The Supreme Court of South Carolina

In the Matter of Alonzo Chisolm, Petitioner.

Appellate Case No. 2021-000012

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 13, 2013, Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is an inactive member of the Bar in good standing.

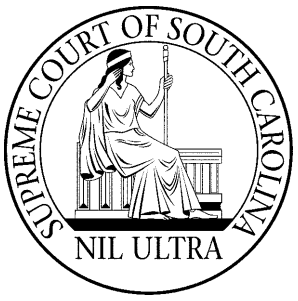
Petitioner has now submitted a resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

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

FOR THE COURT

s/ Jason Bobertz
DEPUTY CLERK

Columbia, South Carolina
January 19, 2021



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 3
January 27, 2021
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Lisa Fisher, Respondent.

Appellate Case No. 2020-000226

Opinion No. 28006
Submitted December 30, 2020 – Filed January 27, 2021

PUBLIC REPRIMAND

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

James M. Griffin, Esquire, of Griffin Davis LLC, of Columbia, for Respondent.

PER CURIAM: Respondent Lisa Fisher was sanctioned for violating Rule 11, SCRCP, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §§ 15-36-10 to -100 (Supp. 2018), during the lengthy dispute regarding the estate of Respondent's late great-aunt. These sanctions were reported to the Commission on Lawyer Conduct,[1] and formal charges were filed against Respondent on April 17, 2019, alleging she engaged in frivolous and abusive litigation tactics that constituted misconduct. Following a hearing, a Panel of the Commission on Lawyer Conduct (the Panel) found Respondent committed misconduct and recommended Respondent receive a Letter of Caution and be ordered to pay the costs of the disciplinary proceedings. Both Respondent and the

[1] *See* S.C. Code Ann. § 15-36-10(H) ("If the court imposes a sanction on an attorney in violation of the provisions of this section, the court shall report its findings to the Commission on Lawyer Conduct.").

Office of Disciplinary Counsel have filed exceptions to the Panel Report. We issue a public reprimand.

Respondent is licensed to practice law in California. However, at all times relevant to the matters alleged in the formal charges, she was admitted *pro hac vice* in South Carolina, and thus is subject to the South Carolina attorney disciplinary process by virtue of Rule 404(d)(9), SCACR (requiring attorneys admitted *pro hac vice* to "submit to the jurisdiction of the South Carolina courts and the South Carolina disciplinary process"). We further find Respondent meets the definition of "lawyer" as set forth in Rule 2(r), RLDE, Rule 413, SCACR, as a result of her "providing or offering to provide legal services in South Carolina."[2]

Respondent's great-aunt passed away in February 2009, and through a series of frivolous pleadings, motions, and appeals, Respondent raised various challenges to the will and protracted the related litigation for over ten years until the Supreme Court of the United States finally denied her petition for a writ of certiorari. *See Fisher v. Huckabee*, 140 S.Ct. 59 (2019) (denying certiorari); *Fisher v. Huckabee*, 422 S.C. 234, 811 S.E.2d 739 (2018) (rejecting Respondent's legally flawed claims). In our opinion addressing the lower court's award of sanctions against Respondent, this Court concluded Respondent lacked standing and repeatedly pursued claims that were meritless and wholly without evidence to support them. *Fisher v. Huckabee*, Op. No. 2018-MO-039 (S.C. Sup. Ct. filed Dec. 12, 2018) (withdrawn, substituted, and refiled Jan. 16, 2019). In doing so, we observed Respondent "has certainly engaged in abusive litigation tactics that amount to sanctionable conduct" under Rule 11, SCRCP. *Id*. at 3. Respondent's misconduct resulted in a substantial waste of time, judicial resources, and estate assets.

Accordingly, we accept the Panel's finding that Respondent violated Rule 3.1, RPC, Rule 407, SCACR (setting forth a lawyer's duty not to abuse legal procedure through frivolous proceedings). We further find Respondent committed professional misconduct under Rule 8.4(a), RPC, Rule 407, SCACR, which constitutes grounds for discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR. We find a public reprimand is the appropriate sanction, *cf. In re Fabri*, 418 S.C. 384, 793 S.E.2d 306 (2016) (publicly reprimanding attorney for litigation conduct

[2] *See Fisher v. Huckabee*, Op. No. 2018-MO-039, at 3 (S.C. Sup. Ct. filed Dec. 12, 2018) (withdrawn, substituted, and refiled Jan. 16, 2019) (finding Respondent provided advice to her mother, who was a named party to the action, during the course of the estate litigation).

that violated the South Carolina Rules of Civil Procedure), and we hereby publicly reprimand Respondent and order her to pay the costs of these proceedings within thirty (30) days of this opinion.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ABB, Inc., and BFP, LP, a/k/a Bullington Family Partnership, Respondents,

v.

Integrated Recycling Group of SC, LLC, John Murphy Armstrong, Jr., and Michael T. Armstrong, Appellants.

Appellate Case No. 2017-001943

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 5793
Heard March 10, 2020 – Filed January 27, 2021

AFFIRMED

J. Falkner Wilkes, of Greenville, for Appellants.

Gregory Jacobs English, of Wyche Law Firm, of Greenville, for Respondents.

LOCKEMY, C.J.: Integrated Recycling Group of SC, LLC (IRG), John Murphy Armstrong, and Michael T. Armstrong (collectively, Debtors) appeal the circuit court's order granting summary judgment in favor of ABB, Inc. and BFP, LP (collectively, Creditors). Debtors argue the circuit court erred by (1) finding the collateral at issue was personal property rather than a fixture and (2) failing to find

Creditors lost their priority over the collateral when their UCC-1 filing lapsed. We affirm.

FACTS/PROCEDURAL HISTORY

In 2005, Creditors loaned Debtors approximately $5 million (the ABB Loan). Creditors filed a complaint against Debtors to collect the debt March 16, 2011. IRG then filed for bankruptcy. To settle their claims as to both actions, Debtors and Creditors entered into a debt settlement agreement (the Settlement Agreement) on October 27, 2011, with an effective date of November 10, 2011. Pursuant to this agreement, IRG executed a promissory note (the Note) in favor of Creditors for $1.4 million with an interest rate of 4% per annum. The Note provided that after five years all remaining principal and interest were to be due and fully payable as a balloon payment. IRG signed a blanket continuing security agreement granting Creditors a security interest in IRG's "inventory, general intangibles, accounts, chattel paper, instruments and documents, equipment, commercial tort claims, letter-of-credit rights, and all parts, replacements, substitutions, profits, products, accessions and cash and non-cash proceeds and supporting obligations of any of the foregoing." To further secure the loan, Debtors signed a "continuing Pelletizer security agreement" (the Pelletizer Agreement) giving Creditors a security interest in a "60 Ton Air Cooled Pelletizing Machine/Cooler, Model #NGR105VSP, Series #Q02028" (the Pelletizer). IRG defaulted on the Note by failing to pay interest from August through November of 2016 and by failing to pay the full balance of the debt when it became due on November 10, 2016. Creditors then instituted this action against Debtors to collect the debt and enforce their security interest in the Pelletizer and other collateral.

The Settlement Agreement defined "the Assets" of IRG as IRG's "Accounts Receivable, Equipment, Furniture, Fixtures, Inventory, Instruments, Chattel Paper, and General Intangibles." The Settlement Agreement stated, "[O]n March 27, 2006, to . . . secure the ABB Loan, ABB filed a UCC-1 Financing Statement, along with a UCC-3 Continuation" against IRG's Assets. Additionally, IRG agreed "the 2006 UCC [wa]s a valid, perfected lien on the Assets of [IRG] and that such lien secure[d] the Debt." Further, as part of the Pelletizer Agreement, which was executed simultaneously with the Settlement Agreement, Debtors agreed Creditors held a "valid and perfected security interest in the [Pelletizer]."

John Murphy and Michael Armstrong (the Armstrongs) filed an answer in their individual capacities, and IRG answered separately. The circuit court subsequently issued a consent order relieving IRG's counsel; however, IRG never retained new counsel. In their answer, the Armstrongs admitted Debtors entered into the Settlement Agreement with Creditors and signed the Pelletizer Agreement giving Creditors a security interest in the Pelletizer.

Thereafter, Creditors moved for summary judgment. In support of their motion, Creditors submitted the affidavit of Bryan Bullington, the Settlement Agreement and the exhibits attached to and incorporated in the Settlement Agreement, including the security agreements and UCC financing statements. Creditors also moved to strike IRG's answer and for default judgment against IRG. In his affidavit, Bullington stated he was the vice president of Creditors, whom he attested held a duly perfected first security interest in the Pelletizer and other collateral of Debtors pursuant to the UCC-1 financing statements filed with the South Carolina Secretary of State and attached to the motion. Further, he stated Creditors provided the purchase money for all collateral and the Pelletizer.

The Armstrongs filed an affidavit in opposition to Creditor's motion for summary judgment. They attested the "heavy equipment that was installed in the building" constituted a fixture because it was "very large," "bolted down," and "very difficult to move in and out of the plant." The Armstrongs stated a third party held a mortgage on the real property where this equipment was located and the mortgage attached to all fixtures on the property. The Armstrongs stated the mortgagee would have priority over Creditors' security interest because Creditors' UCC-1 financing statement had lapsed. In response, Creditors submitted a second affidavit of Bullington, who attested the collateral was "personal property that c[ould] be removed from the real property without damaging it" and therefore was not covered by the third-party mortgage.

At the hearing on their motions, Creditors argued the Armstrongs' affidavit was not made on personal knowledge pursuant to Rule 56, SCRCP, and did not raise any genuine issue of material fact. No counsel appeared on behalf of IRG at the hearing. The Armstrongs argued "the equipment" was a fixture because it was "very heavy equipment and would take a very—would be very difficult to remove." They asserted the mortgage on the real property attached to the equipment and had priority. Creditors argued that as between Debtors and Creditors, the record contained a financing statement and security agreement

covering the collateral and any issue of priority between third parties was irrelevant. The Armstrongs stipulated the principal balance of $1,146,923.12 was due under the Note.

The circuit court granted summary judgment in favor of Creditors. The court found Creditors held a "duly perfected first security interest in the Collateral and [the] Pell[e]tizer." The court concluded the collateral and the Pelletizer were not fixtures or improvements but personal property and Creditors were therefore entitled to possession of the collateral and the Pelletizer. Additionally, the court struck IRG's answer and granted judgment against it for $1,221,984.06. This appeal followed.

ISSUE ON APPEAL

Did the circuit court err by granting summary judgment in favor of Creditors when it classified the equipment at issue as personal property rather than a fixture?

STANDARD OF REVIEW

"When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP." *Coker v. Cummings*, 381 S.C. 45, 51, 671 S.E.2d 383, 386 (Ct. App. 2008). Summary judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "To determine if any genuine issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

LAW/ANALYSIS

Debtors argue the circuit court erred by concluding the Pelletizer was personal property because the evidence could reasonably support a finding it became a fixture when it was anchored to the ground and attached to the building.[1] Debtors

[1] Debtors' arguments address the security interest in the Pelletizer rather than any other equipment or collateral.

contend the Armstrongs' affidavit, which stated the Pelletizer was large, heavy, and installed in the building, provided evidence it was a fixture. They argue the only evidence suggesting the Pelletizer was personal property was Creditors' assertion it could be removed without damaging the real property. We disagree.

"Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ." *NationsBank v. Scott Farm*, 320 S.C. 299, 302-03, 465 S.E.2d 98, 100 (Ct. App. 1995). "When a party makes no factual showing in opposition to a motion for summary judgment, the trial 'court must grant summary judgment to the moving party if, under the facts presented, the latter is entitled to summary judgment as matter of law.'" *Coker*, 381 S.C. at 55, 671 S.E.2d at 388 (quoting *S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc.*, 283 S.C. 182, 189, 322 S.E.2d 453, 457 (Ct. App. 1984)). "[T]o resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial." *NationsBank*, 320 S.C. at 303, 465 S.E.2d at 100; *see also* Rule 56(e), SCRCP ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.").

"A fixture involves a mixed question of law and fact. It is incumbent on the court to define a fixture; but whether it is such in a particular instance depends upon the facts of that case, unless the facts are susceptible of but one inference." *Carson v. Living Word Outreach Ministries, Inc.*, 315 S.C. 64, 70, 431 S.E.2d 615, 618 (Ct. App. 1993). "'Fixtures' means goods that have become so related to particular real property that an interest in them arises under real property law." S.C. Code Ann. § 36-9-102(41) (2003 & Supp. 2019). "A fixture is generally defined as 'an article which was a chattel, but by being physically annexed to the realty by one having an interest in the soil becomes a part and parcel of it.'" *Creative Displays, Inc. v. S.C. Highway Dep't*, 272 S.C. 68, 72, 248 S.E.2d 916, 917 (1978). "Mere affixation does not automatically render property a fixture." *Carjow, LLC v. Simmons*, 349 S.C. 514, 519, 563 S.E.2d 359, 362 (Ct. App. 2002). "An addition made by a person claiming fee simple title is presumed to be a fixture, whereas no presumption arises where the one making the addition has an estate limited in time or use." 18 S.C. Jur. *Fixtures* § 9; *see also Planters' Bank v. Lummus Cotton Gin Co.*, 132 S.C. 16, 23, 128 S.E. 876, 878 (1925) ("[I]t is considered more probable

that an improvement, placed on the premises by one who did not own the fee, was placed there for his personal convenience and during the *limited* term of his estate."). "In determining whether an item is a fixture, courts should consider the following factors: '(1) mode of attachment, (2) character of the structure or article, (3) the intent of the parties making the annexation, and (4) the relationship of the parties.'" *Carjow, LLC*, 349 S.C. at 519, 563 S.E.2d at 362 (quoting *Hyman v. Wellman Enters.*, 337 S.C. 80, 84, 522 S.E.2d 150, 152 (Ct. App. 1999)).

First, we find the circuit court did not err by granting summary judgment in favor of Creditors as to IRG. It is undisputed IRG was in default. *See Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance."). Although IRG argues for the first time in its reply brief that the circuit court erred by granting Creditors' motion to strike its answer, a party cannot raise an issue for the first time in an appellate reply brief. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the [circuit] court."); *Chet Adams Co. v. James F. Pedersen Co.*, 307 S.C. 33, 37, 413 S.E.2d 827, 829 (1992) (holding an issue was waived when the appellant raised it for the first time in its reply brief). Further, IRG failed to oppose the motion for summary judgment in any way. *See Thompkins v. Festival Ctr. Grp. I*, 306 S.C. 193, 196, 410 S.E.2d 593, 594 (Ct. App. 1991) ("[A] party opposing summary judgment may not rest on mere allegations or denials contained in pleadings."). Accordingly, we affirm the circuit court's ruling granting summary judgment in favor of Creditors as to IRG.

Next, viewing the facts in the light most favorable to Debtors, we believe there was no genuine issue of material fact as to whether the Pelletizer was personal property. Although the Armstrongs contend the Pelletizer was a fixture, nothing in their affidavit or the mortgage documents indicated an intent on the part of the Debtors that the Pelletizer or any other equipment was to become a fixture. Their affidavit referred generally to "heavy equipment" but not the Pelletizer specifically. Further, it did not address the nature of the Pelletizer or any other equipment, nor did it describe the relationship of such items to the use of the real property. Rather, the affidavit stated only that the equipment was very heavy, was bolted to the floor, and was difficult to move. Moreover, the Armstrongs did not state they intended any equipment to remain permanently in the building or dispute that the equipment or Pelletizer could be removed from the building without damaging the real property. Finally, the Armstrongs did not dispute Creditors had a valid and

enforceable security interest in the Pelletizer or any other collateral identified in the Settlement Agreement. We find the record contains no evidence to show the Pelletizer or any other collateral was a fixture. We conclude the facts were only susceptible to the inference that such items were personal property. Therefore, viewing the facts in the light most favorable to Debtors, we find there was no genuine issue of material fact as to whether the Pelletizer was personal property and the circuit court did not err by granting summary judgment in favor of Creditors.

In light of our disposition of this issue, we need not address Debtors' remaining argument concerning priority. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that when an appellate court's disposition of a prior issue is dispositive, it need not address remaining issues).

CONCLUSION

For the foregoing reasons, the circuit court's order granting summary judgment in favor of Creditors is

AFFIRMED.

GEATHERS and HEWITT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sea Island Food Group, LLC, d/b/a Squeeze, Plaintiff,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, Hilton Smith, East Bay Company, Ltd., Michael J. Quillen Family Limited Partnership, Defendants.

Michael J. Quillen Family Limited Partnership, Third-Party Plaintiff,

v.

Top of the Bay, LLC, Third-Party Defendant.

Top of the Bay, LLC, d/b/a Club Light, Fourth-Party Plaintiff, Respondent,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, Fourth-Party Defendant, Appellant.

Appellate Case No. 2018-000906

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. 5794
Heard December 9, 2020 – Filed January 27, 2021

AFFIRMED

E. Brandon Gaskins, of Moore & Van Allen, PLLC, and Robert Ernest Sumner, IV, of Butler Snow, LLP, both of Charleston; and Charles Robert Scarminach, of Atlanta GA, all for Appellant.

W. Tracy Brown, of The Brown Law Firm, of Summerville, and William Koatesworth Swope, of The Swope Law Firm, PA, of Charleston, for Respondent.

HEWITT, J.: This case arose out of a building owner's decision to terminate the building's master lease after a fire. It comes to us presenting two issues. The first is whether a subtenant may sue the owner for intentionally interfering with a sublease by wrongfully declaring the building "totally destroyed." The second is a multi-pronged challenge to the jury's award of punitive damages.

We affirm. There was evidence upon which the jury could find the owner improperly declared the property "totally destroyed." That declaration, if wrongful, directly interfered with the building's subleases: in lawyer jargon, it constitutes intentional interference with a contract. We also agree with the trial court's thorough review of the jury's punitive damages award.

FACTS

The building in question is located at 213 East Bay Street in downtown Charleston. Yashick Development Co. purchased the property in 2003 for approximately $1.8 million. It leased the building to a limited partnership (the Master Tenant). The Master Tenant rented space to subtenants.

A fire started on the building's second floor one night in April 2013. The fire caused extensive damage to the second floor and roof. There was less damage to the

building's other areas. In the following months, the Master Tenant hired a company to secure the building and begin the clean-up process. It also hired a company to perform architectural and engineering services for the building's repair.

Within months, the stakeholders became aware of issues related to restoring the building and complying with the applicable earthquake building code. The Master Tenant notified Yaschik of these challenges in June 2013. The Master Tenant also said it believed the total cost of reconstruction would "certainly" exceed the insurance; possibly by "a significant amount." The Master Tenant had a $1 million insurance policy for the property. Yaschik paid substantially more than $1 million when it purchased the building, but $1 million was all the insurance the master lease required.

In August 2013, the Master Tenant notified Yaschik again that reconstruction would require significant additional finances because the repair work would exceed the insurance proceeds. The Master Tenant estimated it could cost between $1.5 and $1.8 million in addition to the $500,000 already spent out of the $1 million insurance. Email messages from around the same time show that Yaschik and the Master Tenant disputed who had final responsibility to pay for the repair/rebuild.

Things came to a head the next month; five months after the fire. The Master Tenant sent Yaschik a letter advising of several developments, including the insurance company's decision to pay the remaining insurance. The Master Tenant insisted Yaschik approve the structural plans for the building's repair before submitting them to the City of Charleston. About a week later, Yaschik sent the Master Tenant a letter purporting to terminate the master lease, claiming the building was a total loss.

The relevant part of the lease provides:

> If premises are totally destroyed by fire or other casualty, this lease shall terminate as of the date of such destruction and rental shall be accounted for as between Landlord and Tenant as of that date. If premises are damaged but not wholly destroyed by fire or other casualty, rent shall abate in such proportion as use of premises has been lost to the Tenant. Landlord shall restore premises to substantially the same condition as prior to damage as speedily as practicable, whereupon full rental shall commence.

The subleases contained language similar to the master lease regarding the building's destruction due to fire. The Master Tenant and the subtenants took the position that the building was not "totally destroyed" and that Yaschik's termination was ineffective.

At some point, the Master Tenant and subtenants discovered Yaschik had been negotiating since at least May 2013 to sell the building to a neighboring property owner. May 2013 was a month after the fire, and roughly four months before Yaschik declared the building totally destroyed.

Three months *after* Yaschik declared the building destroyed, Yaschik and the neighbor reached a contingent agreement for the property's sale. That transaction never closed. Yaschik instead undertook efforts to restore the property on its own.

The resulting lawsuit involved multiple parties and claims. Many of the claims, if not all of them, stemmed from Yaschik terminating the master lease and subleases.

The claim at issue in this appeal is the claim against Yaschik by a subtenant—Top of the Bay, Inc. d/b/a Club Light (Top). Top claimed Yaschik wrongfully terminated the master lease and interfered with Top's sublease with the Master Tenant. Top also sued the Master Tenant, claiming the Master Tenant breached the sublease by not restoring the fire-damaged premises.

Much of Yaschik's argument on appeal is tied to the fact that the trial court granted the Master Tenant a directed verdict on Top's breach of contract claim, finding the Master Tenant's duty to restore the building, if any, expired once Yaschik terminated the master lease. The trial court denied Yaschik's similar motion on Top's intentional interference claim, finding the issue of whether Yaschik was justified in declaring the premises a total loss under the master lease was a jury question.

The jury found Yaschik breached the master lease and interfered with the subleases by improperly declaring the building a total loss. It entered substantial verdicts against Yaschik and in favor of the Master Tenant and the subtenants. On the claim at issue here (intentional interference with Top's sublease), the jury awarded Top $1 in nominal damages and $133,333.33 in punitive damages. Yaschik moved for judgment notwithstanding the verdict (JNOV), a new trial, a new trial nisi remittitur,

or setoff. The trial court denied these motions in a detailed written order. This appeal followed.

ISSUES

The first issue is whether the trial court erred in failing to grant Yaschik a directed verdict or JNOV on Top's claim for intentional interference with Top's sublease. The second issue is whether the jury's punitive damages award was improper and contrary to law. Yaschik presented the issues somewhat differently in its brief. We have consolidated some of them for the purposes of this opinion.

DIRECTED VERDICT/JNOV

"In ruling on motions for directed verdict or [JNOV], the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Steinke v. South Carolina Dep't of Labor, Licensing & Reg.*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Id.* "[T]he trial [court] cannot disturb the factual findings of a jury unless a review of the record discloses no evidence which reasonably supports them." *Burns v. Universal Health Servs., Inc.*, 361 S.C. 221, 231–32, 603 S.E.2d 605, 611 (Ct. App. 2004). "The appellate court will reverse the trial court's ruling on a JNOV motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Id.* at 232, 603 S.E.2d at 611.

"The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). "An essential element to the cause of action for tortious interference with contractual relations requires the intentional procurement of the contract's breach. Where there is no breach of the contract, there can be no recovery." *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007) (citation omitted).

"Furthermore, an essential element to the cause of action for intentional interference with . . . contractual relations requires that the interference be for an improper

purpose or by improper methods." *Id.* at 482, 642 S.E.2d at 732. "Interference with a contract is justified when it is motivated by legitimate business purposes." *Gailliard v. Fleet Mortg. Corp.*, 880 F. Supp. 1085, 1089 (D.S.C. 1995). "Generally, there can be no finding of intentional interference with . . . contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party." *Eldeco*, at 482, 642 S.E.2d at 732 (quoting *Southern Contracting, Inc. v. H.C. Brown Constr. Co.*, 317 S.C. 95, 102, 450 S.E.2d 602, 606 (Ct. App. 1994)).

Yaschik's lead argument relies on a misinterpretation of the trial court's ruling. The trial court explained that it did not find the subtenants failed to demonstrate the Master Tenant breached the subleases; the court found the Master Tenant had a valid defense for any breach of the subleases. Specifically, the trial court found the Master Tenant was relieved of its duties under the subleases once Yaschik declared the building a total loss and terminated the master lease. We agree with the trial court's finding. Top's interference claim did not require the trial court to find that the Master Tenant was responsible for repairing the building and that the Master Tenant breached that promise. Rather, the claim could stand as long as there was evidence Yaschik's declaration of a total loss kept the Master Tenant from honoring the sublease.

Yaschik also argues any interference with Top's sublease was justified. Specifically, Yaschik contends it made a reasonable business decision in deciding to sell the property instead of restoring it at significant cost.

There was certainly evidence from which the jury could conclude Yaschik's decision to declare the building "totally destroyed" was justified in light of the large amount of money it would take in excess of the insurance coverage to restore the building. But there was also evidence that Yaschik did not believe the building was "totally destroyed" and terminated the master lease (as well as the subleases) out of a desire to protect its own interests. Yaschik began negotiating to sell the building as early as May 2013—the month after the fire. It was also aware fairly early that there were structural issues with the building that would cost a significant amount of money in excess of the insurance policy to repair. In spite of this knowledge, Yaschik's president did not enter the building during the five months between the fire and declaring it a total loss. The jury was also presented with photographs of the building showing portions of it that were generally intact.

Top's intentional interference claim is consistent with precedent. Our supreme court previously upheld an intentional interference claim based on the potential that a jury could determine a third party intended to procure a breach of someone else's employment agreement. *See Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 287 S.C. 190, 191, 336 S.E.2d 472, 472 (1985). This court also previously upheld an intentional interference claim when there was evidence an insurance company cancelled a policy (causing the insured to breach a contract with someone else) not for reasons grounded in the insurance policy, but for its own business interests. *See S. Contracting, Inc. v. H.C. Brown Const. Co.*, 317 S.C. 95, 96, 450 S.E.2d 602, 603 (Ct. App. 1994).

Yaschik conceded at oral argument that whether the building was "totally destroyed" was appropriately a jury question. The judge charged the jury on what it meant for a building to be "totally destroyed" and that the cost of repairs is only one way to measure a building's value. Top's interest and Yaschik's interest were adverse: Yaschik was interested in saving money; Top was interested in a quick repair allowing its business to reopen. Because evidence supported conflicting inferences about Yaschik declaring the building totally destroyed, we find the trial court properly denied Yaschik's motions for directed verdict and JNOV.

PUNITIVE DAMAGES

Yaschik contends Top failed to present clear and convincing evidence that Yaschik's conduct was willful, wanton, or in reckless disregard of Top's rights. It also argues the punitive damages award violates due process because its conduct was not reprehensible and because of the disparity between the actual or potential harm and the award's amount.

"In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence." S.C. Code Ann. § 15-33-135 (2005). The jury has considerable discretion to determine the amount of damages. *See Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 404-05, 714 S.E.2d 904, 915 (Ct. App. 2011) (noting the deference due to the jury on punitive damages). If there is a claim that an award of punitive damages violates due process, an appellate court examines the trial court's constitutional review de novo. *See Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009).

The trial court did not err in determining the jury's punitive damages award was supported by clear and convincing evidence. "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." *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011). "The test by which a tort is to be characterized as reckless, [willful] or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights." *Id.* (quoting *Rogers v. Florence Printing Co.*, 233 S.C. 567, 577–78, 106 S.E.2d 258, 263 (1958)).

Top presented evidence that Yaschik was aware Top was a subtenant under the master lease, yet still conducted private negotiations to sell the property and terminate the master lease, thereby terminating Top's sublease. This evidence, combined with the rest presented at trial, is sufficient for a jury to infer Yaschik acted with willful, wanton, or reckless disregard for Top's rights under the sublease.

The due process review of punitive damages involves the following factors:

> (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.

Hollis, 394 S.C. at 396, 714 S.E.2d at 911 (quoting *Austin v. Stokes–Craven Holding Corp.*, 387 S.C. 22, 52, 691 S.E.2d 135, 151 (2010)).

The degree of reprehensibility is determined by weighing the following factors:

> (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.

Hollis, 394 S.C. at 397, 714 S.E.2d at 911 (quoting *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185).

We agree with the trial court that the first two reprehensibility factors favor Yaschik: the harm in this case was purely economic and did not involve any indifference or reckless disregard for the health or safety of others. We also agree with the trial court that the third and fifth factors cut the other way. Top's owners were directly and materially impacted by the termination of Top's sublease, Yaschik's actions in terminating the master lease were no mere accident, and the jury could find Yaschik acted deceitfully based on the evidence presented.

As for whether there were repeated wrongful actions versus an isolated incident, even though Yaschik only terminated the master lease one time, the case centered on a series of actions that played out over several months. Viewing all five reprehensibility factors, we agree with the trial court that they favor an award of punitive damages.

When looking at the disparity between actual or potential harm and a punitive damages award, 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." *Hollis*, 394 S.C. at 399, 714 S.E.2d at 913 (quoting *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185). Yaschik concedes it has the ability to pay these punitive damages. Further, we agree with the trial court that the award is directly related to the harm caused by Yaschik's conduct and that it is reasonable to believe the six figure award will deter Yaschik from engaging in similar conduct in the future.

Yaschik argues the ratio of punitive to other damages in these case is grossly disproportional and excessive. The jury awarded Top $1 in nominal damages and $133,333 in punitive damages, representing a 133,333:1 ratio. At face value, this ratio would be concerning. *See Duncan v. Ford Motor Co.*, 385 S.C. 119, 145, 682 S.E.2d 877, 890 (Ct. App. 2009) ("[I]n practice few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003))).

However, numerous federal cases have found that a "ratio test" is inapplicable in cases that involve nominal damages. *See Saunders v. Branch Banking And Tr. Co.*

of VA, 526 F.3d 142, 154 (4th Cir. 2008) ("[W]hen a jury only awards nominal damages or a small amount of compensatory damages, a punitive damages award may exceed the normal single digit ratio because a smaller amount 'would utterly fail to serve the traditional purposes underlying an award of punitive damages, which are to punish and deter.'" (quoting *Kemp v. Am. Tel. & Tel. Co.*, 393 F.3d 1354, 1364–65 (11th Cir. 2004))); *Williams v. Kaufman Cty.*, 352 F.3d 994, 1016 (5th Cir. 2003) (stating "any punitive damages-to-*compensatory* damages 'ratio analysis' cannot be applied effectively in cases where only *nominal* damages have been awarded"); *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629, 645 (6th Cir. 2005) (noting that in a § 1983 unlawful arrest case, "the plaintiff's economic injury was so minimal as to be essentially nominal" and that in such a case, U.S. Supreme Court precedent "on the ratio component of the excessiveness inquiry—which involved substantial compensatory damages awards for economic and measurable noneconomic harm—are therefore of limited relevance." (footnote omitted)). We agree with this persuasive authority and find a ratio test is inapplicable in this case.

As to the third and final factor of the *Hollis* test, the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases, the parties agree there are no authorized civil penalties applicable in this case. Yaschik points to multiple South Carolina cases in which awards for punitive damages were upheld for tortious interference with contractual relations claims. *See Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 139, 584 S.E.2d 120, 128 (Ct. App. 2003) (finding a 9.9 to 1 ratio was proper); *Collins Music Co. v. Terry*, 303 S.C. 358, 360, 400 S.E.2d 783, 784 (Ct. App. 1991) (finding a 6 to 1 ratio was proper); *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 287 S.C. 190, 193, 336 S.E.2d 472, 474 (1985) (reinstating a punitive damage award with a ratio of 1.5 to 1). However, in all of these cases, the juries awarded meaningful compensatory damages as opposed to the nominal damages awarded here.

We agree with the trial court that it makes sense to look to the damages awarded to the other subtenant that was similarly situated. That subtenant—Sea Island Food Group, LLC d/b/a Squeeze (Squeeze)—was awarded roughly $740,000 in actual damages and nearly $470,000 in punitive damages. Given that Squeeze was in essentially the same position and suffered the same harm as Top, we find the award of $133,333 in punitive damages was reasonable under the circumstances.

We note this analysis is highly fact dependent and that comparing the punitive damage awards to other parties may not be appropriate in other cases. However, given the facts of this case, we find this comparison appropriate.

We agree with the trial court that the nominal damage award was likely based on the fact that Top did not present enough information for the jury to decide the amount of Top's lost profits without speculating. That does not diminish the jury's additional findings that Yaschik violated Top's rights, and did so willfully.

Given all these factors, we find the jury's punitive damages award did not violate Yaschik's due process rights.

CONCLUSION

Based on the foregoing, the trial court's denial of Top's motions for directed verdict, JNOV, and motions related to the punitive damages award are

AFFIRMED.

THOMAS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Aneisha Shaire Young, Appellant.

Appellate Case No. 2018-000525

Appeal From Jasper County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 5795
Submitted November 2, 2020 – Filed January 27, 2021

AFFIRMED

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

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General Susannah Rawl Cole, all of Columbia; and Solicitor Isaac McDuffie Stone, III, of Bluffton, all for Respondent.

HEWITT, J.: Aneisha Shaire Young appeals her convictions for murder, attempted murder, and possessing a weapon during the commission of a violent crime. Young argues a former cellmate's testimony should not have been admitted because the

State did not disclose the testimony's contents before trial. She also argues text messages should have been excluded and that the trial court erred in qualifying a SLED Agent as an expert in cell phone location analysis. We respectfully disagree with each of these arguments. Thus, we affirm.

FACTS

Devonte Freeman was shot and killed late one night in April 2016 near the Siesta Hotel in Jasper County. Wrenshad Anderson—Freeman's brother—was with him when he died.

Anderson met Freeman at the Siesta earlier that evening and recalled seeing Young at the hotel, which he believed was unusual because she did not usually spend time there. He remembered Young was wearing all black. According to Anderson and other witnesses, he and Freeman recently had disagreements and fights over money with Young, Eric Darien, and Keandre Frazier.

While Anderson and Freeman were at the Siesta, Keith Horton, the hotel's property manager, received a call from an unidentified female, calling from a blocked number, notifying him that Freeman was at the property. Horton knew Freeman had been placed on trespass notice for having a gun on the premises a few weeks earlier. Horton then went looking for Freeman, and Young approached him to tell him where to find Freeman. After that, Horton recalled seeing Young and two other men leave the Siesta in a car. Horton found Freeman and Anderson, asked them to leave, and they agreed to leave peacefully.

According to Anderson, he and Freeman were walking from the Siesta to another location when they heard leaves rustling, followed by gunshots. Anderson recalled he and Freeman started running down the path when Freeman was shot and fell to the ground. Anderson said the shooters, two figures dressed in all black, continued to fire at them even after Freeman was shot.

When officers arrived, they found Anderson on the ground holding Freeman, who had been shot in the back of the head. Anderson initially indicated he believed Darien and Frazier were the perpetrators, but he also believed Young was involved.

Anderson said he called Darien and Young after the shooting and confronted them, but they said they were in the "country." He recalled Young contacted him repeatedly the next day and denied her involvement.

Officers recovered .9 millimeter and .22 caliber shell casings from the crime scene. They also interviewed people who were at the Siesta the night of the shooting and confirmed Frazier was playing cards at the hotel when the shooting occurred. Young gave a statement to police, but police were unable to confirm her alibi. Officers also obtained search warrants for various cell phones.

A Jasper County grand jury indicted Young for Freeman's murder, Anderson's attempted murder, and possessing a weapon during the commission of a violent crime. At trial, the State offered the testimony of multiple witnesses, including the testimony of two of Young's cellmates from the detention center—Marie Powell and Debbie Spann—who both testified Young told them she killed Freeman and wanted to kill Anderson because he was the only witness. The State also introduced incriminating text messages between Young and others sent around the time of the shooting and in the days immediately afterwards. Additionally, SLED Agent Eric Grabski testified as an expert witness in cell phone location analysis, stating Young's cell phone used cell phone towers on the night of the murder in a manner that contradicted Young's statements to police. Young did not testify or present any evidence in her defense.

The jury found Young guilty of all counts. The trial court sentenced Young to thirty years' imprisonment for murder, a consecutive term of ten years for attempted murder, and a concurrent term of five years for the weapons charge. This appeal followed.

ISSUES

1. Did the trial court err in allowing Young's former cellmate, Debbie Spann, to testify against her when the State did not share the contents of Spann's testimony before trial?

2. Did the trial court err in admitting text messages because they were not trustworthy under Rule 803(6), SCRE (pertaining to business records), and unduly prejudicial under Rule 403, SCRE?

3. Did the trial court err in qualifying SLED Agent Eric Grabski as an expert in cell phone location analysis?

SPANN'S TESTIMONY

Young claims the State's failure to provide a synopsis of Spann's testimony violated Rule 5, SCRCrimP, and her due process rights by failing to provide sufficient notice, resulting in a "trial by ambush."

There was no question the State identified Powell as a potential witness. Powell and Spann were both on the pre-trial witness list. According to the colloquy in the record, the State had difficulty locating Spann and had not served her with a subpoena at the start of the trial. The State did not disclose a summary of Spann's testimony to Young prior to trial.

On the trial's third day, the State told the court it had located Spann that morning and served her with a subpoena. Young objected to Spann testifying, arguing it was a due process violation because Spann's testimony caught her by surprise and the State did not provide a synopsis of what Spann would say. The trial court encouraged Young's counsel to talk to Spann before she testified and see if that would "cure" any prejudice from the lack of notice. Although it is fair to say the trial court forecasted Spann would likely be allowed to testify, the court did not announce a ruling to that effect. Four witnesses testified after that, including Powell (another of Young's former cellmates, as already mentioned). Spann testified next. Young did not object when Spann took the stand.

The failure to contemporaneously object to Spann's testimony means any argument about that testimony is not preserved. *See State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) ("To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court."). Although Young initially objected to Spann's testimony, she did not renew her objection prior to Spann testifying. *See Doe v. S.B.M.*, 327 S.C. 352, 356, 488 S.E.2d 878, 880 (Ct. App. 1997) ("The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object.").

Even so, and even if we believed there was an abuse of discretion in admitting the testimony (we express no opinion whatsoever on that question), it is evident Spann's testimony was cumulative to Powell's testimony. *See State v. Haselden*, 353 S.C.

190, 197, 577 S.E.2d 445, 448–49 (2003) (recognizing the admission of improper evidence is harmless when the evidence is merely cumulative of other evidence). Young admitted her involvement in Freeman's murder to both women. Just like Spann, Powell said Young admitted her co-defendant had the .9 millimeter gun, she had the .22 caliber gun, and she planned to tell police the co-defendant killed Freeman. Just like Spann, Powell recalled Young asked how much Powell's boyfriend would charge to kill Anderson. And just like Spann, Powell testified Young admitted she killed Freeman and expressed interest in killing Anderson because he was the only witness.

TEXT MESSAGES

Young argues the trial court erred in admitting multiple text messages into evidence because the State could not prove Young sent the text messages. Young also claims the messages were confusing, had multiple meanings, were racially provocative, and were thus unfairly prejudicial. We disagree.

There was a preliminary showing that some of the messages were Young's own statements. Young gave police a cell phone number she admitted was hers, but she disavowed the text messages by claiming she broke and lost that phone. Officers got the data associated with the phone number from the phone's service provider—Verizon. This data included incoming and outgoing text messages. At trial, the State sought to enter the text messages (both incoming and outgoing) into evidence.

At trial, the State called a Verizon representative to authenticate certain aspects of the text messages. The Verizon representative verified the accuracy of the phone numbers sending and receiving the messages, the date and time the messages were sent, and the content of the messages. The testimony also made clear that this witness could not and would not testify about the identity of who sent the messages.

The trial court gave specific reasons for admitting the various messages. For some, the court noted Young had identified one of the phone numbers as hers and that there was accordingly evidence from which the jury could conclude some of the messages were admissions. The court allowed other messages to show Young was in contact with a phone identified with Eric Darien (another suspect)—a fact Young denied. The court allowed another group of messages not for their truth, but because Young's response was arguably incriminating. For example, there was no testimony about who sent Young messages, shortly after the shooting, which stated "I see you hittin

[expletive] [with] that fire welcome to family fool." Young's responses—"Already ... delete this text NOW" and "Who told u?"—suggested she was involved. The Verizon representative read the messages into the record.

Young's arguments about undue prejudice are not preserved. Although Young initially objected to the text messages based on relevance and undue prejudice, the objection completely lacked specificity. Young never argued why the text messages were irrelevant or prejudicial, and the trial court never ruled upon the objection. *See State v. Bailey*, 253 S.C. 304, 310, 170 S.E.2d 376, 379 (1969) ("It is well settled that an objection, to be good, must point out the specific ground of the objection, and that if it does not do so, no error is committed in overruling it." (quoting 53 Am. Jur. *Trial* § 137 (1945))); *State v. Millings*, 247 S.C. 52, 53, 145 S.E.2d 422, 423 (1965) ("[A]n objection couched in terms no more specific than 'highly prejudicial' is too general."). Instead, Young's arguments at trial centered entirely on the trustworthiness of the text messages as business records under Rule 803(6), SCRE.

We also respectfully reject Young's business records argument. The trial court did not rule the text messages were admissible solely under the business records rule. After establishing that the records were reliable, the court ruled several of the messages were admissions because Young had identified the cell phone number as hers in a recorded interview with police. The jury might not (and apparently did not) believe Young's subsequent statements that she broke and lost her phone. We also agree the incoming text messages to Young's phone were not hearsay because they were not admitted for their truth, but because Young's responses were incriminating.

The fact that the State could not identify who sent some of these messages does not affect the question of whether Verizon's records of the text messages are business records. *See* Rule 803(6), SCRE ("A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; *provided, however,* that subjective opinions and judgments found in business records are not admissible."). Young's arguments do not call into question the trustworthiness of Verizon's record keeping or the authenticity of the text messages.

CELL PHONE LOCATION EXPERT

Young argues the trial court erred in qualifying SLED Agent Grabski as an expert in cell phone location analysis because he "admitted the program and method of his cell phone analysis had never been peer reviewed" and he had never been qualified as an expert witness in state court prior to this case. We disagree.

The proffer at trial established Agent Grabski had been a member of the SLED surveillance and intelligence unit for two years and had performed cell phone location analysis in over 200 cases. It also revealed Agent Grabski was trained by the FBI's Cellular Analysis Survey Team and received additional training from private entities. Agent Grabski also said he received extensive training in pen register track and trace techniques.

Agent Grabski's testimony centered on a map he developed showing how Young's cell phone "pinged" off different cellular towers the night of Freeman's murder. He explained that he and his team log general location information after they receive cell phone data from a service provider. These maps show which cellular tower, and which sector on the tower, received a signal from the phone. Agent Grabski explained the cell tower and sector reliably illustrate the general area a phone is located.

The proffer disclosed there are limitations on how cell phone location data can be used. For example, Agent Grabski noted precise longitude and latitude data from cellular carriers can be untrustworthy. Still, he said there is no legitimate questioning of the historical data identifying which cell phone tower (and which sector) a mobile phone engages during a call. He further explained this tower and sector information is a reliable way to get a general idea of a phone's movements. Then, over several pages of testimony, Agent Grabski walked through the data showing Young's phone began the night on Hilton Head Island, traveled to the general area in Ridgeland where the shooting occurred, and then returned to Hilton Head after 2 a.m.

Grabski acknowledged he did not know the individual who developed the cell phone "mapping" software and did not know if the software had been peer reviewed. He also acknowledged he had not testified as an expert witness before.

We see no abuse of the trial court's discretion in qualifying Agent Grabski as an expert in this sort of cell phone location analysis. *See Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012) ("The qualification of a witness as an expert is within the discretion of the circuit court, and we will not reverse absent an abuse of that discretion."). It is evident from Agent Grabski's proffer that his testimony would help the jury understand the cell phone location data and Young's movements on the night of the shooting. It is equally evident that Agent Grabski has the requisite knowledge, skill, experience, and training, and his testimony was reliable. *See State v. Martin*, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011) ("Before a witness is qualified as an expert, the trial court must find (1) the expert's testimony will assist the trier of fact, (2) the expert possesses the requisite knowledge, skill, experience, training, or education, and (3) [] the expert's testimony is reliable."); *Hall v. Clarendon Outdoor Advert., Inc.*, 311 S.C. 185, 188, 428 S.E.2d 1, 2 (Ct. App. 1993) ("To be competent as an expert, a witness by reason of study or experience or both must possess such knowledge or skill in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.").

The fact that Agent Grabski acknowledged he did not know the individual who developed the software that helped him produce the location "map" and did not know if the software had been peer reviewed does not tend to show he lacked the requisite knowledge, training, or experience, or that his testimony was unreliable. This court recently examined the same sort of testimony, on the same subject, at length. *See State v. Warner*, 430 S.C. 76, 83–89, 842 S.E.2d 361, 364–67 (Ct. App. 2020) (finding similar testimony regarding cell phone location analysis and related expert testimony reliable and admissible).

In fact, other jurisdictions have also determined this method of using cell phone records to determine a cell phone's location "is a well-accepted, reliable methodology." *See, e.g., United States v. Lewisbey*, 843 F.3d 653, 659 (7th Cir. 2016). The fact that this was Agent Grabski's first time testifying as an expert does not render his testimony unreliable. *See Warner*, 430 S.C. at 87, 842 S.E.2d at 366 ("The number of times a court has qualified a witness as an expert or found a method reliable will almost never be relevant to the trial court's Rule 702 task, as what matters is the method's endorsement by the relevant field, not the bench.").

CONCLUSION

Based on the foregoing, Young's convictions are

AFFIRMED.[1]

THOMAS and HILL, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Ronnie Carrol Tucker, Defendant,

Bail Out Bonding (Surety), Appellant.

Appellate Case No. 2017-002599

Appeal From Pickens County
Perry H. Gravely, Circuit Court Judge

Opinion No. 5796
Heard October 14, 2020 – Filed January 27, 2021

AFFIRMED

Kenneth Clifton Gibson, of The Law Office of Kenneth Gibson, of Greenville, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

KONDUROS, J.: In this bond estreatment case, Bail Out Bonding (Surety) appeals the decision of the circuit court ordering a partial estreatment of Ronnie Carrol Tucker's bond. Surety contends Tucker's entry into a pretrial intervention (PTI) program was a "deferred disposition" pursuant to section 17-15-20(B) of the

South Carolina Code (2014), thereby releasing it from liability. Tucker failed to complete PTI and failed to appear for trial. The circuit court partially estreated the bond. We affirm.

FACTS

Tucker was charged with two counts of unlawful conduct towards a child. The circuit court authorized Tucker's release from custody pursuant to an appearance recognizance bond in an order filed on September 29, 2014, specifying the conditions of Tucker's release. The order mandated:

> [Tucker] be released from custody on the condition that he will personally appear before the designated court at the place, date and time required to answer the charge made against him and do what shall be ordered by the court and not depart the State without the permission of the court and be of good behavior.

Tucker signed the order indicating he agreed he was obligated to be present at his trial. Surety also signed the order establishing its obligation to the State in the amount of $10,000 "should [Tucker] fail in performing the conditions of this [o]rder." Thereafter, the solicitor allowed Tucker to participate in PTI; however, Tucker did not successfully complete PTI.[1] After Tucker failed to appear for trial for the criminal charges pending against him, the circuit court issued a bench warrant on February 16, 2016. The court then ordered Surety to appear in court and held a hearing on December 15, 2017, to address the bond.

At the bond estreatment hearing, Surety argued Tucker's referral to PTI qualified as a "deferred disposition" pursuant to section 17-15-20(B), discharging the bond and ending Surety's liability on the bond. In opposition, the State argued entry into PTI did not constitute a deferred disposition under the statute and the charges against Tucker were still pending. The State asserted it sent bond cards to Surety on three separate dates; Surety denied receiving the cards.

[1] The Record does not contain a copy of the PTI agreement between Tucker and the solicitor's office.

The circuit court ordered the estreatment of twenty-five percent of the $10,000 bond $10,000, which amounted to $2,500. This appeal followed.

STANDARD OF REVIEW

"The trial court's estreatment of a bond forfeiture will not be set aside unless there has been an abuse of discretion." *State v. Policao*, 402 S.C. 547, 552, 741 S.E.2d 774, 776 (Ct. App. 2013). "An abuse of discretion occurs when the circuit court's ruling is based on an error of law." *Id.* (quoting *State v. Lara*, 386 S.C. 104, 107, 687 S.E.2d 26, 28 (2009)).

> An appellate court reviews the circuit court's ruling on the forfeiture or remission of a bail bond for abuse of discretion. An abuse of discretion occurs when the circuit court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the circuit court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious.

State v. McClinton, 369 S.C. 167, 170, 631 S.E.2d 895, 896 (2006) (citation omitted).

LAW/ANALYSIS

Surety contends entry into PTI is a "deferred disposition" under section 17-15-20(B) of the South Carolina Code (2014), thereby discharging the bond and relieving the surety of its obligation. We disagree.

Section 17-15-20 establishes the obligations of a person under a bond agreement and when a bond is discharged. The statute sets forth, in part:

> (A) An appearance recognizance or appearance bond must be conditioned on the person charged personally appearing before the court specified to answer the charge

> or indictment and to do and receive what is enjoined by the court, and not to leave the State . . . .
>
> (B) Unless a bench warrant is issued, an appearance recognizance or an appearance bond is discharged upon adjudication, a finding of guilt, a deferred disposition, or as otherwise provided by law.

Id.

The Pretrial Intervention Act, found in sections 17-22-10 to -170 of the South Carolina Code (2014 & Supp. 2019), authorizes each circuit's solicitor to establish and supervise a PTI program:

> (A) Each circuit solicitor shall have the prosecutorial discretion as defined herein and shall as a matter of such prosecutorial discretion establish a pretrial intervention program in the respective circuits.
> . . .
>
> (C) A pretrial intervention program shall be under the direct supervision and control of the circuit solicitor; however, he may contract for services with any agency desired.

S.C. Code Ann. § 17-22-30.

A person accepted into the PTI program must:

> (1) waive, in writing and contingent upon his successful completion of the program, his right to a speedy trial; [and]
>
> (2) agree, in writing, to the tolling while in the program of all periods of limitation established by statutes or rules of court . . . .

S.C. Code Ann. § 17-22-90.

The PTI statutory provisions specifically mandate the solicitor and the defendant shall enter into an agreement, including a timeframe by which the solicitor will decide to dismiss the charges or to pursue a conviction.

> In any case in which an offender agrees to an intervention program, a specific agreement must be made between the solicitor and the offender. This agreement shall include the terms of the intervention program, the length of the program and a section stating the period of time after which the prosecutor will either dismiss the charge or seek a conviction based upon that charge.

S.C. Code Ann. § 17-22-120.

Section 17-22-150 establishes the opportunity available to a defendant upon a successful completion of the PTI program and the result of unsuccessful completion.

> (a) In the event an offender successfully completes a pretrial intervention program, the solicitor shall effect a noncriminal disposition of the charge or charges pending against the offender. Upon such disposition, the offender may apply to the court for an order to destroy all official records relating to his arrest and no evidence of the records pertaining to the charge may be retained . . . .
>
> (b) In the event the offender violates the conditions of the program agreement: (1) the solicitor may terminate the offender's participation in the program, (2) the waiver executed pursuant to [section] 17-22-90 shall be void on the date the offender is removed from the program for the violation[,] and (3) the prosecution of pending criminal charges against the offender shall be resumed by the solicitor.

§ 17-22-150.

We note our supreme court has confirmed the solicitor, not the court, makes the decision to admit a defendant into PTI.

> [T]he judge cannot overrule the solicitor's objection to an applicant's admission to PTI without running afoul of our constitutional provision requiring a separation of powers. A circuit judge is a member of the judicial department and cannot constitutionally exercise the function of a member of the executive department. The solicitors and Attorney General are members of the executive branch of government.

State v. Tootle, 330 S.C. 512, 515, 500 S.E.2d 481, 482 (1998) (citations omitted).

An analysis of the issue on appeal must include a review of not only subsection (B) of section 17-15-20, but also subsection (A). Section 17-15-20(A) establishes:

> An appearance recognizance or appearance bond must be conditioned on the person charged *personally appearing before the court specified* to answer the charge or indictment *and to do and receive what is enjoined by the court*, and not to leave the State, and be of good behavior toward all the citizens of the State, or especially toward a person or persons specified by the court.

(emphases added).

Thus, the bond requires the defendant to appear and to do what the court requires. We note that the solicitor, not the court, authorizes and contracts with a defendant to participate in PTI, and if the defendant violates its agreement with the solicitor, "the prosecution of *pending* criminal charges against the offender *shall be resumed* by the solicitor." S.C. Code Ann. § 17-22-150(b)(3) (emphases added). Tucker did not receive a resolution from the court of the charges against him at the time he entered PTI. Rather, he entered into an agreement with the solicitor only. Section 17-15-20(A) mandates that a bond is conditioned on the defendant's actions towards the court, not the solicitor's office.

This court's decision in *State v. Firetag Bonding Service* is impactful. 345 S.C. 54, 545 S.E.2d 838 (Ct. App. 2001). In that matter, a surety added to the back of a bond agreement, "NOTICE: NO CONTINUANCE WITHOUT PRIOR CONSENT FROM BONDING COMPANY." *Id.* at 55, 545 S.E.2d at 839. When the defendant failed to appear for trial, the court estreated the bond. *Id*. On appeal, the surety argued because the court did not notify the surety the matter was continued to a later date, the trial court erred by estreating the bond. *Id.* This court, however, affirmed the trial court, explaining section 17-15-20(A) establishes an appearance recognizance bond requires a defendant to personally appear and "*to do and receive what shall be enjoined by the court.*" *Id.* at 56, 545 S.E.2d at 839 (emphasis by court) (quoting § 17-15-20). Our court further stated:

> As is readily apparent, nothing in this section authorizes a surety . . . to set the conditions of an appearance recognizance regarding when and where the defendant must appear. "What" a defendant must "do and receive," *i.e.*, the conditions of the appearance recognizance, are those things "enjoined by the court," not the surety. The stamped notation on the back of the appearance recognizance at issue that seeks to limit the magistrate's authority to continue the defendant's case constitutes, therefore, an unauthorized condition. As such, the notation is nothing more than mere surplusage and in no way affects the validity of the appearance recognizance itself.

Id.

The statutory directive requiring a defendant to do what the court enjoins is applicable here as well. Tucker's entry into PTI—the opportunity the solicitor gave him—was not "those things 'enjoined by the court.'" *Id.* Rather, the condition of the bond required Tucker's appearance in court, and the court did not err in estreating the bond when Tucker failed to appear.

We now address subsection (B) of section 17-15-20, which allows for the discharge of a bond under certain circumstances. "Unless a bench warrant is issued, an appearance recognizance or an appearance bond is discharged upon adjudication, a finding of guilt, a deferred disposition, or as otherwise provided by

law." *Id.* The statute provides, therefore, for specific instances in which a bond is discharged. Surety contends entry into PTI is one of those circumstances. We disagree.

We turn to our jurisprudence for instances in which the disposition of charges against a defendant may be addressed at a later time. We note precedent indicates a court may choose to suspend a rendered sentence to allow a defendant to participate in the system known as "drug court." In *State v. Perkins*, our supreme court described the opportunity available to a defendant for drug court:

> The Thirteenth Circuit Drug Court Program (hereinafter "Drug Court Program" or "Program") is a voluntary therapeutic program which may be offered to a defendant that is charged with a drug abuse offense within the thirteenth circuit jurisdiction. The defendant pleads guilty to the charge and agrees with the solicitor to enter the Program. As a result, the trial court imposes a sentence on the defendant, but suspends the sentence, conditioned upon the successful completion the Program. The participant agrees to abide by certain terms and conditions of participation and may be sanctioned or ultimately terminated for failure to comply with the terms of the Program.

378 S.C. 57, 59, 661 S.E.2d 366, 367 (2008).

Another example of the court's authority to defer a complete resolution of charges was discussed in *State v. Campbell*, 376 S.C. 212, 656 S.E.2d 371 (2008), in which the defendant planned to testify against a codefendant. While the issue on appeal in *Campbell* is not relevant here, the supreme court referenced the common practice of an abated sentence as an incentive for testimony: "We note the typical procedure in this situation is that a defendant pleads guilty pursuant to a plea agreement and then the defendant's sentencing is held in abeyance until after the defendant has cooperated at the co[]defendant's trial." *Id.* at 217, 656 S.E.2d at 373-74.

Surety contends Tucker's entry into PTI was similar to other forms of deferred resolution of charges against a defendant. We disagree.

Surety specifically argues Tucker's entry into PTI is similar to a conditional discharge in section 44-53-450(A) of the South Carolina Code (2018). However, that statute establishes the court's authority to place a defendant on probation, after a determination of guilt, and require the defendant to participate in a drug treatment program:

> Whenever any person who has not previously been convicted of any offense under this article or any offense under any state or federal statute relating to marijuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a controlled substance, . . . the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation . . . , including the requirement that such person cooperate in a treatment and rehabilitation program . . . . Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him.

Id.

We recognize multiple examples in our jurisprudence of the deferred and abated disposition of criminal matters but find them dissimilar to entry into PTI. The solicitor's invitation to a defendant to enter into PTI allows a solicitor, not the court, to hold pending charges in abeyance during the pendency of PTI. The disposition of the outstanding charges against the defendant are not addressed by the court until PTI is successfully completed or the pending charges are resumed because a defendant does not complete PTI. Further, upon entry into PTI, the defendant has not pled guilty. Thus, the characteristics of PTI are unlike other matters in which a court defers disposition of charges against a defendant.

Tucker did not plead guilty, was not found guilty, and was not placed on probation by the court. The circuit court did not render a decision regarding the charges against him. Rather, the solicitor and Tucker entered into an agreement to allow

Tucker an opportunity to participate in PTI. The PTI statute clearly establishes criminal charges remain pending during the intervention program and the offender will be prosecuted if he does not successfully complete PTI. As such, entry into the PTI program does not qualify as a deferred disposition under section 17-15-20(B).

In addition to finding entry into PTI is not a deferred disposition and the charges against Tucker were still pending upon entry into PTI, we also find Surety is obligated on the bond pursuant to contract law. Our jurisprudence indicates a surety bond is a contract, subject to the rules of contract interpretation:

> We have held that the State's right to estreatment or forfeiture of a bail bond issued in a criminal case arises from the contract, *i.e.*, the bail bond form signed by the parties. The parties to such a contract typically include the defendant; the person or company which acts as surety for the bond, if any; and the state and local government entities identified on the bond form. We routinely have applied contract principles to resolve various issues arising in bond forfeiture cases.

State v. McClinton, 369 S.C. 167, 171, 631 S.E.2d 895, 897 (2006). "The State's right to estreatment is governed by contract." *State v. Cochran*, 358 S.C. 24, 27, 594 S.E.2d 844, 845 (2004).

If the bond agreement is breached, the liability of the surety is established, unless the court orders otherwise. *Pride v. Anders*, 266 S.C. 338, 341, 223 S.E.2d 184, 186 (1976). "Since it was undisputed that the condition of the recognizances had been breached by the failure of the defendants to appear, the recognizances were forfeited and the liability of appellant-surety to pay the amount of the penalty then became fixed, unless relieved or exonerated by action of the court." *Id.* at 340, 223 S.E.2d at 185.

"The obligation of a surety is not to the State to produce the defendant, but is rather 'an obligation to answer, to the extent of the penalty, for the default of the defendants, as principals.'" *State v. Mitchell*, 421 S.C. 365, 372, 807 S.E.2d 193, 196 (2017) (quoting *Pride*, 266 S.C. at 341, 223 S.E.2d at 186).

Under the terms of the bond agreement, Surety agreed to indebt itself to the State in the amount of $10,000 "should [Tucker] fail in performing the conditions of this [o]rder." When Tucker failed to appear for trial, "the liability of the surety became fixed." 266 S.C. at 340, 223 S.E.2d at 185. "Since it was undisputed that the condition of the recognizances had been breached by the failure of the defendants to appear, the recognizances were forfeited and the liability of appellant-surety to pay the amount of the penalty then became fixed, unless relieved or exonerated *by action of the court*." *Id.* (emphasis added).

We also find it noteworthy the *Firetag* decision indicated defendant's failure to appear alone was sufficient to authorize the court to estreat the bond. "Indeed, [defendant's] failure to appear on August 16, 1999, was alone a sufficient basis for the magistrate to forfeit the amount of the appearance recognizance, notwithstanding the stamped notation." 345 S.C. at 56, 545 S.E.2d at 839. Surety contracted to be indebted to the State in the amount of $10,000 should Tucker fail to appear for trial. The principles of contract law dictate Surety was bound by its obligation. Because the circuit court did not act to relieve Surety of its promise, Surety remained liable.

CONCLUSION

We find the circuit court did not abuse its discretion by its partial estreatment of the bond. Tucker's acceptance into PTI by the solicitor was not a deferred disposition by the court; the PTI statutory provisions establish the charges remained pending; and, because Surety was contractually liable for the failure of Tucker to appear for trial, the court did not err in estreating the bond. Accordingly, the circuit court's decision is

AFFIRMED.

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