E.2d at 325. On appeal, we found "it would be going entirely too far . . . to hold that the unlawful sale of the barbiturate capsules brought about a condition of suicidal mania as the natural and probable consequence of the sale, or that this result should have been reasonably foreseen by the respondent." 212 S.C. at 495, 48 S.E.2d at 328.

Likewise, in *Horne v. Beason*, 285 S.C. 518, 331 S.E.2d 342 (1985), this Court affirmed the dismissal of a wrongful death action brought by the estate of Horne, a seventeen-year-old who hung himself with a cloth bathrobe belt tied to overhead bars in his jail cell shortly after being arrested. 285 S.C. at 521-22, 331 S.E.2d at

344-45. We explained, "Foreseeability is often a jury issue but not here." 285 S.C. at 522, 331 S.E.2d at 345. We applied standard proximate cause principles and found the defendants could not be expected to foresee that Horne would hang himself. 285 S.C. at 521-22, 331 S.E.2d at 344-45. We specifically addressed the unique facts of the case, stating "the presence of overhead bars is of no real significance" and there are "few things more unlike a dangerous instrumentality than a bathrobe belt." 285 S.C. at 521-22, 331 S.E.2d at 345. We concluded, "Under the circumstances, none of the defendants should have been expected to foresee that Horne would likely commit suicide." 285 S.C. at 522, 331 S.E.2d at 345.[1]

As *Scott* and *Horne* illustrate, South Carolina courts apply traditional proximate cause principles in analyzing whether a particular plaintiff can recover for wrongful death from suicide. "Each case must be decided largely on the special facts belonging to it." *Scott*, 212 S.C. at 494, 48 S.E.2d at 328. *See* Alex B. Long, *Abolishing the Suicide Rule*, 113 NW. U. L. Rev. 767 (2019) (discussing the "trend among court decisions away from singling out suicide cases for special treatment and toward an analytical framework that more closely follows traditional tort law principles"). Thus, we restate the first question as asking us to explain how our standard proximate cause analysis applies to an alleged wrongful death from suicide.

Proximate cause requires proof of cause-in-fact and legal cause. *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006). In causation, as in other contexts, "proximate" is the opposite of "remote." *See Stone v. Bethea*, 251 S.C. 157, 162, 161 S.E.2d 171, 173 (1968) ("When the [conduct] appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause."). The cause-in-fact and legal cause elements are designed to enable courts and juries to differentiate between proximate and remote causes in a reliable manner.

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[1] *Cf. Hearn v. Lancaster Cty.*, 566 F. App'x 231, 236 (4th Cir. 2014) (explaining that because of qualified immunity, the personal representative of an inmate who committed suicide in jail may recover from a governmental entity or employee only if the representative meets the "deliberate indifference" standard "that is generally only satisfied by government conduct that shocks the conscience" (citing *Parrish v. Cleveland*, 372 F.3d 294, 302 (4th Cir. 2004))).

As to legal cause, "foreseeability is considered 'the touchstone . . . ,' and it is determined by looking to the natural and probable consequences of the defendant's act or omission." *Baggerly*, 370 S.C. at 369, 635 S.E.2d at 101 (quoting *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994)). In most cases, foreseeability ends up being addressed as a question of fact for the jury. *Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 317, 422 S.E.2d 128, 131 (1992). In the first instance, however, legal cause is just what its name suggests—a question of law. "[W]hen the evidence is susceptible to only one inference . . . [legal cause] become[s] a matter of law for the court." *Id.* (citing *Matthews v. Porter*, 239 S.C. 620, 625, 124 S.E.2d 321, 323 (1962)); *see also Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) (discussing foreseeability, and stating "in rare or exceptional cases . . . the issue of proximate cause [may] be decided as a matter of law" (quoting *Bailey v. Segars*, 346 S.C. 359, 367, 550 S.E.2d 910, 914 (Ct. App. 2001))).

In cases involving wrongful death from suicide, our courts have consistently decided legal cause as a matter of law. *See Horne*, 285 S.C. at 522, 331 S.E.2d at 345 (finding as a matter of law the suicide was not foreseeable); *Scott*, 212 S.C. at 495, 48 S.E.2d at 328 (same); *Crolley v. Hutchins*, 300 S.C. 355, 357-58, 387 S.E.2d 716, 718 (Ct. App. 1989) (same). Therefore, whether a suicide is a foreseeable consequence of tortious conduct is first a question of law for a court to decide. If a court determines a particular suicide is not unforeseeable as a matter of law, legal cause—foreseeability—becomes a question for the jury.

A plaintiff must also prove cause-in-fact. "Causation in fact is proved by establishing the plaintiff's injury would not have occurred 'but for' the defendant's negligence." *Hurd v. Williamsburg Cty.*, 363 S.C. 421, 428, 611 S.E.2d 488, 492 (2005) (citing *Oliver*, 309 S.C. at 316, 422 S.E.2d at 130). This is a difficult burden in claims for wrongful death from suicide. For instance, proving causation-in-fact in this case required Mrs. Wickersham to prove the following sequence of causal events: Ford's defective design of the airbag enhanced Mr. Wickersham's injuries, which in turn caused him to suffer severe pain he would not otherwise have had, which in turn caused him to experience an uncontrollable impulse to commit suicide, which in turn caused him to take his own life involuntarily, which he would not have done but for Ford's defective design.

We answer the Fourth Circuit's first certified question as follows:

> South Carolina does not recognize a general rule that suicide is an intervening act that always breaks the chain of causation in a wrongful death action. Rather, our courts apply traditional principles of proximate cause. First, the court must decide as a matter of law whether the suicide was unforeseeable. If the court determines the suicide was not unforeseeable as a matter of law, the jury must consider foreseeability. The jury must also consider causation-in-fact, including whether the defendant's tortious conduct caused a decedent to suffer from an involuntary and uncontrollable impulse to commit suicide.

III. Proximate Cause of Enhanced Injuries

In *Donze v. General Motors, LLC*, 420 S.C. 8, 800 S.E.2d 479 (2017), we addressed the following question certified to us by the United States District Court for the District of South Carolina:

> Does comparative negligence *in causing an accident* apply in a crashworthiness case when the plaintiff alleges claims of strict liability and breach of warranty and is seeking damages related only to the plaintiff's enhanced injuries?

420 S.C. at 11, 800 S.E.2d at 480 (emphasis added). We answered the certified question "no" and held "comparative negligence does not apply to permit the negligence of another party—whether the plaintiff or another defendant—*in causing an initial collision* to reduce the liability of a manufacturer for enhanced injuries in a crashworthiness case." 420 S.C. at 20, 800 S.E.2d at 485 (emphasis added). In reaching our decision, we adopted the reasoning of *Jimenez v. Chrysler Corp*., 74 F. Supp. 2d 548 (D.S.C. 1999), *rev'd in part on other grounds*, 269 F.3d 439 (4th Cir. 2001), in which the district court explained "the alleged negligence causing the collision is legally remote from, and thus not the legal cause of, the enhanced injury caused by a defective part that was supposed to be designed to protect in case of a collision." 420 S.C. at 18, 800 S.E.2d at 484 (quoting *Jimenez*, 74 F. Supp. 2d at 566). Therefore, we held, "[b]ecause a collision is presumed, and enhanced injury is foreseeable as a result of the design defect, the triggering factor of the accident is simply irrelevant." *Id*. (quoting *Jimenez*, 74 F. Supp. 2d at 566).

In this case, the Fourth Circuit asks a different question. We are now asked whether comparative negligence—which is normally thought of as a defense[2]—applies when the conduct to be compared relates only to the enhancement of the injuries, not to the cause of the accident. As we did with the first question, we restate the question. We address the question as one of proximate cause. The question is whether a plaintiff's actions that cause only the enhancement of his injuries—not the accident itself—may be proximate, or are they necessarily legally remote as in *Donze*, and therefore irrelevant. We anticipated this question in *Donze*. *See* 420 S.C. at 20 n.4, 800 S.E.2d at 485 n.4 (noting our ruling applied only to a plaintiff's fault "in causing the collision," and leaving open the possibility a plaintiff's conduct independent of the initial collision—such as "'tying a door shut for example'"—could reduce a plaintiff's recovery for his enhanced injuries (quoting *Jimenez*, 74 F. Supp. 2d at 566 n.11)); *see also* 420 S.C. at 24-25, 800 S.E.2d at 488 (Kittredge, J., concurring) ("I would limit the holding to true crashworthiness cases where it is established as a matter of law that the plaintiff's comparative fault was not a proximate cause of the 'enhanced injuries.'").

In contrast to the situation in *Donze*, if a plaintiff's actions that do not cause the accident are nevertheless a contributing cause to the enhancement of his injuries, the plaintiff's actions are not necessarily a legally remote cause. We now hold—under a standard proximate cause analysis—even though the cause of the accident itself is legally remote, comparative principles must apply in a crashworthiness case in determining who caused the enhancement of the plaintiff's injuries. This is a different question than who caused the initial collision. A plaintiff's actions that do not cause the accident, but cause the enhancement of his injuries, must be compared to the fault of the manufacturer in determining the manufacturer's share of liability for the enhanced injuries.

Under *Donze*, any fault Mr. Wickersham may have had in causing the accident is remote. However, Ford maintained Mr. Wickersham was out of position in his driver's seat by leaning into the passenger seat when the airbag deployed, and Mr. Wickersham being out of position was a proximate cause of the enhancement of his injuries. The jury agreed, and found Mr. Wickersham was thirty percent at fault for his injuries. These actions must be compared to Ford's fault in determining

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[2] *See Donze*, 420 S.C. at 10, 800 S.E.2d at 480 (stating "the defense of comparative negligence does not apply in crashworthiness cases").

Ford's liability for enhancement of Mr. Wickersham's injuries. We answer the second certified question as follows:

> When there is evidence in a crashworthiness case that the plaintiff's own actions—although not a cause of the accident itself—caused his enhanced injuries, comparative principles must be employed to determine the defendant's share of liability for the plaintiff's enhanced injuries. This is a separate inquiry from the plaintiff's fault as a cause of the accident, which—under *Donze*—is legally remote and therefore not relevant. It is also a separate question from "fault," and it is not necessarily a defense as we normally consider comparative negligence to be. Rather, it is a question of proximate cause. As would be true in any case, it is the plaintiff's burden to prove the defendant proximately caused the damages he alleges. In a crashworthiness case, it is the plaintiff's burden to prove the defendant's tortious conduct—whether the theory of recovery is negligence, breach of warranty, or strict liability—proximately caused a specific share of the plaintiff's enhanced injuries.

CERTIFIED QUESTIONS ANSWERED.

BEATTY, C.J., HEARN and JAMES, JJ., and Acting Justice James E. Lockemy, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Daufuskie Island Utility Company, Inc., Appellant,

v.

South Carolina Office of Regulatory Staff, Haig Point Club and Community Association Inc., Melrose Property Owner's Association, Inc., and Bloody Point Property Owner's Association, Respondents.

Appellate Case No. 2018-001107

Appeal From The Public Service Commission

Opinion No. 27905
Heard April 18, 2019 – Filed July 24, 2019

REVERSED AND REMANDED

Thomas P. Gressette Jr. and George Trenholm Walker, Walker Gressette Freeman & Linton, LLC, of Charleston, for Appellant.

Andrew McClendon Bateman and Jeffrey M. Nelson, of Columbia, for Respondent South Carolina Office of Regulatory Staff; John Julius Pringle Jr. and Lyndey Ritz Zwing Bryant, Adams and Reese LLP, of Columbia, for Respondents Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc., and Bloody Point Property Owner's Association.

JUSTICE FEW: Daufuskie Island Utility Company, Inc. (DIUC) filed an application with the Public Service Commission for a rate increase for the water and sewer service it provides to residents of Daufuskie Island in Beaufort County. During a hearing on the merits of the application, the commission approved a purported settlement agreement between the Office of Regulatory Staff (ORS) and three property owners' associations: Haig Point Club and Community Association Inc., Melrose Property Owner's Association, Inc., and Bloody Point Property Owner's Association. DIUC appealed, and we reversed. *Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff*, 420 S.C. 305, 803 S.E.2d 280 (2017). We found the agreement "was not a true settlement" because DIUC did not agree to it. 420 S.C. at 315-16, 803 S.E.2d at 285-86. We remanded the case to the commission for a new hearing on all issues. 420 S.C. at 316, 803 S.E.2d at 286.

On remand, the commission held a second hearing on the merits and issued a second order. DIUC now appeals the second order, arguing the commission erred in disallowing certain rate case expenses[1] and refusing to include items of capital in DIUC's rate base.[2] DIUC argues ORS and the commission applied a higher standard of scrutiny on remand in retaliation against DIUC for successfully seeking reversal of the commission's initial order. At oral argument on this second appeal, when pressed by the Court to respond to DIUC's "retaliation" argument, appellate counsel for ORS conceded a heightened standard had been employed. Counsel stated, "Was

[1] Rate case expenses are expenses incurred by a utility in the preparation of a rate application and in related proceedings before the commission. *See generally* 73B C.J.S. *Public Utilities* § 87 (2015) (describing rate case expenses as "expenses incurred during a rate-making proceeding"); 64 Am. Jur. 2d *Public Utilities* § 127 (2011) (describing rate case expenses as "costs incurred by a utility to prepare and present a rate case").

[2] "'The "rate base" is the amount of investment on which a regulated public utility is entitled to an opportunity to earn a fair and reasonable return.' It 'represents the total investment in, or the fair value of, the used and useful property which it necessarily devotes to rendering the regulated services.'" *Utils. Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 101 n.2, 708 S.E.2d 755, 758 n.2 (2011) (quoting *S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n of S.C.*, 270 S.C. 590, 600, 244 S.E.2d 278, 283 (1978)).

it a higher standard than was previously applied? It certainly was a different standard," and "I don't believe it was a lesser standard, you are correct." Pressed further, counsel stated, "You're right. There is a difference . . . [in] the way we handled the methodology . . . ." Finally, a Justice of the Court challenged counsel, "The reason that [the rate case expenses] were paid the first go around . . . , but disallowed the next time, is because of the higher level of scrutiny." Counsel responded, "At the end of the day I think that's a fair characterization."

We appreciate the professionalism of appellate counsel as an officer of the court in giving candid answers to our direct questions. We do not attribute the actions of ORS to its appellate counsel. Nevertheless, these retaliatory actions by ORS are deeply troubling. We rightly demand more of governmental representatives—like ORS—than such an unprofessional approach to the legitimate financial interests of South Carolina businesses, *and* of South Carolina utility ratepayers. Likewise, we expect more respect for the rulings of this Court than administrative officers exhibit when they retaliate against parties who prevail against them on appeal.

The misconduct by ORS, however, does not necessarily require the commission's order on remand be reversed. For two reasons, we find it must be. First, ORS is not simply a party to a rate case application. Under the legislation creating it, "ORS . . . has the power to review and investigate rate applications, and to make recommendations to the PSC." *Utils. Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 105, 708 S.E.2d 755, 760 (2011); *see generally* S.C. Code Ann. § 58-4-10(B) (Supp. 2018) (providing ORS "must represent the public interest of South Carolina before the commission" and "must be considered a party of record in all filings, applications, or proceedings"); § 58-4-50(A)(2), (9) (2015) (providing ORS must "make inspections, audits, and examinations of public utilities" and "serve as a facilitator or otherwise act directly or indirectly to resolve disputes and issues involving matters within the jurisdiction of the commission"). Specifically, in a rate application proceeding, ORS must "review, investigate, and make appropriate recommendations to the commission with respect to the rates charged or proposed to be charged by any public utility." § 58-4-50(A)(1).

These statutes require ORS to fulfill a unique role in proceedings before the commission. They require ORS to act in a fair and unbiased manner to protect the public interest, provide public utilities a fair rate application proceeding, and make appropriate and reliable recommendations to the commission. When ORS fails to meet this responsibility, it necessarily affects the decision-making of the

commission. In this case, ORS made recommendations to the commission which the commission accepted. The commission's decision cannot be separated from the higher standard of scrutiny ORS now concedes it applied on remand from its unsuccessful first trip to this Court.

Second, the commission's own treatment of DIUC's rate case expense claims demonstrate the commission also employed a heightened standard of scrutiny on remand. In the commission's initial order, the commission awarded DIUC a portion of rate case expenses for work performed by its consultant, Guastella Associates. Addressing DIUC's initial request to recover $191,200 in rate case expenses, the commission wrote,

> ORS proposed . . . current rate case expenses in the amount of $75,000 for [Guastella's] preparation of the Application, developing rate models, calculating test year data, filing other rate case documents and legal expenses. . . . The Commission agrees with ORS's judgment that $75,000 in rate case expenses is a reasonable amount to pass to ratepayers for this rate case.

On remand, DIUC requested more rate case expenses than the $75,000 the commission awarded the first time, including $542,978 for Guastella's services. During the remand hearing, when asked by a commissioner to explain ORS's rate case expense recommendation—specifically, "how much goes to Guastella Associates"—a witness for ORS responded, "'Zero goes to Guastella Associates,' is the quick and easy answer. They have submitted, roughly $540,000 worth of invoices that were insufficient, and we removed those." The commission then adopted ORS's proposed adjustment and excluded recovery of the entire $542,978. The commission's wholesale rejection of every Guastella invoice appears retaliatory because the commission approved and awarded $75,000 for Guastella's services after the initial hearing.[3]

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[3] Although the commission's order on remand appears to allow DIUC the ability to recover the $75,000 awarded after the initial hearing, the order on remand only specifies, "The $75,000 is a figure that was used in the previous hearing and was arrived at during settlement negotiations between the ORS and POAs." Because the commission's order precludes recovery for all of the invoices detailing the rate case services performed by Guastella, it is not clear to us how the order on remand

Additionally, in contrast to the commission's assessment of the invoices in its order after the initial hearing, the commission heavily scrutinized the format of the Guastella invoices on remand. The commission's order on remand provides, "The Commission agrees with ORS. . . . The evidence shows that a large sum of what DIUC seeks was based on invoices that could not be verified." The commission's order denying DIUC's motion for reconsideration also provides, "ORS . . . completed a thorough review of all invoices from Guastella Associates, and found that they 'contained mathematical errors, lacked sufficient detail, and/or did not appear to be paid.'" However, the commission expressed these concerns with the invoices only in its evaluation on remand. The commission's harsher treatment of the *same* invoices on remand—of which rate case expenses were previously awarded—convinces us the commission itself employed a retaliatory standard of scrutiny.

The commission is "vested with power . . . to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State." S.C. Code Ann. § 58-3-140(A) (2015). "When presiding over a ratemaking proceeding, the PSC takes on a quasi-judicial role." *Utils. Servs.*, 392 S.C. at 105, 708 S.E.2d at 760. In *Utilities Services*, we explained,

> [T]he PSC is the ultimate fact-finder in a ratemaking application. It has the power to independently determine whether an applicant has met its burden of proof. The PSC is not bound by ORS's determination that an expenditure was reasonable and proper for inclusion in a rate application. The PSC may determine—independent of any party—that an expenditure is suspect and requires further scrutiny.

392 S.C. at 106, 708 S.E.2d at 761.

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actually permits DIUC the ability to recover the previously awarded rate case expenses.

However, in scrutinizing evidence during a ratemaking proceeding, the commission should evaluate the evidence in accordance with objective and consistent standards. *See Utils. Servs.*, 392 S.C. at 113, 708 S.E.2d at 764-65 (acknowledging "the PSC's duty to fix 'just and reasonable' rates" includes evaluating evidence within "the context of an objective and measurable framework"); *see also* § 58-3-225(A) (2015) ("Hearings conducted before the commission must be conducted under dignified and orderly procedures designed to protect the rights of all parties.").

This Court's review is governed by section 1-23-380 of the South Carolina Code (Supp. 2018). We may reverse an order of the commission "if substantial rights of the appellant have been prejudiced because the [commission's] findings, inferences, conclusions, or decisions" are "arbitrary." § 1-23-380(5)(f). A decision by the commission is arbitrary "if it is without a rational basis, is based . . . not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985) (citing *Hatcher v. S.C. Dist. Council of Assemblies of God, Inc.*, 267 S.C. 107, 117, 226 S.E.2d 253, 258 (1976); *Turbeville v. Morris*, 203 S.C. 287, 315, 26 S.E.2d 821, 832 (1943)).

The commission's denial of DIUC's rate case expenses it previously permitted was arbitrary because DIUC's evidence was subjected to a retaliatory, higher standard of scrutiny on remand. As counsel for ORS conceded, "The reason that the rate case expenses were paid the first go around, but disallowed the next time, is because of the higher level of scrutiny." This arbitrary, higher standard of scrutiny affected substantial rights of DIUC. The commission's findings of fact and conclusions of law must be reversed. We remand to the commission for a new hearing.

DIUC's rate application will now go before the commission for a third hearing. In our initial reversal and remand, we explained certain points of law applicable to the merits of DIUC's claims. *Daufuskie Island Util. Co.*, 420 S.C. at 316-20, 803 S.E.2d at 286-88. In this reversal and remand, we do not address the merits at all. In reversing the commission twice, we do not intend to make any suggestion of our views of the merits. Rather, we simply require the commission and ORS evaluate the evidence and carry out their important responsibilities consistently, within the "objective and measurable framework" the law provides. *Utils. Servs.*, 392 S.C. at 113, 708 S.E.2d at 765.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Johnny Tucker, Employee, Respondent,

v.

South Carolina Department of Transportation, Employer, and State Accident Fund, Carrier, Petitioners.

Appellate Case No. 2018-000076

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Workers' Compensation Commission

Opinion No. 27906
Heard March 26, 2019 – Filed July 24, 2019

AFFIRMED

David Hill Keller and Evelyn A. Norton, Turner Padget Graham & Laney, P.A., of Greenville, for Petitioners.

Preston F. McDaniel, The McDaniel Law Firm, of Columbia; Gerald Malloy, Malloy Law Firm, of Hartsville, for Respondent.

JUSTICE FEW: In this appeal from the workers' compensation commission, we address the timing requirement in South Carolina Code subsection 42-17-90(A) (2015) for a claim based on a change of condition. We reject Petitioners' argument that satisfying this timing requirement is dependent on a claimant requesting a

hearing within the time period set forth in the subsection. Rather, we hold the timing requirement is satisfied upon the filing of a Form 50 to initiate the claim.

Johnny Tucker injured his shoulder on May 2, 2011, while working at the South Carolina Department of Transportation. The commission found he "sustained 5% permanent partial disability . . . for which he is entitled to fifteen weeks of compensation." On May 2, 2013, Tucker filed a Form 50 asserting a claim for additional benefits on the basis that his condition caused by the 2011 injury had changed. Tucker checked the box on line 13a of the Form 50 indicating, "I am not requesting a hearing at this time." On July 30, 2014, Tucker filed another Form 50. This second Form 50 was identical to the first except this time he checked the box on line 13b indicating, "I am requesting a hearing."

Petitioners—the Department of Transportation and the State Accident Fund—defended the claim on the basis that Tucker did not comply with the timing requirement of subsection 42-17-90(A). The subsection provides that when a party makes a claim based on a change of condition, "the review must not be made after twelve months from the date of the last payment of compensation pursuant to an award." Tucker received his last payment of compensation on November 28, 2012. The first Form 50 was filed within twelve months, but Tucker's request for a hearing in the second Form 50 did not occur within twelve months.

Petitioners argued a claimant must request a hearing within twelve months to satisfy the timing requirement. The commission agreed, and denied the claim. The court of appeals did not agree. It held the claim "was timely filed," and reversed in an unpublished decision. *Tucker v. S.C. Dep't of Transp.*, Op. No. 2017-UP-379 (S.C. Ct. App. filed Oct. 18, 2017). Petitioners filed a petition for a writ of certiorari with this Court, again arguing a claimant must request a hearing within twelve months. We granted the petition.

Subsection 42-17-90(A) is ambiguous in respect to the timing requirement. Its operative language regarding timing is "the review must not be made after twelve months from the date of the last payment of compensation." The term "review" is not defined anywhere in the Workers' Compensation Act, in the commission's regulations, or in our decisions. The ordinary meaning of the term gives us little guidance as to the intent of the Legislature as to what event must occur to meet the timing requirement. In addition, the point in time at which a review becomes "made" is not something that is clear to us. We find, however, there is no basis in the law for Petitioners' proposition that the date a claimant requests a hearing is determinative of whether a claim for change of condition is timely.

We have addressed this timing requirement before. In *Wallace v. Campbell Limestone Co.*, 198 S.C. 196, 17 S.E.2d 309 (1941), the claimant waited more than three years after his last payment of compensation to file a claim for additional benefits. 198 S.C. at 199, 17 S.E.2d at 310. We held the commission correctly denied the claim on the ground it was filed too late. 198 S.C. at 203, 17 S.E.2d at 312. We later characterized our holding in *Wallace* as, "We have gone no further than to hold that the application for review must be made within one year after the last payment of compensation." *Allen v. Benson Outdoor Advert. Co.*, 236 S.C. 22, 30, 112 S.E.2d 722, 726 (1960) (citing *Wallace*).

In *Allen*, the claimant did file his application for review within twelve months, "but there was no hearing . . . until . . . twelve days after the expiration of the one year period." 236 S.C. at 29, 112 S.E.2d at 725. The employer and carrier argued "it is not sufficient for the application for review to be made within one year after the last payment of compensation but the application must be heard by the Commission within that period." 236 S.C. at 29-30, 112 S.E.2d at 725. We rejected that position, stating, "It represents a literal and strict construction of [the subsection] when under the well-settled rule a liberal construction is required." 236 S.C. at 30, 112 S.E.2d at 725. After noting, "Similar statutes have been construed in other jurisdictions as only requiring that the application for review be made within the statutory period," 236 S.C. at 30, 112 S.E.2d at 726, we held the commission could hear the claim because "[t]he application for review here [was] filed within one year after the last payment of compensation," 236 S.C. at 31, 112 S.E.2d at 726.[1]

Petitioners place a strained interpretation on our decision in *Allen*. The argument seems to be that requesting a hearing is the event we referred to in *Allen* as the "application for review." We find no support for this argument. In *Allen* itself, we gave no indication the claimant *ever* requested a hearing. We stated simply, "Hearings were held . . . ." 236 S.C. at 25, 112 S.E.2d at 723. We now hold a Form 50 is the modern equivalent of what we then referred to as an application.[2] The Form

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[1] In *Allen*, we held the commission had "jurisdiction" to hear the claim, 236 S.C. at 31, 112 S.E.2d at 726, but the issue we addressed in *Allen*—and address here—is not jurisdictional. Rather, the question is simply whether the claimant satisfied the timing requirement of subsection 42-17-90(A). If not, the commission has jurisdiction, but it must deny the claim as untimely.

[2] Form 50 did not exist when we decided *Allen* in 1960. There were other industrial commission forms at least as early as 1947, but there was no separate form for filing

states at the top, "A claim for workers' compensation benefits is made based on the following grounds." It then has various boxes to check and blanks to fill in to provide the essential factual and legal basis for the claim. We do not believe this

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a claim. The available forms included Form 11, entitled "Notice of Accident to His Employer," and Form 25, entitled "Request that Claim be Assigned for Hearing." Form 50 appears to have been created in 1968. At that time, Form 50 was entitled "Application of Employee for Benefits and Request for Hearing." Until 1990, the Form 50 was called an "Application," and the filing of it was an automatic request for a hearing. Ernest B. Castles, THE SOUTH CAROLINA WORKMEN'S COMPENSATION ACT ANNOTATED (Castles ed., 1947), *later revised as* THE SOUTH CAROLINA WORKMEN'S COMPENSATION LAW (S.C. Indus. Comm'n ed., 1950, 1956, 1959, 1970, and 1974).

The workers' compensation commission adopted regulations in 1990. 14 S.C. Reg. 109-76 (Jun. 22, 1990). Before then, "practitioners often filed a claim by filing a letter of representation. A letter of representation was construed to toll the statute of limitations and preserve the claim until it was ripe for adjudication. Filing a Form 50 . . . caused a hearing to be scheduled regardless of whether the claim was ripe . . . ." Grady L. Beard et al., THE LAW OF WORKERS' COMPENSATION INSURANCE IN SOUTH CAROLINA 434-35 (6th ed. 2012). The commission amended Form 50 in 1990 to add lines 13a and 13b "to eliminate setting claims for adjudication prematurely." *Id.* at 435. After the amendment, the common practice to file a claim was a claimant would file a Form 50 and "check[] the box opposite line 13a" indicating no hearing was requested. *Id.* "When the claim [became] ripe for adjudication, the claimant [w]ould file a new Form 50 . . . marking the box opposite line 13b . . . requesting a hearing." *Id.* (citing 67 S.C. Code Ann. Regs. 67-207 (Supp. 2018)).

In common practice, therefore, to file a timely claim, attorneys have done precisely what Tucker did in this case. There is no indication there was ever a practice or procedure under which the request for a hearing was given any significance in meeting timing deadlines. While the discussion in Beard, *supra*, relates to the filing of an initial claim to meet the two-year statute of limitations in section 42-15-40 of the South Carolina Code (2015), we see no reason to believe the same practice was not observed in filing a claim for a change of condition. Therefore, Petitioners' contention that we meant in *Allen* to require the request of a hearing to meet the timing requirement of subsection 42-17-90(A) is unsupported in law and the history of practice in this area.

form can be reasonably construed as anything other than an "application for review" as we used the term in *Allen*. Therefore, if *Allen* was not clear before, we now clarify that the filing of a Form 50 to initiate a claim for a change of condition is the event that must occur within twelve months of the last payment of compensation to meet the timing requirement of subsection 42-17-90(A).

The fact a claimant does not request a hearing does not mean the claim will sit unattended. In *Russell v. Wal-Mart Stores, Inc.*, 426 S.C. 281, 826 S.E.2d 863 (2019), we pointed out a "primary goal of the Workers' Compensation Act is to provide quick and efficient resolution of work-related injury claims." 426 S.C. at 285, 826 S.E.2d at 865. The commission shares with the parties the responsibility to meet that goal. 426 S.C. at 287, 826 S.E.2d at 866. We stated, "In most instances, . . . a claim filed with the commission will be assigned to one commissioner who must promptly conduct a hearing and 'determine the dispute in a summary manner.'" 426 S.C. at 288, 826 S.E.2d at 866 (quoting S.C. Code Ann. § 42-17-40(A) (2015)). If the parties reasonably need time to prepare, or to negotiate in good faith, the assigned commissioner—or an appellate panel on review—should allow it. In ordinary circumstances, however, no claim may be allowed to sit while the commission waits for a party to request a hearing. In other words, even if a claimant checks the line 13a box indicating "I am not requesting a hearing at this time," the commission must act reasonably to move the claim toward a "quick and efficient resolution."[3]

At oral argument, we discussed with counsel the possibility a claimant may file a Form 50 within twelve months, and then intentionally delay a hearing in the hope that evidence will later develop to support a change of condition claim. In the case before us, there is no indication whatsoever Tucker or his counsel attempted to do this. Such an improper effort,[4] as we have explained, should have no chance of success. However, if an employer suspects this, and the commission does nothing to move the claim toward resolution, the employer may request a hearing or in some other fashion seek to protect its interests.

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[3] We recognize that our decisions in *Russell* and this case will change the practice of allowing claims to sit until a hearing is requested, and will require the commission to consider amending certain regulations, including 67-207.

[4] *See* Rule 3.1, RPC, Rule 407, SCACR ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . .").

We affirm the court of appeals' decision finding the claim "timely." We remand to the commission to promptly conduct a hearing on the merits of Tucker's claim for a change of condition.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charleston County Assessor, Petitioner-Respondent,

v.

University Ventures, LLC, Respondent-Petitioner.

Appellate Case No. 2017-002369

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From The Administrative Law Court
Shirley C. Robinson, Administrative Law Judge

Opinion No. 27907
Heard February 21, 2019 – Filed July 24, 2019

AFFIRMED AS MODIFIED

Joseph Dawson III, Bernard E. Ferrara Jr., Austin Adams Bruner and Johanna S. Gardner, all of North Charleston, for Petitioner-Respondent.

Morris A. Ellison and William T. Dawson III, both of Womble Bond Dickinson (US), LLP, of Charleston, for Respondent-Petitioner.

JUSTICE KITTREDGE: In 2006, University Ventures, LLC (the Taxpayer) purchased a vacant lot in Charleston County (the Property). In 2008, the Taxpayer

received building permits to construct a hotel and pool on the Property. Construction began, and the hotel and pool were completed in April 2009, at which time a certificate of occupancy was issued. As a result of the completed improvements and pursuant to law, the Charleston County Assessor (the Assessor) reappraised the Property. The new appraisal resulted in an increase in the value of the Property, which in turn increased the Taxpayer's 2010 property tax bill. The Taxpayer paid the increased 2010 tax bill without objection.

This case concerns the Taxpayer's challenge to the 2011 tax bill. In 2011, the Assessor continued to value the Property as an improved lot, which it in fact was. The Taxpayer protested and claimed its 2011 tax bill should have been based on the Property's value as a vacant lot as of December 31, 2008. The court of appeals rejected the Taxpayer's argument, finding it would be absurd to value the Property as a vacant lot after improvements were completed.

This appeal requires us to construe statutes addressing the process for reassessing real property and reconcile those with statutes that address the value of improvements to real property. For reasons we explain below and consistent with South Carolina's statutory scheme, we find that when the value set by a reassessment program's uniform date of value conflicts with the value set by the completion of improvements to property, the improvement value controls. We therefore affirm the court of appeals' decision as modified.

I.

It appears the parties' dispute is the result of their different interpretations and usages of the term "reassessment." As a result, we use terminology in this opinion that the parties and courts have not previously used in an effort to make clear which portions of the reassessment cycle we are discussing at any given time.

The South Carolina Department of Revenue (DOR) must periodically order the reassessment of real property to ensure it is "assessed uniformly and equitably throughout the State." S.C. Code Ann. § 12-43-210(A) (2014); *id.* § 12-4-510(3) (2014). In 1995, the General Assembly enacted section 12-43-217, initially requiring "each county or the State [to] appraise and equalize those properties under its jurisdiction" by conducting a reassessment program once every four years. Act No. 145, 1995 S.C. Acts 900, 1483–84. However, the next year, the General Assembly amended the statute to provide:

> Notwithstanding any other provision of law, once every *fifth* year each county or the State shall appraise and equalize those properties under its jurisdiction. Property valuation must be complete at the end of December of the fourth year [hereinafter, an Appraisal Year] . . . . In the fifth year, the county or State shall implement the program and assess all property on the newly appraised values [hereinafter, an Implementation Year].

Act No. 431, 1996 S.C. Acts 2605, 2616–17 (emphasis added); S.C. Code Ann. § 12-43-217(A) (2014).[1] Counties applied section 12-43-217 retroactively, meaning they began implementing the reassessment program outlined in the statute five years after each county's respective most-recent Implementation Year. *See Old Citadel Assocs., L.L.C. v. Charleston Cty. Assessor*, No. 03-ALJ-17-0149-CC, 2004 WL 3154634, at *12 (S.C. Admin. Ct. Mar. 29, 2004) (explaining a prospective application in which every county implemented the new program in 1997 "would have created a nightmare for the [DOR] since it is charged by statute to oversee each of the 46 counties as they prepare for and conduct their reassessments").

In February 1997, the Director of the DOR ordered Charleston County to complete its next "reassessment" (i.e., countywide appraisal) by December 31, 1999, and implement the revised values in the tax year 2000 (the 2000 reassessment).[2] *Id.* at

[1] Section 12-43-217 and the parties all refer to a "quadrennial" reassessment despite the fact that the statute requires reassessment to occur every five years. Presumably, this error harkens back to the original version of the statute requiring a reassessment to occur every four years, and, when the statute was amended to require reassessment every five years, the reference to "quadrennial" reassessment was overlooked.

[2] As we explain later, the parties and courts have used the term "reassessment" imprecisely to mean, depending on the context in which it is used, either the countywide appraisal *or* the implementation of the revised values from the appraisal.

*13. However, in 1999, in the middle of Charleston County's reappraisal process, the General Assembly amended section 12-43-217 to add subsection (B), which provides:

> A county by ordinance may postpone for not more than one property tax year the implementation of revised values resulting from the equalization program provided pursuant to subsection (A). . . . The postponement allowed pursuant to this subsection does not affect the schedule of the appraisal and equalization program required pursuant to subsection (A) of this section.

Act No. 93, 1999 S.C. Acts 295, 316. The amendment took effect on July 1, 1999. Subsequently, Charleston County adopted Ordinance No. 1125, postponing the implementation of the revised values resulting from the 1999 countywide appraisal from tax year 2000 (as ordered by the DOR) to tax year 2001. *See Old Citadel*, 2004 WL 3154634, at *13.

From the first time the Assessor began following section 12-43-217's five-year reassessment cycle (during the 1999 countywide appraisal), he differentiated between Year 4 of the cycle (an Appraisal Year[3]) and Year 3 of the cycle (hereinafter, a Value Year). By this, we mean that although the Assessor conducted the appraisals in Year 4 of a given reassessment cycle, he determined the value of each property in the county based on the property's worth as of December 31 of Year 3. *See* S.C. Code Ann. § 12-37-900 (Supp. 2018) (stating that for tax purposes, the value of a piece of property is determined by its value on December 31 of the preceding year); *Lindsey v. S.C. Tax Comm'n*, 302 S.C. 274, 275 n.1, 395 S.E.2d 184, 185 n.1 (1990) ("The pertinent date to determine the value of property for a given tax year is December 31st of the preceding year."). For example, in the first reassessment program conducted in Charleston County after the enactment of section 12-43-217, the Assessor reappraised properties in 1999 (an Appraisal Year) at the DOR's order, but "valued" the properties (i.e., determined the value of each property being appraised) as of December 31, 1998.[4]

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[3] *See* S.C. Code Ann. § 12-43-217(A) ("Property valuation must be complete at the end of December of the fourth year . . . .").

[4] The gravamen of the Taxpayer's argument is that, in the Taxpayer's opinion, there is no legal distinction between Year 3 and Year 4 of a cycle, nor should there be.

See Old Citadel, 2004 WL 3154634, at *2.[5]

The Assessor thereafter kept to the five-year reassessment cycle set forth in section 12-43-217:

- Conducting a countywide appraisal every five years (i.e., all calendar years ending in the numbers 4 or 9 were/are Appraisal Years: 1999, 2004, 2009, 2014, 2019, etc.);

- Basing the value of each property on the property's worth as of December 31 of the year preceding the Appraisal Year (i.e., all calendar years ending in the numbers 3 or 8 were/are Value Years: 1998, 2003, 2008, 2013, 2018, etc.); and

- Implementing the revised values the year following the Appraisal Year (i.e., all calendar years ending in the numbers 0 or 5 were/are Implementation Years: 2000, 2005, 2010, 2015, 2020, etc.). Aside from the initial implementation of the 2000 reassessment that was delayed to 2001 by Ordinance No. 1125, Charleston County has delayed the Implementation Year only once, from tax year 2010 (i.e., the 2010 reassessment, which is the subject of this appeal) to 2011.

[5] Specifically, *Old Citadel* states "Charleston County undertook a countywide reassessment of all real property within the county for the tax year 2000," but delayed the implementation of the reassessment to 2001. The order goes on to explain that, "[a]s a result of the reassessment, [the taxpayers'] properties were revalued as of December 30 [sic], 1998." We provide this information to demonstrate the imprecise language used by prior courts which have addressed the reassessment cycles created in section 12-43-217. Specifically, we believe it is an oversimplification to state Charleston County undertook a countywide *reassessment* for the tax year 2000. Rather, to be more precise, the Assessor *reappraised* all property in the county in 1999 (an Appraisal Year)—backdating the values to 1998 (a Value Year) in accordance with section 12-37-900 and *Lindsey*—and, on the DOR's orders, was scheduled to *implement* the revised values in 2000 (an Implementation Year), which was delayed to 2001 by county ordinance in accordance with section 12-43-217(B).

II.

As mentioned at the outset, in December 2006, the Taxpayer bought the Property, which, at that point, was a vacant lot. In 2008, the Taxpayer received two building permits from the City of North Charleston to begin construction of a hotel and pool. In April 2009, the improvements were completed, and the City of North Charleston issued a certificate of occupancy. As a result of the completed improvements in 2009 and the associated increase in property value, the Assessor reappraised the Property and issued a 2010 tax bill valuing the Property (with the fully-constructed hotel and pool) at $8,180,000 and billing the Taxpayer for $122,356.44. *See* S.C. Code Ann. §§ 12-37-670(A)–(B)(1), -3140(E) (2014). The Taxpayer paid this bill. At no time did the Taxpayer in any manner challenge the 2010 tax bill based on the 2009 improvements and increased property value. In fact, the Taxpayer concedes the increased property value in 2009 based on the completed hotel and pool, and the resulting 2010 tax bill, were proper. Yet the Taxpayer, relying on the reassessment statutes, argues the 2011 tax bill must be based on the value of the Property as of December 31, 2008, as a vacant lot. We disagree.

Irrespective of the improvements to the Property, throughout 2009, the Assessor conducted a countywide appraisal of all properties, setting the uniform value date for the appraisal as December 31, 2008 (2008 being a Value Year). Likewise, while 2010 was initially scheduled to be an Implementation Year, the Charleston County Council adopted Ordinance No. 1586, delaying the implementation of the 2010 reassessment (i.e., the implementation of the revised values from the 2009 appraisal) from 2010 to 2011. Aside from delaying the implementation, Ordinance No. 1586 did "not affect the schedule of the appraisal and equalization program required pursuant to S.C. Code Ann. Section 12-43-217."

As a result, in June 2011, the Assessor sent out notifications to those taxpayers in Charleston County whose property values would be subject to an increase pursuant to the 2010 reassessment, including the Taxpayer.[6] In the notice, the Assessor explained Charleston County was "required by state law to implement a reassessment in 2011," and "by law, properties must be valued as of 12/31/2008"—a date on which the improvements to the Property were not yet completed.

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[6] *See* S.C. Code Ann. § 12-43-217(A) ("[T]he county or State shall notify every taxpayer of any change in value or classification if the change is one thousand dollars or more.").

(Emphasis omitted.) The Assessor nonetheless stated the Property's "current market value" had been recalculated for the reassessment as $9,630,000 based on the 2009 completed hotel and pool, but the Property's increase in value between 2010 and 2011 was statutorily capped at $9,407,000.[7] In September 2011, the Taxpayer filed a written objection to the Assessor's recalculated valuation of the Property. As noted, the Taxpayer's position was that the County was stuck with the December 31, 2008 value based on the Property's status as a then-vacant lot. The Assessor refused to make any adjustments.

The Taxpayer then appealed to the Charleston County Board of Assessment Appeals (the Board), asserting the Property's improvements were incomplete on the uniform date of value (December 31, 2008). According to the Taxpayer, the Assessor was therefore required to value the Property as a vacant lot for the 2010 reassessment implemented in 2011. The Taxpayer asked the Board to set a land-only value for the Property of $628,439. Ultimately, the Board agreed with the Taxpayer, valuing the Property at $628,439 "based on the land value of the parcel and the building being incomplete at the end of 2008."

The Assessor filed a request for a contested case hearing with the Administrative Law Court (ALC). During the opening statements at the hearing, the Assessor stated the "real question" was whether improvements completed during an Appraisal Year (i.e., improvements that were incomplete during a Value Year) should count toward the revised property values implemented during a reassessment program. The Assessor argued that a decision upholding the Board's order would force the Assessor to value parcels whose improvements were completed before the end of an Appraisal Year as undeveloped lots. According to the Assessor, such a decision "leads almost to an absurd result . . . because then people would just wait to [request] a certificate of occupancy until after [a Value Year] so their property could escape reassessment" for the next five years.

In response, the Taxpayer argued the Assessor was misrepresenting which calendar year equated to the Appraisal Year (i.e., Year 4 in the cycle). While the Assessor contended 2009 (the year the improvements to the Property were completed) was

[7] *See* S.C. Code Ann. § 12-37-3140(B) (limiting any increase in fair market value of real property that is attributable to a reassessment program to fifteen percent within a five-year period).

an Appraisal Year, the Taxpayer asserted 2008 was the Appraisal Year based on the parties' stipulation that December 31, 2008, was the uniform date of value.[8]

The Taxpayer also claimed the purpose of a reassessment was to equalize, relative to one another, values for properties which may have been appraised at different points in a county's past. As a result, the Taxpayer contended it was fundamentally unfair that all properties in Charleston County would be valued on the same day except for the Property and other parcels whose improvements were incomplete on the uniform date of value but were completed during the following calendar year (i.e., during an Appraisal Year).

Finally, the Taxpayer noted it was

> important to emphasize [its argument the Property should be taxed as a vacant lot was only applicable] for tax year 2011. For tax year 2012 and forward, you value the [P]roperty based on the fact that the certificate of occupancy has been issued. So we're talking about one tax year [that the Taxpayer should be entitled to pay lower taxes as if the Property were a vacant lot]; we're not talking about multiple tax years here because the statutes allow the Assessor to come back in 2012 and reassess because that limiting factor [having to conform to the reassessment cycle's uniform date of value] isn't present anymore.

The Taxpayer did not specify which statutes would allow the Assessor to "come back in 2012 and reassess" in the middle of a reassessment cycle; nor did it cite

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[8] According to the Taxpayer, the preceding reassessment cycle was implemented in 2005 (the 2005 reassessment) after implementation was delayed for one year from 2004, and had a uniform date of value of December 31, 2003. As a result, the Taxpayer contends the five-year cycle set forth in section 12-43-217 requires the next appraisal to have occurred in 2008, and the next implementation to have occurred in 2009. However, there is no evidence the 2005 reassessment was delayed one year, as the Taxpayer contends. *See, e.g.*, *Charleston County Ordinances*, Charleston Cty., https://www.charlestoncounty.org/ordinances.php (last visited May 17, 2019) (including a copy of Ordinance No. 1586, delaying the implementation of the 2010 reassessment, but containing no ordinance purporting to similarly delay the 2005 reassessment).

any other authority for its contention that the Property should be taxed at its full value in 2010, taxed as a vacant lot in 2011, and taxed again as a completed property in 2012.

Walter Ziegler, a long-term employee in the Assessor's Office, testified on behalf of the Assessor. During direct examination, he testified about the pertinent dates and values related to the Property, including the date the certificate of occupancy was issued and the dates and amounts associated with various tax bills. Ziegler also explained the Assessor's treatment of the Property during the 2010 reassessment was not unique because the Assessor included the value of completed improvements for any property in Charleston County that received a certificate of occupancy in 2009.

During cross-examination, Ziegler confirmed that the first time the Assessor reassessed the Property with its improvements was in the 2010 tax year. Ziegler also stated the last reassessment (i.e., the 2005 reassessment) had a uniform value date of December 31, 2003.

Following the hearing, the ALC determined the Assessor had misconstrued section 12-43-217, holding the reassessment cycle was comprised of the calendar years 2005 through 2009, rather than 2006 through 2010 as the Assessor contended. Likewise, the ALC found that because the improvements to the Property were not complete as of the uniform date of value (December 31, 2008), the Property should have been valued as vacant land for purposes of the 2010 reassessment, setting the value of the "vacant lot" at $860,537 after averaging valuations provided by the Taxpayer's and Assessor's expert witnesses.

The Assessor appealed, and the court of appeals affirmed the ALC's findings of which calendar years fell within the reassessment cycle, but reversed the ALC's valuation of the Property. *Charleston Cty. Assessor v. Univ. Ventures, L.L.C.*, 421 S.C. 194, 209–10, 805 S.E.2d 216, 225 (Ct. App. 2017). In particular, the court of appeals found support in the case law for the Taxpayer's contention that 2009 was the end of the five-year reassessment cycle surrounding the 2010 reassessment. *See Charleston Cty. Assessor v. LMP Props., Inc.*, 403 S.C. 194, 197, 743 S.E.2d 88, 89 (Ct. App. 2013) ("[T]he parties[, including the Assessor,] agreed that the date for valuing properties was December 31, 2003, because 2004 [(i.e., five years before 2009)] was the year of the countywide reassessment.").[9] The court of

[9] The court of appeals additionally cited several ALC cases allegedly standing for the proposition that 1999 was also, in its words, "a reassessment year," thus

appeals also determined the confusion in this case stemmed from the Assessor's delay of the "1999 reassessment to 2001, instead of 2000" because the two-year "delay" caused the Assessor to mistake the permissible one-year delay in implementation with an impermissible one-year delay in valuation and appraisal. Thus, the court of appeals concluded the Assessor had created a six-year reassessment cycle through a "repeated pattern of delaying the implementation year."

Nonetheless, the court of appeals reversed the ALC's valuation of the Property, ultimately rejecting both parties' arguments as to the proper method of valuation. In disagreeing with the Taxpayer's argument that the Property should be valued as a vacant lot, the court of appeals concluded the Assessor's valuation of the Property in 2010 was the most recent and accurate reflection of the Property's worth, and it would be wholly inappropriate to value a parcel with a completed hotel as if it were a vacant lot. Likewise, in dismissing the Assessor's argument that the Property should be reassessed for the 2011 tax year higher than the 2010 tax year, the court of appeals found that had the 2010 reassessment not been delayed one year, the Assessor would not have been able to reassess the Property for the 2011 tax year, and the delay alone did not authorize a belated re-appraisal date. The court of appeals therefore set the value of the Property for the 2010 reassessment at its value during the 2010 tax year.

Both parties appealed. The Assessor did not appeal the court of appeals' valuation determination, challenging instead the court's characterization of the years in the reassessment cycle(s). The Taxpayer contested the valuation determination, arguing the Property should be valued as a vacant lot for the 2011 tax year. We granted the parties' cross-petitions for writs of certiorari seeking review of the court of appeals' decision.

III.

The Assessor argues the lower courts erred in finding the Assessor's actions have created a six-year reassessment cycle. Specifically, the Assessor avers he has consistently followed section 12-43-217's five-year reassessment cycle since the statute's enactment, and any confusion and/or evidence to the contrary is the result of the inconsistent usage by the parties and courts of the terms "reassessment" and

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providing further support for its conclusion that the reassessment cycles ended in 2004 and 2009, as the Taxpayer argued.

"reassessment year" to mean both an Appraisal Year and an Implementation Year. The Assessor also contends there is, and must be, a legal distinction between a Value Year and an Appraisal Year. Finally, the Assessor asserts his application of section 12-43-217's reassessment cycle has been consistent since the statute's enactment more than twenty years ago. We agree with the Assessor.

A.

Section 12-43-217(A) provides in part, "Property valuation [for a given five-year reassessment cycle] must be complete at the end of December of the fourth year . . . ." "The pertinent date to determine the value of property for a given tax year is December 31st of the preceding year." *Lindsey*, 302 S.C. at 275 n.1, 395 S.E.2d at 185 n.1.

The Assessor contends, and we agree, that section 12-37-900 and *Lindsey* both require the Assessor to value properties appraised during an Appraisal Year at their worth on December 31 of the preceding year, or in other words, December 31 of the Value Year. As a result, if—as the parties stipulated—the uniform date of value for the 2010 reassessment is December 31, 2008, that necessarily means: (1) 2008 is a Value Year; (2) the Assessor conducted the countywide appraisal in 2009; and (3) 2009 is therefore an Appraisal Year.

The court of appeals found section 12-43-217(A) creates an exception to section 12-37-900 and *Lindsey*. See *Univ. Ventures*, 421 S.C. at 205 n.7, 805 S.E.2d at 222 n.7. Specifically, the court of appeals found significant section 12-43-217(A)'s mandate to complete "property valuation" in Year 4 of a given reassessment cycle. *See* S.C. Code Ann. § 12-43-217(A) ("*Property valuation* must be complete at the end of December of the fourth year . . . ." (emphasis added)). According to the court of appeals, a plain reading of the phrase "property valuation" requires the valuation and appraisal to occur in the same year (Year 4), unlike what section 12-37-900 and *Lindsey* would otherwise require.

This interpretation of sections 12-43-217(A) and 12-37-900 reads a conflict into the statutes where none exists. *Cf. Hodges v. Rainey*, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000) ("Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative."); *id.* at 91, 533 S.E.2d at 584 ("The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd."). Reading the statutes in harmony with one another, section 12-43-217(A) requires a county assessor to conduct a countywide appraisal in Year 4

of the cycle (the Appraisal Year); and section 12-37-900 fills in the details about how, precisely, to value the properties in that appraisal, namely by calculating their worth as of December 31 of the preceding year (the Value Year). *Cf. LMP Props.*, 403 S.C. at 200, 743 S.E.2d at 91 ("Section 12-43-215 states merely that any adjustments to a property's value must be 'based on the market values of real property as they existed in the year that the equalization and reassessment program was conducted.' *The statute is silent on the date to be used for determining the highest and best use of the property. Accordingly,* ***it cannot be read to mandate a diversion from the general rule that the use of the property is to be determined as of December 31st of the preceding year****. Such a finding would result in potentially unreasonable and illogical valuations* in instances when the use of a property changes, potentially dramatically, from the time of the last countywide reassessment." (internal alteration marks omitted) (emphasis added)).

The court of appeals' interpretation of section 12-43-217(A) as requiring the valuation and appraisal to occur in the same year defeats the legislative intent underlying the reassessment cycles. *See Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342–43, 713 S.E.2d 278, 283 (2011) ("Courts will reject a statutory interpretation that . . . would defeat the plain legislative intention."). In particular, the General Assembly charged the government with assessing all property "uniformly *and equitably* throughout the State." S.C. Code Ann. § 12-43-210(A) (emphasis added). However, failing to distinguish between a Value Year and an Appraisal Year leads to inequitable consequences to taxpayers.

For example, requiring the Assessor to set a uniform date of value of December 31 of the same calendar year he conducts the appraisals would essentially require the Assessor—who may appraise properties at any time during the year—to guess what the future values of the properties would be at the end of that year and assume market conditions will stay the same between the time of the appraisal and the end of the year. Clearly, guessing the future values of properties is a wholly inequitable method of conducting a reassessment, particularly because the values of properties appraised later in the year will tend to be more accurate as market trends become more apparent closer to the uniform date of value. Because properties appraised in the earlier part of the year would not enjoy the same benefit—namely, a greater degree of accuracy in determining their values—we find valuing and appraising properties in the same year is inequitable and not what the legislature intended.

Likewise, even if the Assessor did not guess at the future value and merely set the value of each individual property the day of its respective appraisal, properties evaluated at the end of the year could be at a disadvantage due to having an extra year's worth of appreciation added to their value compared to properties evaluated at the beginning of the year.[10] Moreover, while a year's worth of appreciation may not, in most instances, represent a large change in value for a given property, if the market took a drastic downturn or upturn compared to the beginning of the year, properties valued/appraised before and after the change would have grossly disparate tax burdens. This, too, would be inequitable, and is easily avoidable by distinguishing between a Value Year and an Appraisal Year.

As a result, we believe the Assessor is correct in stating there is a legal distinction between a Value Year and an Appraisal Year, and policy considerations dictate such a distinction is the most equitable way to conduct countywide appraisals.

B.

During oral arguments, the Taxpayer contended five other counties in our state do not follow the same approach—Value Year (Year 3)/Appraisal Year (Year 4)/Implementation Year (Year 5)—as the Assessor.[11] While this may be correct, those counties nonetheless distinguish between a Value Year and an Appraisal Year, instead combining the Appraisal and Implementation Years. For example, in a post dated January 23, 2019, the Horry County Assessor's website stated, "The Horry County Assessor's Office is in the process [in January 2019] of appraising all property values at fair market value as of December 31, 2018. This new value

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[10] For instance, all aspects of the properties being relatively equal, if a county assessor appraised *and* valued Property X on January 2 of an Appraisal Year, and appraised *and* valued Property Y on December 31 of the same year, Property Y would have approximately an entire year's worth of extra appreciation in value over Property X, and as a result would have a higher tax burden than Property X. In contrast, if the county assessor looked at the values of both Property X and Property Y as of December 31 of the year preceding the appraisals, presumably the properties would have approximately the same amount of appreciation in value from the last appraisal.

[11] The Taxpayer specifically cited Beaufort, Berkeley, Greenville, Horry, and Spartanburg counties.

will be used for calculating property tax bills issued by Horry County during October 2019."[12] Thus, in Horry County, it appears 2019 is an Appraisal *and* Implementation Year, where the Horry County Assessor's Office conducts its appraisals in the first half of 2019 and sends out the revised tax bills during the second half of 2019. However, Horry County's Value Year (2018) is still different than its Appraisal Year (2019).

Assuming the DOR has approved the reassessment timelines in these other counties, this may be a reasonable approach to interpreting the ambiguous phrase "property valuation" in section 12-43-217(A). We limit our finding only to hold that the Value Year and Appraisal Year may not be the same, but do not decide whether the Appraisal Year and Implementation Year may—or must—occur simultaneously.

Nonetheless, we note the DOR's Property Tax Manual states, "A countywide *reappraisal* takes place every five years. Usually, a countywide reassessment program is *implemented the next year*."[13] In interpreting section 12-43-217(A) differently from Horry County and others, the Assessor seemingly follows this approach set forth by the DOR.[14]

Additionally, the Assessor has been conducting its reassessments in this manner since the enactment of section 12-43-217 in 1996. In particular, in February 1997,

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[12] *News and Announcements: Countywide Reassessment of Real Properties Underway for 2019 Tax Year*, Horry Cty. Gov't (Jan. 23. 2019), https://www.horrycounty.org/News/PostId/1219/countywide-reassessment-of-real-properties-underway-for-2019-tax-year.

[13] S.C. Dep't of Revenue, *South Carolina Property Tax* 11 (2015), https://dor.sc.gov/resources-site/publications/Publications/Property_Tax_Guide.pdf (emphasis added).

[14] The Taxpayer argues this portion of the DOR's Property Tax Manual says nothing about differentiating between a Value Year and an Appraisal Year. However, the DOR has no authority to ignore state statute or this Court's precedent—i.e., section 12-37-900 or *Lindsey*—nor do we read the Property Tax Manual in derogation of those principles. Rather, the Assessor's recognition of a Value Year, an Appraisal Year, and an Implementation Year harmonizes the Property Tax Manual, the DOR's orders, and section 12-37-900 and *Lindsey*.

the DOR ordered the Assessor to "complete a reassessment program for the 1999 tax year with implementation of the reassessment program in tax year 2000." The Assessor interpreted the DOR's order to "complete a reassessment program" and implement it the following year as meaning he was required to take *some* action—i.e., conduct a countywide appraisal—in 1999 and then implement the revised values the following year. The Assessor has distinguished an Appraisal Year from an Implementation Year ever since.

We have previously "held in many cases that where the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons." *Etiwan Fertilizer Co. v. S.C. Tax Comm'n*, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950); *see also Purdy v. Moise*, 223 S.C. 298, 305, 75 S.E.2d 605, 608 (1953) (finding a municipality's "construction of its own ordinance, the enforcement of which it is charged with, should be given some consideration and not overruled without cogent reason therefor"). Here, the DOR's and the Assessor's interpretation of section 12-43-217 has been consistent since the statute's enactment, and has been successfully defended in multiple cases before the ALC and court of appeals. As a result, the Assessor's interpretation of section 12-43-217 is entitled to some deference.

Accordingly, we find that, as with Horry County's approach, the Assessor's approach is a reasonable interpretation of section 12-43-217(A) that results in few—if any—inequitable consequences to taxpayers.

C.

In sum, there is a legally required distinction between a Value Year and an Appraisal Year. Because the parties stipulated December 31, 2008, was the uniform date of value, necessarily, 2008 must have been a Value Year in Charleston County. Consequently, section 12-37-900 and *Lindsey* required 2009 to be an Appraisal Year. Likewise, the DOR's Property Tax Manual and section 12-43-217(A) required 2010 to be an Implementation Year, and section 12-43-217(B) allowed the Charleston County Council to delay implementation by one year to 2011. This timing aligns without a single gap or inconsistency with the historic dates related to the enactment of section 12-43-217 and Charleston County's previous reassessment cycles, in that each relevant date for the reassessments falls five years after the corresponding date in the last reassessment

(aside from the two permissible one-year, *implementation-only* delays in 2000 and 2010).

Accordingly, we find the court of appeals erred in finding the 2010 reassessment consisted of the calendar years 2005, 2006, 2007, 2008 (the Value *and* Appraisal Year), and 2009 (the Implementation Year, allegedly impermissibly delayed two years to 2011 in violation of section 12-43-217(B)). Instead, we hold the 2010 reassessment consisted of the calendar years 2006, 2007, 2008 (the Value Year), 2009 (the Appraisal Year), and 2010 (the Implementation Year, before it was delayed by Ordinance No. 1586 to 2011).

IV.

As to the proper value of the Property for the 2010 reassessment, the Taxpayer argues the court of appeals erred in reversing the ALC's decision to value the Property as a vacant lot. We disagree.

As an initial matter, the Assessor did not appeal the court of appeals' valuation determination. As a result, the Assessor has abandoned his argument below that the Property should be reappraised and reassessed in 2011 at a higher tax burden than that of the 2010 tax year—a tax burden which the Taxpayer paid without protest. *See Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 42 n.7, 535 S.E.2d 642, 646 n.7 (2000) (stating an issue is deemed abandoned if a party fails to make an argument as to the merits of the issue). Therefore, the only argument before us is the Taxpayer's argument that the Property should be taxed at its full value in 2010, taxed as a vacant lot in 2011, and taxed again as a developed property in 2012.

The General Assembly has clearly evidenced its intent for the value of improvements to control over the values set by a reassessment program. *See* S.C. Code Ann. § 12-37-3120 (2014) ("If the provisions of this article are inconsistent with other provisions of law, the provisions of this article apply."); *id.* § 12-37-3140 (containing, in the same article, the statute related to determining fair market value based on improvements to real property). Presumably, this is because the value set when the improvements are completed is the most current and accurate estimate of a property's worth and, therefore, the valuation would not need to be updated via a reassessment program. *Cf. id.* § 12-37-3140(A)(1) (stating a property's fair market value is the value applicable at the later of specified dates); *id.* § 12-37-3140(B) (stating an increase in value attributable to improvements overrides the fifteen percent cap in increased value otherwise applicable to

reassessment programs). As the court of appeals explained, it would be both absurd and contrary to statute to set the value of the Property for the 2010 reassessment as if it was still a vacant lot, notwithstanding the uniform date of value for the reassessment. *See id.* §§ 12-37-670(A), -3140(E).

We therefore find the court of appeals did not err in setting the value of the Property at $8,180,000 for purposes of the 2010 reassessment.

V.

In conclusion, we hold the value of property must be determined as of its worth on December 31 of the year preceding that of the appraisal. We also hold, in accordance with section 12-37-3120, that when a property is valued differently using a reassessment program's uniform date of value and the date of completion of improvements to the property, the improvement value necessarily is controlling. Accordingly, while we find the court of appeals erred in analyzing which years properly fell within Charleston County's 2010 reassessment, it reached the correct result in valuing the Property. We therefore affirm the court of appeals' decision as modified.

AFFIRMED AS MODIFIED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

A. Marion Stone, III, Respondent,

v.

Susan B. Thompson, Petitioner.

Appellate Case No. 2017-000227

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Jocelyn B. Cate, Family Court Judge

Opinion No. 27908
Heard June 13, 2019 – Filed July 24, 2019

REVERSED

Donald Bruce Clark, of Donald B. Clark, LLC, of Charleston, for Petitioner.

Alexander Blair Cash and Daniel Francis Blanchard, III, both of Rosen Rosen & Hagood, LLC, of Charleston, for Respondent.

JUSTICE HEARN: This case initially came to the Court to consider whether an order from a bifurcated hearing determining the existence of a common-law

marriage was immediately appealable. In *Stone v. Thompson*, 426 S.C. 291, 826 S.E.2d 868 (2019), we held it was and retained jurisdiction to consider the merits. We must now determine whether the family court was correct in finding Susan Thompson and Marion Stone were common-law married in 1989, as well as whether Stone was entitled to an award of attorney's fees.

Our review in this case has prompted us to take stock of common-law marriage as a whole in South Carolina. We have concluded the institution's foundations have eroded with the passage of time, and the outcomes it produces are unpredictable and often convoluted. Accordingly, we believe the time has come to join the overwhelming national trend and abolish it. Therefore, from this date forward—that is, purely prospectively—parties may no longer enter into a valid marriage in South Carolina without a license. Consistent with our findings regarding the modern applicability of common-law marriage rationales, we also take this opportunity to refine the test courts are to employ henceforth.

Nevertheless, the case before us remains. We do not believe Stone demonstrated the mutual assent required to prove a common-law marriage, and as a result, we hold the parties were not married and reverse the family court on the merits and as to the issue of attorney's fees.[1]

[1] This Court has had jurisdiction of this case since 2018 when the issue of the appealability of the order finding a common-law marriage was briefed, orally argued, and ruled upon. After finding the matter was appealable, we maintained jurisdiction in the interest of judicial economy, and the parties briefed and orally argued the merits of the case. Unbeknownst to this Court, a mediation was apparently conducted subsequent to oral argument, and while an opinion was in circulation, this Court was advised by Stone's counsel that a mediated agreement had been reached. Stone's counsel requested that the appeal be dismissed and that the case be remanded to the family court for approval of the agreement. We issued an order directing the family court not to take any action while this case was pending, and thereafter, counsel for Thompson requested we deny the motion to remand and decide the case on its merits. Accordingly, we deny the motion to remand and resolve the case that was fully briefed and argued to us.

I.

a. *Historical Common-law Marriage*

The institution of common-law marriage traces its roots to informal marriage in Europe prior to the Reformation. Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 718 (1996); *see also* Ashley Hedgecock, Comment, *Untying The Knot: The Propriety of South Carolina's Recognition of Common Law Marriage*, 58 S.C. L. REV. 555, 559-62 (2007). England recognized such unions during colonization, and as a result, common-law marriage migrated to the New World. Bowman, *supra*, at 719. Some states proceeded to adopt the doctrine, while others did not. *Id*. at 719-22. A primary reason for those that did was logistical—frontier America was sparsely populated and difficult to travel, making access to officials or ministers impractical for many. *Id*. at 722-24. States also sought to legitimize "subversive" relationships and the children thereof, as well as to direct women to the family for financial support instead of the public fisc. Hedgecock, *supra*, at 560; *see also* Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 968-69 (2000).

South Carolina followed New York's approach in adopting common-law marriage, holding it was a matter of civil contract that did not require ceremony; rather, two people were married when they agreed and intended to be. *Fryer v. Fryer*, 9 S.C. Eq. (Rich. Cas.) 85, 92 (1832); *Fenton v. Reed*, 4 Johns. 52 (N.Y. Sup. Ct. 1809). As Justice Littlejohn explained in 1970, the institution sought to "legitimatize innocent children and adjust property rights between the parties who treated each other the same as husband and wife." *Jeanes v. Jeanes*, 255 S.C. 161, 168-69, 177 S.E.2d 537, 540-41 (1970) (Littlejohn, J. concurring). Common-law marriage in South Carolina rests upon moral paternalism, as our courts have long recognized. *Id*. at 166-67, 177 S.E.2d at 539 ("The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy." (quotation omitted)). While our legislature has not expressly codified common-law marriage, it has recognized the institution by exception to the general requirement to obtain a marriage license. S.C. Code Ann. § 20-1-360 (2014).

b. *The Modern Trend*

The prevailing trend, however, has been repudiation of the doctrine. The reasons have been myriad—from economic to social—including some more

nefarious than others. Bowman, *supra*, at 731-49. Alabama became the most recent state to do so, enacting Ala. Code 1975 § 30-1-20 in 2016. *See Blalock v. Sutphin*, __ So. 3d __, 2018 WL 5306884 at *5 (Ala. 2018). By our count, this leaves fewer than ten jurisdictions that currently recognize the institution.[2]

In 2003, the Pennsylvania Commonwealth Court set forth a thorough explanation for its conclusion that common-law marriage should no longer be recognized in *PNC Bank Corp. v. W.C.A.B. (Stamos)*, 831 A.2d 1269 (Pa. Commw. Ct. 2003).[3] Notably, the court determined:

> The circumstances creating a need for the doctrine are not present in today's society. A woman without dependent children is no longer thought to pose a danger of burdening the state with her support and maintenance simply because she is single, and the right of a single parent to obtain child support is no longer dependent upon his or her marital status. Similarly, the marital status of parents no longer determines the inheritance rights of their children. Access to both civil and religious authorities for a ceremonial marriage is readily available in even the most rural areas of the Commonwealth. The cost is minimal, and the process simple and relatively expedient.

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[2] Our legislature has attempted to remove South Carolina from the ranks of recognizing states on many occasions, to no avail. *See, e.g.*, H.B. 3925, 122nd Gen. Assemb., 1st Reg. Sess. (S.C. 2017); S.B. 11, 120th Gen. Assemb., 1st Reg. Sess. (S.C. 2013); H.B. 3588, 116th Gen. Assemb., 1st Reg. Sess. (S.C. 2005); H.B. 4597, 115th Gen. Assemb., 1st Reg. Sess. (S.C. 2004); H.B. 3625, 115th Gen. Assemb., 1st Reg. Sess. (S.C. 2003); H.B. 3774, 114th Gen. Assemb., 1st Reg. Sess. (S.C. 2001); H.B. 3452, 114th Gen. Assemb., 1st Reg. Sess. (S.C. 2001); H.B. 3668, 113th Gen. Assemb., 1st Reg. Sess. (S.C. 1999); H.B. 3656, 113th Gen. Assemb., 1st Reg. Sess. (S.C. 1999); H.B. 4410, 112th Gen. Assemb., 1st Reg. Sess. (S.C. 1998).

[3] Pennsylvania's Commonwealth Court—one of two intermediate appellate courts—held that common-law marriage was abolished in the state. Pennsylvania's legislature subsequently agreed, enacting a statute affixing January 1, 2005, as the final day on which a valid common-law marriage could be contracted. 23 PA. CONS. STAT. ANN. § 1103 (West 2005).

831 A.2d at 1279 (internal citations omitted). The court also pointed to benefits of standardized formal marriage requirements such as predictability, judicial economy, and upholding the statutes' "salutary" purposes. *Id*. at 1279-81.

c. *Modern South Carolina*

The common law changes when necessary to serve the needs of the people. *Russo v. Sutton*, 310 S.C. 200, 204, 422 S.E.2d 750, 753 (1992). We will act when it has become apparent that the public policy of the State is offended by outdated rules of law. *Id*. (abolishing the "heart balm" tort of alienation of affections); *see also Nelson v. Concrete Supply Co.,* 303 S.C. 243, 399 S.E.2d 783 (1991) (abolishing contributory negligence); *McCall v. Batson,* 285 S.C. 243, 329 S.E.2d 741 (1985) (abolishing sovereign immunity). As discussed—and perhaps intuitively—common-law marriage's origins lie in the common law, and consequently, it may be removed by common-law mandate, regardless of tacit recognition by our legislature. *Russo*, 310 S.C. at 204, 422 S.E.2d at 753.

We find the Pennsylvania court's reasoning and other considerations sufficiently persuasive to adopt a bright-line rule requiring those who wish to be married in South Carolina to obtain a lawful license. Our law contains similar provisions regarding child support, inheritance, and the ceremonial marriage process. *See* S.C. Code Ann. §§ 20-1-210 to -240 (1976); §§ 62-2-101 to -109 (1976 & Supp. 2018); § 63-5-20 (1976 & Supp. 2018). The paternalistic motivations underlying common-law marriage no longer outweigh the offenses to public policy the doctrine engenders. By and large, society no longer conditions acceptance upon marital status or legitimacy of children. The current case is emblematic of this shift, as the parties' community of friends was wholly unconcerned with their marital status, and indeed several of their witnesses were in similar relationships. Meanwhile, courts struggle mightily to determine if and when parties expressed the requisite intent to be married, which is entirely understandable given its subjective and circumstantial nature. The solemn institution of marriage is thereby reduced to a guessing game with significant ramifications for the individuals involved, as well as any third party dealing with them.

Critically, non-marital cohabitation is exceedingly common and continues to increase among Americans of all age groups.[4] The right to marry is a fundamental

[4] Renee Stepler, *Number of U.S. adults cohabitating with a partner continue to rise, especially among those 50 and older*, Pew Research Ctr. (Apr. 6, 2017),

constitutional right, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015), which leads us to believe the right to remain unmarried is equally weighty, particularly when combined with our admonitions that a person cannot enter into such a union accidentally or unwittingly, *Callen v. Callen*, 365 S.C. 618, 626, 620 S.E.2d 59, 63 (2005). Further, we must agree with the many observers who have noted that common-law marriage requirements are a mystery to most.[5] The present case is again illustrative. None of the multiple witnesses who were asked understood what was required to constitute a common-law marriage, despite the fact that, as mentioned, several were involved in lengthy cohabitating relationships themselves. Moreover, two of such partners testified in complete opposition to one another, with one reporting they were common-law married, and the other stating emphatically they were not. This further persuades us to reject a mechanism which imposes marital bonds upon an ever-growing number of people who do not even understand its triggers.

Our public policy is to promote predictable, just outcomes for all parties involved in these disputes, as well as to emphasize the sanctity of marital union. We can discern no more efficacious way to fulfill these interests than to require those who wish to be married in our State to comply with our statutory requirements. Our quest to see inside the minds of litigants asserting different motivations and levels of knowledge at varying times must yield to the most reliable measurement of marital intent: a valid marriage certificate.

d. *Prospective Application*

The states that have abolished common-law marriage have consistently done so prospectively. However, many have utilized the legislative avenue, and as this Court pointed out in *Russo*, "the legislature cannot create a statute which applies retroactively to divest vested rights." 310 S.C. at 205 n.5, 422 S.E.2d at 753. This Court can choose to retroactively apply a judicial change to the common law, although we did not in *Russo*. *Id*.

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https://www.pewresearch.org/fact-tank/2017/04/06/number-of-u-s-adults-cohabiting-with-a-partner-continues-to-rise-especially-among-those-50-and-older/.

[5] *See* Bowman, *supra*, at 711 & n.6 (discussing the widely-held belief that cohabitation for seven years resulted in legal marriage).

The Pennsylvania Commonwealth Court in *Stamos* also elected to apply its decision purely prospectively. 831 A.2d at 1282-83. The court weighed the purpose of its new rule, the level of reliance on the old rule, and the impact on judicial function by retroactive application. *Id*. at 1283. The Pennsylvania court noted the benefits of the new rule should not undermine relationships which were validly entered into at the time, and upending formerly-correct decisions of law served the interests of no one. The court also concluded the old rule had been in effect for such a length of time that citizens undoubtedly relied upon it, including the parties before the court. *Id*.

We likewise decline to exercise our prerogative to apply our ruling today retroactively. We see no benefit to undoing numerous marriages which heretofore were considered valid in our State, and we will not foreclose relief to individuals who relied on the doctrine. Accordingly, our ruling today is to be applied purely prospectively; no individual may enter into a common-law marriage in South Carolina after the date of this opinion.

e. *Refining the Test*

Consistent with our observations regarding the institution's validity in modern times, we believe we must update the standards courts are to apply in future common-law marriage litigation. A common-law marriage is formed when the parties contract to be married, either expressly or impliedly by circumstance. *Callen*, 365 S.C. at 624, 620 S.E.2d at 62. The key element in discerning whether parties are common-law married is mutual assent: each party must intend to be married to the other and understand the other's intent. *Id*. Some factors to which courts have looked to discern the parties' intent include tax returns, documents filed under penalty of perjury, introductions in public, contracts, and checking accounts.[6]

Appellate courts have previously recognized two lines of cases regarding common-law marriage. *See Tarnowski v. Lieberman*, 348 S.C. 616, 620, 560 S.E.2d 438, 440 (Ct. App. 2002); *Barker*, 330 S.C. at 366-67, 499 S.E.2d at 506-07. The first holds that a party proves a common-law marriage by a preponderance of the

[6] *Kirby v. Kirby*, 270 S.C. 137, 142, 241 S.E.2d 415, 417 (1978); *Cathcart v. Cathcart*, 307 S.C. 322, 414 S.E.2d 811 (Ct. App. 1992); *Barker v. Baker*, 330 S.C. 361, 364, 366, 499 S.E.2d 503, 505-06 (Ct. App. 1998); *Owens v. Owens*, 320 S.C. 543, 546, 466 S.E.2d 373, 375 (Ct. App. 1996).

evidence.[7] *Tarnowski*, 348 S.C. at 620, 560 S.E.2d at 440. The second relies on "a strong presumption in favor of marriage by cohabitation, apparently matrimonial, coupled with social acceptance over a long period of time." *Barker*, 330 S.C. at 367, 499 S.E.2d at 506. This presumption—like common-law marriage itself—is based on a conception of morality and favors marriage over concubinage and legitimacy over bastardy. *Jeanes*, 255 S.C. at 166-67, 177 S.E.2d at 539-40. It can only be overcome by "strong, cogent, satisfactory or conclusive evidence" showing the parties are not married. *Id*. at 167, 177 S.E.2d at 540. This Court has held that once a common-law marriage becomes complete, "no act or disavowal" can invalidate it. *Campbell v. Christian*, 235 S.C. 102, 109, 110 S.E.2d 1, 5 (1959).[8]

Thompson argues the rebuttable presumption of common-law marriage is based on outdated assumptions about cohabitation. Given our foregoing assessment of common-law marriage, it will come as no surprise that we agree. The concerns regarding immorality, illegitimacy, and bastardy are no longer stigmatized by society, and as a result, they can no longer serve as the basis for assuming individuals are married.

Additionally, consistent with our preceding discussion regarding the sanctity of a marital relationship and our reticence to impose one on those who did not fully intend it, we believe a heightened burden of proof is warranted. Therefore, we hold the "clear and convincing evidence" standard utilized in probate matters should also apply to living litigants.[9] This is an intermediate standard—more than a preponderance, but less than beyond a reasonable doubt—and requires a party to show a degree of proof sufficient to produce a firm belief in the allegations sought to be established. *In re Estate of Duffy*, 392 S.C. 41, 46, 707 S.E.2d 447, 450 (Ct. App. 2011).

Finally, to the extent necessary, we clarify a section of this Court's opinion in *Callen*. 365 S.C. at 626, 620 S.E.2d at 63. A party is not required to show his

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[7] In probate matters, however, a party alleging a common-law marriage must carry his burden by clear and convincing evidence. S.C. Code Ann. § 62-2-802(b)(4) (2009).

[8] The preceding law is that which was in effect when Stone filed this case.

[9] We join other jurisdictions in adopting this standard for non-probate common-law marriage disputes. *See Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 1021 (Pa. 1998).

opponent had legal knowledge of common-law marriage; ignorance of the law remains no excuse. He must demonstrate that both he and his partner mutually intended to be married to one another, regardless of whether they knew their resident state recognized common-law marriage or what was required to constitute one.

To sum up, in the cases litigated hereafter, a party asserting a common-law marriage is required to demonstrate mutual assent to be married by clear and convincing evidence. Courts may continue to weigh the same circumstantial factors traditionally considered, but they may not indulge in presumptions based on cohabitation, no matter how apparently matrimonial. While we have set forth the law to be applied in future litigation, we apply the principles in effect at the time this action was filed to the case at hand.

II.

a. *Factual and Procedural Background*

Stone and Thompson met in the early 1980's and began a romantic relationship shortly thereafter. Thompson was married to another man at the time and obtained a divorce from him in 1987. Later that year, Stone and Thompson had their first child. After Hurricane Hugo hit Charleston in 1989, the parties had their second child and started living together. They continued to live, raise their children, and manage rental properties together for approximately twenty years. Thompson worked as a veterinarian and owned multiple practices, while Stone performed contracting work and collected rent from tenants. The parties ultimately ended their relationship after Thompson discovered Stone was having an affair with a woman in Costa Rica.

In 2012, Stone filed an amended complaint in family court seeking a declaratory judgment that the parties were common-law married, a divorce, and an equitable distribution of alleged marital property. Thompson answered, asserting the parties were never common-law married and seeking dismissal. She also asked the court to bifurcate the issues to first determine if a common-law marriage existed if it would not dismiss the case. After a hearing, the family court denied Thompson's motion to dismiss but granted her motion to bifurcate, ordering a trial on the sole issue of whether the parties were married at common law.

The trial involved more than a week of proceedings, testimony from over 40 witnesses, and nearly 200 exhibits. Stone's testimony focused on the parties'

cohabitation for approximately twenty years, the fact that they raised their two children together during this time, and their partnership in acquiring, renovating, and renting multiple properties in the Charleston area. He submitted evidence that the parties were jointly titled on real estate, boats, bank accounts, and credit cards, as well as that Thompson had listed herself as married to him on several documents from 2005-2008, including some prescribing criminal penalties for false statements. Stone's witnesses generally testified that the parties were assumed to be married in the community and were introduced as husband and wife by themselves and others on multiple occasions without correction.

Conversely, Thompson testified she never intended to marry Stone and went to great lengths to preserve her unmarried status. She pointed to numerous documents listing both her and Stone as single during the relevant time period, including all of their tax returns, his documents related to a Costa Rican financial venture, and a 2008 agreement signed by both parties. Thompson's witnesses reported that they and others in the community knew she and Stone were not married and they never heard them introduced as such. Several testified Thompson had told them she would never marry again.

The family court concluded the parties were common-law married beginning in 1989 when they began to live together full-time and Thompson introduced Stone as her husband during an art opening. The court found Stone's testimony credible while rejecting Thompson's versions of events on credibility grounds, as it determined Stone's witnesses were longtime friends of both parties and were distressed at having to testify, while many of Thompson's witnesses did not become close to her until after the affair. The family court concluded that Stone presented sufficient evidence of the parties' apparently-matrimonial cohabitation to trigger a presumption of marriage that could only be refuted by strong, cogent evidence they never agreed to marry. The court found Thompson failed to submit such evidence, as once she expressed the intention to be married in December 1989, no subsequent act could change it, as there is no common-law divorce. The family court awarded $125,620.32 in attorney's fees and costs to Stone, reasoning that Thompson's actions and denial of a common-law marriage were "flatly contradicted time and again . . . ."

Thompson appealed to the court of appeals, which determined the family court's order was not final and appealable because it did not end the case. *Stone v. Thompson*, 418 S.C. 599, 795 S.E.2d 49 (Ct. App. 2016). Thompson petitioned for

a writ of certiorari, which this Court granted. We issued an opinion on April 3, 2019, finding the order was appealable. *Stone*, 426 S.C. 291, 826 S.E.2d 868.

b. *Standard of Review*

Appellate courts review family court matters de novo, with the exceptions of evidentiary and procedural rulings. *Stoney v. Stoney*, 422 S.C. 593, 813 S.E.2d 486 (2018) (citing *Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011)). Even under de novo review, the longstanding principles that trial judges are in superior positions to assess witness credibility and that appellants must show the trial judge erred by ruling against the preponderance of the evidence remain applicable. *Stoney*, 422 S.C. at 595, 813 S.E.2d at 487. Likewise, this Court reviews a family court's award of attorney's fees de novo. *Chisholm v. Chisholm*, 396 S.C. 507, 510, 722 S.E.2d 222, 224 (2012).

c. *Analysis*

Thompson asserts the record reflects she never intended to be married to Stone. Stone contends the family court correctly found the parties were common-law married in 1989 because the record demonstrates the parties held themselves out and signed multiple documents under threat of criminal penalties as such during the course of their relationship.

The family court found the parties were married in 1989 after they moved in together, had their second child, and held themselves out as a married couple, as this established the requisite meeting of the minds. We disagree. Stone testified Thompson introduced him as her husband to a third party at an art opening around Christmas 1989, but Thompson stated this did not occur. Stone did not produce the third party to confirm that it did, and even respecting the court's credibility finding, we do not believe this rises to a preponderance of the evidence that, at that time, the two intended to be married and knew the other did as well.

Further, no evidence from the subsequent decade and a half demonstrated mutual intent to be married. Even assuming Stone intended to be married to Thompson throughout this time—which the evidence presented does not fully support—the critical inquiry is whether Thompson ever did. The parties continued to live and raise children together—consistent with their agreement to participate in a committed relationship—as well as run their business partnership of purchasing, flipping, and/or managing properties. Although some witnesses testified the two

introduced each other as husband and wife, others testified they never heard them do so, and still others testified they knew not to because Thompson had told them they were not married. While acknowledging the family court's credibility determination, we nonetheless disagree with the court's view of the evidence. The court's finding that Thompson's witnesses largely became close to her after the affair is contradicted by fourteen witnesses who were acquainted with her and Stone during the relevant time period and testified they knew the parties were not married, while Stone's merely assumed they were. Significantly, there were no documents from 1989-2004 in which Thompson indicated she was married, and many that reflected she was not. Moreover, the children's birth certificates stated their last name was Thompson. While the children were born shortly before 1989, their legal last name remained Thompson until June 2000, when it was changed to Thompson Stone. Even if a rebuttable presumption the parties were married arose, Thompson refuted it by strong, cogent evidence.

The evidence presented as to the factors appellate courts consider in determining intent was decidedly mixed. For example, Thompson insisted on filing her taxes as "single head of household" during the entirety of her relationship with Stone. *Kirby*, 270 S.C. at 142, 241 S.E.2d at 417; *Cathcart*, 307 S.C. 322, 414 S.E.2d 811. On the other hand, both she and Stone filed other documents under penalty of perjury claiming they were married. *Barker*, 330 S.C. at 366, 499 S.E.2d at 506. Both sides presented evidence that the parties did/did not introduce themselves to others as married over the years. *Id*. at 364, 499 S.E.2d at 505. The parties signed some contracts jointly, but many more were only in one's name or the other's. *Owens*, 320 S.C. at 546, 466 S.E.2d at 375. Finally, the parties shared at least one checking account, but Thompson disputed Stone's assertion that they shared several. *Id*.

The closest the parties came to the requisite meeting of the minds, in our opinion, was from 2005-2008, when Thompson indicated she was married to Stone, at least for certain purposes. It began with a medical intake form dated May 31, 2005, which only she signed, but continued that year with several documents both parties signed. These included a mortgage loan application stating they were married followed by mortgage documents listing the parties as husband and wife. Mortgage documents from December 2006 and January 2007 likewise listed the parties as married. Thompson signed a transfer of insurance from Stone to herself that indicated she was his wife as of October 2008. She finally listed herself as

married on another medical intake form with a different doctor in December 2008, which she sought to change to "single" two weeks after this case was filed.

However, these documents are undercut by others from the same period, including Thompson's continued tax filings as single, Stone's Costa Rican documents wherein he listed himself as single, and a 2008 reconciliation agreement signed by both parties in which they agreed they had preserved their unmarried status. Thompson further explained the parties signed the financial documents as married during this time because banks were more closely scrutinizing mortgage loans.[10] While we in no way condone false statements in pursuit of a financial benefit, we do not believe these documents evidence the necessary intent to prove the parties were common-law married.

It is clear the parties intended to be in a committed relationship and business partnership together, but their conduct in living together, raising children, and running the business does not demonstrate they each intended to be married and knew the other intended the same. Furthermore, because our decision constitutes a reversal on the merits, we likewise reverse the family court's award of attorney's fees. *Chisholm*, 396 S.C. at 510-11, 722 S.E.2d at 224.

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[10] This calls to mind yet another reason to abolish common-law marriage, as the *Stamos* court recognized:

> [C]ouples may swear in applying for benefits that they are man and wife, but file tax returns averring under penalty of perjury that they are single. One attorney in oral argument, when asked how he could explain affidavits to the IRS inconsistent with the testimony of his client in the litigation then before the court, replied matter-of-factly that he assumed it lowered their tax liability. What is truly astonishing is not that parties take inconsistent positions to gain advantage, but that they seem to see nothing particularly inappropriate in their chameleon-like behavior. We must conclude that this court can no longer place its imprimatur on a rule which seems to be a breeding ground for such conduct and its attendant disrespect for the law itself.

831 A.2d at 1281.

CONCLUSION

Based on the foregoing, we **REVERSE** the family court's decision.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Progressive Direct Insurance Company, Plaintiff,

v.

Bryan Reeves, Defendant.

Appellate Case No. 2018-001436

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
Cameron McGowan Currie, United States District Court Judge

Opinion No. 27909
Heard May 8, 2019 – Filed July 24, 2019

CERTIFIED QUESTION ANSWERED

J.R. Murphy and Megan Walker, both of Murphy & Grantland, P.A., of Columbia, for Plaintiff.

William R. Padget and Carl D. Hiller, both of Finkel Law Firm, LLC, of Columbia, for Defendant.

JUSTICE KITTREDGE: We are presented with a certified question from the United States District Court for the District of South Carolina, asking this Court to

construe section 38-77-350(C) of the South Carolina Code (2015) and determine whether, under the facts presented, an insurance company is required to make a new offer of underinsured motorist (UIM) coverage when an additional named insured is added to an existing policy. The statute provides that an insurer is not required to make a new UIM coverage offer "on any automobile insurance policy which renews, extends, changes, supersedes, or replaces an existing policy." S.C. Code Ann. § 38-77-350(C). In 2012, Wayne Reeves acquired an insurance policy from Progressive Direct Insurance Company (Progressive) covering his motorcycle. When the policy was issued, Wayne declined optional UIM coverage. In 2015, Wayne's wife (Jennifer) and son (Bryan) were added to the policy as "drivers and household residents," because they also drove motorcycles. In 2017, Bryan sold his motorcycle and purchased another motorcycle, a 2016 Harley Davidson, which was added to the policy. At the time, Wayne had Bryan added as named insured to the policy. Progressive did not offer Bryan any optional coverages.

Later in 2017, Bryan was involved in an accident while driving his 2016 Harley Davidson. Bryan ultimately made a claim against Progressive to reform the policy to include UIM coverage based on Progressive's failure to offer him the optional coverage. Progressive contended that adding Bryan as a named insured was a change to an existing policy, and as a result, Progressive was not required to offer Bryan UIM coverage. Based on the undisputed facts, the parties filed cross motions for summary judgment, and the federal district court certified the following questions to us:

> Whether the addition of a named insured (Added Named Insured) to an existing insurance policy under which the Added Named Insured was previously a resident[-]relative insured is a "change" under [section 38-77-350(C) of the South Carolina Code] and, consequently, does not require an additional offer of optional coverages if an offer that satisfies [section 38-77-350(A) and (B) of the South Carolina Code] was previously made to the named insured who originally applied for the policy (Original Named Insured)?
>
> If the insurer was required but failed to make a separate offer of optional coverage to the Added Named Insured, whether reformation should be limited to vehicle(s) in which the Added Named Insured has an insurable interest?

For reasons we will explain below, we answer the first certified question: Yes, the addition of Bryan Reeves as a named insured was a change to the existing policy pursuant to section 38-77-350(C), and Progressive was not required to make an additional offer of UIM coverage to Bryan. Having answered the first certified question "yes," we do not reach the second question.

I.

In its certification order, the federal district court summarized the relevant facts as follows:

> The policy for which Bryan seeks reformation was initially issued to his father, Wayne . . . , in June 2012. The policy was renewed five times, remaining in effect through and including July 30, 2017, on which date Bryan was injured in the motorcycle accident for which he now seeks UIM coverage.
>
> The policy was issued based on completion and execution of an online policy application. The application and related UIM and uninsured motorist ("UM") coverage offer form ("Offer Form") were completed by Wayne or his wife, Jennifer . . . , acting as Wayne's express and implied agent. The Offer Form satisfied the requirements for an offer of optional UM and UIM coverages under [section] 38-77-350(A), and was completed indicating UIM coverage was declined.
>
> Initially, the only named insured was Wayne and the policy covered a single motorcycle owned by him. Jennifer and Bryan were added to the policy in February 2015 and listed as "drivers and household residents." [While Bryan was a resident-relative insured, he owned a 2007 Harley Davidson that was insured under the policy.]
>
> Bryan was designated a named insured in May 2017, because he [became] the owner of a 2016 Harley Davidson motorcycle ("2016 Harley") that was added as a covered vehicle at that time[, merely substituting the 2016 Harley for the 2007 Harley on the policy].[1]

[1] Although she also owned covered motorcycles at various times, Jennifer was apparently never made a named insured.

> Progressive did not provide Bryan with on Offer Form compliant with [s]ection 38-77-350 or otherwise make an offer of optional UM or UIM coverage to Bryan when he became a named insured or at any other time.
>
> At the time of Bryan's accident on July 30, 2017, the policy covered three motorcycles, one of which was owned by Wayne, one by Jennifer, and one by Bryan. Bryan and Wayne were, at that time, both listed as named insureds, though Wayne remained the first named insured. Bryan was driving his 2016 Harley when the accident occurred and suffered injuries for which he seeks damages exceeding the liability limits of the other driver's motor vehicle insurance policy.

Order of Certification at 2–4 (some citations omitted); Stipulation of Facts at 2–3.

II.

Automobile insurance carriers must offer, "at the option of the insured, [UIM] coverage up to the limits of the insured liability coverage." S.C. Code Ann. § 38-77-160 (2015). "If the insurer fails to . . . make a meaningful offer [of UIM coverage] to the insured, the policy will be reformed, by operation of law, to include UIM coverage up to the limits of liability insurance carried by the insured." *Butler v. Unisun Ins. Co.*, 323 S.C. 402, 405, 475 S.E.2d 758, 760 (1996). However, section 38-77-350(C)[2] provides: "An automobile insurer is not required to make a new offer of coverage on any automobile insurance policy which renews, extends, changes, supersedes, or replaces an existing policy." S.C. Code Ann. § 38-77-350(C).

From the plain language of section 38-77-350(C), it is clear an insurance company need not make a new offer of UIM coverage in the case of a "change" to an *existing policy*. We acknowledge that in the context of section 38-77-350(C), the word "change" is ambiguous. Clearly, not all "changes" are the same. The

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[2] Sections 38-77-160 and 38-77-350 deal with the same subject matter (the offer of optional insurance coverages for automobiles) and therefore must be construed together. *See Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000) ("[S]tatutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result.").

question then becomes at what point a "change" rises to a level that escapes the reach of section 38-77-350(C) and thus triggers a duty to reoffer UIM coverage. To properly discern legislative intent, it is essential that the word "change" (and other actions listed, such as "renews, extends, . . . supersedes, or replaces") be considered in the context of the phrase "an existing policy."

In this regard, we follow the framework that other states have utilized. Specifically, as other states have done in interpreting similar language in their own state statutes, we hold an insurance company must make a new offer of coverage when there has been a *material* change to the policy. *See, e.g.*, *Kerr v. State Farm Mut. Auto. Ins. Co.*, 434 So. 2d 970, 971 (Fla. Dist. Ct. App. 1983) ("[T]he test for whether a new rejection of UM coverage had to be obtained is whether the original policy has been changed in any material respect." (internal quotation marks omitted)); *Allstate Ins. Co. v. Kaneshiro*, 998 P.2d 490, 497 (Haw. 2000) ("[W]hen a material change is made to an existing policy, the resulting policy is not a 'renewal or replacement policy' and a new offer of UM/UIM coverage is required."); *Wilkinson v. La. Indem./Patterson Ins.*, 682 So. 2d 1296, 1300 (La. Ct. App. 1996) (finding husband's addition of wife as a named insured did not have the effect of altering coverage, and, thus was not a material change and no new offer of optional coverage was required).

Under the facts presented, we find that adding Bryan as an additional named insured was not a material change that would trigger the requirement to offer UIM coverage to Bryan. Stated differently, adding Bryan as an additional named insured was a change to an existing policy within the meaning of section 38-77-350(C).

Bryan's reliance on *McDonald v. South Carolina Farm Bureau Insurance. Co.*, 336 S.C. 120, 518 S.E.2d 624 (Ct. App. 1999), is misplaced. The specific question in *McDonald* was whether the safe harbor created by section 38-77-350(C) applied where the original named insured, who received a proper offer of UIM coverage, transferred her vehicle to her son, and requested that Farm Bureau put the policy in her son's name. *Id*. at 123–25, 518 S.E.2d 625–26. Because the mother sold the car to her son, the mother was no longer an insured. Farm Bureau argued that the substitution of the son for the mother as the named insured was a "change" falling within section 38-77-350(C). *Id*. The court of appeals rejected the insurer's position, explaining that "[r]emoving [the mother] from the policy and *substituting* [the son] as the named insured was not a mere policy change. It was the creation

of a new insurance policy with a new named insured." *Id.* at 125, 518 S.E.2d at 626 (emphasis added).

Bryan nevertheless (and understandably) clings to the single sentence in *McDonald* that "the legislature intended for insurers to afford all named insured[s] the opportunity to accept or reject UIM coverage." *Id*. at 124, 518 S.E.2d at 626. Based on this one sentence, Bryan extrapolates a categorical rule that the addition of a named insured can never be a change within the meaning of section 38-77-350(C), a position we reject. *McDonald* involved more than adding an additional insured; *McDonald* necessarily involved an entirely new policy, as the prior insured and policyholder was removed altogether as a result of the sale of the vehicle. *McDonald* represents the substitution of a new insured for the prior insured, which resulted in a material change—the creation of a new policy.

In the present case, no new policy was created. An existing policy that covered Bryan's motorcycle was changed to add Bryan as an additional named insured. Neither did the addition of Bryan as a named insured "supersede" or "replace" his father's policy—terms also contemplated by section 38-77-350(C) as not requiring an additional offer of UIM coverage. Rather, under the circumstances presented, the addition of Bryan as a named insured is properly characterized as a change to an existing policy within the meaning of section 38-77-350(C). Consequently, Progressive was not required to reoffer UIM coverage.

III.

In sum, the only modifications made to the policy were substituting the 2007 Harley for the 2016 Harley[3] and reclassifying Bryan as a named insured, rather than a resident-relative insured. The coverage and policy limits did not change, for Bryan and his motorcycle were insured before and after the change. Therefore, we hold the addition of Bryan to his parents' policy was a change contemplated by section 38-77-350(C), and Progressive was not required to make an offer of UIM coverage to Bryan. We answer the first certified question "yes," and decline to answer the second question.

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[3] *Smith v. S.C. Ins. Co.*, 350 S.C. 82, 89, 564 S.E.2d 358, 362 (Ct. App. 2002) ("We hold the addition of a new vehicle is a 'change' to an existing policy as contemplated by [section] 38-77-350(C) and thus a new offer of UIM coverage is not mandated.").

CERTIFIED QUESTION ANSWERED.

BEATTY, C.J., HEARN and FEW, JJ., and Acting Justice Thomas E. Huff, concur.

The Supreme Court of South Carolina

In the Matter of Jay Anthony Mullinax, Respondent.

Appellate Case No. 2019-001153

ORDER

The Office of Disciplinary Counsel asks this Court to transfer Respondent to incapacity inactive status pursuant to Rule 28, RLDE, Rule 413, SCACR, or place Respondent on interim suspension pursuant to Rule 17(c), RLDE, Rule 413, SCACR. The petition also seeks the appointment of the Receiver pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that Respondent is transferred to incapacity inactive status until further order of this Court.

IT IS FURTHER ORDERED that Peyre Thomas Lumpkin, Esquire, is hereby appointed to assume responsibility for Respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Respondent's clients. Mr. Lumpkin may make disbursements from Respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts Respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Respondent, shall serve as an injunction to prevent Respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Peyre Thomas Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre Thomas Lumpkin, Esquire, has been duly

appointed by this Court and has the authority to receive Respondent's mail and the authority to direct that Respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

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

Columbia, South Carolina

July 16, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Keith Alan May, Respondent,

v.

Denise Marie May, Appellant.

Appellate Case No. 2017-000030

Appeal From Charleston County
Daniel E. Martin, Jr., Family Court Judge

Opinion No. 5667
Heard April 17, 2019 – Filed July 24, 2019

AFFIRMED

Harold Alan Oberman, of Oberman & Oberman, of Charleston, for Appellant.

Donald Bruce Clark, of Donald B. Clark, LLC, and Mary Kathryn Schmutz, of Schmutz & Schmutz, both of Charleston, for Respondent.

KONDUROS, J.: Denise Marie May (Wife) appeals the family court's grant of Keith Alan May's (Husband's) motion to set aside judgment in the parties' divorce action based on mutual mistake pursuant to Rule 60, SCRCP. We affirm.

FACTS/PROCEDURAL BACKGROUND

Husband and Wife were married twice. This action involves the divorce ending their second marriage. As part of the divorce action, Husband and Wife were subject to mandatory mediation. Wife appeared pro se at the mediation, although she had previously been represented by counsel. Husband was represented at the mediation. The parties reached a consensus on all relevant issues at the conclusion of the mediation, and the mediator drafted a settlement agreement (the Agreement) intended to reflect the agreed-upon terms. The relevant part of the Agreement provided:

> The Wife shall refinance or assume the debt on the home to remove the Husband's name from the indebtedness to Benchmark Mortgage. The Wife shall refinance or assume the debt on the home to remove the Husband's name from the indebtedness on or before June 7, 2016. The Husband hereby waives and relinquishes any and all interest in the property and the equity therein. The Wife shall be responsible for any and all debts and liabilities associated with this property and shall hold the Husband harmless therefrom.
>
> Should the Wife not refinance or otherwise remove the Husband's name from the Benchmark Mortgage on or before June 7, 2016, the house shall be placed on the market for sale by June 13, 2016. . . . All net sales proceeds shall be split by the parties on a 50/50 basis.

Husband and Wife initialed each page of the Agreement and signed the final page. Husband and Wife then appeared before the family court, again with counsel and pro se respectively, and affirmed they had read and understood the Agreement and consented to it. Wife refinanced the mortgage on the marital home and removed Husband's name therefrom in the allotted time. However, according to Husband, Husband's attorney, and the mediator, the parties agreed that if Wife was able to refinance the marital home, she would pay Husband $60,000 as his part of the equity in the home. As exposed in the above-quoted portion of the Agreement, the document did not include this provision.

Husband filed a Rule 60(a) and (b), SCRCP motion, arguing the Agreement should be reformed to correct his and Wife's mutual mistake in signing something other than what they agreed to at mediation. Husband's attorney, Husband, and the mediator presented affidavits to that effect. Wife attested in her affidavit "there is no error, clerical or otherwise, in the agreement or the [family court]'s Order. This is the agreement that was drafted [and] signed [,] and it is precisely to what I agreed." Wife also argued evidence regarding anything that occurred during mediation was protected by privilege under Rule 8, SCADR. The family court concluded the Agreement reflected a mistake and should be reformed. The family court indicated it did not rely on the mediator's affidavit in reaching its conclusion. Rather, the family court relied on the parties' affidavits and the internal inconsistency in the Agreement which under Wife's interpretation, would give Husband no equity in the marital home if Wife refinanced but would give him half the equity if the home was sold. Additionally, the court declared each party should pay his or her own attorney's fees. The family court denied Wife's motion for reconsideration, and this appeal followed.

STANDARD OF REVIEW

"Whether to grant or deny a motion under Rule 60(b)[, SCRCP,] lies within the sound discretion of the judge. Our standard of review, therefore, is limited to determining whether there was an abuse of discretion." *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004) (citation omitted). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009).

LAW/ANALYSIS

I. Mediation[1]

Wife argues the family court could not consider any information related to the mediation other than that contained in the original Agreement presented to the family court because Rule 8, SCADR, prohibits such disclosure. She contends this would have the effect of negating the affidavits of Husband, Husband's attorney,

[1] We address this issue first as its consideration impacts the analysis of mutual mistake discussed in section II.

and the mediator in consideration of whether a mutual mistake occurred. We disagree.

In 2018, Rule 8 was revised to specifically address the issue in this case. It now provides for a limited exception to confidentiality.

> **(c) Limited Exceptions to Confidentiality.** There is no confidentiality attached to information that is disclosed during a mediation:
>
> . . .
>
> (4) offered for the limited purpose in judicial proceedings of establishing, refuting, approving, voiding, or reforming a settlement agreement reached during a mediation;
>
> . . .[2]

Prior to the revision of Rule 8, this court considered the language of the prior version and what type of information it protected from disclosure in later proceedings.[3] In *Huck v. Oakland Wings, LLC*, 422 S.C. 430, 435-36, 813 S.E.2d

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[2] This revision is consistent with a Florida case cited in Husband's brief, *DR Lakes Inc. v. Brandsmart U.S.A. of W. Palm Beach*, 819 So. 2d 971 (Fla. Dist. Ct. App. 2002). Florida, like South Carolina, has now revised its Alternative Dispute Resolution Rules to recognize an exception to the confidentiality of mediation as it relates to correcting a settlement agreement reached therein.

[3] The version of Rule 8 in place at the time of Husband's motion stated:

> **(a) Confidentiality.** Any mediation communication disclosed during a mediation, including, but not limited to, oral, documentary, or electronic information, shall be confidential, and shall not be divulged by anyone in attendance at the mediation or participating in the mediation, except as permitted under this rule or by statute. Additionally, the parties, their attorneys[,] and

288, 290-91 (Ct. App. 2018), *cert. denied*, S.C. Sup. Ct. Order dated Aug. 3, 2018, the court found:

> Avtex argues the trial court erred in concluding the South Carolina rules governing alternative dispute resolution prevented it from compelling disclosure of the terms of [a settlement agreement with other parties]. The Hucks argue the settlement agreement is protected because it was a part of the mediation process.
>
> We find the trial court erred in denying Avtex's motion to disclose settlement. The documents referred to in Rule 8 are designed to protect any documents prepared for use by the mediator and the parties to the mediation itself. Once the parties reach a settlement, documents prepared in conjunction with the settlement and release are not for the purpose of, or in the course of, mediation. Rather, they are documents prepared in connection with the litigation and to bring the litigation to a close. Rule 8 is designed to protect the communications made during the mediation itself and to protect the process. The parties' mediation agreement reinforces the rule and simply incorporates the same language. The request for production of the settlement documents does not disclose confidential information from the mediation (i.e., it does not disclose or discuss information the parties utilized to reach the settlement).

> any other person present or participating in the mediation must execute an Agreement to Mediate that protects the confidentiality of the process. The parties and any other person present or participating shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial [,] or other proceeding, any mediation communication disclosed in the course of a mediation . . . .

In the instant case, neither Husband's, nor Husband's attorney's, nor the mediator's affidavits disclosed the substance of the negotiations. Rather, they stated what the parties agreed to as a result of the mediation and that the Agreement as prepared did not contain the agreed-upon terms. The statement of what the parties agreed to at the conclusion of the mediation process, even if it was incorrectly memorialized in the written agreement, is not "information they utilized to reach the settlement," nor does it reveal documents or material relied upon during or in the course of the mediation. Therefore, Rule 8 as it existed at the time of Husband's motion did not protect the relevant affidavits. Furthermore, the legislature's revision to Rule 8 last year makes clear it intended to permit the correction of mediated settlement agreements. Accordingly, the admission of the disputed affidavits was not erroneous.

II. Mutual Mistake

Wife contends the family court erred in reforming the settlement agreement on the basis of mutual mistake. Specifically, she maintains Husband did not establish a mistake at all and if he did, the mistake was a unilateral mistake on Husband's part in failing to read the Agreement. We disagree.

"A contract may be reformed on the ground of mistake when the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it." *George v. Empire Fire & Marine Ins. Co.*, 344 S.C. 582, 590, 545 S.E.2d 500, 504 (2001). "A mistake is mutual whe[n] both parties intended a certain thing and by mistake in the drafting did not obtain what was intended. Before equity will reform a contract, the existence of a mutual mistake must be shown by clear and convincing evidence." *Id*. (citation omitted).

Wife correctly argues Husband was required to establish a mistake by clear and convincing evidence. The family court indicated it based its finding of mistake on the internal inconsistency in the Agreement—the parties agreed to split the marital home's equity if sold, but Husband would receive no equity if Wife refinanced the mortgage. This incongruity suggests a mistake. However, in the absence of the affidavits regarding the $60,000 provision, that inconsistency may not rise to the

level of clear and convincing evidence.[4] Nevertheless, considering all the information presented to the family court, it is clear the parties agreed to the $60,000 equity payment and it was inadvertently omitted from the Agreement. Wife contends she did not admit to any mistake and therefore a finding of mutual mistake is in error. However, Wife's affidavit is equivocal and does not deny she consented to the $60,000 equity provision at the time of the drafting of the Agreement. Regardless, as noted by one court, "the issue of mutual mistake arises only when alleged by one party and *denied* by the other. Agreement on the matter would eliminate it as an issue to be tried." *Steffens v. Steffens*, 422 So. 2d 963, 964 n.1 (Fla. Dist. Ct. App. 1982).

Having concluded Husband presented clear and convincing evidence of mutual mistake in the record, the remaining question is whether Husband's own negligence in failing to read the Agreement precludes a finding of mutual mistake permitting reformation of the Agreement.

South Carolina case law is replete with cases finding a party's failure to read a contract does not vitiate the contract or that party's obligations under it. *See Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981) ("One who is capable of reading and understanding but fails to read a contract before signing is bound by the terms thereof."); *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) ("A person signing a document is responsible for reading the document and making sure of its contents. Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it."); *id*. at 664, 582 S.E.2d at 440 ("One who signs a written instrument has the duty to exercise reasonable care to protect himself."). Concomitantly, our courts attempt to avoid outcomes in which a party receives a windfall. *See Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 172, 604 S.E.2d 385, 393 (2004) ("According to the collateral source rule, a wrongdoer should not

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[4] Wife also points to a provision in the Agreement whereby Husband is excused from child support payments if Wife does not sell the house. However, Husband and Wife had only one child eligible for child support at the time they signed the Agreement and the child would turn eighteen years old approximately fifteen months after the deadline to refinance the house. Therefore, this provision does not indicate the parties intended to offset the lack of equity to Husband with the unpaid child support as the amounts would be significantly disparate.

receive a windfall simply because the injured party received compensation from an independent source."); *see also Proctor v. Whitlark & Whitlark, Inc.*, 414 S.C. 318, 332, 778 S.E.2d 888, 896 (2015) ("Granting a windfall to a gambler would neither punish excessive gaming nor protect a gambler and his family from the gambler's irresistible impulses." (quoting *McCurry v. Keith*, 325 S.C. 441, 444, 481 S.E.2d 166, 168 (Ct. App. 1997))).

The tension between these legal tenets was addressed in *Jumper v. Queen Mab Lumber Co*., 115 S.C. 452, 106 S.E. 473 (1921), a case that is almost one hundred years old and yet appears to be directly on point.

> [W]e assert that it would be a monstrous perversion of justice to deny the right of reformation upon the ground that the defendant was negligent in not reading the contract before signing it. It was as much the duty of the plaintiff to read the contract and see that it conformed to the agreement as it was the defendant's. If the plaintiff read it and discovered the discord and allowed the execution to proceed intending to take advantage of it, he does not assume a position that commends him to a [c]ourt of [e]quity.

Id. at 465, 106 S.E. at 478.

> [I]f when presented for their signatures [the parties] thought or assumed that no discord existed, their signing would be the result of their co-operative fault; if one of them discovered the discord and remained silent, it would be a fraud upon the other not to call attention to it. In any conceivable event, therefore, reformation would be decreed.

Id. at 464, 106 S.E. at 477.

We find the analysis in *Jumper* persuasive and controlling. Although Husband should have read the Agreement more carefully, Wife either neglected to read the Agreement herself or recognized Husband's error and elected to remain silent.

Consequently, we affirm the family court's decision to set aside the judgment and reform the Agreement to correct the mutual mistake of the parties.

III. Parol Evidence Rule

Wife also contends the parol evidence rule prohibited the introduction of the previously discussed evidence because the Agreement was unambiguous. We disagree.

While Wife's argument may be correct in many circumstances, our courts have made clear the parol evidence rule does not preclude extrinsic evidence in cases involving mistake and reformation. The Supreme Court of South Carolina has "confirm[ed] . . . the general principle that extrinsic evidence is admissible to prove mutual mistake in cases seeking reformation." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 50, 747 S.E.2d 178, 186 (2013). Therefore, Wife's contention is without merit.

IV. Attorney's Fees

Finally, Wife argues the family court erred in not requiring Husband to pay her attorney's fees. We disagree.

Wife maintains that if she wins on appeal, the family court erred in not awarding her attorney's fees. Our disposition of the case defeats this argument. Having neglected to set forth any other basis for entitlement to attorney's fees, we affirm the family court's decision.

CONCLUSION

Based on the foregoing, the family court's decision is

AFFIRMED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Price Oulla and Bonnie Oulla, Appellants,

v.

Lisa Velazques; Harbison Community Association, Inc.; Cody Sox; and Patten Seed Company d/b/a Super-Sod; Defendants,

Of which Patten Seed Company d/b/a Super-Sod is the Respondent.

Appellate Case No. 2017-000093

Appeal From Orangeburg County
R. Knox McMahon, Circuit Court Judge
James B. Jackson, Jr., Circuit Court Judge

Opinion No. 5668
Heard June 5, 2019 – Filed July 24, 2019

AFFIRMED

William E. Applegate, IV, David Breault Lail, and Christopher James Bryant, all of Yarborough Applegate, LLC, of Charleston, for Appellants.

Charles H. Williams, of Williams & Williams, of Orangeburg; and Edward Raymond Moore, III, Wesley Brian Sawyer, and Rogers Edward Harrell, III, all of Murphy & Grantland, PA, of Columbia; for Respondent.

THOMAS, J.: In this civil action arising from an automobile accident, Price Oulla and Bonnie Oulla (collectively, the Oullas) appeal the circuit court's order granting Patten Seed Company's d/b/a Super-Sod (Super-Sod) motion for summary judgment. On appeal, the Oullas argue the circuit court erred in finding (1) the loader of a vehicle did not owe a duty under section 56-5-4100 of the South Carolina Code (2018) to ensure the load did not escape the vehicle and (2) the loader of a vehicle that travelled on a public highway did not owe a common-law duty to third-party drivers on public highways to ensure the load did not escape the vehicle. Further, the Oullas argue the circuit court erred in denying their motion to amend their complaint. We affirm.

FACTS/PROCEDURAL HISTORY

In July 2014, Harbison Community Association (Harbison) ordered two pallets of sod from Super-Sod for a landscaping project. On July 22, 2014, Harbison sent two employees—Cody Sox and Corey Branham—to pick up the sod from Super-Sod's location in Orangeburg. Sox and Branham drove a Harbison maintenance truck with a double-axle flatbed trailer from Columbia to Orangeburg to get the sod. They arrived at Super-Sod's location, completed the purchase, and drove to the sod loading site.

Prior to loading the pallets onto the trailer, Melvin Kearse, a Super-Sod employee working at the loading area, wrapped the sod using plastic wrap. Sox directed Kearse to load the pallets onto the flatbed trailer with one pallet placed in front of the double-axle and the other pallet behind it. Using a forklift, Kearse loaded the pallets onto the trailer as directed. Sox and Branham inspected the trailer, checked the hitch, ensured the load was balanced, and confirmed the trailer bed was clean and free of debris. Although Sox intended to bring straps to tie down the pallets, he and Branham forgot to bring them. Sox asked if Super-Sod had any straps they could use, but he was told Super-Sod did not have any. Sox then decided to leave Super-Sod's property and drive back to Columbia without tying down or otherwise securing the pallets.

Sox and Branham drove for a short period of time without incident before taking a cloverleaf onramp to westbound Interstate 26 (I-26). Sox successfully exited the onramp and merged into the right-hand lane of the interstate highway. However,

shortly after merging onto the highway, a blue tractor-trailer veered into Sox's lane, forcing him to take evasive action. Sox swerved into the shoulder of the interstate to avoid the tractor-trailer. Sox felt the flatbed trailer sway and decided to pull over onto the side of the interstate. When he stopped, Sox noticed the plastic wrap on one of the pallets had torn and approximately half of a pallet of sod had fallen off the back of the trailer. Although none of the sod struck any vehicles, much of it fell into the right-hand lane and forced traffic to the left-hand lane.

Sox called 911 and the operator dispatched a fire engine and a fire truck. When fire department personnel arrived at the scene, they blocked the right-hand lane of traffic while they removed the sod from the roadway. After they removed the sod, the firemen moved the fire truck off to the side of the road and reopened the right-hand lane for travel. Shortly afterward, fire department personnel received reports of an accident where traffic was still backed up. Price Oulla had been driving west on I-26 and had come to a stop due to the traffic congestion in the area. After Oulla stopped, Lisa Velazques drove into the back of his vehicle at a high rate of speed, causing injuries and damage to both vehicles.

On December 31, 2014, the Oullas filed a complaint for negligence against Velazques, Harbison, Sox, and Super-Sod. On May 5, 2016, Super-Sod filed a motion for summary judgment, arguing it did not owe a duty of care to the Oullas and even if it did owe a duty, its conduct did not proximately cause the accident. Approximately thirty minutes prior to the hearing on Super-Sod's motion for summary judgment on June 29, 2016, the Oullas filed a motion to amend their complaint pursuant to Rule 15, SCRCP. The proposed amended complaint included a reference to section 56-5-4100 as a basis for the Oullas' claim that Super-Sod owed them a duty of care and added a cause of action for breach of an implied warranty of merchantability. The Oullas argued against Super-Sod's motion but did not notify the circuit court they filed the motion to amend, move for a continuance, or object to the summary judgment hearing proceeding as scheduled.

At the hearing, the Oullas argued section 56-5-4100 imposed a legal duty on Super-Sod to secure its customers' vehicles and trailers and that duty extended to members of the traveling public. Additionally, the Oullas argued Super-Sod owed them a duty of care under common law principles. Super-Sod argued it had no legal duty to the Oullas under the statute or otherwise and its conduct was not the proximate cause of the Oullas' injuries. The circuit court granted Super-Sod's

motion for summary judgment, finding Super-Sod did not owe the Oullas a duty of care under section 56-5-4100 or the common law, and even if it did, Super-Sod's conduct was not the proximate cause of the accident.

The Oullas filed a motion to reconsider under Rule 59(e), SCRCP, which the circuit court denied. The Oullas filed a notice of appeal. While the appeal was pending, the Oullas filed a motion for relief from judgment pursuant to Rule 60(b), SCRCP. In their motion, the Oullas argued the circuit court failed to rule on their motion to amend their complaint. Further, the Oullas argued that although their motion was made pursuant to Rule 60(b), it should be considered under the more lenient standard of Rule 15.

The circuit court denied the Oullas' motion for relief from judgment, finding the Oullas failed to show any mistake, inadvertence, or excusable neglect sufficient to award relief under Rule 60(b). Further, the circuit court stated that even if the motion was considered under the more lenient standard of Rule 15, the Oullas' motion would still fail because adding the claim for breach of warranty of merchantability would unfairly prejudice Super-Sod and the amendment alleging a duty of care under section 56-5-4100 would be futile in light of the circuit court's prior grant of summary judgment on that issue. This appeal followed.

LAW/ANALYSIS

I. Motion to Amend the Complaint

The Oullas argue the circuit court abused its discretion by denying their motion to amend under Rule 60(b) because the circuit court should have considered their motion to amend under Rule 15 instead of Rule 60(b). We disagree.

A denial of a motion to amend under Rule 15 or a motion under Rule 60(b) is within the sound discretion of the circuit court. *See Bowman v. Bowman*, 357 S.C. 146, 151, 591 S.E.2d 654, 656 (Ct. App. 2004) (holding a Rule 60(b) motion is subject to abuse of discretion review); *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 153, 723 S.E.2d 835, 840 (Ct. App. 2012) (holding a Rule 15 motion is subject to abuse of discretion review). Because both motions are subject to the sound discretion of the circuit court, they "will rarely be disturbed on appeal. The [circuit court's] finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Sullivan*, 397 S.C. at 153, 723 S.E.2d at

840 (quoting *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997)). "An abuse of discretion occurs when the [circuit court]'s ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support." *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

Under Rule 15(a), SCRCP:

> A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party.

However, pursuant to Rule 60(b), SCRCP:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> . . . .

"In determining whether to grant relief under Rule 60(b)(1), the court must consider the following factors: '(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party.'" *Rouvet v. Rouvet*, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010) (quoting *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510–11, 548 S.E.2d 223, 226 (Ct. App. 2001)).

No published South Carolina opinion states whether a post-judgment motion to amend should be considered using the standards of Rule 15 or Rule 60(b).

However, South Carolina rules are similar to the federal rules. According to the commenters on the federal rules:

> Although Rule 15(a)(2) [of the Federal Rules of Civil Procedure] vests the [trial court] with virtually unlimited discretion to allow amendments by stating that leave to amend may be granted when "justice so requires," there is a question concerning the extent of this power once a judgment has been entered or an appeal has been taken. Most courts faced with the problem have held that once a judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or Rule 60. The party may move to alter or amend the judgment within 28 days after its entry under Rule 59(e) or, if the motion is made after that 28-day period has expired, it must be made under the provisions in Rule 60(b) for relief from a judgment or order. This approach appears sound. To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation. Furthermore, the drafters of the rules included Rules 59(e) and 60(b) specifically to provide a mechanism for those situations in which relief must be obtained after judgment and the broad amendment policy of Rule 15(a) should not be construed in a manner that would render those provisions meaningless.

6 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1489 (3d ed. 2010) (footnotes omitted). The majority of federal courts and courts in other jurisdictions agree with this view and have held that if a party seeks to amend a complaint after judgment, the party must first satisfy the more stringent Rule 59(e) or 60 standard before the court will evaluate the proposed amendment under the more liberal Rule 15 standard to amend complaints.[1] However, a minority of

[1] *See Williams v. Citigroup Inc.*, 659 F.3d 208, 213 (2nd Cir. 2011); *The Tool Box, Inc. v. Ogden City Corp.*, 419 F.3d 1084, 1087 (10th Cir. 2005); *Ahmed v.*

courts, including the Fourth Circuit Court of Appeals, have held courts considering whether to grant a motion to amend after the entry of a final judgment should apply the more lenient standard of Rule 15 and not the standards of Rule 59 or 60.[2]

Initially, we find the majority view applying Rule 60(b)'s more stringent standard before allowing a postjudgment motion to amend to be considered under Rule 15 favorable for the same reasons listed in section 1489 of *Federal Practice & Procedure*. *See* Wright and Miller, *supra*, § 1489 (stating the practice of requiring a movant's postjudgment motion to amend to meet the standards of Rule 60(b) before considering the motion under Rule 15 favors finality of judgments, expeditious termination of litigation, and prevents the standards of Rule 60(b) from being rendered meaningless by Rule 15).

Turning to the present case, we find the circuit court did not abuse its discretion in denying the Oullas' motion to amend their complaint. *See Sullivan*, 397 S.C. at 153, 723 S.E.2d at 840 ("The [circuit court's] finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." (quoting *Berry*, 328 S.C. at 450, 492 S.E.2d at 802)). The circuit court found the Oullas failed to establish any mistake, inadvertence, surprise, or excusable neglect sufficient to grant their motion for relief under Rule 60(b)(1). Specifically, the circuit court found the Oullas failed to properly raise the issue of the pending motion to amend to the circuit court before it ruled on Super-Sod's motion for summary judgment. We agree.

Although the Oullas filed their motion to amend with the clerk of court on the day of the hearing on Super-Sod's motion for summary judgment, they failed to bring it to the circuit court's attention until well after the circuit court filed its order granting Super-Sod's motion for summary judgment. Additionally, in their motion to amend, the Oullas failed to point to any reason for their failure to bring this to

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Dragovich, 297 F.3d 201, 207–08 (3rd Cir. 2002); *Vicom, Inc. v. Harbridge Merch. Servs., Inc.*, 20 F.3d 771, 784 n.13 (7th Cir. 1994); *Nextel Spectrum Acquisition Corp. v. Hispanic Info. & Telecomm. Network, Inc.*, 571 F. Supp. 2d 59, 61 (D.D.C. 2008); *Chrisalis Props., Inc. v. Separate Quarters, Inc.*, 398 S.E.2d 628, 634 (N.C. Ct. App. 1990); *Johnson v. Bollinger*, 356 S.E.2d 378, 382 (N.C. Ct. App. 1987).

[2] *See Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 471 (4th Cir. 2011); *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006).

the circuit court's attention and relied on the circuit court's lack of action on their motion as a ground for mistake, inadvertence, surprise, or excusable neglect. Further, the circuit court found the proposed amended complaint, specifically the claim for breach of warranty, would prejudice Super-Sod due to the lack of timeliness in raising the claim. We find the Oullas' failure to promptly bring the motion to amend to the circuit court's attention, lack of an explanation why they failed to bring this to the circuit court's attention, and the potential prejudice the late amendment of their complaint would cause Super-Sod are all factors the circuit court considered in deciding to deny the Oullas' motion. *See Fontaine*, 291 S.C. at 538, 354 S.E.2d at 566 ("An abuse of discretion occurs when the [circuit court]'s ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support."); *Rouvet*, 388 S.C. at 309, 696 S.E.2d at 208 ("In determining whether to grant relief under Rule 60(b)(1), the court must consider the following factors: '(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party.'" (quoting *Microtronics, Inc.*, 345 S.C. at 510–11, 548 S.E.2d at 226)). Accordingly, we find the circuit court did not abuse its discretion in denying the Oullas' motion pursuant to Rule 60(b).

II. Duty of a Loader

A. Standard of Review

"When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the [circuit] court pursuant to Rule 56(c), SCRCP." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 354, 650 S.E.2d 68, 70 (2007). "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* at 354–55, 650 S.E.2d at 70 (quoting Rule 56(c), SCRCP). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Id.* at 355, 650 S.E.2d at 70.

"To prevail on a theory of negligence, the plaintiff must establish three elements: (1) that defendant owed a plaintiff a duty of care; (2) that by some act or omission, defendant breached that duty; and (3) that as a proximate result of the breach, the plaintiff suffered damage." *Staples v. Duell*, 329 S.C. 503, 506, 494 S.E.2d 639,

641 (Ct. App. 1997). As an initial matter, "[t]he court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law." *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 39, 533 S.E.2d 312, 316 (2000). "Whether the law recognizes a particular duty is an issue of law to be determined by the court." *Ellis v. Niles*, 324 S.C. 223, 227, 479 S.E.2d 47, 49 (1996). "An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003). "Determining the proper interpretation of a statute is a question of law, and [the appellate court] reviews questions of law de novo." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

B. Statutory Duty

The Oullas argue the circuit court erred in granting Super-Sod's motion for summary judgment because section 56-5-4100 imposes a duty on the loader of a vehicle to secure a load of a vehicle traveling on public roads. The Oullas rely on the language of subsection (C), which they assert requires the loader of the vehicle to comply with the other provisions of 56-5-4100 and therefore, imposes a duty on the loader of a vehicle to ensure the load is secure. We disagree.

Under section 56-5-4100 of the South Carolina Code (2018):

> (A) No vehicle may be driven or moved on any public highway unless the vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking, or otherwise escaping from the vehicle, except that sand, salt, or other chemicals may be dropped for the purpose of securing traction, and water or other substance may be sprinkled on a roadway in the cleaning or maintaining of the roadway by the public authority having jurisdiction.
>
> (B) Trucks, trailers, or other vehicles when loaded with rock, gravel, stone, or other similar substances which could blow, leak, sift, or drop must not be driven or moved on any highway unless the height of the load against all four walls does not extend above a horizontal

> line six inches below their tops when loaded at the loading point; or, if the load is not level, unless the height of the sides of the load against all four walls does not extend above a horizontal line six inches below their tops, and the highest point of the load does not extend above their tops, when loaded at the loading point; or, if not so loaded, unless the load is securely covered by tarpaulin or some other suitable covering; or unless it is otherwise constructed so as to prevent any of its load from dropping, sifting, leaking, blowing, or otherwise escaping from the vehicle. This subsection also includes the transportation of garbage or waste materials to locations for refuse in this State.
>
> (C) The loader of the vehicle and the driver of the vehicle, in addition to complying with the other provisions of this section, shall sweep or otherwise remove any loose gravel or similar material from the running boards, fenders, bumpers, or other similar exterior portions of the vehicle before it is moved on a public highway.

Additionally, South Carolina law provides that "No person shall operate on any highway any vehicle with any load unless such load and any covering thereon is securely fastened so as to prevent such covering or load from becoming loose, detached[,] or in any manner a hazard to other users of the highway." S.C. Code Ann. § 56-5-4110 (2018).

"The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly." *Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011). "[Our supreme court] has held that a statute shall not be construed by concentrating on an isolated phrase." *Id.* "[I]t is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Id.* "When the language of a statute is plain, unambiguous, and conveys a clear and definite meaning, the application of standard rules of statutory interpretation is unwarranted." *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003) (quoting *State v. Benjamin*, 341 S.C. 160, 163, 533 S.E.2d

606, 607 (Ct. App. 2000)). "In such circumstances, [the appellate c]ourt simply lacks the authority to look for or impose another meaning and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope." *Id.* (quoting *Benjamin*, 341 S.C. at 163, 533 S.E.2d at 607).

We find the circuit court did not err in granting Super-Sod's motion for summary judgment because section 56-5-4100 does not impose a duty on the loader of a vehicle to ensure the load on the vehicle is secure. *See Hansson*, 374 S.C. at 354–55, 650 S.E.2d at 70 ("Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" (quoting Rule 56(c), SCRCP)); *Ellis*, 324 S.C. at 227, 479 S.E.2d at 49 ("Whether the law recognizes a particular duty is an issue of law to be determined by the court."). We find section 56-5-4100 only places a duty on the *operator* of a vehicle not to drive or move a vehicle on a public highway unless the vehicle is constructed or loaded in a way to prevent its load from escaping the vehicle. The statute states: "No vehicle may be *driven or moved on any public highway* unless the vehicle is so constructed or loaded as to prevent any of its load from dropping, sifting, leaking or otherwise escaping from the vehicle." § 56-5-4100(A) (emphasis added). Additionally, subsection (B) also includes language prohibiting "trucks, trailers, or other vehicles" from being "*driven or moved on any public highway*" when loaded unless they are in compliance with certain safety regulations. § 56-5-4100(B) (emphasis added). Further, the next section in the Code requires that an operator must make sure the load is secured: "No person shall *operate on any highway* any vehicle with any load unless such load and any covering thereon is securely fastened so as to prevent such covering or load from becoming loose, detached or in any manner a hazard to other users of the highway." § 56-5-4110 (emphasis added). We find these statutes and subsections, when read together, indicate the Legislature intended only to place a duty on the *operator* of a vehicle to refrain from driving or moving a vehicle on a public highway unless the load is secured. *See Beaufort Cty.*, 395 S.C. at 371, 718 S.E.2d at 435 ("The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly."); *id.* ("[I]t is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result."). Interpreting section 56-5-4100(C) as imposing a duty on the loader of the vehicle to ensure the load is secured, other than clearing the vehicle of debris as mandated by the subsection, would result in a forced

construction that would improperly expand the statute's scope. *See* § 56-5-4100(C) ("The loader of the vehicle and the driver of the vehicle, in addition to complying with the other provisions of this section, shall sweep or otherwise remove any loose [debris from various] exterior portions of the vehicle before it is moved on a public highway."); *Tilley*, 355 S.C. at 373, 585 S.E.2d at 298 ("In such circumstances, [the appellate c]ourt simply lacks the authority to look for or impose another meaning and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope." (quoting *Benjamin*, 341 S.C. at 163, 533 S.E.2d at 607)). Accordingly, we find section 56-5-4100 does not impose a duty on the loader of a vehicle to ensure the load is secured.

C. Common-Law Duty

The Oullas argue the circuit court erred in granting Super-Sod's motion for summary judgment because Super-Sod owed them a common-law duty to ensure the load was secured. Specifically, the Oullas contend that because an improperly secured load on a trailer presents a foreseeable risk of harm to other drivers traveling on public highways, Super-Sod owed them a duty to properly secure the load once it undertook the service of wrapping the pallets of sod and loading them onto the Harbison vehicle's trailer. We disagree.

South Carolina has adopted section 323 of the Restatement (Second) of Torts. *See Johnson v. Robert E. Lee Acad., Inc.*, 401 S.C. 500, 504–05, 737 S.E.2d 512, 514 (Ct. App. 2012). Under that section:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (1965). Accordingly, a party may incur liability if that party undertakes an obligation to another. *See Johnson*, 401 S.C. at 505, 737 S.E.2d at 514.

Section 324A of the Restatement (Second) of Torts (1965) extends liability for those who render services to another to foreseeable third parties. The section states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A (1965). In contrast to section 323, South Carolina has specifically rejected section 324A. *See Miller v. City of Camden*, 329 S.C. 310, 315 n.2, 494 S.E.2d 813, 815 n.2 (1997) ("We decline to adopt the expanded liability of Restatement 2d of Torts § 324A (1965).").

"Foreseeability of injury, in the absence of a duty to prevent that injury, is an insufficient basis on which to rest liability." *S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325 (1986). "Foreseeability itself does not give rise to a duty." *Id.*

We find the circuit court did not err in finding Super-Sod did not owe the Oullas a duty of care under the common law. *See Ellis*, 324 S.C. at 227, 479 S.E.2d at 49 ("Whether the law recognizes a particular duty is an issue of law to be determined by the court."). We find Super-Sod did not assume a duty to the Oullas because

Kearse merely placed the pallets of sod on the trailer as Sox directed. Holding Super-Sod assumed the duty of ensuring the pallets were properly secured to the trailer by merely placing the pallets on the trailer as its customer directed would extend the concept of duty in tort liability beyond reasonable limits. *See Huggins v. Citibank, N.A.*, 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003) ("The concept of duty in tort liability will not be extended beyond reasonable limits."). If Super-Sod assumed a duty, that duty was to Harbison, not to the Oullas or other third parties. *See Johnson*, 401 S.C. at 505, 737 S.E.2d at 514 (finding a party may incur liability if that party undertakes an obligation to another party and adopting the view of the Restatement (Second) of Torts § 323). Although it was likely foreseeable the pallets of sod were a danger to other drivers, such as the Oullas, if they were not properly secured, our supreme court has rejected the idea that one who undertakes a duty to render services to another should recognize a duty to third persons. *See Miller*, 329 S.C. at 315 n.2, 494 S.E.2d at 816 n.2 ("We decline to adopt the expanded liability of Restatement 2d of Torts § 324A (1965). This section imposes a duty on 'one who undertakes . . . to render services to another which he should recognize as necessary for the protection of a third person' and requires no actual volunteer relationship between the defendant and the third party." (quoting Restatement (Second) of Torts § 324A)). We find the mere fact it was foreseeable an unsecured load could be a danger to the Oullas and other drivers is insufficient to impose liability on Super-Sod under the common law. *See Booz-Allen & Hamilton, Inc.*, 289 S.C. at 376, 346 S.E.2d at 325 ("Foreseeability of injury, in the absence of a duty to prevent that injury, is an insufficient basis on which to rest liability."). Accordingly, we find the circuit court did not err in finding Super-Sod did not owe the Oullas a duty of care under the common law.

Because Super-Sod did not owe the Oullas a duty of care under section 56-5-4100 or under the common law, we find the Oullas failed to allege a duty sufficient to sustain a claim of negligence. *See Staples*, 329 S.C. at 506, 494 S.E.2d at 641 ("To prevail on a theory of negligence, the plaintiff must establish three elements: (1) that defendant owed a plaintiff a duty of care; (2) that by some act or omission, defendant breached that duty; and (3) that as a proximate result of the breach, the plaintiff suffered damage."). Accordingly, we find Super-Sod was entitled to judgment as a matter of law. *See Hansson*, 374 S.C. at 354–55, 650 S.E.2d at 70 ("Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" (quoting Rule 56(c), SCRCP));

Simmons, 341 S.C. at 39, 533 S.E.2d at 316 ("The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law."). Therefore, we affirm the circuit court's order granting Super-Sod's motion for summary judgment.

CONCLUSION

Based on the foregoing, we affirm the circuit court's orders denying the Oullas' motion to amend pursuant to Rule 60(b) and granting Super-Sod's motion for summary judgment.

AFFIRMED.

HUFF and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jeffrey Kennedy, Respondent,

v.

Richland County School District Two, Eric Barnes, and Chuck Earles, Appellants.

Appellate Case No. 2015-000613

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5669
Heard November 17, 2016 – Filed July 24, 2019

AFFIRMED

Kathryn Long Mahoney and Thomas Kennedy Barlow, both of Halligan Mahoney & Williams, of Columbia, for Appellants.

Thomas Jefferson Goodwyn, Jr. and Rachel Gottlieb Peavy, both of Goodwyn Law Firm, LLC, of Columbia, for Respondent.

WILLIAMS, J.: In this civil matter, Richland County School District Two (the District), Eric Barnes, and Chuck Earles (collectively, Appellants) appeal the circuit court's award of actual and punitive damages to Jeffrey Kennedy in his defamation claim against them. Upon our initial consideration of this appeal, we

reversed, finding Appellants acted within their qualified privilege. *See Kennedy v. Richland Cty. Sch. Dist. Two*, Op. No. 2017-UP-040 (S.C. Ct. App. filed Jan. 25, 2017). Respondent petitioned for a writ of certiorari. Our supreme court granted the writ, reversed our decision, and remanded the case to this court for consideration of Appellants' remaining issues on appeal. As to their remaining issues, Appellants contend the circuit court erred in (1) denying their motions for directed verdict and judgment notwithstanding the verdict (JNOV) regarding the defamation claim; (2) denying their motion for JNOV regarding individual capacity claims under the South Carolina Tort Claims Act (SCTCA); (3) denying their motion for JNOV regarding punitive damages, or alternatively, for a new trial absolute or *nisi remittitur*, and in affirming the constitutionality of the punitive damages award; (4) excluding evidence of Kennedy's alleged theft and termination from a subsequent employer that occurred during the pendency of the trial; and (5) failing to instruct the jury that no defamatory communication was made as a result of Kennedy's termination from the District and that Kennedy's termination was not part of his defamation claim. On remand, we affirm.

FACTS/PROCEDURAL HISTORY

Kennedy started working for the District in May 2008 as a security guard. Kennedy worked the third shift from 11:00 P.M. to 7:00 A.M., and he provided security for several schools, including Spring Valley High School (Spring Valley),[1] his base of operation. Specifically, Kennedy's security job required him to patrol the grounds of each school in his rotation, check all of the windows, secure doors, activate and reset alarms, and respond to alarm calls in the District. Although the third shift provided Kennedy with a normal hourly rate, Kennedy obtained a greater amount of pay by working overtime hours during events at Spring Valley.

Spring Valley gave Kennedy a set of keys, which provided him access to the various buildings and offices on campus and allowed him to properly perform his security duties. Unfortunately, security at Spring Valley was difficult to maintain because of the numerous keys issued to various groups of people including parents, students, teachers, coaches, administration, student groups, and custodial staff.

[1] Although Kennedy covered up to seven schools during his shift, Spring Valley is the focus school because it is the one in which the events leading to the defamation occurred.

In 2010, the District named Earles as the Emergency Services Manager—essentially, the District's head of security—and Earles hired Barnes as his Assistant Security Manager. After perceiving the department's reputation of spreading gossip and rumors, Earles issued a "Change of Culture" memorandum to the entire department imploring the staff to not repeat rumors and to "MIND YOUR OWN BUSINESS." In February 2011, Earles recommended Kennedy for a promotion to lieutenant after Kennedy applied for the position. Kennedy was scheduled to start his new position within the department on March 7, 2011.

However, on March 4, 2011, Tim Hunter, Spring Valley's athletic director, reported a theft of $1,000 from his office in Bates Hall. Several people had keys to Hunter's office, including Kennedy, the custodial staff, and the athletic coaches. Kennedy was on duty the night of the alleged theft, and as a result, he set the alarm in Bates Hall that night, and he turned the alarm off the next morning. Sometime between when Kennedy initially set the alarm and when he turned it off the next morning, the baseball team returned from a game and set off the alarm in Bates Hall. Kennedy was called to respond, but he did not enter the building because he observed the baseball team inside as well as the baseball coach disarming and re-setting the alarm.

Following the reported theft, Appellants reviewed the videotape footage from the time Kennedy set the alarm to when he turned it off. There were only two cameras with recorded images. One showed traffic going by outside, and one showed the entrance and exit of Bates Hall. Neither of these camera covered the athletic director's office—the location of the reported missing funds. The videotape of the entrance to the building showed Kennedy turning off the alarm around 5:50 A.M. and leaving the camera's viewing range for about five minutes before exiting the building.

After reviewing the inconclusive video footage, Appellants believed Kennedy was the thief, and they questioned him about the incident twice in the presence of human resources (HR) staff. Appellants performed no further investigation and, specifically, did not interview others who were present in the building that night with access to the athletic director's office, including coaches, players, and custodial staff. Instead, Appellants placed Kennedy on paid administrative leave and turned over the investigation to the Richland County Sheriff's Office. Barnes acted as "liaison" between the District and the sheriff's office. The investigation focused mainly on Kennedy, although testimony indicated that various other

people were around the area of the theft on the night of March 3, 2011. The sheriff's office never criminally charged Kennedy, or anyone else, with the theft of $1,000, but Appellants testified they believed Kennedy was the thief, and stated Kennedy could not be trusted as a security officer because he was a "common denominator" in the various other thefts that occurred at Spring Valley around the same time.

Following the theft accusations and subsequent investigations, the District's HR office informed Kennedy that he would no longer be considered for the promotion to lieutenant, but they permitted him to return to work. The District scheduled Kennedy to return to work on June 16, 2011. Prior to his return, however, Earles decided Kennedy would not be allowed to have keys or patrol buildings. Instead, Earles assigned Kennedy to the security watch room in what amounted to a reduced, desk-duty role. Due to the twenty-four-hour nature of the security department and the rare interaction with second and third shift personnel, instead of holding a mandatory meeting, Earles elected to send a confidential email on June 15, 2011, informing personnel of his decision regarding Kennedy. Earles addressed the email to security supervisors and an HR director. [2]

Earles's June 15, 2011 email, addressed with the subject line "**CONFIDENTIAL**," read as follows:

> THE INFORMATION CONTAINED IN THIS E-MAIL IS CONFIDENTIAL AND WILL ONLY BE SHARED WITH OTHER DISTRICT SECURITY SUPERVISORS, AS NEEDED, WHEN THEY WILL BE SUPERVISING MR. KENNEDY.
>
> Mr. Kennedy will be reporting to work tomorrow night (Thursday, June 16) to work on 3rd shift, weekdays. This will be his permanent assignment.
>
> I have told him that he will be assigned to work the watch room answering phones and performing whatever other duties are necessary in the watch room. [sic]

[2] Witness testimony indicated Barnes also informed some personnel of Earles's decision.

> His [sic] is NOT to be given any assignment that involves having keys to any District facility.
>
> Thank you.

Appellants admit the email contained sensitive information that could harm Kennedy if it was released beyond its intended recipients. The email managed, however, to reach personnel beyond those intended recipients. While Appellants claim they did not print and place the email within the confines of the District,[3] Kennedy and other witnesses testified they saw and read the printed email while it was located in unsecured District security vehicles and on a desk in an unsecured office where every security employee filled out their time cards.

Kennedy stated Appellants' distrust in him and their belief that he was a thief negatively impacted his life outside of the District. Prior to the theft accusations, Kennedy was actively involved in his church as a youth mentor and as security for his church's pastor during the collection of the offering plate. After the accusations, however, the church no longer scheduled Kennedy or asked for his assistance.

Kennedy continued to work at the District until October 2012, when he was terminated from his position.[4] At trial, Kennedy presented evidence of his difficult home life following his termination, which included his eviction from his home, divorce from his long-term wife, repossession of his car, and cashing out of his retirement fund. Kennedy was able to secure work with Allied Barton Security, but he resigned in February 2014 after allegations surfaced that he stole a five-

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[3] Earles admitted to printing one copy of the email and placing it in a file in his office.

[4] Kennedy's termination did not directly result from the March 2011 theft allegation but rather from an incident involving a violation of District policy and another employee. While initially part of his underlying complaint, the circuit court directed a verdict against Kennedy's claims related to the termination. Thus, any defamation related to his termination was not part of this appeal.

dollar pair of safety goggles and ten dollars in cash.[5] At the time of trial, Kennedy was working for GEO Care as a security officer.

On March 11, 2013, Kennedy filed a lawsuit in the circuit court alleging multiple causes of action against numerous defendants, including Earles and Barnes. Prior to trial, Kennedy dismissed certain named defendants, leaving only the District, Appellants, and Kim Jones as named defendants. On the first day of trial, Kennedy filed a motion in limine seeking exclusion of any evidence or cross-examination related to specific instances of petty theft he was accused of while working as a security guard for Allied Barton in February 2014.[6] The circuit court granted the motion to exclude the proffered witness' testimony as inadmissible character evidence under Rules 403 and 404, SCRE. At the close of Kennedy's case, the circuit court granted the defendants' directed verdict motion as to Kennedy's claim for intentional infliction of emotional distress. The court additionally granted Jones's directed verdict motion as to Kennedy's defamation claim. After the defense rested, the circuit court granted the District's directed verdict motion as to Kennedy's claim for negligent supervision. Consequently, the only causes of action before the jury were Kennedy's claims of defamation against Earles and Barnes.

On October 3, 2014, the jury returned a verdict against Barnes for $100,000 in actual damages and $150,000 in punitive damages and against Earles for $100,000 in actual damages and $200,000 in punitive damages. Appellants filed post-trial motions, which the circuit court denied in its February 24, 2015 order. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in denying Appellants' motions for directed verdict and JNOV regarding the defamation claim?

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[5] These charges were raised during the pendency of the trial and were the subject of a motion in limine, which is part of this appeal. *See* Part III, *infra.*

[6] This incident occurred after Kennedy filed his complaint. These charges were pending at the time of trial and are submitted as part of this appeal.

II. Did the circuit court err in denying Appellants' motion for JNOV regarding individual capacity claims under the SCTCA?

III. Did the circuit court err in denying Appellants' motion for JNOV regarding punitive damages or, alternatively, for a new trial absolute or *nisi remittitur* and in affirming the constitutionality of the punitive damages award?

IV. Did the circuit court err in excluding evidence of Kennedy's alleged theft and termination from a subsequent employer that occurred during the pendency of the trial?

V. Did the circuit court err in failing to instruct the jury that no defamatory communication was made as a result of Kennedy's termination from the District and that Kennedy's termination was not part of his defamation claim?

STANDARD OF REVIEW

In actions at law, when a case tried by a jury is appealed, "the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings." *Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006).

When a circuit court's ruling on a motion for directed verdict or JNOV is appealed, an appellate court must apply the same standard as the circuit court. *RFT Mgmt. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 171 (2012). In determining these motions, the circuit court must view the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the nonmoving party. *McBride v. Sch. Dist. of Greenville Cty.*, 389 S.C. 546, 558, 698 S.E.2d 845, 851 (Ct. App. 2010). If the evidence at trial yields more than one reasonable inference or its inference is in doubt, the circuit court must deny the motion for directed verdict or JNOV. *RFT Mgmt.*, 399 S.C. at 332, 732 S.E.2d at 171. "When the evidence yields only one inference, a directed verdict in favor of the moving party is proper." *Parrish v. Allison*, 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007). "However, if the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should be denied." *Id.*

"An appellate court will reverse the [circuit] court's ruling only if no evidence supports the ruling below." *RFT Mgmt.*, 399 S.C. at 332, 732 S.E.2d at 171. "When considering [such] motions, neither the [circuit] court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Parrish*, 376 S.C. at 319, 656 S.E.2d at 388.

LAW/ANALYSIS

I. Directed Verdict/JNOV

Appellants argue the circuit court erred in denying Appellants' motions for directed verdict and JNOV on Kennedy's defamation claim. We disagree.

The tort of defamation allows a plaintiff to recover when a defendant communicates a false message about the plaintiff to others that injures the plaintiff's reputation. *McBride*, 389 S.C. at 559, 698 S.E.2d at 852. To prove defamation, the plaintiff must show: "(1) a false and defamatory statement was made; (2) the unprivileged publication of the statement to a third party; (3) the publisher was at fault; and (4) either the statement was actionable irrespective of harm or the publication of the statement caused special harm." *Williams v. Lancaster Cty. Sch. Dist.*, 369 S.C. 293, 302–03, 631 S.E.2d 286, 292 (Ct. App. 2006). "The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002).

First, a jury could find that the insinuation in Earles's June 15, 2011 email and in Barnes' statement to employees was not only that Kennedy was a thief but, more importantly, that Kennedy was not to be trusted with keys. *See Fountain v. First Reliance Bank*, 398 S.C. 434, 441–42, 730 S.E.2d 305, 309 (2012) ("To render the defamatory statement actionable, it is not necessary that the false charge be made in a direct, open and positive manner. A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain." (quoting *Tyler v. Macks Stores of S.C., Inc.*, 275 S.C. 456, 458, 272 S.E.2d 633, 634 (1980))). Kennedy presented testimony that a security guard without keys is

"worthless"[7] and demonstrated his reputation in his community was damaged when he testified his role as a mentor in his church significantly decreased following the publication of the email. *See Timmons v. News & Press, Inc.*, 232 S.C. 639, 644, 103 S.E.2d 277, 280 (1958) ("[The] plaintiff may offer evidence of the surrounding circumstances from which defamatory meaning may be inferred."). Undoubtedly, the statement of distrust—"[Kennedy] is NOT to be given any assignment that involves having keys to any District facility"—coupled with the inference that Kennedy was a thief was damaging to Kennedy's previous reputation as a reliable security guard, especially one for whom Appellants believed was worthy of a promotion to lieutenant. We find Kennedy presented sufficient evidence to raise a jury question as to whether a false and defamatory statement was made.

Second, evidence of the defamatory statement's publication came in the form of Earles's June 15, 2011 email—containing the defamatory statement—that Earles sent to third parties, District employees. The record contains evidence that the email ultimately reached personnel well beyond its intended recipients. While Appellants claim they did not print and place the email within the confines of the District, Kennedy and other witnesses testified they saw and read the printed email while it was located in unsecured District security vehicles and on a desk in an unsecured office where every security employee filled out their time cards. *See Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 520, 506 S.E.2d 497, 507 (1998) (Toal, J. concurring) ("The publication of defamatory matter is its communication, intentionally or *by a negligent act*, to a third-party—someone other than the person defamed." (emphasis added)); *Kendrick v. Citizens & S. Nat'l*

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[7] Barry Mitchell, a former security guard and Kennedy's former co-worker at the District, testified as follows:

> Q: And so the letter says that he is not to have keys?
> A: Yes, ma'am.
> Q: Are you interpreting that how?
> A: He was not to be trusted.
> Q: A security guard without keys really isn't a security guard?
> A: Worthless.
> Q: I'm sorry?
> A: Is worthless, for what we do. If you can't use keys, you can't work.

Bank, 266 S.C. 450, 454, 223 S.E.2d 866, 868 (1976) ("Publication includes proof that the complaining party was the person with reference to whom the defamatory matter was spoken.").

Kennedy was also required to present some evidence of fault on behalf of the publisher. *Williams*, 369 S.C. at 302–03, 631 S.E.2d at 292 (finding a plaintiff must prove the following elements to establish defamation . . . "(3) the publisher was at fault . . . ."); *Jones v. Sun Publ'g. Co.*, 278 S.C. 12, 15, 292 S.E.2d 23, 24 (1982) (finding an appellant was only required "to establish some measure of legal fault by the publisher in order to warrant submission of the matter to the jury" when the appellant was not a public official or public figure). Our courts have chosen to retain the common law malice standard and its accompanying presumptions when addressing fault in private-figure actions. *See Erickson v. Jones St. Publishers., LLC*, 368 S.C. 444, 475–76, 629 S.E.2d 653, 670 (2006). When the defamatory comments were made in this case, Appellants' belief that Kennedy committed the thefts at Spring Valley was based on an incomplete and cursory investigation. Moreover, Earles testified he was aware of the security department's propensity to spread gossip, and both Appellants alluded to the harm the email would cause if it reached other employees. Despite this awareness, copies of the email were seen in unsecured District security vehicles and on a desk in an unsecured office where every security employee filled out their time cards. We find Kennedy presented sufficient evidence to raise a jury question as to fault.

Based on the foregoing analysis, we find the circuit court did not err in submitting Kennedy's defamation claim to the jury.[8]

[8] Appellants do not present any arguments on the final element of a defamation claim. Moreover, based on our supreme court's decision finding Appellants exceeded the scope of their privilege, we need not address Appellants' arguments regarding privilege or actual malice on remand. *See Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999) (finding a qualified privilege can be abused either by a party exceeding the scope of the privilege *or* by proof of actual malice).

II. Individual Liability under the SCTCA

Appellants assert the circuit court erred in denying their motion for JNOV on the individual liability claims against Appellants because the evidence does not support a finding of actual malice under the SCTCA. We disagree.

The SCTCA sets forth the liability of government employees as follows:

> (a) This chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity. An employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except as expressly provided for in subsection (b).
>
> (b) Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.

S.C. Code Ann. § 15-78-70(a)-(b) (2005).

Appellants argue "actual malice" under the SCTCA is interpreted by our courts as the equivalent of "constitutional malice." The term "actual malice" is often used to describe the standard associated with constitutional malice—publication of a defamatory statement with knowledge of its falsity or reckless disregard for its truth. *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 279–280 (1964). However, Appellants' use of actual malice confuses the common law actual malice standard with the constitutional actual malice standard. *See Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 134 n.7, 492 S.E.2d 103, 106 n.7 (1997) (noting the distinction between common law actual malice and constitutional actual malice); *Sanders v. Prince*, 304 S.C. 236, 239, 403 S.E.2d 640, 642–43 (1991) ("[T]he [circuit court]'s instructions on the definition of actual malice were erroneous because they included the definition of common law malice."). The constitutional actual malice standard, upon which Appellants base their individual liability argument, should only be used when the plaintiff is a public official or public figure allegedly

defamed in matters of public interest or concern. *Sanders*, 304 S.C. at 239, 403 S.E.2d at 643 ("In cases involving the defamation of a public official, the plaintiff must prove that the defendant acted with constitutional actual malice, that is, with knowledge that the statement was false or with reckless disregard of its falsity.").

According to Appellants, because constitutional malice is a higher standard than common law malice and Kennedy failed to sustain his burden of proof under this heightened standard, the circuit court erred in denying Appellants' motions relating to individual liability under the SCTCA. We agree that actual malice does, in fact, refer to constitutional malice when defamation involves the First Amendment, a public official, or an issue of public concern. *See id.* at 239–240, 403 S.E.2d at 642–43. The defamation in this case, however, does not involve the First Amendment, a public official, or a matter of public concern. Accordingly, Appellants have misinterpreted the standard as it applies to this argument, and as such, we find this argument is without merit. Thus, we affirm the circuit court's denial of Appellants' motion for JNOV as to this issue.

III. Damages

Appellants contend the damages award was grossly excessive and not founded upon the evidence presented at trial. Thus, Appellants argue the circuit court erred in denying their motion for JNOV regarding punitive damages, denying their alternative motions for a new trial absolute and a new trial *nisi remittitur*, and affirming the constitutionality of the punitive damages award. We disagree and address each argument in turn.

A. Motion for New Trial Absolute and *Nisi Remittitur*

Appellants dispute the denial of their motion for a new trial, or in the alternative, new trial *nisi remittitur*, claiming the evidence did not support the size of the award and the jury capriciously fixed damages without regard to the evidence. We disagree.

The jury maintains discretion, as reviewed by the circuit court, in awarding actual and punitive damages. *Miller v. City of W. Columbia*, 322 S.C. 224, 230, 471 S.E.2d 683, 687 (1996). "The grant or denial of new trial motions rests within the discretion of the [circuit court] and [its] decision will not be disturbed on appeal unless [its] findings are wholly unsupported by the evidence or the conclusions

reached are controlled by error of law." *Stevens v. Allen*, 336 S.C. 439, 446, 520 S.E.2d 625, 628–29 (Ct. App. 1999), *aff'd,* 342 S.C. 47, 536 S.E.2d 663 (2000). While a circuit court may grant a motion for a new trial on the ground that the verdict is inadequate or excessive, a jury's determination of damages is given substantial deference. *Id.* at 446–47, 520 S.E.2d at 629. An appellate court will only intervene when the verdict is "so grossly excessive and the amount awarded is so shockingly disproportionate to the injuries to indicate that it was the result of caprice, passion, prejudice, or other considerations not found on the evidence." *Miller*, 322 S.C. at 231, 471 S.E.2d at 687.

The circuit court may grant a new trial *nisi* when it finds the amount of the verdict to be merely inadequate or excessive. *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). However, a party must provide compelling reasons to justify invading the province of the jury. *Id.* "The [circuit court] that heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than this [c]ourt. Accordingly, great deference is given to the [circuit court]." *Id.* at 405–06, 477 S.E.2d at 723. The denial of a motion for a new trial *nisi* will not be reversed on appeal unless there was an abuse of discretion. *Id.* at 406, 477 S.E.2d at 723. An appellate court is obligated to review the record and determine whether an abuse of discretion amounting to an error of law exists. *Id.* at 406, 477 S.E.2d at 723–24.

In this case, Appellants argue the verdict—$100,000 in actual damages and $150,000 in punitive damages against Barnes and $100,000 in actual damages and $200,000 in punitive damages against Earles—is one that shocks the conscience based on the evidence presented at trial, and at a minimum, they are entitled to a new trial *nisi remittitur*. In particular, they point to the fact that Kennedy remained employed with the District for fourteen months following the investigation and defamatory statements. Additionally, they claim Kennedy only suffered a "minor indignity," was paid the same rate, and no witness testified to having a different perception of Kennedy after the investigation.

We find the circuit court did not abuse its discretion in denying Appellants' motions for a new trial absolute or a new trial *nisi remittitur*. In examining the record, we note Kennedy testified to not being able to obtain the same amount of overtime hours after being removed from his original job with the District because he was limited in his role as a result of having his keys taken away. Furthermore, Kennedy testified his reputation outside of the District diminished after the email

was published, specifically mentioning his reputation as a youth mentor and security guard at his church. Finally, the evidence indicates his reputation as a trustworthy guard, who was once recommended for a promotion, had diminished to the point where he was considered a thief, who could no longer trusted with keys, and who could be viewed as a "worthless" security guard. Considering these factors and that a person's reputation is invaluable,[9] we find the verdict is supported by the evidence, did not shock the conscience, and the circuit court did not err in denying Appellants' motions for a new trial absolute, or in the alternative, a new trial *nisi remittitur*.

B. Punitive Damages

"The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future." *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). In addition, "[p]unitive damages also serve to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party." *Id.* at 378–79, 529 S.E.2d at 533. Recklessness is a "conscious failure to exercise due care[,]" and "implies the doing of a negligent act knowingly." *Solley v. Navy Fed. Credit Union*, 397 S.C. 192, 211, 723 S.E.2d 597, 607 (Ct. App. 2012) (quoting *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011)). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." *Id.* This present consciousness of wrongdoing justifies the assessment of punitive damages against the tortfeasor, meaning "at the time of his act or omission to act the [tortfeasor must] be conscious, or chargeable with consciousness, of his wrongdoing." *Id.* (quoting *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011)).

1. Motion for JNOV

Appellants assert Kennedy failed to present clear and convincing evidence that any defamation by Appellants was willful, wanton, or in reckless disregard of Kennedy's rights. Thus, Appellants contend the circuit court erred in denying their

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[9] *See Miller*, 332 S.C. at 231, 471 S.E.2d at 687 ("[A] person's reputation is invaluable.").

motion for JNOV as to whether the jury had sufficient evidence to consider a punitive damages award. We disagree.

To receive an award of punitive damages, a plaintiff must present clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights. S.C. Code Ann. § 15-33-135 (2005) ("In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence."); *see also Cody P.*, 395 S.C. at 625, 720 S.E.2d at 480 ("In order to recover punitive damages, the plaintiff must present clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights."). "A conscious failure to exercise due care constitutes willfulness." *Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000). The circuit court must submit the issue of punitive damages to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton. *Id.*

Appellants argue there was insufficient evidence to support submitting the punitive damages issue to the jury. Specifically, Appellants state that finding they acted with "such conduct" would be inconsistent with the circuit court's ruling in granting a directed verdict on the issues of negligent supervision and intentional infliction of emotional distress. In particular, Appellants note in ruling on those two issues, the circuit court found the District had a reasonable expectation the email would remain confidential while also pointing out that, as with the actual malice argument, the "greater weight of the evidence" supported the lack of willful, wanton, or malicious conduct by Appellants.

We find, however, the punitive damages issue does not involve whether sufficient evidence shows Appellants' negligence in preventing the email from being printed and placed by non-supervisory employees, as it would in a negligent supervision discussion. Rather, the issue here is whether evidence exists to allow a jury to find Appellants acted recklessly or with a conscious disregard for Kennedy's rights in making the defamatory statements. Moreover, as previously stated in the actual malice discussion, when viewing the evidence as a whole, we find there was clear and convincing evidence of actual malice to support an award of punitive damages. *See Hainer*, 328 S.C. at 135 n.8, 492 S.E.2d at 107 n.8 ("We remind [circuit courts] that in cases in which the issue of punitive damages is submitted to the

jury, there must be clear and convincing evidence of [common law actual malice] to warrant such an award.").

In particular, we note that at the time the defamatory comments were made, Appellants' belief that Kennedy committed the thefts at Spring Valley was based on an incomplete and cursory investigation. Moreover, Earles testified he was aware of the security department's propensity to spread gossip, and both Appellants alluded to the harm the email would cause if it reached other employees. Despite this awareness, copies of the email were seen in unsecured District security vehicles and on a desk in an unsecured office where every security employee filled out their time cards. Thus, we find this was sufficient evidence to create a jury issue as to recklessness. *See Welch*, 342 S.C. at 302, 536 S.E.2d at 420; *see also Solley*, 397 S.C. at 211, 723 S.E.2d at 607 ("If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." (quoting *Cody P.*, 395 S.C. at 625, 720 S.E.2d at 480)); *Miller*, 322 S.C. at 231–32, 471 S.E.2d 687–88 (finding the circuit court did not err in denying the motion to strike punitive damages when defendant published a defamatory statement without factual support knowing that the publication would defame plaintiff). We find the circuit court did not err in submitting the punitive damages issue to the jury because clear and convincing evidence existed at trial to permit the jury to find Appellants acted willfully, wantonly, or with reckless disregard for Kennedy's rights—as defined by law in South Carolina—in publishing their statements to security department personnel.

2. Constitutionality of Award

Appellants also challenge the constitutionality of the punitive damages award. Thus, we are required to conduct a de novo review to determine whether the award of punitive damages in this case is consistent with due process. *See Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 396, 714 S.E.2d 904, 911 (Ct. App. 2011); *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009) (holding "appellate courts must conduct a de novo review when evaluating the constitutionality of a punitive damages award"). We are required to determine whether the award was reasonable in light of the following three guideposts:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Austin v. Stokes–Craven Holding Corp., 387 S.C. 22, 52, 691 S.E.2d 135, 151 (2010). Based on our determinations, we find the punitive damages awards to be constitutional. We address each factor in turn.

a. Reprehensibility

In reviewing the reasonableness of a punitive damages award, a court should first consider the degree of reprehensibility of the defendant's conduct. *See Mitchell, Jr.*, 385 S.C. at 587, 686 S.E.2d at 185. This is "perhaps the most important indicium of the reasonableness of a punitive damages award." *Id.* (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). Moreover, reprehensibility represents the idea that "some wrongs are more blameworthy than others." *Id.* Our supreme court dictated that, in evaluating reprehensibility, a court should consider whether:

> (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Mitchell, Jr., 385 S.C. at 587, 686 S.E.2d at 185. "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." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003). Reviewing the reprehensibility factors, we agree with the circuit court's findings and find Appellants' misconduct was reprehensible.

As to the first two factors, we find the weight of the evidence is in favor of Appellants. Although Appellants' conduct demonstrated reckless disregard for Kennedy's rights, no evidence indicates Appellants acted with reckless disregard for Kennedy's health or safety. *See Hollis*, 394 S.C. at 398, 714 S.E.2d at 912 ("Reckless disregard for the property rights of others can be sufficient misconduct to support an award of punitive damages . . . However, when evaluating the degree of a defendant's reprehensibility in a post-trial review of the award, the defendant's reprehensibility is not enhanced pursuant to this second consideration unless it involves the reckless disregard for the health or safety of people.") (internal citation omitted). Moreover, we agree with the circuit court's finding that Kennedy did not suffer physical harm, other than embarrassment and distress. Typically, finding only economic harm would weigh against reprehensibility and in favor of the defendant. *See id.* at 397, 714 S.E.2d at 912. However, "infliction of economic injury, especially . . . when the target is financially vulnerable, can warrant a substantial penalty." *Gore*, 517 U.S. at 576. While Appellants argue no evidence demonstrated the economic harm caused to Kennedy, we find they failed to consider the evidence demonstrating Kennedy's damaged reputation, the removal of the recommendation for a promotion, and the reduced overtime hours and pay available to him, all of which show economic harm.

Under the third factor, we find Kennedy presented evidence of financial vulnerability. Appellants contend the circuit court erred in finding Kennedy "was forced to cash out his retirement as a result of the alleged defamation (as opposed to his termination from either Richland Two or SCANA)." Moreover, they assert Kennedy presented no evidence of the financial impact the defamatory communication had on him. First, the circuit court simply stated in its order, "Evidence was presented that [Kennedy] was financially vulnerable; for example, after his termination, he cashed out his retirement." This statement does not mean the circuit court based its finding of financial vulnerability on the termination, which would have been inappropriate for the defamation verdict. Rather, this was merely an example of how the jury may have interpreted the evidence presented at trial as showing Kennedy's financial vulnerability, regardless of how it developed. This demonstrates Kennedy's financial vulnerability because the impact of losing a source of income was so great on Kennedy that he had to resort to the extreme measure of cashing out his retirement fund. Furthermore, Kennedy demonstrated he was a financially vulnerable target because he testified to being evicted from his house and having his car repossessed following his termination from the District.

Again, this evidence attests only to Kennedy's financial vulnerability not to the financial impact the termination had on him. Accordingly, we agree with the circuit court, and we disagree with Appellants' argument.

As to the fourth factor, while we agree that the defamation was a one-time event, we find the evidence demonstrates Appellants maintained a continuing and persistent belief that Kennedy was a thief without verified, factual support or regard for Kennedy's rights or reputation. *See Hollis*, 394 S.C. at 398, 714 S.E.2d at 912 (finding a higher degree of reprehensibility because defendant continued for years to engage in conduct the jury determined to be reckless). We believe this factor weighs in favor of reprehensibility and against Appellants.

Examining the final factor, we agree with the circuit court's finding that the jury could have inferred that the harm caused to Kennedy was the result of intentional malice, trickery, or deceit. Specifically, Appellants testified to being frustrated with the District's HR department for allowing Kennedy to remain on staff instead of being fired following the theft investigation. Moreover, Appellants testified they believed Kennedy actually committed the theft and conveyed that he could not be trusted with keys. As previously mentioned, there was sufficient evidence to allow the jury to infer actual malice, and malice is indicative of reprehensible conduct. Thus, when examining the record in light of these five considerations, we believe the circuit court did not err in finding Appellants' conduct reprehensible.

b. Disparity between Actual Harm and Punitive Damages

While a well-defined constitutional limit on the ratio between actual and punitive damages does not exist, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425. When determining the reasonableness of a particular ratio of actual harm suffered to punitive damages awarded, a court may consider: "the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." *Mitchell, Jr.*, 385 S.C. at 588, 686 S.E.2d at 185. Essentially, an appellate court "must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Campbell*, 538 U.S. at 426.

In this case, the jury determined that Barnes was liable to Kennedy for $100,000 in actual damages and $150,000 in punitive damages, and Earles was liable to Kennedy for $100,000 in actual damages and $200,000 in punitive damages. We note this amounts to a 1.5 to 1 ratio of punitive damages to actual damages for Barnes and a 2 to 1 ratio of punitive damages to actual damages for Earles. First, we find it probable that awarding $150,000 and $200,000, respectfully, in punitive damages will deter Appellants from similar conduct in the future and will likely encourage Appellants to implement more effective safeguards to prevent the release of sensitive information.

Considering the second factor, we believe the award of punitive damages is "reasonably related to the harm likely to result from such conduct." *Mitchell, Jr.*, 385 S.C. at 588, 686 S.E.2d at 185. While we recognize determining whether a compensatory damages award is "substantial" is a relative and imprecise review, we, nonetheless, believe the cumulative $200,000 award of actual damages to Kennedy is a substantial compensatory damages award in South Carolina. *See id.* at 592, 686 S.E.2d at 187 (finding an award of $150,000 actual damages is a "fairly substantial compensatory damage award in South Carolina"). When the actual damages awarded are substantial, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outer limits of the due process guarantee." *Id.* (quoting *Campbell*, 538 U.S. at 425).

Here, the evidence established that, prior to the theft occurring, Kennedy earned approximately $1,600–$1,700 per pay period at the District, which equates to approximately $38,400 per year.[10] Moreover, Kennedy testified to suffering harm to his reputation outside of the District, which is an invaluable asset. *See Miller*, 322 S.C. at 231, 471 S.E.2d at 687 ("[A] person's reputation is invaluable."). During closing argument, Kennedy suggested the jury consider an award of $400,000 as an appropriate award based on the evidence at trial because this amount represented approximately ten years pay for Kennedy at the rate he earned prior to the Spring Valley theft and prior to having his keys taken away from him. Additionally, Kennedy suggested this amount would convey the idea that Appellants were wrong in their actions and in their treatment of Kennedy. Thus, we believe the cumulative award of $350,000 in punitive damages was reasonably related to the actual harm suffered by Kennedy.

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[10] This figure was estimated using a conservative estimate of $1,600 every pay period with pay periods occurring twice a month. Thus, $1,600 x 24 = $38,400.

As to the third consideration, there is no direct evidence in the record to indicate Appellants' ability to pay a punitive damages award. When considering all three factors, we believe a 2 to 1 ratio for Earles and a 1.5 to 1 ratio for Barnes does not exceed due process limits.

c. Comparative Penalty Awards

When assessing the reasonableness of a punitive damages award, a court should also consider "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Mitchell, Jr.*, 385 S.C. at 588, 686 S.E.2d at 186. When identifying "comparable cases," our supreme court has instructed courts to consider: "the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant." *Id.* at 588–89, 686 S.E.2d at 186.

Initially, we note there are no authorized civil penalties that would apply to this case. Additionally, while we are unable to find a case factually on point with this case, there is a history of appellate courts in South Carolina upholding an award of punitive damages in defamation cases. *See Miller*, 322 S.C. at 230–32, 471 S.E.2d at 687–88 (affirming $250,000 in actual damages and a $500,000 punitive damages award); *Constant v. Spartanburg Steel Products, Inc.*, 316 S.C. 86, 88, 91, 447 S.E.2d 194, 195, 197 (1994) (upholding the jury verdict of $400,000 actual damages and $100,000 punitive damages); *Rogers v. Florence Printing Co.*, 233 S.C. 567, 574, 106 S.E.2d 258, 262 (1958) (finding, although the verdict for punitive damages was four times as large as that for actual damages, it was not a basis for reversal by an appellate court). Moreover, as it relates to comparable cases involving identifiable ratios, we note that South Carolina courts have most often upheld verdicts on the lower end of the single-digit spectrum, but will deviate from this standard when a case involves particularly egregious conduct. *See James v. Horace Mann Ins. Co*, 371 S.C. 187, 196–97, 638 S.E.2d 667, 671–72 (2006) (upholding a 6.82 to 1 ratio); *Cock–N–Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 4, 9–10, 466 S.E.2d 727, 729, 731–32 (1996) (upholding a 28 to 1 ratio); *Rogers*, 233 S.C. at 574, 106 S.E.2d at 262 (upholding a 4 to 1 ratio); *Mackela v. Bentley*, 365 S.C. 44, 49–50, 614 S.E.2d 648, 651 (Ct. App. 2005) (upholding a 3.75 to 1 ratio); *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 318, 594 S.E.2d 867, 877 (Ct. App. 2004) (upholding a 2.54 to 1 ratio and a 2.5 to

1 ratio); *Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 141, 584 S.E.2d 120, 129 (Ct. App. 2003) (upholding a 10:1 ratio).

In conclusion, we find the punitive damages award meets constitutional due process because the conduct was reprehensible, the ratio of punitive damages to actual damages was on the low end of the single-digit spectrum, and comparable cases justify upholding the award.

IV. Exclusion of Evidence

Appellants contend the circuit court committed prejudicial error by excluding evidence or cross-examination related to the alleged petty theft charges against Kennedy, which occurred at SCANA in February 2014 while he was employed as a night-shift security guard for Allied Barton.[11] We disagree.

The admission or exclusion of evidence is within the circuit court's discretion, and its decision will not disrupted or reversed absent an abuse of discretion. *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005). Our supreme court has "recognized that similar acts are admissible if they tend to prove or disprove some fact in dispute." *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmtys, Inc.*, 397 S.C. 348, 360, 725 S.E.2d 112, 119 (Ct. App. 2012). However, "[e]vidence of similar acts has the potential to be exceedingly prejudicial." *Id.* Even if evidence is relevant and falls within an exception allowing for its admission, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Rule 403, SCRE; *see also State v. Clasby*, 385 S.C. 148, 155–56, 682 S.E.2d 892, 896 (2009) ("Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed

[11] Appellants sought to introduce Bill Simpson, a SCANA investigator, as a witness who would testify to his investigation into Kennedy's role in the alleged SCANA thefts, Kennedy's confession to some of the thefts, Kennedy's payment of restitution for the thefts, and the end of Kennedy's employment with Allied Barton. Furthermore, Appellants assert Simpson was prepared to authenticate a video showing Kennedy committing the thefts.

by the danger of unfair prejudice to the defendant." (quoting *State v. Gaines*, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008))).

In this case, Appellants first claim the evidence is probative of their truth defense. We disagree. Truth of a statement is a defense to defamation. *See Parrish*, 376 S.C. at 327, 656 S.E.2d at 392 (noting truth is an affirmative defense in a defamation action). Here, however, Appellants cannot possibly claim this subsequent evidence as probative of their truth defense because the subsequent SCANA theft occurred *after* Appellants filed their answer containing their affirmative truth defense.[12] Thus, we do not find the evidence is probative of an affirmative defense if the evidence in question arose after the assertion of the affirmative defense.

Appellants also assert the excluded evidence was highly probative to Kennedy's damages claim as it related to his reputation. "The tort of defamation allows a plaintiff to recover for injury to his or her reputation *as the result* of the defendant's communications to others of a false message about the plaintiff." *Swinton Creek Nursery*, 334 S.C. at 484, 514 S.E.2d at 133 (emphasis added). Thus, *Swinton Creek Nursery* indicates that the plaintiff's reputation would have to be in good standing prior to the defamation occurring. In this case, Appellants sought to introduce evidence at trial resulting from an event occurring three years after the defamatory comments were made in an apparent attempt to portray Kennedy's reputation as retroactively soiled and damaged so that Appellants' defamatory statement would not appear to be damaging. Thus, we do not find the excluded evidence was probative to Kennedy's damages following the 2011 incident.

Finally, Appellants correctly state that character evidence can be admitted because Kennedy opened the door for this evidence by asserting a defamation claim. *See Sheriff v. Cartee*, 121 S.C. 143, 113 S.E. 579, 580 (1922) (finding the general good character of a plaintiff may be given in an action for slander). However, we find the circuit court did not abuse its discretion in excluding the evidence because its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Rule 403, SCRE. When the SCANA theft occurred, Kennedy's reputation had already been damaged. Allowing the SCANA theft evidence would be unfairly prejudicial or cause

[12] Appellants filed their answer with affirmative defenses on May 16, 2013, whereas, Kennedy's incident at SCANA did not occur until February 2014.

confusion of the issues because it would present difficulty in determining when the actual injury to Kennedy's reputation occurred. Thus, we find the circuit court did not abuse its discretion or commit an error in law in excluding the SCANA evidence.

IV. Jury Instructions

Regarding the final issue, Appellants claim the circuit court erred in failing to instruct the jury regarding its ruling that no defamation accompanied Kennedy's termination from the District. Appellants cite no legal authority or provision supporting their argument, and their argument is largely conclusory. Thus, we find Appellants have abandoned this issue and we need not address its merits. *See Snow v. Smith*, 416 S.C. 72, 91 n.7, 784 S.E.2d 242, 252 n.7 (Ct. App. 2016) (finding appellants abandoned their argument because they failed to provide legal citations or authority).

CONCLUSION

Based on the foregoing analysis, the circuit court's decisions as to Appellants' remaining issues are

AFFIRMED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marion E. Crocker, Jr., Appellant,

v.

South Carolina Department of Health and Environmental Control, Respondent.

Appellate Case No. 2017-000052

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

Opinion No. 5670
Heard April 17, 2019 – Filed July 24, 2019

AFFIRMED

Gerald F. Smith, of Smith Law Office, and Adam Tremaine Silvernail, of Law Office of Adam T. Silvernail, both of Columbia, for Appellant.

Eugene Hamilton Matthews, of Richardson Plowden & Robinson, PA, of Columbia, for Respondent.

KONDUROS, J.: Marion E. Crocker, Jr. appeals a circuit court order granting summary judgment to the South Carolina Department of Health and Environmental Control (the Department) on Crocker's discrimination claim brought under the

South Carolina Human Affairs Law (SCHAL).[1] On appeal, Crocker argues the circuit court erred in finding (1) the statute of limitations in section 1-13-90(d)(6)[2] applied to his claim, (2) section 1-13-90(c)[3] did not create a private right of action, and (3) Crocker was not entitled to equitable tolling of the statute of limitations. We affirm.

FACTS

The Department employed Crocker from January 1980 until September 2013. Crocker held three different positions during this time: manager of operational systems, director of Information Technology (IT) operations, and IT project manager. Around September 2012, the Department sought applicants for an Agency Chief Information Officer. Crocker and four other internal employees submitted applications for the position. A three-member panel conducted interviews and recommended the top three applicants to the Department's Director of Administration. Although Crocker's background at the Department exceeded all of the specific job requirements and qualifications for the position, the panel did not select Crocker as one of the top three applicants. However, the panel selected Dakin McPhail, an internal employee who formerly worked under Crocker's supervision, as one of the top three applicants. The Director of Administration ultimately selected McPhail for the position in January 2013. Although McPhail did not meet the minimum qualifications for the position, the Director of Administration stated she chose McPhail because he performed the best in his interview. At the time of the selection, McPhail was forty-five years old while Crocker was fifty-five years old.

Crocker filed a formal grievance with the Department about the selection process, but in March 2013 the Department denied the grievance, finding the nature of the

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[1] S.C. Code Ann. §§ 1-13-10 to -110 (2005 & Supp. 2018) (creating a state agency—the South Carolina Human Affairs Commission (SCHAC)—and procedures for the agency to follow "to eliminate and prevent discrimination because of race, religion, color, sex, age, national origin, or disability").

[2] Section 1-13-90(d)(6) states an action under this chapter "must be brought within one year from the date of the violation alleged, or within one hundred twenty days from the date the complainant's charge is dismissed, whichever occurs earlier."

[3] Section 1-13-90(c) sets forth the procedure for the SCHAC to follow when investigating complaints asserting a violation by a state agency or department.

grievance did not fall within the provisions of the State Employee Grievance Procedure Act.[4] On August 7, 2013, Crocker filed a Charge of Discrimination (Charge) based on age with the SCHAC alleging violations of the Age Discrimination in Employment Act (ADEA)[5] and the SCHAL and noting McPhail did not meet the minimum requirements for the position. Two days later, the SCHAC waived deferral of Crocker's Charge and transferred the complaint to the United States Equal Employment Opportunity Commission (EEOC) for processing, ending the SCHAC's involvement in the case.[6] On July 1, 2015, the EEOC issued a determination finding "there is reasonable cause to believe" the Department denied Crocker the promotion based on his age. The EEOC attempted to conciliate the Charge as required by the ADEA and ultimately sent Crocker a "Notice of Conciliation Failure" on February 11, 2016. The EEOC also mailed Crocker a "Notice of Right to Sue" on February 11, 2016, stating, "You may file a lawsuit against [the Department] under federal law based on this [C]harge in federal or state court. Your lawsuit **must be filed WITHIN [ninety] days of your receipt of this notice**; or your right to sue based on this [C]harge will be lost."

Crocker filed this lawsuit based on this Charge in state circuit court on March 28, 2016, alleging violations of the SCHAL. The Department answered and filed a motion for summary judgment, contending the applicable state law statute of limitations barred Crocker's claims. At a hearing in October 2016, the Department argued (1) the statute of limitations in section 1-13-90(d)(6) barred Crocker's claims, (2) no private cause of action existed for Crocker under section 1-13-90(c), and (3) Crocker was not entitled to equitable tolling. Crocker responded that the statute of limitations did not apply to his claim because the EEOC handled his claim, not the SCHAC. Crocker also contended a plaintiff could only sue a state agency through the SCHAL under section 1-13-90(c).

On November 21, 2016, the circuit court filed an order granting summary judgment to the Department. In its order, the circuit court found Crocker could not bring a private cause of action under section 1-13-90(c). The circuit court also

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[4] S.C. Code Ann. §§ 8-17-310 to -380 (2019 & Supp. 2018).
[5] 29 U.S.C. §§ 621-634 (2012 & Supp. 2017).
[6] The SCHAC transfers all discrimination complaints not filed within 180 days of the alleged violation to the EEOC for processing. *See* § 1-13-90(a) ("Any person shall complain in writing under oath or affirmation to the [SCHAC] within [180] days after the alleged discriminatory practice occurred.").

determined the applicable statute of limitations in section 1-13-90(d)(6) barred Crocker's claims. The circuit court noted Crocker only brought claims under the SCHAL, not federal law. Finally, the circuit court found Crocker failed to make any showing he was entitled to equitable tolling of the statute of limitations. Crocker filed a motion to alter or amend, which the circuit court denied. This appeal followed.

LAW/ANALYSIS

I. Private Right of Action under Section 1-13-90(c)[7]

Crocker argues the circuit court erred in finding a private cause of action did not exist under section 1-13-90(c) of the South Carolina Code (2005 & Supp. 2018) because the legislature intended for the statute to contain an implied cause of action. Specifically, Crocker asserts the language in section 1-13-90(c)(1)[8] evidences an intent by the legislature to create a private cause of action. We disagree.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Id.* "Whe[n] the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed[,] and the court has no right to impose another meaning." *Id.* "[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

Section 1-13-90(c) sets forth the SCHAC's procedure for investigating complaints asserting a violation by a state agency or department. After investigating the

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[7] We address Crocker's second issue first.

[8] S.C. Code Ann. § 1-13-90(c)(1) ("Information gathered during an investigation under this subsection shall not be made public by the [SCHAC], its officers[,] or employees, except for information made public as a result of being offered or received into evidence in an action brought under this subsection.").

complaint, a hearing on the claim may be ordered before a panel of three members of the SCHAC. *See* § 1-13-90(c)(5), (11). After hearing the evidence from both the complainant and respondent, if the panel finds the respondent engaged in unlawful discriminatory practice, it will issue an opinion and order requiring the respondent to discontinue the practice and requiring other such action as the panel finds will "effectuate the purposes of [the SCHAC]." § 1-13-90(c)(16). Either party can appeal the decision to the Administrative Law Court (ALC) within thirty days after receipt of notice. § 1-13-90(c)(19)(ii). "There is no provision in the [SCHAL] for the filing of independent suits to enforce private rights against state departments, agencies, or subdivisions. The only avenue of judicial redress for state public employees under the [SCHAL], unlike . . . the ADEA, is through an agency enforcement action." 5 Emp. Discrimination Coordinator § 45:70 (citation omitted).

The circuit court correctly found section 1-13-90(c) does not provide a private cause of action. Initially, the SCHAC did not follow the procedures outlined in section 1-13-90(c) because the EEOC, not the SCHAC, handled Crocker's complaint after the SCHAC waived deferral. Regardless, even if the SCHAC had handled Crocker's claim, section 1-13-90(c) does not grant Crocker a private cause of action because the language of the statute provides for an administrative investigation and hearing for parties that accuse a state agency of discrimination. *See* § 1-13-90(c); *see also Nat'l R.R. Passenger Corp.*, 414 U.S. at 458 ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."). This section grants the SCHAC the authority to investigate the complaint and order a hearing on the claim. § 1-13-90(c)(5), (11). If the three-member SCHAC panel finds in favor of the complainant, it shall issue an opinion and order requiring the respondent to discontinue the discriminatory practice and requiring any other action the panel finds "will effectuate the purposes of [the SCHAC]." § 1-13-90(c)(16). Finally, at this point, the statute gives both the complainant and respondent the right to appeal the SCHAC panel's decision to the ALC. § 1-13-90(c)(19)(ii). Because the statute expressly outlines an administrative remedy, no private cause of action is available for Crocker under section 1-13-90(c). *See Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 ("Whe[n] the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed[,] and the court has no right to impose another meaning."); *see also Nat'l R.R. Passenger Corp.*, 414 U.S. at 458 ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other

remedies."). Therefore, because the circuit court correctly found section 1-13-90(c) did not provide a private cause of action for Crocker, we affirm as to this issue.

II. Statute of Limitations under Section 1-13-90(d)(6)[9]

Crocker argues the circuit court erred in finding section 1-13-90(d)(6) of the South Carolina Code (2005) operated as a statute of limitations on his claim because that statute is inapplicable to his claim. Crocker asserts because his claim falls under section 1-13-90(c), not section 1-13-90(d), the statute of limitations in subsection (d) is inapplicable. Finally, Crocker contends even if the statute of limitations applies to his claim, this court should equitably toll the time limitation. We disagree.

"[The plaintiff] has the obligation to apprise the [circuit] court of the theory of his cause of action and that theory must be adhered to by this [c]ourt on review." *Troutman v. Facetglas, Inc.*, 281 S.C. 598, 601, 316 S.E.2d 424, 425-26 (Ct. App. 1984).

> If a charge filed with the [SCHAC] by a complainant pursuant to this chapter is dismissed by the [SCHAC], or if within [180] days from the filing of the charge the [SCHAC] has not filed an action under this chapter or entered into a conciliation agreement to which the complainant is a party, the complainant may bring an action in equity against the respondent in circuit court. The action must be brought within one year from the date of the violation alleged, or within [120] days from the date the complainant's charge is dismissed, whichever occurs earlier . . . .

§ 1-13-90(d)(6); *see Orr v. Clyburn*, 277 S.C. 536, 541, 290 S.E.2d 804, 806-07 (1982) (recognizing a private right of action under section 1-13-90(d) of the SCHAL); *see also Ferguson v. Waffle House, Inc.*, 18 F. Supp. 3d 705, 717 n.6 (D.S.C. 2014) (noting the plaintiff's complaint lists SCHAL as one of the statutes under which he is pursuing his claim); *Robinson v. BGM Am., Inc.*, 964 F. Supp.

[9] Because Crocker's first and third issues are related, we address those together.

2d 552, 578 (D.S.C. 2013) (stating the plaintiff's complaint includes claims based on SCHAL); *Gleaton v. Monumental Life Ins. Co.*, 719 F. Supp. 2d 623, 635 (D.S.C. 2010) (acknowledging the plaintiff asserted discrimination claims under SCHAL). The "SCHAL . . . ha[s] a different timetable for exhaustion of remedies prior to [the] filing of a lawsuit [than federal law]." *Oroujian v. Delfin Grp. USA LLC*, 57 F. Supp. 3d 544, 549 n.4 (D.S.C. 2014).

"[E]quitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 117, 687 S.E.2d 29, 33 (2009). "The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use." *Id.* at 115, 687 S.E.2d at 32. In the employment discrimination context, the Fourth Circuit Court of Appeals has found, "Equitable tolling applies whe[n] the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action." *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987). "To invoke equitable tolling, the plaintiff must therefore show that the defendant attempted to mislead him and that the plaintiff reasonably relied on the misrepresentation by neglecting to file a timely charge." *Id.*

The circuit court correctly found the statute of limitations in section 1-13-90(d)(6) barred Crocker's claim. Here, Crocker satisfied all of the prerequisites to bring his claim under federal law in federal court by timely filing his employment discrimination charge with the EEOC and receiving the EEOC's notice of the right to sue. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973) (finding a plaintiff satisfied the prerequisites to bring a federal action by filing a timely employment discrimination charge with the EEOC and acting on the notice of a right to sue from the EEOC). However, Crocker brought his claim in state circuit court under the SCHAL.[10] Even though the SCHAC did not handle Crocker's

[10] Crocker cites *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), in his brief. In that case, the Supreme Court of the United States held states possess sovereign immunity from any employment discrimination lawsuit brought by an individual under the ADEA. *Id.* This immunity would have caused a federal court to dismiss Crocker's suit against the Department if he brought the claim under the ADEA, which likely led to his decision to bring his claim in state court under the SCHAL, only to have it regrettably dismissed as untimely under section 1-13-90(d)(6).

claim, the SCHAL applies in this case because Crocker chose to bring his claim in state court arguing a state law theory.[11] *See Troutman*, 281 S.C. at 601, 316 S.E.2d at 425-26 ("[The plaintiff] has the obligation to apprise the [circuit] court of the theory of his cause of action and that theory must be adhered to by this [c]ourt on review."). Crocker cites to multiple SCHAL code sections in his complaint, including section 1-13-90(c). However, as explained above, only section 1-13-90(d) could have provided Crocker with a private cause of action under the SCHAL. *See Orr*, 277 S.C. at 541, 290 S.E.2d at 806-07 (recognizing a private right of action under section 1-13-90(d) of the SCHAL). Because the SCHAL—specifically section 1-13-90(d)—applies to this case, the statute of limitations in section 1-13-90(d)(6) operated to bar Crocker's claim because he failed to bring his action within a year of the alleged violation. § 1-13-90(d)(6) ("The action must be brought within one year from the date of the violation alleged, or within [120] days from the date the complainant's charge is dismissed, whichever occurs earlier . . . ."); *see also Oroujian*, 57 F. Supp. 3d at 549 n.4 ("[The] SCHAL . . . ha[s] a different timetable for exhaustion of remedies prior to [the] filing of a lawsuit [than federal law]."). The alleged violation occurred in January 2013, but Crocker did not file this action in the circuit court until March 2016; therefore, section 1-13-90(d)(6) bars this action under the SCHAL.

Crocker contends even if the statute of limitations applied to his claim, this court should equitably toll the time limitation. We find the circuit court correctly refused to apply equitable tolling to Crocker's claim. In this case, Crocker did not allege the Department participated in any deceptive or bad faith attempts to conceal the existence of his cause of action. Crocker claimed the administrative proceedings and notices by the EEOC were sufficient to justify equitably tolling the statute of limitations. Therefore, Crocker did not meet his burden of establishing sufficient facts to justify the use of equitable tolling.[12] *See Brown v.*

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[11] Crocker argues he filed his lawsuit within the ninety-day window provided in his Notice of Right to Sue from the EEOC. However, the Notice of Right to Sue expressly states it only applies to lawsuits brought under federal law, and Crocker brought his action under state law.

[12] If Crocker had filed his Charge with the SCHAC within 180 days of the alleged violation, he would have had an opportunity to pursue a remedy through state law because the SCHAC, not the EEOC, would have investigated his claim under the procedures for discrimination allegations against state agencies in section 1-13-90(c) of the SCHAL.

Lexington Cty. Health Servs. Dist., Inc., C/A No. 3:12-2674-MBS, 2013 WL 5467626, at *7 (D.S.C. Sept. 27, 2013) (finding South Carolina's doctrine of equitable tolling does not rescue a plaintiff when he waits until after the EEOC issues a right-to-sue letter to file a state law claim); *see also Hooper*, 386 S.C. at 117, 687 S.E.2d at 33 ("[E]quitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use."); *English*, 828 F.2d at 1049 ("To invoke equitable tolling, the plaintiff must therefore show that the defendant attempted to mislead him and that the plaintiff reasonably relied on the misrepresentation by neglecting to file a timely charge."). Because the statute of limitations in section 1-13-90(d)(6) applied and barred this action and the doctrine of equitable tolling does not apply, we affirm this issue.

CONCLUSION

Accordingly, the circuit court's grant of summary judgment is

AFFIRMED.

HUFF and THOMAS, JJ., concur.