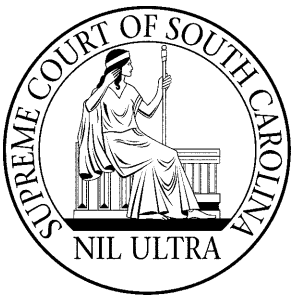

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 32
August 23, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

27731 - Protestant Episcopal v. Episcopal Church Granted until 9/1/17

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5477-Otis Nero v. SCDOT	Granted 08/22/17
5488-Linda Gibson v. Ameris Bank	Denied 08/23/17
5489-State v. Eric T. Spears	Denied 08/18/17
5490-Anderson County v. Joey Preston	Denied 08/16/17
5491-Jenna Foran v. Murphy USA	Pending
5492-State v. Demario Monte Thompson	Pending
5496-State v. John W. Dobbins, Jr.	Pending
5497-Kan Enterprises v. S.C. Dep't of Revenue	Pending
5498-State v. Sandy Lynn Westmoreland	Pending

5499-State v. Jo Pradubsri	Denied 08/18/17
5500-Willliam Huck v. Avtex Commercial	Pending
5501-State v. Lorenzo B. Young	Pending
5502-State v. Preston Ryan Oates	Pending
5503-State v. Wallace Steve Perry	Pending
2017-UP-126-Ronald Ferguson v. Mill Creek, LP	Denied 08/18/17
2017-UP-208-Estate of Willie Weekley v. L. C. Weekley	Denied 08/18/17
2017-UP-215-Sandy Chamblee v. Anderson Cty. Fire Dep't	Denied 08/18/17
2017-UP-217-Clarence B. Jenkins, Jr. v. SCDEW	Denied 08/18/17
2017-UP-225-State v. Joseph T. Rowland	Pending
2017-UP-227-Arrowpoint Capital Corp. v. SC Second Injury Fund (3)	Denied 08/18/17
2017-UP-228-Arrowpoint Capital Corp. v. SC Second Injury Fund (2)	Denied 08/18/17
2017-UP-229-Arrowpoint Capital Corp. v. SC Second Injury Fund	Denied 08/18/17
2017-UP-234-Suntrust v. Mark Ostendorff	Denied 08/18/17
2017-UP-233-Martha Perez v. Alice Manufacturing	Pending
2017-UP-236-State v. Dennis E. Hoover	Pending
2017-UP-237-State v. Shane Adam Burdette	Pending
2017-UP-241-Robert Lester, Jr. v. Marco and Timea Sanchez	Pending
2017-UP-243-Clifford Holley v. Dan-Sa	Denied 08/16/17
2017-UP-245-State v. Dameon L. Thompson	Pending
2017-UP-249-Charles Taylor v. Stop "N" Save	Denied 08/18/17

2017-UP-258-State v. Dennis Cervantes-Pavon	Denied	08/18/17
2017-UP-261-Bank of America v. Shawn Bethea	Pending	
2017-UP-262-In the matter of Carl M. Asquith	Denied	08/16/17
2017-UP-263-State v. Dean Nelson Seagers	Denied	08/18/17
2017-UP-264-Jerry Hogan v. Corder and Sons, Inc.	Denied	08/18/17
2017-UP-265-Genesie Fulton v. L. William Goldstein	Denied	08/18/17
2017-UP-268-Neva Steffens v. Ocwen Loan Servicing	Denied	08/18/17
2017-UP-272-State v. Wayland Purnell	Denied	08/18/17
2017-UP-274-Thomas Thompson v. SCDPPPS	Denied	08/18/17
2017-UP-278-Bank of America v. Theda Vaughan	Denied	08/18/17
2017-UP-279-Jose Jimenez v. Kohler Company	Denied	08/18/17
2017-UP-280-Terlizzi Home Improvement v. Michael L. Boheler	Pending	
2017-UP-281-Paulo Zortea v. Anne Zortea n/k/a Anne C. Spearman	Denied	08/16/17
2017-UP-282-Mother Doe A. v. The Citadel	Pending	
2017-UP-283-State v. Kadrin Rajun Singleton	Pending	
2017-UP-289-Marion Stone v. Susan Thompson	Pending	
2017-UP-293-SCDSS v. Janet Bright and Randy Bright	Pending	
2017-UP-295-State v. Anthony Adkins	Denied	08/18/17
2017-UP-296-Rivergate Homeowners v. WW & LB	Pending	
2017-UP-299-Michael Strum v. Heather Strum	Denied	08/18/17
2017-UP-300-TD Bank v. David H. Jacobs	Denied	08/18/17
2017-UP-307-SCDSS v. Ashley Marie Cole	Pending	

2017-UP-311-State v. Robert William Wazney Pending

2017-UP-315-State v. Taquan L. Brown Pending

2017-UP-317-Jimmy Long v. SCDPPPS Pending

2017-UP-318-Debbie Murphy v. Thomas Murphy Pending

2017-UP-325-Tony King v. Christopher Miller Pending

2017-UP-331-SCDSS v. Nina Ward Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5253-Sierra Club v. Chem-Nuclear Pending

5326-Denise Wright v. PRG Pending

5328-Matthew McAlhaney v. Richard McElveen Pending

5368-SCDOT v. David Powell Pending

5374-David M. Repko v. County of Georgetown Pending

5382-State v. Marc A. Palmer Pending

5387-Richard Wilson v. Laura B. Willis Pending

5388-Vivian Atkins v. James R. Wilson, Jr. Pending

5391-Paggy D. Conits v. Spiro E. Conits Pending

5393-SC Ins. Reserve Fund v. East Richland Pending

5398-Claude W. Graham v. Town of Latta Pending

5403-Virginia Marshall v. Kenneth Dodds Pending

5411-John Doe v. City of Duncan Pending

5414-In the matter of the estate of Marion M. Kay Pending

5415-Timothy McMahan v. SC Department of Education	Pending
5416-Allen Patterson v. Herb Witter	Pending
5417-Meredith Huffman v. Sunshine Recycling	Pending
5418-Gary G. Harris v. Tietex International, Ltd.	Pending
5419-Arkay, LLC v. City of Charleston	Pending
5420-Darryl Frierson v. State	Pending
5424-Janette Buchanan v. S.C. Property and Casualty Ins.	Pending
5428-State v. Roy L. Jones	Pending
5430-Wilfred Allen Woods v. Etta Catherine Woods	Pending
5431-Lori Stoney v. Richard Stoney	Pending
5432-Daniel Dorn v. Paul Cohen	Pending
5433-The Winthrop University Trustees v. Pickens Roofing	Pending
5434-The Callawassie Island v. Ronnie Dennis	Pending
5435-State v. Joshua W. Porch	Pending
5436-Lynne Vicary v. Town of Awendaw	Pending
5438-The Gates at Williams-Brice v. DDC Construction Inc.	Pending
5441-State v. David A. Land	Pending
5442-Otha Delaney v. First Financial	Pending
5443-State v. Steven Hoss Walters, Jr.	Pending
5444-Rose Electric v. Cooler Erectors of Atlanta	Pending
5446-State v. Rickey Mazique	Denied 08/17/17
5447-Rent-A-Center v. SCDOR	Pending

5448-Shanna Kranchick v. State	Pending
5449-A. Marion Stone III v. Susan B. Thompson	Pending
5450-Tzvetelina Miteva v. Nicholas Robinson	Pending
5451-Pee Dee Health v. Estate of Hugh Thompson, III (3)	Pending
5452-Frank Gordon, Jr. v. Donald W. Lancaster	Pending
5453-Karen Forman v. SCDLLLR (3)	Pending
5454-Todd Olds v. City of Goose Creek	Pending
5455-William Montgomery v. Spartanburg County	Pending
5456-State v. Devin Johnson	Pending
5458-William Turner v. SAIIA Construction	Pending
5460-Frank Mead, III, v. Beaufort Cty. Assessor	Pending
5462-In the matter of the Estate of Eris Singletary Smith	Pending
5464-Anna D. Wilson v. SCDMV	Pending
5467-Belle Hall Plantation v. John Murray (David Keys)	Pending
5469-First Citizens Bank v. Park at Durbin Creek	Pending
5471-Joshua Fay v. Total Quality Logistics	Pending
5473-State v. Alexander Carmichael Huckabee, III	Pending
5475-Sara Y. Wilson v. Charleston Co. School District	Pending
5476-State v. Clyde B. Davis	Pending
5479-Mark M. Sweeny v. Irene M. Sweeney	Pending
5486-SC Public Interest v. John Courson	Pending

5487-State v. Toaby Alexander Trapp	Pending
2015-UP-330-Bigford Enterprises v. D. C. Development	Pending
2015-UP-466-State v. Harold Cartwright, III	Pending
2015-UP-547-Evalena Catoe v. The City of Columbia	Pending
2016-UP-052-Randall Green v. Wayne Bauerle	Pending
2016-UP-056-Gwendolyn Sellers v. Cleveland Sellers, Jr.	Pending
2016-UP-068-State v. Marcus Bailey	Pending
2016-UP-109-Brook Waddle v. SCDHHS	Pending
2016-UP-132-Willis Weary v. State	Pending
2016-UP-135-State v. Ernest M. Allen	Pending
2016-UP-137-Glenda R. Couram v. Christopher Hooker	Pending
2016-UP-138-McGuinn Construction v. Saul Espino	Pending
2016-UP-139-Hector Fragosa v. Kade Construction	Pending
2016-UP-141-Plantation Federal v. J. Charles Gray	Pending
2016-UP-184-D&C Builders v. Richard Buckley	Pending
2016-UP-199-Ryan Powell v. Amy Boheler	Pending
2016-UP-261-Samuel T. Brick v. Richland Cty. Planning Comm'n	Pending
2016-UP-280-Juan Ramirez v. Progressive Northern	Pending
2016-UP-315-State v. Marco S. Sanders	Pending
2016-UP-320-State v. Emmanual M. Rodriguez	Pending
2016-UP-325-National Bank of SC v. Thaddeus F. Segars	Pending
2016-UP-330-State v. William T. Calvert	Pending

2016-UP-338-HHH Ltd. of Greenville v. Randall S. Hiller	Pending
2016-UP-340-State v. James Richard Bartee, Jr.	Pending
2016-UP-366-In Re: Estate of Valerie D'Agostino	Pending
2016-UP-367-State v. Christopher D. Campbell	Pending
2016-UP-368-Overland, Inc. v. Lara Nance	Pending
2016-UP-382-Darrell L. Goss v. State	Pending
2016-UP-392-Joshua Cramer v. SCDC (2)	Pending
2016-UP-395-Darrell Efird v. The State	Pending
2016-UP-402-Coves Darden v. Francisco Ibanez	Pending
2016-UP-404-George Glassmeyer v. City of Columbia (2)	Pending
2016-UP-406-State v. Darryl Wayne Moran	Pending
2016-UP-408-Rebecca Jackson v. OSI Restaurant Partners	Pending
2016-UP-411-State v. Jimmy Turner	Pending
2016-UP-421-Mark Ostendorff v. School District of Pickens	Pending
2016-UP-424-State v. Daniel Martinez Herrera	Pending
2016-UP-430-State v. Thomas James	Pending
2016-UP-431-Benjamin Henderson v. Patricia Greer	Pending
2016-UP-436-State v. Keith D. Tate	Pending
2016-UP-447-State v. Donte S. Brown	Pending
2016-UP-448-State v. Corey J. Williams	Pending
2016-UP-452-Paula Rose v. Charles Homer Rose, II	Pending

2016-UP-454-Gene Gibbs v. Jill R. Gibbs	Pending
2016-UP-461-Melvin T. Roberts v. Mark Keel	Pending
2016-UP-473-State v. James K. Bethel, Jr.	Pending
2016-UP-475-Melissa Spalt v. SCDMV	Pending
2016-UP-479-State v. Abdul Furquan	Pending
2016-UP-485-Johnson Koola v. Cambridge Two (2)	Pending
2016-UP-486-State v. Kathy Revan	Pending
2016-UP-487-Mare Baracco v. Beaufort Cty.	Pending
2016-UP-489-State v. Johnny J. Boyd	Pending
2016-UP-515-Tommy S. Adams v. The State	Pending
2016-UP-519-Live Oak Village HOA v. Thomas Morris	Pending
2016-UP-527-Grange S. Lucas v. Karen A. Sickinger	Pending
2016-UP-528-Betty Fisher v. Bessie Huckabee and Lisa Fisher v. Betty Huckabee	Pending
2016-UP-529-Kimberly Walker v. Sunbelt	Pending
2017-UP-002-Woodruff Road v. SC Greenville Hwy. 146	Pending
2017-UP-009-In the matter of Daryl Snow	Pending
2017-UP-013-Amisub of South Carolina, Inc. v. SCDHEC	Pending
2017-UP-015-State v. Jalann Williams	Pending
2017-UP-017-State v. Quartis Hemingway	Pending
2017-UP-021-State v. Wayne Polite	Pending
2017-UP-022-Kenneth W. Signor v. Mark Keel	Pending

2017-UP-025-State v. David Glover	Pending
2017-UP-026-State v. Michael E. Williams	Pending
2017-UP-028-State v. Demetrice R. James	Pending
2017-UP-029-State v. Robert D. Hughes	Pending
2017-UP-031-FV-I, Inc. v. Bryon J. Dolan	Pending
2017-UP-037-State v. Curtis Brent Gorny	Pending
2017-UP-040-Jeffrey Kennedy v. Richland Sch. Dist. Two	Pending
2017-UP-043-Ex parte: Mickey Ray Carter, Jr. and Nila Collean Carter	Pending
2017-UP-046-Wells Fargo v. Delores Prescott	Pending
2017-UP-054-Bernard McFadden v. SCDC	Pending
2017-UP-059-Gernaris Hamilton v. Henry Scott	Pending
2017-UP-065-State v. Stephon Robinson	Pending
2017-UP-067-William McFarland v. Mansour Rashtchian	Pending
2017-UP-068-rick Still v. SCDHEC	Pending
2017-UP-070-State v. Calvert Myers	Pending
2017-UP-071-State v. Ralph Martin	Pending
2017-UP-082-Kenneth Green v. SCDPPPS	Pending
2017-UP-096-Robert Wilkes v. Town of Pawleys Island	Pending
2017-UP-103-State v. Jujuan A. Habersham	Pending
2017-UP-108-State v. Michael Gentile	Pending
2017-UP-118-Skydive Myrtle Beach, Inc. v. Horry County	Pending

2017-UP-124-Rudy Almazan v. Henson & Associates	Pending
2017-UP-137-In the matter of Calvin J. Miller	Pending
2017-UP-139-State v. Jeffrey Lynn Chronister	Pending
2017-UP-145-Cory McMillan v. UCI Medical Affiliates	Pending
2017-UP-158-State v. Rion M. Rutledge	Pending
2017-UP-169-State v. David Lee Walker	Pending
2017-UP-192-David Johnson v. Mark Keel	Pending
2017-UP-193-John Gregory v. Mark Keel	Pending
2017-UP-194-Mansy McNeil v. Mark Keel	Pending
2017-UP-195-Edward Green v. Mark Keel	Pending
2017-UP-209-Jose Maldonado v. SCDC (2)	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James Michael Farrell, Respondent.

Appellate Case No. 2017-001450

Opinion No. 27733
Submitted July 27, 2017 – Filed August 23, 2017

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

James Michael Farrell, of Philadelphia, PA, Pro Se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to disbarment. We accept the Agreement and disbar respondent from the practice of law in this state, retroactive to February 19, 2016, the date of his interim suspension. The facts, as set forth in the Agreement, are as follows.

Facts

On February 6, 2017, respondent was convicted in the United States District Court for the District of Maryland of seven counts of money laundering, two counts of attempted tampering with official proceedings, and one count of attempted witness tampering.

Law

Respondent admits that his conduct constitutes grounds for discipline under Rules 7(a)(4) and 7(a)(5) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state, retroactive to February 19, 2016, the date of his interim suspension. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court. Respondent will not be eligible to apply for readmission until he has successfully completed all conditions of his criminal sentence, including, but not limited to, any period of probation or parole, pursuant to Rule 33(f)(10), RLDE.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Otis Nero, Appellant,

v.

South Carolina Department of Transportation, Employer,

AND

State Accident Fund, Carrier, Respondents.

Appellate Case No. 2015-001277

Appeal From The Workers' Compensation Commission

Opinion No. 5477
Heard November 17, 2016 – Filed March 29, 2017
Withdrawn, Substituted, and Refiled August 23, 2017

REVERSED

Stephen J. Wukela, of Wukela Law Firm, of Florence, for Appellant.

John Gabriel Coggiola, of Willson, Jones, Carter & Baxley, P.A., of Columbia, for Respondent.

MCDONALD, J.: In this appeal from the Appellate Panel of the South Carolina Workers' Compensation Commission (the Appellate Panel), Otis Nero argues the

Appellate Panel erred in failing to find (1) his employer, the South Carolina Department of Transportation (SCDOT), received adequate notice of his workplace accident and (2) he demonstrated reasonable excuse for—and SCDOT was not prejudiced by—any late formal notice. We reverse.

Facts and Procedural History

On June 20, 2012, Nero was working on a SCDOT road crew supervised by lead man Benjamin Durant and supervisor Danny Bostick. Nero's work, along with that of four or five other members of the crew, involved pulling a thirty-foot-long two-by-four "squeegee board" to level freshly poured concrete. At some point during the day, Bostick pulled Nero off the squeegee board temporarily because Nero appeared overheated. After a break, Nero returned to pulling the squeegee board.

At approximately 3:00 p.m., after finishing their work and cleaning up, the crew, including Nero, Durant, and Bostick, was talking and joking near the supervisor's truck when Nero lost consciousness and fell to the ground. Nero regained consciousness, stood up, told his supervisors he was fine, and drove home. Once home, Nero passed out again while sitting in his driveway. His wife immediately took him to the hospital where he was admitted and treated.

At the emergency room, Nero filled out a "History and Physical Report" and stated, "I passed out talking to my boss." Nero was initially seen by his primary care physician, Dr. Robert Richey. After a series of tests, Dr. Richey determined Nero had cervical stenosis and referred Nero to a neurosurgeon, Dr. William Naso, who performed a fusion surgery.

On July 9, 2012, prior to his surgery, Nero provided the human resources department with his "SCDOT Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)" paperwork. Nero did not mention the squeegee incident in this submission, and under the section designated "approximate date condition commenced," Nero stated, "several years—neck and syncope." During his deposition, Nero testified he had not been treated for any back or neck problems prior to the squeegee board incident.

On January 6, 2014, Nero filed a request for a hearing, alleging he suffered injuries to his neck and shoulders while pulling the squeegee board on June 20, 2012. The

single commissioner found Nero's claim compensable as an injury by accident that aggravated a preexisting cervical disc condition in Nero's neck. The single commissioner further determined Nero had a "reasonable excuse" for not formally reporting his work injury because (1) his lead man and supervisor were present and knew of pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury, (2) the lead man and supervisor followed up with Nero, and (3) SCDOT was aware Nero did not return to work after the June 20, 2012 incident. Further, SCDOT was notified Nero was hospitalized and ultimately had neck surgery. Finally, the single commissioner found SCDOT was not prejudiced by the late formal reporting of the injury.

SCDOT appealed to the Appellate Panel. The Appellate Panel reversed the single commissioner, finding that although Nero's supervisors witnessed him pass out, Nero never reported that the squeegee board accident involved a "snap" in his shoulders and neck. The Appellate Panel further found Nero's excuse for not formally reporting was not reasonable and SCDOT was prejudiced because Nero's late reporting deprived it of the opportunity to investigate the incident and whether Nero's work aggravated his preexisting cervical stenosis.

Standard of Review

The Administrative Procedures Act (APA) establishes the standard for our review of Appellate Panel decisions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, this court can reverse or modify the decision of the Appellate Panel when the substantial rights of the appellant have been prejudiced because "the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010); *see also* S.C. Code Ann. § 1–23–380(5)(d)–(e) (Supp. 2016). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (quoting *S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (2005)).

"Statutory interpretation is a question of law subject to de novo review." *Transp. Ins. Co. & Flagstar Corp.*, 389 S.C. at 428, 699 S.E.2d at 689. "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Id.* (quoting *Dunton v. S.C. Bd. of Exam'rs In Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) (citations omitted)). However, workers' compensation statutes are to be liberally construed in favor of coverage to serve the beneficent purpose of the Workers' Compensation Act; "only exceptions and restrictions on coverage are to be strictly construed." *James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010). Because the issue of timely notice is a jurisdictional question, "the [c]ourt may take its own view of the preponderance of the evidence." *Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 475, 753 S.E.2d 416, 419 (2013) (quoting *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009)); *Mintz v. Fiske-Carter Constr. Co.*, 218 S.C. 409, 413, 63 S.E.2d 50, 52 (1951) (reversing award of compensation and noting hearing commissioner awarded compensation without discussion of "the jurisdictional defense of timely notice.").

Law and Analysis

I. Adequate Notice

Nero argues the Appellate Panel erred when it found SCDOT did not receive adequate notice under section 42–15–20(A) of the South Carolina Code (2015). We agree.

Section 42–15–20 sets forth the requirement that an employee provide timely notice of an accident to an employer, stating, in pertinent part:

> (A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to the giving of such notice, unless it can be shown that the

> employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.
>
> (B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby.

"Section 42–15–20 requires that every injured employee or his representative give the employer notice of a job-related accident within ninety days after its occurrence." *Bass v. Isochem*, 365 S.C. 454, 472–73, 617 S.E.2d 369, 379 (Ct. App. 2005); *see also McCraw v. Mary Black Hosp.*, 350 S.C. 229, 237, 565 S.E.2d 286, 290 (2002) ("Pursuant to S.C. Code Ann. § 42–15–20 (1985), notice to the employer must be given within 90 days after the occurrence of the accident upon which the employee is basing her claim."). "Generally, the injury is not compensable unless notice is given within ninety days." *Bass*, 365 S.C. at 473, 617 S.E.2d at 379. "The burden is upon the claimant to show compliance with the notice provisions of section 42–15–20." *Id.*; *Lizee v. S.C. Dep't of Mental Health*, 367 S.C. 122, 127, 623 S.E.2d 860, 863 (Ct. App. 2005) ("The claimant bears the burden of proving compliance with these notice requirements.")"Section 42–15–20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability." *Hanks v. Blair Mills, Inc.*, 286 S.C. 378, 381, 335 S.E.2d 91, 93 (Ct. App. 1985). The provision for notice shall be liberally construed in favor of claimants. *See Etheredge v. Monsanto Co.*, 349 S.C. 451, 458, 562 S.E.2d 679, 683 (Ct. App. 2002) (reiterating "the liberal construction our Supreme Court requires of workers' compensation provisions for notice."). In *Etheredge*, this court concluded "notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a

potential compensation claim." 349 S.C. at 459, 562 S.E.2d at 683; *contra Sanders v. Richardson*, 251 S.C. 325, 328, 162 S.E.2d 257, 258 (1968) (explaining that just because an employer has knowledge of the fact that an employee becomes ill while at work "does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted in a compensable injury"). The purpose of the notice provision "is at least twofold; first, it affords protection of the employer in order that he may investigate the facts and question witnesses while their memories are unfaded, and second, it affords the employer opportunity to furnish medical care of the employee in order to minimize the disability and consequent liability upon the employer." *Mintz*, 218 S.C. at 414, 63 S.E.2d at 52.

Our review of the record confirms Nero never formally reported his injury to his employer. Nero was able to communicate with SCDOT because he submitted the necessary paperwork for benefits under the Family and Medical Leave Act[1] (FMLA). As Nero has not alleged any mental condition, physical issue, or third party prevented his formal reporting, we must determine whether SCDOT had knowledge of Nero's accident pursuant to section 42–15–20(A).

Nero submits the following facts in support of his argument that SCDOT had adequate notice of his workplace injury. On June 20, 2012, Bostick was concerned about Nero due to both the heat and his age and temporarily pulled Nero off of the squeegee board. After finishing for the day, though while still on the clock, Nero lost consciousness and fell to the ground—Durant and Bostick both witnessed the incident. After regaining consciousness and driving home, Nero passed out a second time. His wife immediately took him to the hospital where he was admitted, treated by a neurosurgeon, and diagnosed with cervical stenosis. He underwent neck surgery approximately two months later. Durant and Bostick were both aware that Nero was hospitalized and had surgery. In fact, they spoke with Nero while he was in the hospital. Nero never returned to work thereafter.

SCDOT argues Nero omitted several crucial facts contrary to his argument that a reasonably conscientious manager should have been aware of a potential compensation claim. First, "and most importantly," SCDOT points to the "SCDOT Certification of Health Care Provider for Employee's Serious Health Condition

[1] 29 U.S.C.A. §§ 2601–2654 (2009 & Supp. 2011).

(Family Medical Leave Act)" (Exhibit 1), signed by Nero and Dr. Richey and delivered to the human resources department on July 9, 2012.[2] Exhibit 1 states the approximate date Nero's condition commenced was "several years—neck and syncope."[3] Next, SCDOT contends Nero never actually reported his injury to his employer, despite speaking to both Bostick and Durant while hospitalized. Finally, SCDOT remarks on the medical evidence in the record. In the "Patient Health History Questionnaire" Nero prepared and signed for Dr. Naso, Nero stated his problems were not related to his job and this was not a worker's compensation injury. Dr. Naso initially commented, "I do not think his syncope is related to cervical spine pathology." However, Dr. Richey testified Nero's preexisting cervical spine condition was aggravated by his pulling of the squeegee board and that this, along with Nero's work in the heat, caused the syncope.

At his deposition, Nero testified the injury to his upper back and shoulders was a result of pulling the squeegee over a concrete pad.

> Q: And tell me what happened during that process of you pulling the squeegee board?
>
> A: I got a pain in between pulling the squeegee board when they take someone off it that put more stress in there, due to whoever is left on the squeegee has got less to help pull it.
>
> Q: Yes Sir.
>
> A: But you also still got to keep going [be]cause if you don't keep going—you're going to blotch up. So I was doing that, I felt like a pressing like a, you know, snap back there between my shoulder and my neck. . . .

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[2] Bostick testified that had he been aware of the contents of Exhibit 1, he would have further investigated the accident.

[3] SCDOT failed to note that Exhibit 1 also indicated Nero required neck surgery and that his beginning date for incapacity was listed as June 20, 2012.

> Q: Okay. Now did you tell him, "Hey Mr. Bostick, I—I think I've hurt my neck just now"?
>
> A: No, I didn't tell him that.
>
> Q: Okay, when he took you off, what did you do?
>
> A: I just step out of the way, got off to see—out of the cement, took a little break, and then I went right back.

Nero further testified that while he was pulling the squeegee, he felt "like a bone snapped or something snapped—or popped." Nero spoke with Bostick and Durant while he was in the hospital but did not report that he felt "a snap[ping], crackling, and popping sensation" in his neck. Nero testified he told Bostick, "I think he asked me what . . . was wrong. I said I am in the hospital. I said ever since I fell out, I said, I've been here ever since."

Although Nero never formally reported his injuries to his supervisors, Durant and Bostick both witnessed Nero fall to the ground, unconscious, after completing the physically challenging squeegee board work. *See Hanks*, 286 S.C. at 381, 335 S.E.2d at 93 ("Section 42–15–20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability."). Significantly, Durant's reason for not reporting Nero's incident to Bostick was that Bostick was "right there." Because our supreme court has long held that the statutory notice provision is to be liberally construed in favor of claimants, we find the Appellate Panel erred in reversing the single commissioner's determination that SCDOT received adequate notice under section 42–15–20(A). *See Etheredge*, 349 S.C. at 459, 562 S.E.2d at 683 (concluding "notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim").

II. Reasonable Excuse

Nero next contends the Appellate Panel erred in finding he failed to establish a "reasonable excuse" for any notice deficiency and that SCDOT was prejudiced by this lack of notice. We agree.

Section 42–15–20(B) provides in relevant part that "no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby." Once reasonable excuse has been established, it is the employer's burden to demonstrate prejudice from the absence of formal notice. *Lizee*, 367 S.C. at 129–30, 623 S.E.2d at 864. However, "lack of prejudice does not justify compensation unless the requirement of reasonable excuse is also satisfied." *Gray v. Laurens Mill*, 231 S.C. 488, 492, 99 S.E.2d 36, 38 (1957). When determining whether prejudice exists, the Appellate Panel should be cognizant that the notice requirement protects the employer by enabling it to "investigate the facts and question witnesses while their memories are unfaded, and . . . to furnish medical care [to] the employee in order to minimize the disability and consequent liability upon the employer." *Mintz*, 218 S.C. at 414, 63 S.E.2d at 52.

Here, Nero's reason for not formally reporting his workplace incident was that his supervisors were present when he lost consciousness. Moreover, Durant and Bostick talked with Nero while he was hospitalized and were aware of his treatment and subsequent surgery, as well as the fact that he never returned to work after his collapse. Further, as the single commissioner recognized, Durant testified he never reported the incident to his own supervisor, Bostick, because it happened in Bostick's presence.

> Q: I'm looking at [these] instructions you guys got about injuries on the job. As the lead man, do you get to choose—you have some discretion in choosing what injuries to report and what injuries not to report?
>
> A: Do we get—no. I don't care if it's—if it—whatever it is, it is, if it's small or whatever else.
>
> Q: I mean, a guy hurts his thumb, you've got to report it?

A: If you hurt your thumb and you feel like you need medical attention, you need to go report it.

. . . .

Q: But do you have any responsibility as the lead man to report injuries?

A: Do I have any? Yes, if it happens right here with me, I have a responsibility to report it.

Q: What if I say, look here, lead man, it's just my thumb. Don't worry about it. I don't want to report it.

A: Well—

Q: Can you say, no, we're not going to tell the supervisor?

A: No, I am not going to do that because there's too much that [can] come back and bite you.

Q: All right. Well, let me ask you, when [Nero] passed out that day, did you tell your supervisor about it?

A: He was right there.

. . . .

Q: Safe to say, after that day, when you knew that Nero had passed out, you felt like that it had been reported wherever it needed to be reported on the count of the fact that your supervisor was standing right there?

> A: Well, not only that, I mean, being real, it probably done got back to whoever it need[ed] to get back to when he was out of work.

In reversing the single commissioner's finding that Nero provided a "reasonable excuse" for not formally reporting his work injury, the Appellate Panel found:

> Although Claimant's supervisors witnessed Claimant's syncope episode, Claimant never reported the alleged accident from pulling the squeegee board, which was the basis of his claim. Claimant was given several opportunities to report his work accident and even submitted FMLA paperwork . . . indicating that his problem lasted for several years instead of requesting workers' compensation.

Although Nero failed to give SCDOT formal notice, his excuse was reasonable because his supervisors were both present at the time of his injury and were aware of his treatment. In fact, Durant's reason for not reporting Nero's incident to Bostick was that Bostick was "right there" during the incident. The preponderance of the evidence in the record does not support the Appellate Panel's finding that Nero presented no "reasonable excuse" for failing to provide timely notice pursuant to section 42–15–20(B). Further, because SCDOT was aware Nero never returned to work following the June 2012 syncopal episode and knew of his hospitalization and surgical treatment, no prejudice can be established.

Conclusion

Based on the foregoing analysis, the decision of the Appellate Panel is

REVERSED.

LOCKEMY, C.J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Linda A. Gibson, formerly known as Linda Ann Avinger, individually and as Trustee of the Paul William Gibson Family Trust, and Heritage Seven, LLC, Respondents,

v.

Ameris Bank, Appellant.

Appellate Case No. 2014-001487

Appeal From Berkeley County
Robert E. Watson, Master in Equity

Opinion No. 5488
Heard February 17, 2016 – Filed May 24, 2017
Withdrawn, Substituted, and Refiled August 23, 2017

REVERSED

Robert E. Stepp, Tina Marie Cundari, and Benjamin Rogers Gooding, of Sowell Gray Stepp & Laffitte, LLC, of Columbia, for Appellant.

Desa Ballard and Harvey M. Watson, III, of Ballard & Watson, Attorneys at Law, of West Columbia, for Respondents.

LOCKEMY, C.J.: A master-in-equity entered judgment in the amount of $2,913,866.00 against Ameris Bank (Ameris) for breach of fiduciary duty, negligent misrepresentation, and aiding and abetting a breach of fiduciary duty claims asserted by Linda Gibson, individually and as trustee of the Paul William Gibson Family Trust (the Trust), and Heritage Seven, LLC (collectively, Respondents). On appeal, Ameris argues the master erred (1) in concluding Ameris owed Respondents a fiduciary duty in a $2.8 million commercial loan transaction for a real estate venture that ultimately failed; (2) in concluding Ameris was liable for negligent misrepresentation because one of Ameris's future employees told Gibson that the transaction was a "good deal" and that the "rents would cover the debt" and because Ameris structured the loan "to include borrowing the down payment of $700,000" such that the apartments were purchased with "100% borrowed money"; (3) in concluding Ameris aided and abetted Gibson's real estate agent in breaching his fiduciary duty; and (4) in awarding actual damages and excessive punitive damages. We reverse.

FACTS/PROCEDURAL HISTORY

Ameris commenced this foreclosure action when Respondents failed to repay a $2.8 million loan that Ameris made to Heritage Seven[1] for the purchase and renovation of an apartment complex in North Charleston. Respondents answered the complaint and asserted counterclaims of negligent misrepresentation, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty. The foreclosure action settled, and Galt Valley, LLC—the entity to which Ameris assigned the loan—accepted deeds to the apartment complex and collateral in lieu of foreclosure. Respondents' counterclaims remained, however, and were tried before a master.

In deciding to purchase the apartment complex, Gibson first consulted her real estate and financial advisor, Rolando Villavicencio. On August 28, 2007, Gibson signed a contract to purchase the apartment complex and sought financing from First Reliance Bank (First Reliance). Gibson previously worked with First Reliance in 2005 when First Reliance financed Heritage Seven's purchase of a $2.4

[1] Gibson personally owned a 50% interest in Heritage Seven, and the Trust owned the remaining 50% interest. Gibson guaranteed the loan in her individual capacity and as trustee of the Trust.

million shopping center in Moncks Corner. Karl Zerbst was the loan officer and Benji Lanier was the analysist for the 2005 shopping center loan from First Reliance.

After seeking financing from First Reliance for the apartment complex, Villavicencio complained to Zerbst that he and Gibson were not being served at First Reliance and wanted to know who could help them obtain financing. According to Gibson, Zerbst told her that she would be better served at Ameris and that he had given her loan documents to Lanier, who had left First Reliance and had begun working at Ameris on October 11, 2007. Gibson decided to seek financing from Ameris. Her understanding was that Lanier would handle the loan at Ameris and Zerbst would ultimately handle the transaction for her. However, Zerbst testified he never told Gibson or Villavicencio that he was going to work for Ameris.

Zerbst ended his employment with First Reliance on October 5, 2007. Although Zerbst spoke with other banks, including Ameris, regarding potential employment, he remained unemployed from October 5, 2007, until January 11, 2008, when he accepted a written employment offer from Ameris. Zerbst testified he did not work for Ameris and did nothing on Ameris's behalf before January 11, 2008. Marc Bogan, an executive at Ameris, testified Ameris did not encourage Zerbst to refer customers to it or authorize Zerbst to do anything on its behalf before hiring Zerbst in January 2008. Bogan stated no one at Ameris had the ability or right to control Zerbst's conduct before Zerbst formally accepted the employment offer on January 11, 2008. Further, Richard Sturm, the President of Ameris, testified Ameris never told Gibson that Zerbst was acting on Ameris's behalf prior to January 2008.

In mid-October 2007, Gibson spoke with Zerbst about the apartment complex transaction. At that time, Gibson believed Zerbst had left First Reliance but had not yet joined Ameris. Gibson testified she and Zerbst discussed "the wisdom" of her closing the apartment transaction, the appraisal, the location, and the rents she would charge. According to Gibson, Zerbst thought the apartment complex was a "good investment," and Zerbst assured her that the rents would cover the debt.

On November 2, 2007, Respondents and Ameris closed the apartment complex loan. Gibson underwent surgery soon after the loan closing. While Gibson was

recuperating, Ameris disbursed funds to Villavicencio when he submitted invoices for work performed in the renovation of the apartment complex. Gibson testified that while she was unable to visit the apartment complex because of her health problems, Villavicencio assured her that "everything was fine, on schedule, on budget." On February 7, 2008, Villavicencio sent an email to Lanier, stating that the project was "moving along as planned" and that he expected the units to be completed and ready for leasing by the next month. When Gibson visited the apartments in March 2008 after recovering from her surgery, however, she discovered Villavicencio and the contractor were not on speaking terms, Villavicencio had lied to her about the status of the project, and all three apartment buildings were being renovated at once, instead of one at a time as originally planned. In May 2008, Gibson fired Villavicencio because she believed he had mismanaged her properties and stolen several hundred thousand dollars from her while managing her shopping center and apartment complex. After firing Villavicencio, Gibson managed the apartment complex herself. Gibson also took control of the loan proceeds and arranged for Ameris to place the disbursements in her checking account without receiving invoices.

After Gibson began renting the units, several tenants lost their jobs and were unable to pay rent. Gibson allowed many of the tenants to remain in the apartments and pay a lower rate. Gibson testified the rental income from the apartment complex was insufficient to cover the interest payments on the loan, so she had to use funds from her savings account to pay the remaining interest.

The master determined the relationship between Zerbst and Gibson was more than a creditor and debtor relationship. The master found Zerbst accepted Gibson's trust, Zerbst advised Gibson about the apartment complex transaction, Zerbst was Ameris's agent when Respondents purchased the apartment complex, and Zerbst and Ameris breached their fiduciary duties to Respondents. The master also found Appellant liable for breach of fiduciary duty, negligent misrepresentation, and aiding and abetting Villavicencio's breach of fiduciary duty. The master awarded Respondents actual damages of $1,153,625.00 and punitive damages of $3,551,232.00, for a total damages award of $4,704,857.00. The master found Respondents comparatively at fault for 20% of their damages and reduced the total award of actual and punitive damages by 20%. The master then applied an $850,000.00 set-off to the reduced total award for the money received in the

settlement of the case Respondents had filed against Villavicencio and others for the same injury. The final judgment was $2,913,886.00.

STANDARD OF REVIEW

"An action in tort for damages is an action at law." *Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 560, 619 S.E.2d 5, 9 (Ct. App. 2005). "Our scope of review for a case heard by a Master-in-Equity who enters a final judgment is the same as that for review of a case heard by a circuit court without a jury." *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989). "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009). "[Q]uestions of law may be decided with no particular deference to the trial court . . . ." *U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009). "In an action at law, '[this court] will affirm the master's factual findings if there is any evidence in the record which reasonably supports them.'" *Query v. Burgess*, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006) (quoting *Lowcountry Open Land Trust v. State*, 347 S.C. 96, 101-02, 552 S.E.2d 778, 781 (Ct. App. 2001)).

LAW/ANALYSIS

A. Breach of Fiduciary Duty and Negligent Misrepresentation

Before the master and again before this court, Ameris maintained that Zerbst was not its agent in October 2007 and Ameris cannot, therefore, be held liable for any damages resulting from Zerbst's conduct.[2] We agree.

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[2] Respondents asserted during oral argument that there were no factual issues presented to this court for our review. We disagree. We find Ameris adequately raised the issue of whether Zerbst was Ameris's agent such that it can be reviewed on appeal. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 75 (2d ed. 2002) (noting our courts have broadly construed the requirements that parties specifically state their issues on appeal where it is "reasonably clear from appellant's arguments" that the issue is in dispute); *Eubank v. Eubank*, 347 S.C. 367, 373 n.2, 555 S.E.2d

"Generally, agency is a question of fact." *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 434, 540 S.E.2d 113, 118 (Ct. App. 2000). "In an action at law, '[this court] will affirm the master's factual findings if there is any evidence in the record which reasonably supports them.'" *Query*, 371 S.C. at 410, 639 S.E.2d at 456 (quoting *Lowcountry Open Land Trust*, 347 S.C. at 101-02, 552 S.E.2d at 781). "The test to determine agency is whether or not the purported principal has the *right to control* the conduct of his alleged agent." *Fernander v. Thigpen*, 278 S.C. 140, 144, 293 S.E.2d 424, 426 (1982). "[A]n agency may not be established solely by the declarations and conduct of an alleged agent." *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996)).

We find no evidence to support the master's finding that Zerbst was Ameris's agent prior to January 11, 2008. Specifically, we find there was no evidence presented that Zerbst was employed by Ameris before he accepted Ameris's written offer on January 11, 2008, or that Ameris had a right to control Zerbst's conduct in October

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413, 416 n.2 (Ct. App. 2001) (noting wife contended husband had not sufficiently raised an issue as required by Rule 208 (b)(1)(B), SCACR, but considering the issue because a statement within the brief "when read in conjunction with [h]usband's argument, adequately raised the issue"); *Southern Welding Works, Inc. v. K & S Const. Co.*, 286 S.C. 158, 160, 332 S.E.2d 102, 104 (Ct. App. 1985) (finding a party failed to comply with the supreme court rules requiring exceptions to "contain a complete assignment of error," but considering the issues because they "are reasonably clear from K & S's argument and . . . were ruled on by the trial court").

Here, Ameris's statement of issue on appeal questions, "Did the master-in-equity err in concluding that the bank owed the borrower (a limited liability company) a fiduciary duty in a $2.8 million dollar commercial loan transaction for a real estate venture that ultimately failed?" Additionally, Ameris argued several times in its brief and at oral argument that "Zerbst was not employed by Ameris Bank or any bank" at the time he made representations to Gibson regarding the wisdom of the transaction. While the word "agency" was not included in Ameris's statement of issues on appeal, it is reasonably clear from the brief that Ameris challenged the master's findings that Zerbst was Ameris's agent.

2007. Additionally, there is no evidence in the record that Ameris ever represented to Respondents that Zerbst was its agent. *See id.* at 244-45, 473 S.E.2d at 868 ("Apparent authority to do an act is created as to a third person by written or spoken words *or any other conduct of the principal* which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him."); *id.* at 245, 473 S.E.2d at 868 ("Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief.").

In response to questioning by Respondents' attorney, Zerbst testified he kept a calendar in 2007. Zerbst explained the calendar was produced in litigation with First Reliance in which First Reliance alleged he violated his covenant not to compete by going to work for Ameris. First Reliance, Ameris, and Zerbst ultimately settled that case. Ameris could not produce that calendar after Gibson requested it in discovery.

The master found,

> The parties' filings in the litigation between First Reliance and [Zerbst] and Ameris state that Ameris was in possession of [Zerbst's] 2007 day planner, which presumably would have shown exactly when [Zerbst] and Ameris met to discuss Zerbst['s] employment. However, Ameris has failed to produce the 2007 calendar, claiming it has been lost." . . . Based on the other evidence presented, it is likely that the 2007 calendar would contain further evidence that [Zerbst] was acting as Ameris'[s] agent before he was formally employed by Ameris.

We find Zerbst's lost calendar could not have contained evidence that Zerbst was Ameris's agent. The fact that the calendar might have shown that Zerbst discussed employment with Ameris before accepting its written employment offer on January 11, 2008, is of no consequence because Zerbst admitted he discussed employment with Ameris before January 2008. More importantly, however, the calendar would not have contained any representations by Ameris that Zerbst was

acting as its agent. *See id.* at 244-45, 473 S.E.2d at 868 ("Apparent authority to do an act is created as to a third person by written or spoken words *or any other conduct of the principal* which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him.")

Accordingly, we hold Zerbst was not Ameris's agent in October 2007 and reverse the master's decision finding Ameris liable for breach of fiduciary duty and negligent misrepresentation.

B. Aiding and Abetting a Breach of Fiduciary Duty

Ameris argues the master erred in finding it aided and abetted Villavicencio in breaching his fiduciary duty to Respondents. Ameris asserts there was no evidence that it knew about, or knowingly participated in, Villavicencio's breach. We agree.

"The elements for the cause of action of aiding and abetting a breach of fiduciary duty are[] (1) a breach of a fiduciary duty owed to the plaintiff[,] (2) the defendant's knowing participation in the breach[,] and (3) damages." *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (Ct. App. 2008). "The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach." *Future Group, II v. Nationsbank*, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996). To prove this cause of action, the plaintiff must present evidence that the defendant had actual knowledge of the third party's breach of fiduciary duty. *See id.* (reversing the trial court's verdict in favor of the plaintiff on the plaintiff's claim for aiding and abetting a breach of fiduciary duty where there was no evidence that the defendant bank had actual knowledge of the third party's breach of fiduciary duty).

We hold the master erred in finding Ameris aided and abetted Villavicencio's breach of fiduciary duty because there was no evidence that Ameris had actual knowledge of Villavicencio's breach when it disbursed loan proceeds to him. The record on appeal contains no evidence that, while Villavicencio was involved with the apartment project from November 2007 until May 2008, Ameris's employees had actual knowledge that Villavicencio was breaching his fiduciary duty to Respondents. Zerbst testified Gibson authorized Villavicencio to receive loan disbursements. Further Zerbst stated Gibson never told him, or anyone at Ameris,

not to disburse money according to Villavicencio's instructions during the construction phase

The record on appeal shows Zerbst was the first Ameris employee to express concerns about Ameris's administration of the loan disbursements. Zerbst testified he worked in Ameris's Murrell's Inlet office when Ameris first hired him in January 2008 and he was not involved with making advancements on Respondents' loan while he worked in Murrell's Inlet. Zerbst testified he did not learn about the disbursements on Respondents' loan until October 2008—five months after Gibson fired Villavicencio in May 2008. Zerbst communicated his concerns to Don Snipes, a regional credit officer at Ameris, in May 2009. On July 3, 2009—more than a year after Gibson fired Villavicencio—Snipes emailed another Ameris employee and expressed concerns that Ameris had mismanaged the loan and had potentially aided Villavicencio in siphoning off some of the loan proceeds. Because the evidence does not show that Ameris had actual knowledge of Villavicencio's breach of fiduciary duty while Villavicencio was committing his breach, we hold the master erred in finding Ameris knowingly participated in Villavicencio's breach.

C. Damages

Ameris argues the master erred in awarding actual and punitive damages and in calculating the damages award. Because we reverse the master's finding of liability as to all three causes of action, there is no basis for awarding actual or punitive damages. Accordingly, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when the disposition of a prior issue is dispositive).

CONCLUSION

For the foregoing reasons, the decision of the master is

REVERSED.

HUFF, J., concurs.

KONDUROS, J., concurs in result only.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Anderson County, Appellant,

v.

Joey Preston and the South Carolina Retirement System, Respondents.

Appellate Case No. 2013-002499

Appeal From Anderson County
Roger L. Couch, Circuit Court Judge

Opinion No. 5490
Heard June 11, 2015 – Filed May 31, 2017
Withdrawn, Substituted and Refiled August 16, 2017

AFFIRMED IN PART AND REVERSED IN PART

James Theodore Gentry, Troy A. Tessier, and Wade Stackhouse Kolb, III, of Greenville, and Alice Witherspoon Parham Casey, of Columbia, all of Wyche Law Firm, for Appellant.

Candy M. Kern-Fuller, of Upstate Law Group, LLC, of Easley, and Lane Whittaker Davis, of Nelson Mullins Riley & Scarborough, LLP, of Greenville, for Respondent Joey Preston.

Justin Richard Werner, of Columbia, for Respondent South Carolina Retirement System.

WILLIAMS, J.: On November 18, 2008, the Anderson County Council (the 2008 Council) voted to approve a severance agreement (the Severance Agreement) for outgoing county administrator Joey Preston. Anderson County (the County) filed the instant action against Preston seeking rescission of that agreement. Following a nonjury trial, the circuit court entered judgment in favor of Preston on all causes of action as well as his counterclaim against the County. The County appeals the circuit court's decision, raising numerous issues on appeal. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

Prior to the vote on Preston's Severance Agreement, the political environment in Anderson County was "toxic."[1] Throughout his tenure, Preston was involved in constant litigation—both individually and in his capacity as county administrator—with members of the council he served.

The 2008 Council was comprised of Chairman Michael Thompson and Council members Larry Greer, Ron Wilson, Gracie Floyd, Robert Waldrep, Cindy Wilson, and Bill McAbee. In June 2008, primary challengers ousted three incumbent members of the 2008 Council: Tommy Dunn defeated Thompson, Tom Allen defeated McAbee, and Eddie Moore defeated Greer. Some of the primary victors, as well as Waldrep and Cindy Wilson, ran on platforms calling for examination into and possible reform of the financial and governance practices of the Preston administration.

From June to December 2008, Waldrep and Cindy Wilson held a series of meetings with Moore, Dunn, and Allen at Waldrep's office. During these meetings, the participants laid out an agenda for the incoming Council (the 2009 Council) that included firing the law firm for the County and hiring a new one; hiring a financial investigator or auditor; designating Moore as chairman; drafting

[1] While the circuit court cited numerous examples of troublesome behavior that reflected the "leadership wasteland" existing in Anderson County, we focus only on the events relevant to resolving the issues on appeal.

resolutions for the first meeting; implementing a hiring freeze; and addressing the position of county administrator and various other personnel matters.

After the primary elections, Preston retained Robert Hoskins as his attorney. On September 25, 2008, Hoskins notified the 2008 Council of Preston's anticipatory breach of contract claim, stating the following:

> [I]t has come to Mr. Preston's attention that certain existing Council members have made statements that they and certain newly elected Council Members intend, after January 2009, to prevent him from carrying out his duties as County Administrator. . . . Preston considers the intent of certain members of Council and their allies to prevent him from performing his job as an anticipatory breach of his employment contract. . . . [T]he political and personal agenda of the obstructionists has rendered his ability to serve the people of Anderson County beyond January 1, 2009 impossible.

In response, the 2008 Council referred Preston's claim to its personnel committee—chaired by Ron Wilson—and hired Tom Bright, an employment attorney, to advise the County on the matter. Bright then interviewed all seven members of the 2008 Council, as well as the county attorney, to receive their input.

On October 23, 2008, Preston's attorney delivered a letter to Bright, in which he alluded to a number of causes of action and tort claims Preston planned to assert against current and incoming Council members. In the letter, however, he offered to settle Preston's anticipatory breach claim and "all claims against the County and the two individual Council [m]embers [he] previously mentioned." Under this proposed settlement, Preston would resign and execute a complete release of all claims against the County, Waldrep, and Cindy Wilson in exchange for the County paying $1,276,081 in damages: $827,222 for the total amount of pay and benefits due under his employment agreement[2] (the Employment Agreement); $356,087 to the South Carolina Retirement System (SCRS) to purchase seven years, seven months, and twenty-three days of service credits to allow him to retire immediately

[2] In July 1998, Preston—who had served as county administrator since 1996—entered into an Employment Agreement with the County that granted him an initial three-year term and allowed for one-year renewals at the end of each contract year.

with a full pension; and $92,772 to his health reimbursement account for retiree health benefits.

After receiving the letter, Bright met with the personnel committee to discuss how the County should address the matter. In his notes outlining Preston's claims and the County's options, Bright stated Preston had no anticipatory breach or constructive discharge claim. Bright also advised the committee that, under our supreme court's ruling in *Piedmont Public Service District v. Cowart* (*Cowart II*), 324 S.C. 239, 478 S.E.2d 836 (1996), the County had a good argument that Preston's Employment Agreement was voidable—and therefore, had no value—because it purported to extend his employment beyond the term of the Council that approved it. Nevertheless, Bright also told the committee if the County were to lose, then it could face up to $2 million in litigation costs going forward. Thus, Bright advised the 2008 Council it could (1) do nothing, (2) leave the issue for the 2009 Council to decide, (3) terminate Preston and pay him nothing, or (4) settle with Preston and pay out his contract. As to the fourth option, Bright cautioned that "[c]itizens may go after Preston and former Council members for giving away their [money] without good reason" if the 2008 Council chose to settle. After considering the options, the personnel committee directed Bright "to go and talk to Mr. Hoskins and try and get the best deal you can."

Following several weeks of negotiations, Bright emailed Hoskins a copy of a proposed severance agreement and release of all claims on November 18, 2008. That evening, the 2008 Council voted to amend the agenda to consider the Severance Agreement, voted for its approval, voted to approve budget transfers to fund it, and then voted to reapprove it on reconsideration. The 2008 Council approved the Severance Agreement, and the budget transfers to fund it, by a 5–2 vote. After the votes, the 2008 Council voted to hire Michael Cunningham as the new county administrator and adjourned without conducting any further business.

Pursuant to the terms of the Severance Agreement, Preston agreed to resign as county administrator on November 30, 2008, and release all claims against the County and any of its Council members regarding his employment. In exchange, Preston received $1,139,833—less state and federal withholdings—from the County. The County also contributed $359,258 to the SCRS "to pay for retirement service credits," paid Preston $780,575 "in the form of a severance benefit," and gave Preston title to the 2006 GMC Yukon he was using as a County vehicle.

The newly constituted 2009 Council held its first meeting on January 6, 2009, during which it voted to hire a new law firm and a financial investigator to review Cunningham's employment contract, investigate the manner in which he was hired, and review the actions taken by the 2008 Council on November 18, 2008.[3]

Thereafter, the County sued Preston, alleging causes of action for (1) violation of the State Ethics Act,[4] section 2-37(g) of the Anderson County Code of Ordinances (the County Code), and the common law; (2) violation of public policy; (3) breach of fiduciary duty; (4) fraud; (5) constructive fraud; (6) negligent misrepresentation; (7) capriciousness, unreasonableness, and fraud; (8) fundamental and substantial breach of the Severance Agreement; (9) breach of fiduciary duties relating to back-dated documents; (10) constructive trust; and (11) unjust enrichment. The County later amended its complaint to include additional factual allegations. Preston filed his answer to the amended complaint, asserting counterclaims against the County and SCRS.[5] The County then filed a reply to Preston's counterclaims.

On December 12, 2011, the case was designated as complex and assigned for all purposes to the Honorable Roger L. Couch. After hearing arguments, the circuit court denied the parties' cross-motions for summary judgment in all respects on

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[3] In *Bradshaw v. Anderson County*, our supreme court held South Carolina Code section 4-9-660 (1986) of the Home Rule Act expressly authorized the 2009 Council—operating under a council–administrator form of government—to directly engage professionals "for the purpose of inquiries and investigations." 388 S.C. 257, 263, 695 S.E.2d 842, 845 (2010). The court found the 2009 Council had the authority to investigate the 2008 Council's business and financial practices, "especially concerning contracts related to the former and current County Administrators." *Id.* at 258, 695 S.E.2d at 842. According to the court, it would be absurd to require the county administrator, "who is answerable to the council and not the electorate, to investigate himself." *Id.* at 263, 695 S.E.2d at 845.

[4] S.C. Code Ann. §§ 8-13-100 through -1520 (Supp. 2016).

[5] SCRS asserted cross-claims against Preston in its answer to the County's amended complaint. While the circuit court retained SCRS as a party—finding the extent of its liability was a question of fact—the court excused SCRS from appearing with the parties' consent. The parties also settled Preston's false arrest and abuse of process counterclaims and stipulated to their dismissal prior to trial.

October 23, 2012. As to Preston and the County, the court found summary judgment was inappropriate because genuine issues of material fact existed regarding the claims and counterclaims asserted. The matter was tried without a jury from October 29, 2012, to November 5, 2012. In its May 3, 2013 order (the Final Order), the court granted judgment in favor of Preston on all causes of action as well as his counterclaim against the County.

In the Final Order, the circuit court disqualified four 2008 Council members for improperly participating in the votes approving the Severance Agreement. The court found Thompson voted in violation of section 2-37(g)(4)(e) of the County Code because he was seeking future employment from the County through Preston at the time of the vote. The court likewise found Ron Wilson's vote violated subsections 2-37(g)(4)(a) and (e) because Ron Wilson's daughter had recently received a substantial financial benefit from Preston after he extended her personal services contract with the County. Although Waldrep and Cindy Wilson voted against the Severance Agreement, the court found their votes violated section 2-37(g) because both had a "financial interest greater than that of the general Anderson County public" and their participation created "a substantial appearance of impropriety." Given that "Preston agreed not to pursue any further claims against any County Council member," the court found Waldrep and Cindy Wilson "had a direct economic interest"—regardless of the vote's outcome—and should not have participated while he maintained a lawsuit against them individually.

After disqualifying four of the seven members, the court—relying upon *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999), and section 2-37(g)(3) of the County Code—nevertheless found "a majority of those present and properly voting approved Preston's Severance Agreement." The court also held, *inter alia*, (1) public policy neither rendered the Severance Agreement nor the vote adopting it void; (2) Preston did not breach a fiduciary duty because he owed no duty to disclose Council members' personal conflicts of interest; (3) the County failed to prove its claims for fraud, constructive fraud, and negligent misrepresentation; (4) the 2008 Council's approval of the Severance Agreement was neither unreasonable or capricious nor was it a product of fraud and abuse of power; (5) the County's constructive trust claim no longer remained viable; (6) rescission was unavailable as a remedy; (7) the County had unclean hands; (8) adequate remedies at law barred the County from invoking the court's equitable jurisdiction; (9) the County breached the covenant not to sue in the Severance Agreement by bringing this

lawsuit; and (10) the issue concerning the award of attorney's fees should be held in abeyance pending the final disposition and the filing of a petition.

In light of the circuit court's Final Order, the County filed a motion to alter or amend the judgment as well as a motion to amend its complaint. Preston filed an answer, and the County submitted a reply. Richard Freemantle, a third party, filed a post-trial motion to intervene. The circuit court, however, denied all of the parties' post-trial motions in an order (the Post-Trial Order) dated November 8, 2013. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in concluding Preston owed no fiduciary duty to inform the County of improper votes and finding his conduct did not constitute fraud, constructive fraud, or negligent misrepresentation?

II. Did the circuit court err in finding a single tainted vote did not require invalidation of the Severance Agreement's approval or mandate its rescission?

III. Did the circuit court err in refusing to invalidate the 2008 Council's approval of the Severance Agreement based upon the absence of a quorum?

IV. Did the circuit court err in holding future payments from SCRS to Preston were not available in fashioning a remedy?

V. Did the circuit court err in holding rescission was an unavailable remedy?

VI. Did the circuit court err in finding the County acted with unclean hands?

VII. Did the circuit court err in concluding the County could not invoke its equitable powers because an adequate remedy at law existed?

VIII. Did the circuit court err in holding the County breached the terms of the Severance Agreement by bringing the instant lawsuit?

STANDARD OF REVIEW

Because the County's main purpose in bringing the instant lawsuit was to rescind the Severance Agreement, this action is equitable in nature. *See ZAN, LLC v. Ripley Cove, LLC*, 406 S.C. 404, 412, 751 S.E.2d 664, 669 (Ct. App. 2013) (per curiam). In an equitable action, this court reviews factual findings and legal conclusions de novo. *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 248, 715 S.E.2d 348, 352 (Ct. App. 2011). "Therefore, we may find facts according to our own view of the preponderance of the evidence." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012). Moreover, we are free to decide "question[s] of law with no particular deference to the circuit court." *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). Our de novo review, however, does not require this court to disregard the circuit court's findings or "ignore the fact that the [circuit] court is in the better position to assess the credibility of the witnesses." *Ripley Cove*, 406 S.C. at 412, 751 S.E.2d at 669 (quoting *Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011)). Further, this broad scope of review does not relieve the appellant of the burden of demonstrating the circuit court erred in its findings. *Ballard*, 399 S.C. at 593, 733 S.E.2d at 109.

LAW/ANALYSIS

I. Preston's Knowledge of Conflicts of Interest

First, the County contends the circuit court erred in finding Preston's failure to inform the 2008 Council of Thompson and Ron Wilson's conflicts of interest prior to the Severance Agreement's approval did not constitute a breach of fiduciary duty, fraud, constructive fraud, or negligent misrepresentation.

A. Breach of Fiduciary Duty

The County argues Preston—in his capacity as county administrator—owed the highest duty of loyalty and breached this duty by knowingly allowing Thompson and Ron Wilson to introduce, debate, preside over, and cast improper votes in favor of his Severance Agreement. According to the County, Preston had a duty to make these conflicts of interest known because he was still employed as county administrator when he attended the vote affecting his own interest. We disagree.

"To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of

the defendant." *RFT Mgmt. Co. v. Tinsley & Adams LLP*, 399 S.C. 322, 335–36, 732 S.E.2d 166, 173 (2012).

"A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Moore v. Moore*, 360 S.C. 241, 250, 599 S.E.2d 467, 472 (Ct. App. 2004). "To establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will not act in [its] own behalf but in the interest of the party so reposing." *Id.* at 251, 599 S.E.2d at 472. "The evidence must show the entrusted party actually accepted or induced the confidence placed in [it]." *Id.*

In the instant case, the circuit court held Preston owed no fiduciary duty to disclose information about his employment claims to the 2008 Council because Preston and the County had assumed adverse positions by October and November of 2008.

Although Preston owed the County a fiduciary duty throughout his employment as county administrator,[6] in this particular context, the County had no foundation for believing Preston would not act in his own interest to achieve the best possible settlement of his claims against the County. *See generally Moore*, 360 S.C. at 251, 599 S.E.2d at 472 (explaining that, for a plaintiff "[t]o establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will not act in [its] own behalf but in the interest of the party so reposing"). The parties clearly had opposing interests throughout settlement negotiations and remained adverse to one another during the 2008 Council's vote on the Severance Agreement. Moreover, in preparation of litigation, the County and Preston each retained attorneys to represent their respective interests. In light of these facts and circumstances, we are unable to find any basis upon which the County could have reasonably believed Preston would act on its behalf—instead of representing his own interests—while trying to settle his employment claims against the County.

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[6] *See, e.g.*, *Young v. McKelvey*, 286 S.C. 119, 122, 333 S.E.2d 566, 567 (1985) ("It is implicit in any contract for employment that the employee shall remain faithful to the employer's interest throughout the term of employment. An employee has a duty of fidelity to his employer." (quoting *Berry v. Goodyear Tire & Rubber Co.*, 270 S.C. 489, 491, 242 S.E.2d 551, 552 (1978))).

Because the parties were directly adverse to one another, we hold Preston owed no duty to disclose Thompson and Ron Wilson's conflicts of interest during the vote on his Severance Agreement. *See id.*; *see also Boaz v. Boaz*, 221 S.W.3d 126, 133 (Tex. App. 2006) ("[A]dverse parties who have retained professional counsel . . . do not owe fiduciary duties to one another.").

Our holding is further supported by the State Ethics Act[7] and the County Code,[8] neither of which give Preston a legal duty to disclose Council members' conflicts

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[7] *See, e.g.*, Act No. 248, 1991 S.C. Acts 1616–17 ("No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated has an economic interest." (current version at S.C. Code Ann. § 8-13-700(B) (Supp. 2016)).

[8] *See, e.g.*, Anderson County, S.C., Code of Ordinances § 2-288(a)(6) (2000) ("A councilmember who has a financial or other private interest in any legislation shall disclose on the records of the county council the nature and extent of such interest. . . . A councilmember shall disqualify himself from voting if the matter under consideration involves his personal or financial interest to the extent such interest conflicts with his official duties and would impair his independence or judgment."); § 2-37(g)(4) ("No member [of Council] shall vote on any matter in which he/she has a personal or financial interest greater than that of the general Anderson County public, or in which he/she is otherwise disqualified by any state or county law or regulation. Each member shall make known, in the manner required by law, any such disqualifying interest and refrain from voting upon or otherwise participating, in his capacity as a county officer, in matters related thereto."). Subsection 2-37(g)(4) further provides, in relevant part, that a "member shall be deemed to have a personal or financial interest" in the following situations: the member "has such an interest individually or if any member of his/her immediate family (i.e. brother, sister, direct ancestor or direct descendant) has such an interest;" the member "has a substantial financial interest in any business which contracts with the county for sale or lease of land, materials, supplies, equipment or services or personally engages in such matter;" the member "is so deemed by any state law or regulation;" or the member "cannot, for any other reason, render a fair, unbiased and impartial judgment in the matter, or his/her participation in the matter at hand would create a substantial appearance of impropriety."

of interest. To the contrary, the relevant provisions imposed only a positive legal duty on Council members—not the county administrator—to disclose their own personal conflicts and abstain from voting if necessary. Further, when questions on conflicts of interests did arise, the County Code instructed members to seek guidance from the county attorney, not the county administrator. *See* Anderson County, S.C., Code of Ordinances § 2-289 (2000) (providing when an official "has doubt as to the applicability of a provision of [the ethics] division to a specific situation or definition of terms used in the Code, he shall apply to the county attorney for an advisory opinion and be guided by that opinion when given").

Based on the foregoing, we affirm the circuit court's finding that Preston owed no fiduciary duty to disclose Thompson and Ron Wilson's conflicts of interest during the 2008 Council's vote on his Severance Agreement.

B. Fraud, Constructive Fraud, and Negligent Misrepresentation

The County further contends Preston's failure to disclose the facts that rendered Thompson and Ron Wilson's votes improper amounted to fraud, constructive fraud, and negligent misrepresentation. We disagree.

"Fraud is an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to [that person] or to surrender a legal right." *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444 (Ct. App. 2003). To establish fraud, a plaintiff must prove the following elements by clear, cogent, and convincing evidence:

> (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Moseley v. All Things Possible, Inc., 388 S.C. 31, 35–36, 694 S.E.2d 43, 45 (Ct. App. 2010) (quoting *Schmauch*, 354 S.C. at 672, 582 S.E.2d at 444–45). "Failure

to prove any element of fraud is fatal to the action." *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002).

"Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." *Moore*, 360 S.C. at 251, 599 S.E.2d at 472 (quoting *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 101, 594 S.E.2d 485, 497 (Ct. App. 2004)). Nondisclosure is fraudulent when a party has a duty to speak. *Schmauch*, 354 S.C. at 673, 582 S.E.2d at 445.

> The duty to disclose may be reduced to three distinct classes: (1) whe[n] it arises from a preexisting definite fiduciary relation between the parties; (2) whe[n] one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; [and] (3) whe[n] the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

Id. at 673–74, 582 S.E.2d at 445–46 (quoting *Jacobson v. Yaschik*, 249 S.C. 577, 585, 155 S.E.2d 601, 605 (1967)).

"Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests." *Woods v. State*, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993) (quoting *Giles v. Lanford & Gibson, Inc.*, 285 S.C. 285, 288, 328 S.E.2d 916, 918 (Ct. App. 1985)). "To establish constructive fraud[,] all elements of actual fraud except the element of intent must be established." *Id.* at 506, 431 S.E.2d at 263. "Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud." *Id.* at 505, 431 S.E.2d at 263 (quoting *Giles*, 285 S.C. at 288, 328 S.E.2d at 918).

When no confidential or fiduciary relationship exists, "and an arm's length transaction between mature, educated people is involved," a party has no right to rely on the other's representations. *Ardis v. Cox*, 314 S.C. 512, 516, 431 S.E.2d 267, 270 (Ct. App. 1993). "This is especially true in circumstances whe[n] one should have utilized precaution and protection to safeguard his interests." *Id.* at 516–17, 431 S.E.2d at 270.

In a negligent misrepresentation action, a plaintiff must prove six elements:

> (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680–81 (Ct. App. 2001). "Thus, a key difference between fraud and negligent misrepresentation is that fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated upon transmission of a negligently made false statement." *Id.* at 42, 557 S.E.2d at 681.

In the instant case, we find the circuit court properly determined the County failed to meet its burden of proving the claims for fraud, constructive fraud, and negligent representation. Because the Severance Agreement's negotiation constituted "an arm's length transaction between mature, educated people"—all of whom were represented by counsel—we hold the County had no right to rely upon any false representations allegedly made by Preston. *See Ardis*, 314 S.C. at 516, 431 S.E.2d at 270. Preston also had no fiduciary duty to disclose Council members' conflicts of interest, and thus, his silence did not constitute fraud. *Cf. Moore*, 360 S.C. at 251, 599 S.E.2d at 472; *Schmauch*, 354 S.C. at 673, 582 S.E.2d at 445. As noted above, the elected officials—not Preston—owed positive legal duties to disclose their own personal conflicts of interest and disqualify themselves from voting under both the County Code and the State Ethics Act. Moreover, our courts have repeatedly recognized the general rule that fraud cannot be predicated on misrepresentations as to matters of law, much less mere mistakes of law. *See First*

Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co., 207 S.C. 15, 30, 35 S.E.2d 47, 59 (1945); *Barber v. Barber*, 291 S.C. 399, 400, 353 S.E.2d 882, 883 (Ct. App. 1987). Given that the parties were clearly in adversarial positions at the time of the vote, the County had no basis for believing Preston owed it a legal duty to disclose information adverse to his claim, nor did it have a right to rely upon Preston's representations.

Based on the foregoing, we affirm the circuit court's finding that Preston's silence during the November 18, 2008 meeting did not constitute fraud, constructive fraud, or negligent misrepresentation. *See Robertson*, 350 S.C. at 348, 565 S.E.2d at 314 (noting that "[f]ailure to prove any element of fraud is fatal to the action"); *Woods*, 314 S.C. at 506, 431 S.E.2d at 263 (noting that, to prove constructive fraud, "all elements of actual fraud except the element of intent must be established"); *Stewart*, 348 S.C. at 42, 557 S.E.2d at 680–81 (requiring that, to establish negligent misrepresentation, a plaintiff must have "justifiably relied on the representation").

II. Tainted Votes

The County further contends the circuit court erred in finding a single tainted vote did not require invalidation of the 2008 Council's approval of the Severance Agreement or mandate its rescission. We disagree.

The County does not advocate for a general rule that would require South Carolina courts to overturn legislation due to a single tainted vote; rather, the County argues courts should apply the single tainted vote rule in rare cases involving egregious circumstances. Specifically, the County contends Ron Wilson and Thompson's tainted votes required invalidation of the 2008 Council's approval of the Severance Agreement in the instant case because the following extraordinary factors were present: (1) the agreement conferred a private benefit on one individual and was not a law of general application; (2) the agreement was passed by a "simple motion," rather than in the form of an ordinance that would require public notice and three readings; (3) the process by which the agreement was passed involved procedural irregularities; (4) members failed to disclose conflicts of interest; (5) the motion was presented by a member with a conflict of interest; and (6) approval of the agreement was not subject to the normal process of political redress.

The County relies upon several cases from other jurisdictions to support its proposed application of the single tainted vote rule. *See, e.g.*, *Dowling Realty v. City of Shawnee*, 85 P.3d 716, 721–22 (Kan. Ct. App. 2004) (remanding the case to

the trial court with directions to send it back to the city planning commission because a local government officer, who advocated approval of his project to "the governmental body of which he . . . [was] a member without identifying himself . . . as having a substantial interest in the project," acted in violation of Kansas ethics rules); *Appeal of City of Keene*, 693 A.2d 412, 415–16 (N.H. 1997) (voiding the county commissioners' denial of the city's request for a determination of public necessity on the grounds that a judicial action by a tribunal is voidable when a member is disqualified but still participates, regardless of whether the disqualified member's vote produces the outcome); *Thompson v. City of Atlantic City*, 921 A.2d 427, 430–43 (N.J. 2007) (voiding a settlement agreement between the mayor and the city as contrary to public policy based upon the involvement of several parties with conflicts of interest).

While we recognize courts in other jurisdictions have invalidated governmental actions based upon a single tainted vote, we are unable to find any South Carolina authority to support this court taking such an extraordinary action. In fact, our precedent suggests South Carolina does not follow the single tainted vote rule. In *Baird*, our supreme court considered whether a court has jurisdiction to invalidate an ordinance based upon tainted votes. 333 S.C. at 535, 511 S.E.2d at 77–78. There, a group of doctors sued Charleston County, arguing a bond ordinance was invalid because a county council member with a conflict of interest voted on the matter in violation of the State Ethics Act. *Id.* at 535, 511 S.E.2d at 77. In determining whether invalidating the bond ordinance was an appropriate remedy for a State Ethics Act violation, the court found the following:

> [T]he vote of a council member who is disqualified because of interest or bias in regard to the subject matter being considered may not be counted in determining the necessary majority for valid action. Therefore, a court has jurisdiction to invalidate an ordinance if the requisite number of votes to pass the ordinance would not exist but for the improper vote.

Id. at 535, 511 S.E.2d at 77–78 (citation omitted).

We read the second sentence in the above quote from *Baird* to also stand for the proposition that a court does *not* have jurisdiction to invalidate an ordinance if, after excluding the improper vote, the requisite number of votes to pass the ordinance still exists. Because *Baird* indicates we do not follow the single tainted

vote rule in South Carolina, we find the circuit court properly declined the County's invitation to apply it in the instant case. Accordingly, we affirm the court's finding that one tainted vote did not require invalidation of the 2008 Council's approval of the Severance Agreement or mandate its rescission.

III. Absence of a Quorum

Next, the County argues the circuit court erred in finding its quorum argument was not preserved, and in addressing the merits of the claim, ruling a quorum existed—despite the invalidation of four votes—because the Severance Agreement was passed by a majority of those Council members present and voting. We agree.

As a preliminary matter, we must determine whether the County properly raised the quorum argument below such that it is preserved for appellate review.

"A post-trial motion must be made when the [circuit] court either grants relief not requested or rules on an issue not raised at trial." *Fryer v. S.C. Law Enf't Div.*, 369 S.C. 395, 399, 631 S.E.2d 918, 920 (Ct. App. 2006); *see also* J. TOAL, A. WALKER & M. BAKER, APPELLATE PROCEDURE IN SOUTH CAROLINA 189 (3d ed. 2016) ("Post-trial motions are . . . utilized to raise issues that could not have been raised at trial.").

After entry of the Final Order, the County filed a motion to reconsider, arguing the circuit court's "invalidation of four total votes mean[t] there was no quorum for the vote on [the Severance Agreement], rendering the vote void." In the Post-Trial Order, the court found the quorum issue was not preserved because the County failed to present the issue to the court, despite having ample opportunity to raise it.

Unlike the circuit court, we find the prospect of a quorum being destructed did not exist until the court invalidated four Council members' votes in the Final Order, and in doing so, granted relief that was not requested by either party. Neither the County nor Preston presented an argument prior to or during trial that would have resulted in four votes being invalidated. The County repeatedly argued in favor of invalidating the votes of Thompson, Ron Wilson, and McAbee. Nevertheless, invalidating three votes would not have destroyed the quorum.

At trial, the circuit court noted the issue of whether Cindy Wilson and Waldrep had conflicts of interest "has come up as an allegation" and stated as follows:

> I didn't remember this being alleged or discussed during our pretrial motion period, that the two votes I want to say that weren't in favor because one time it was an abstention and one time it was a vote against, should also not count because they had a dog in the fight. I don't know whether that's ple[aded]. I don't know if it[] just wasn't argued. It's come up as an argument now, and I . . . went over the pleadings before we started, and I started off with hearings going over those, and I don't recall that being something that was ple[aded], but maybe it has been. I don't know. So, I'm [going to] ask you about that, and I'll give you a chance to tell me about your side of it in just a minute, Mr. Davis.

The court, however, never ruled at trial on whether Cindy Wilson or Waldrep's votes were invalid based upon their conflicts of interest. The court did not find Cindy Wilson and Waldrep were disqualified from voting due to conflicts of interest until it issued the Final Order. Therefore, once the court decided to invalidate Thompson and Ron Wilson's votes, along with Cindy Wilson and Waldrep's votes, the quorum issue arose.

Because the argument regarding Cindy Wilson and Waldrep's votes was not raised prior to trial or ruled upon during trial—and the County argued only for the disqualification of Thompson, Ron Wilson, and McAbee—we find the question of whether a quorum existed first arose when the circuit court invalidated the votes of four Council members due to conflicts of interest in the Final Order. Accordingly, we hold the County's Rule 59(e) motion was the proper means by which to raise the argument that the Severance Agreement should be invalidated because the 2008 Council passed it in the absence of a quorum. *See Fryer*, 369 S.C. at 399, 631 S.E.2d at 920; TOAL ET AL., *supra*, at 189. Further, while the circuit court initially found the quorum issue was not preserved, we note the court also addressed the merits of the parties' quorum arguments in the alternative. Based on the foregoing, we find the County's argument is preserved for appellate review because it was properly raised to and ruled upon by the circuit court.

Turning to the merits, the County argues the circuit court erred in finding the 2008 Council's approval of the Severance Agreement was valid because—contrary to the court's findings—the disqualification of four Council members destroyed the quorum necessary for conducting valid business. We agree.

In the Post-Trial Order, the circuit court found a quorum was present and the vote was valid for the following reasons: (1) a quorum is determined based on a person's presence at the meeting, not on voting ability; (2) "the County's Code did not require a majority of Council to vote on an issue to be a valid vote, but rather a majority of those present and voting to carry the question"; (3) "the County's prior interpretation and usage under its own Code . . . allowed votes to be taken despite the disqualification of certain members, so long as present at the meeting site"; and (4) "the County Code expressly incorporated [the Freedom of Information Act[9]] and the State Ethics Act—both of which define quorum without reference to voting disqualifications—into County meeting procedures."

Section 2-37(g)(3) of the County Code provides, "Except where otherwise specified in these rules, a majority vote of those members present and voting shall decide all questions, motions, and other votes." Section 2-37(d) defines a quorum as follows:

> A quorum shall consist of a majority of the council. In the absence of a quorum, the meeting cannot be convened. Should sufficient members leave during a meeting, the chairperson shall immediately declare a recess and attempt to obtain a quorum. If, after a reasonable time, a quorum has not been obtained, the meeting shall be adjourned. Members of county council may excuse themselves briefly during a meeting without loss of a quorum; however, no vote may be taken during the temporary absence of quorum.

In the instant case, the circuit court invalidated four of the Council member's votes. The County Code, however, provides no guidance for situations in which a vote is invalidated due to a member's conflict of interest. For issues of parliamentary procedure not addressed in the County Code, it provides as follows:

> In all particulars not determined by these rules, or by law, the chairperson or other presiding officer shall be guided by the previous usage of county council or by

[9] S.C. Code Ann. §§ 30-4-10 through -165 (2007 & Supp. 2016).

> parliamentary law and procedure as it may be collected from Roberts [sic] Rules of Order, latest edition.

Anderson County, S.C., Code of Ordinances § 2-37(g)(12) (2000).

The County Code states the Council may not take a vote during the temporary absence of a quorum, but it does not specifically address what happens when such a vote is taken. Therefore, we look to *Robert's Rules of Order*, which provides, "In the absence of a quorum, any business transacted . . . is null and void." HENRY M. ROBERT ET AL., ROBERT'S RULES OF ORDER § 40, at 347 (11th ed. 2013).

Although *Robert's Rules of Order* renders any business transacted in the absence of a quorum null and void, it does not address the effect of an invalidated vote on the calculation of a quorum. Nevertheless, South Carolina courts have repeatedly addressed this issue as it relates to various governing bodies. In *Garris v. Governing Board of South Carolina Reinsurance Facility*, for example, our supreme court considered the effect of a disqualified vote in a corporate context and stated the following:

> In the absence of any statutory or other controlling provision, the common-law rule that a majority of a whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum. A member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts upon the matter.

333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998) (citations omitted).

Prior to *Garris*, our supreme court repeatedly stated the general rule that a corporation's director or board member with a personal interest in a corporate matter may not be "counted to make a quorum at a meeting where the matter is acted upon." *See Talbot v. James*, 259 S.C. 73, 82, 190 S.E.2d 759, 764 (1972); *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 186, 64 S.E.2d 524, 529 (1951); *Fid. Fire Ins. Co. v. Harby*, 156 S.C. 238, 246–47, 153 S.E. 141, 144 (1930); *Peurifoy v. Loyal*, 154 S.C. 267, 288, 151 S.E. 579, 586 (1930).

Likewise, in *Baird*, our supreme court addressed the effect of a disqualified vote in the context of a county council vote. 333 S.C. at 535, 511 S.E.2d at 77–78. Specifically, the *Baird* court considered the issue of "whether invalidation of a bond ordinance [was] a proper remedy for a violation of the State Ethics Act." *Id.* at 535, 511 S.E.2d at 77. As previously noted, the court stated "the vote of a council member who is disqualified because of interest or bias in regard to the subject matter being considered may not be counted in determining *the necessary majority for valid action*." *Id.* (emphasis added). *Robert's Rules of Order* defines a quorum as "[t]he minimum number of members who must be present at the meetings of a deliberative assembly *for business to be validly transacted*." ROBERT ET AL., *supra*, § 3, at 21 (emphasis added). When read in conjunction with the definition of a quorum in *Robert's Rules of Order*, we interpret the court's language in *Baird* to mean a council member who is disqualified due to a conflict of interest may not be counted toward a quorum.

Based upon our review of the relevant authority, we find a council member who has a personal interest in a matter—and votes on the matter—is disqualified from the vote and may not be counted toward the quorum. Our position is supported by South Carolina precedent relating to both corporate boards and county councils. *See Baird*, 333 S.C. at 535, 511 S.E.2d at 77–78; *Talbot*, 259 S.C. at 82, 190 S.E.2d at 764; *Gilbert*, 219 S.C. at 186, 64 S.E.2d at 529; *Fid. Fire Ins. Co.*, 156 S.C. at 246–47, 153 S.E. at 144; *Peurifoy*, 154 S.C. at 288, 151 S.E. at 586.

Applying the rule to the facts of this case, we find the disqualification of Thompson, Ron Wilson, Waldrep, and Cindy Wilson—based upon their individual conflicts—required the court to remove them from its calculation of the quorum. Under the County Code and *Robert's Rules of Order*, a quorum—a majority of those members present and voting—was required for the Council to validly transact business. *See* Anderson County, S.C., Code of Ordinances § 2-37(d), (g)(3); ROBERT ET AL., *supra*, § 3, at 21; *see also Gaskin v. Jones*, 198 S.C. 508, 513, 18 S.E.2d 454, 456 (1942) ("[A] majority of a whole body is necessary to constitute a quorum . . . , and no valid act can be done in the absence of a quorum."). After removing the improper votes, however, only three of the seven Council members could be counted toward the quorum. Given that four members must be present and voting to constitute a quorum, we find the Severance Agreement is null and void because the 2008 Council approved the agreement, as well as the motion to transfer monies to fund it, without the quorum necessary for

taking valid action. Accordingly, we hold the circuit court erred in failing to remove the four disqualified members' votes from its quorum calculation.

Although some may argue this creates an impracticable framework, we note the 2008 Council had several procedural options at its disposal through which it could have passed the Severance Agreement in spite of a majority of Council having personal conflicts. For instance, members with conflicts could have *abstained* from voting, and their abstentions would have allowed them to be counted toward the quorum without tainting the entire vote. Unlike in the case of a recusal—in which a member physically leaves the room to avoid participation—when a member properly abstains, it does not have the effect of defeating a quorum because the member is still physically present. *See generally Gaskin*, 198 S.C. at 513–14, 18 S.E.2d at 456 ("If a quorum is present, a majority of a quorum is sufficient to act and bind the entire body. The members *who are present at a meeting cannot by a mere refusal to vote* defeat the action of the majority of those voting." (emphasis added) (citation omitted)). In this case, because four Council members were *disqualified*, those members are not counted for purposes of the quorum, and therefore, are treated as if they were not present at the meeting. *See Garris*, 333 S.C. at 453, 511 S.E.2d at 59 ("A member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts upon the matter.").

Based on the foregoing, we hold all votes relating to the adoption and funding of the Severance Agreement are null and void because the 2008 Council passed these motions in the absence of a quorum. Therefore, we reverse the circuit court's holding regarding the quorum issue.

IV. Availability of Future Payments from SCRS

The County contends the circuit court erred in declining to have Preston's monthly retirement benefit from SCRS placed in a constructive trust and redirected to the County. The circuit court did not reach the merits of this issue in the Final Order. Instead, the court held that, given its previous findings, the County's "cause of action for constructive trust no longer remain[ed] viable." In light of our holding in Part III, *supra*, we reverse.

V. Rescission

The County contends the circuit court erred in finding rescission was unavailable because the parties cannot be returned to their status quo ante. We disagree.

"Rescission is an equitable remedy that attempts to undo a contract from the beginning as if the contract had never existed." *Ripley Cove, LLC*, 406 S.C. at 413, 751 S.E.2d at 669 (quoting *Mortg. Elec. Sys., Inc. v. White*, 384 S.C. 606, 615, 682 S.E.2d 498, 502 (Ct. App. 2009)).

> A contract may be rescinded for mistake, if justice so requires, in the following circumstances: (1) whe[n] the mistake is mutual and is in reference to the facts or supposed facts upon which the contract is based; (2) whe[n] 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 the true agreement of the parties; (3) whe[n] the mistake is unilateral and has been induced by the fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to the rescission, without negligence on the part of the party claiming rescission; or (4) whe[n] the mistake is unilateral and is accompanied by very strong and extraordinary circumstances which would make it a wrong to enforce the agreement, sustained by competent evidence of the clearest kind.

King v. Oxford, 282 S.C. 307, 313, 318 S.E.2d 125, 128 (Ct. App. 1984). Nevertheless, as our supreme court has noted, "there can be no rescission of a nonexistent contract." *Davis v. Cordell*, 237 S.C. 88, 98, 115 S.E.2d 649, 654 (1960). A cause of action seeking rescission and damages assumes a valid contract, whereas one attacking the contract as void assumes no contract existed. *Id.* at 98, 115 S.E.2d at 653–54.

"In the absence of fraud[,] which would justify shifting the loss to the party who opposes rescission, rescission is appropriate only if both parties can be returned to the status quo prior to the contract." *King*, 282 S.C. at 313, 318 S.E.2d at 129. "When a party elects and is granted rescission as a remedy, [the party] is entitled to be returned to status quo ante." *Miccichi*, 358 S.C. at 95, 594 S.E.2d at 494. "Rescission entitles the party to a return of the consideration paid as well as any

additional sums necessary to restore [the party] to the position occupied prior to the making of the contract." *First Equity Inv. Corp. v. United Serv. Corp. of Anderson*, 299 S.C. 491, 496, 386 S.E.2d 245, 248 (1989). Because rescission returns the parties to the status quo ante, this necessarily requires any party damaged to be compensated. *Miccichi*, 358 S.C. at 95, 594 S.E.2d at 494.

In *Griggs v. E.I. DuPont de Nemours & Co.*, the U.S. Court of Appeals for the Fourth Circuit stated "the inability to compel full restoration of benefits received under the instrument to be rescinded does not automatically preclude the granting of equitable rescission." 385 F.3d 440, 452 (4th Cir. 2004). The court considered various authorities to determine whether a rescissionary remedy could be fashioned that would eliminate the prejudice stemming from one party's delay in seeking rescission. *Id.* at 452; *see also, e.g.*, *Henson v. James M. Barker Co.*, 555 So. 2d 901, 909 (Fla. Dist. Ct. App. 1990) ("In the event restoration to the status quo is impossible, rescission may be granted if the court can balance the equities and fashion an appropriate remedy that would do equity to both parties and afford complete relief."); 24 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 69:51 (4th ed. 2002) ("Where circumstances permit, some courts also have allowed as a substitute for restoration of the consideration a deduction of the amount of it from the recovery against the wrongdoer. This is the most practicable and satisfactory disposition of many cases."). After reviewing these authorities, the Fourth Circuit granted rescission based on the following reasoning:

> Because Griggs's delay in seeking rescission has lessened the likelihood that he will be able to recover the tax payments made on the lump-sum distribution, our remedy properly forces Griggs, not DuPont, to bear the risk that the tax payments will not be fully recovered. Under these circumstances, Griggs's delay in seeking rescission works no prejudice on DuPont, thus making it proper and equitable to grant rescission without requiring Griggs to make complete restoration of the benefits he received in connection with his initial lump-sum election. At the same time, because the relief we describe allows Griggs to rescind his lump-sum election and instead receive a monthly payment for life (albeit in a lesser amount), DuPont's breach of fiduciary duty does not go unremedied.

Griggs, 385 F.3d at 452–53 (footnote omitted).

In light of our invalidation of the Severance Agreement, we find rescission is an unavailable remedy because the contract never existed. *See Cordell*, 237 S.C. at 98, 115 S.E.2d at 654 (noting "there can be no rescission of a nonexistent contract"). We further find rescission inappropriate because the parties cannot be returned to their status quo ante. *See Miccichi*, 358 S.C. at 95, 594 S.E.2d at 494. Although the County would benefit from a return of the monies improperly allocated to fund the void Severance Agreement, Preston cannot be returned to the county administrator position and—at this stage—it is unclear what remedies, if any, he would be entitled to under his Employment Agreement because the circuit court has not ruled upon its validity.

The County relies upon *Griggs* and cites cases from other jurisdictions—as well as secondary sources—in support of its argument that "equity is not as straight-jacketed" as the circuit court suggested. *See, e.g.*, *East Derry Fire Precinct v. Nadeau*, 924 A.2d 390, 393–94 (N.H. 2007) (finding that, when a party was "an active participant in the scheme" to create a fraudulent severance agreement approved by commissioners at a meeting, rescission was appropriate even though it deprived the party of a severance he would have received anyway, based on later events, had he stayed on the job); 17B C.J.S. *Contracts* § 652 ("Complete restoration is not necessary if the party that is not fully restored was actually at fault."). We find these authorities distinguishable, however, because the record in the instant case does not support a finding that Preston engaged in fraudulent conduct, *see Nadeau*, 924 A.2d at 393–94, breached a fiduciary duty, *see Griggs*, 385 F.3d at 453, or was at fault, *see* 17B C.J.S. *Contracts* § 652. Accordingly, we find the County failed to demonstrate why the facts and circumstances of this case justify this court employing an exception to fashion a remedy that does not fully return the parties to their status quo ante.

Based on the foregoing, we affirm the circuit court's finding that rescission is unavailable as a remedy in this case because the parties cannot be returned to their status quo ante.

VI. Unclean Hands

The County further argues the circuit court erred in finding it acted with unclean hands in this matter and could not invoke the court's equitable powers to rescind the Severance Agreement. We agree.

A party with unclean hands is precluded from recovering in equity. *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 756 (Ct. App. 2005). "A party will have unclean hands whe[n] the party behaves unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Id.* (quoting *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 n.2 (2000)). "The expression 'clean hands' means a clean record with respect to the transaction with the defendants themselves and not with respect to others." *Arnold v. City of Spartanburg*, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943). "[T]he rule must be understood to refer to some misconduct in regard to the matter in litigation of which the opposite party can, in good conscience, complain in a [c]ourt of equity." *Id.*

In the Final Order, the circuit court found the record was "replete with evidence of the County's unclean hands" and proceeded to list the conduct it believed supported this finding. After providing a lengthy list of actions, the court concluded:

> [W]hen taken in its totality, the evidence of record firmly establishes that the County, by and through certain of its sitting Council members acting with members of the Council-elect, engaged in a pattern of conduct intended to harass and interfere with Preston's ability to execute his duties as [c]ounty [a]dministrator.

We hold the circuit court erred in finding the County had unclean hands for two reasons. First, the listed actions taken by incoming members of the 2009 Council are irrelevant to the analysis of this issue because those individuals had not been sworn into office yet, and therefore, had no authority to act on behalf of the County. While the court acknowledged these individuals' conduct could not be attributable to the County, it nevertheless included their conduct in the list and used such conduct as a basis for finding the County had unclean hands. To the extent the circuit court relied upon the actions of the incoming Council members, we agree with the County's contention that it "confused the political rhetoric of primary winners with actual County conduct."

Most of the remaining conduct the circuit court cited concerns actions taken by Waldrep and Cindy Wilson toward Preston during his tenure as county administrator, for which he sued both of them in their *individual capacities*, not their capacities as Council members. We find the conduct of two Council members acting in their individual capacities may not, however, be imputed to the

County. Accordingly, we hold the circuit court erred in considering the conduct of "others" in reaching its conclusion. *See Arnold*, 201 S.C. at 532, 23 S.E.2d at 738 (noting "[t]he expression 'clean hands' means a clean record with respect to the transaction with *the defendants themselves* and *not with respect to others*" (emphasis added)); *see also* 30A C.J.S. *Equity* § 118 (2015) ("An innocent party is, of course, not barred from relief because of the misconduct of others for which he or she is not responsible . . . .").

Second, we find the listed conduct had nothing to do with the subject matter of this litigation. In the Final Order, the circuit court primarily focused its analysis upon the actions of two individual Council members, Waldrep and Cindy Wilson, dating back to 2005. In concluding the County had unclean hands, the court specifically found the behavior of Waldrep and Cindy Wilson—along with incoming members of the 2009 Council—"prejudiced Preston in the execution of his duties, prompting his assertion of the anticipatory breach claim and tort claims in the first instance."

As noted above, the County was not responsible for the conduct of its incoming Council members, and thus, their conduct prior to taking office is irrelevant here. We find the court's reliance upon meetings that took place between incoming Council members in 2009 misplaced because the instant matter concerns actions leading up and relating to the November 18, 2008 meeting of the 2008 Council. What occurred after this meeting among individuals not yet sworn into office simply has no bearing upon the resolution of this issue. More importantly, much of the conduct referenced by the circuit court was already litigated in separate matters not before the court.

For these reasons, we hold the circuit court erred in considering conduct that—although indicative of "the atmosphere that surrounded the actors in this case"—was irrelevant to the subject matter of the instant litigation. *See Arnold*, 201 S.C. at 532, 23 S.E.2d at 738; *Anderson*, 365 S.C. at 493, 617 S.E.2d at 756. We find the court ignored the requirements of *Arnold* and *Anderson* in concluding such conduct prejudiced Preston in the execution of his duties as county administrator because, simply put, Preston's ability to execute his duties as county administrator has nothing to do with this case. The instant litigation focuses on whether improper conduct at the November 18, 2008 meeting of the 2008 Council requires this court to invalidate the approval of Preston's Severance Agreement and rescind the agreement itself. Furthermore, Preston had already relinquished his position as county administrator before the 2009 Council decided to bring this action.

Based on the foregoing, we hold the circuit court erred in finding the County could not invoke its equitable powers to rescind the Severance Agreement because the County had unclean hands. Although we agree rescission is unavailable as a remedy in this case, we reverse the circuit court's finding that the County had unclean hands.

VII. Adequate Remedy at Law

The County contends the circuit court further erred in finding equitable relief was unavailable in this case because an adequate remedy at law existed. We agree.

Generally, equitable relief is available only when no adequate remedy at law exists. *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). "An 'adequate' remedy at law is one which is as certain, practical, complete[,] and efficient to attain the ends of justice and its administration as the remedy in equity." *Id.* Our supreme court has consistently held that "[a] suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 593, 748 S.E.2d 781, 785 (2013) (quoting *Felts v. Richland Cty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)). "Whether an action for declaratory relief is legal or equitable in nature depends on the plaintiff's main purpose in bringing the action." *Williams v. Wilson*, 349 S.C. 336, 340, 563 S.E.2d 320, 322 (2002).

In the Final Order, the circuit court concluded if the County "wished to question the legality of the Severance Agreement," then it could have accomplished this goal by bringing a declaratory judgment action challenging the legality of the 2008 Council's actions "without suing Mr. Preston directly for rescission."

Contrary to the circuit court's findings, the County argues it could not have received the complete relief sought—the return of all monies appropriated to fund the Severance Agreement—without the court invalidating the vote, rescinding the contract, and imposing a constructive trust on Preston's monthly retirement benefits. The County's main purpose in bringing this action was to seek the above equitable relief, not merely to question the legality of the Severance Agreement. Because the anti-alienation provision in section 9-1-1680 of the South Carolina Code (Supp. 2016), only allows a party to reach a retiree's benefits in a constructive trust case, we find no adequate remedy at law existed as to this equitable claim. Regardless of whether rescission was available, the County could

not have received complete relief without the court invoking its equitable powers to place Preston's retirement benefits in a constructive trust. Thus, we find a declaratory judgment action would not have afforded the complete relief sought in this action. *See Santee Cooper*, 298 S.C. at 185, 379 S.E.2d at 123 (noting "[a]n adequate remedy at law is one which is as certain, practical, complete[,] and efficient to attain the ends of justice and its administration as the remedy in equity" (citation omitted)). Further, as noted above, a declaratory judgment action can be equitable in nature—and indeed, would have been given the relief sought in this case.

Accordingly, given that no adequate remedy at law existed, we reverse the circuit court's finding that the County could not invoke its equitable powers because the County could have challenged the Severance Agreement's legality via a declaratory judgment action instead of directly suing Preston.

VIII. Breach of the Severance Agreement

In light of our previous holding that the Severance Agreement is invalid because it was approved during an absence of a quorum, we find Preston can no longer succeed on his breach of contract counterclaim. Accordingly, we reverse the circuit court's finding that the County breached the covenant not to sue provision in the Severance Agreement by bringing the instant action. We decline to address whether attorney's fees are appropriate because the circuit court found this issue "should be held in abeyance pending the final disposition of this case and the filing of any petition as required by law."

IX. Remaining Issues

Finally, because our resolution of prior issues is dispositive in this appeal, we decline to rule upon whether the circuit court erred in finding the Severance Agreement was not unreasonable and capricious; a product of fraud and abuse of power; or void as against public policy. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

CONCLUSION

Like the circuit court, we are mindful of the separation of powers concerns attendant to the judicial branch of government overturning the action of a duly

elected county council, and therefore, take this opportunity to clarify that nothing in this opinion shall be construed as passing judgment on the merits or propriety of the 2008 Council's decision. Our decision hinges on the narrow question of whether the 2008 Council had legal authority to approve the Severance Agreement when four of the seven members, despite having clear conflicts of interest, improperly cast their votes on the matter. We hold the 2008 Council had no such authority because it could not legally act in the absence of a quorum. As a result, the Severance Agreement is null and void.

We affirm the circuit court's finding that Preston owed no fiduciary duty to inform the 2008 Council of improper votes and his conduct did not constitute fraud, constructive fraud, or negligent misrepresentation. The circuit court also properly declined the County's invitation to apply the single tainted vote rule because *Baird* demonstrates South Carolina does not follow such rule. We hold the court erred, however, in refusing to invalidate the 2008 Council's approval of the Severance Agreement based upon the absence of a quorum, and accordingly, we reverse. Although we agree with the circuit court that rescission is not an available remedy because the parties cannot be returned to their status quo ante, we reverse the court's finding of unclean hands. We further reverse the court's finding that the County could not invoke its equitable powers because an adequate remedy at law existed. Lastly, we reverse the court's holding that the County breached the terms of the Severance Agreement by bringing the instant action.

AFFIRMED IN PART and REVERSED IN PART.

HUFF, J., concurs. FEW, A.J., not participating.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Lance Leon Miles, Appellant.

Appellate Case No. 2015-000308

Appeal From Lexington County
Thomas A. Russo, Circuit Court Judge

Opinion No. 5511
Heard June 7, 2017 – Filed August 23, 2017

AFFIRMED

Appellate Defender John Harrison Strom, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Megan Harrigan Jameson, Assistant Deputy Attorney General David A. Spencer, all of Columbia; and Solicitor Samuel R. Hubbard, III, of Lexington, for Respondent.

HILL, J.: Lance L. Miles appeals his conviction for trafficking in illegal drugs in violation of section 44-53-370(e)(3) of the South Carolina Code (Supp. 2016). He argues the trial court erred by: (1) instructing the jury, in reply to a question they posed during deliberation, that the State did not have to prove Miles knew the drugs were oxycodone; (2) denying his directed verdict motion; and (3) admitting three

statements he contends were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1960). We affirm.

I.

While scanning parcels for illegal drugs at the Federal Express office in West Columbia, agents from the Lexington County Sheriff's Office became suspicious of a package. They arranged for a controlled delivery to the listed address, which was within an apartment complex. Surveilling the delivery, they observed the delivery person ring the doorbell and leave the package by the front door. A few moments later, an agent noticed Miles exit a nearby apartment and begin walking around the parking lot. The agent then saw a young female emerge from the delivery address. She looked at the box, got on her phone, quickly hung up and went back inside. Miles then got on his phone while walking towards the box. Miles picked up the box and started back to his apartment. Seeing the agents advancing to intercept him, he tried to ditch the box. The agents apprehended and handcuffed him.

Agent Edmonson immediately questioned Miles about the contents of the box. Miles claimed he did not know what was inside. Edmonson then asked if there were drugs inside the box; Miles responded there probably were, but he did not know what kind. At this point, Edmonson read Miles his *Miranda* rights and asked Miles again whether there were drugs in the box. Miles again responded the box could contain drugs, but he did not know what kind. Upon obtaining a search warrant and Miles' consent, the agents opened the box and discovered three hundred pills that a chemist later testified contained a total of nine grams of oxycodone. Edmonson next asked Miles to write down everything he knew about the box and the drugs. Edmonson then reread Miles his *Miranda* rights, and Miles wrote a statement admitting he had been paid one hundred dollars to pick up the box, someone named "Mark" had called him to pick it up, and the "owner" was a "Stacks" from Tennessee.

Edmonson then wrote out two questions. First, "Did you know drugs are in the parcel 'box'?" Miles wrote, "Yes." The second question and answer—related to Miles' admission that he had previously picked up packages for money—were redacted and not presented to the jury.

Miles was indicted for trafficking in illegal drugs, in violation of section 44-53-370(e)(3). He did not testify at his trial and moved unsuccessfully for directed verdict, arguing in part there was insufficient evidence he knew the box contained oxycodone. During the jury charge, the trial court gave the following instruction:

> Mr. Miles is charged with trafficking in illegal drugs and in this case we are referring to [o]xycodone. The State must prove beyond a reasonable doubt that the Defendant knowingly delivered, purchased, brought into this state, provided financial assistance or otherwise aided, abetted, attempted or conspired to sell, deliver, purchase, or bring into this state and was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive pos[session] of the [o]xycodone. Possession may be either . . . actual or constructive.

The trial court charged that the State bore the burden of proving the amount of oxycodone was more than four grams. The trial court further instructed that the State had to prove criminal intent, which required a "conscious wrongdoing," and that intent may be inferred from the conduct of the parties and other circumstances. After deliberating for some time, the jury asked the following question: "Does the [S]tate have to prove that the defendant knowingly brought into the state four grams or more of [o]xycodone or just any amount of illegal drugs in order to consider this trafficking?"

The trial court, over Miles' objection, replied to the jury as follows:

> [T]he law in South Carolina is the State does not have to prove that the Defendant knew that the drugs in the package were [o]xycodone, just that he knew that the package contained illegal drugs. However, the State does have to prove beyond a reasonable doubt that the illegal drugs that were in the package w[ere] more than four grams of [o]xycodone.

The jury later returned with a verdict of guilty. Because Miles had at least two prior drug convictions, he was sentenced to the mandatory minimum term of twenty-five years, and ordered to pay a $100,000 fine.

II.

Miles' primary argument on appeal is the trial court's supplemental charge misinformed the jury that the State did not need to prove beyond a reasonable doubt that Miles knew the drug he possessed was oxycodone. We review jury instructions to determine whether they, as a whole, adequately communicate the law in light of

the issues and evidence presented at trial. *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013).

Section 44-53-370(e)(3) provides in part:

> Any person who *knowingly* sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is *knowingly* in actual or constructive possession or who *knowingly* attempts to become in actual or constructive possession of: . . . four grams or more of any morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin, as described in Section 44-53-190 or 44-53-210, or four grams or more of any mixture containing any of these substances, is guilty of a felony which is known as "trafficking in illegal drugs" . . . .

(emphases added).

Miles contends the term "knowingly" as used in subsection (e) applies to each element of the trafficking offense, including the specific type of drugs listed in (e)(3). The issue of whether trafficking requires proof, not only that the defendant knowingly intended to "sell[], manufacture[], cultivate[] . . ." or "posses[]" illegal drugs, but also had knowledge of the precise identity of the illegal drug being trafficked, has, surprisingly, never been addressed by our appellate courts.

We are mindful that "statutory interpretation begins (and often ends) with the text of the statute in question. Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning." *Smith v. Tiffany*, 419 S.C. 548, 555–56, 799 S.E.2d 479, 483 (2017) (citations omitted).

Courts grapple often with that tricky adverb "knowingly." In *United States v. Jones*, 471 F.3d 535, 538 (4th Cir. 2006), the court construed a federal statute that punished "[a] person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce . . . with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." (quoting 18 U.S.C. § 2423(a) (2000 & Supp. 2003)). Rejecting the argument that the government was required to prove the defendant knew the

person transported was a minor, Judge Wilkinson noted:

> [C]onstruction of the statute demonstrates that it does not require proof of the defendant's knowledge of the victim's minority. It is clear from the grammatical structure of § 2423(a) that the adverb "knowingly" modifies the verb "transports." Adverbs generally modify verbs, and the thought that they would typically modify the infinite hereafters of statutory sentences would cause grammarians to recoil. We see nothing on the face of this statute to suggest that the modifying force of "knowingly" extends beyond the verb to other components of the offense.

Id. at 539.

The United States Supreme Court has not been so gun-shy about the adverb.[1] They ordinarily read a "statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009). They have also found "the word 'knowingly' applies not just to the statute's verbs but also to the object of those verbs." *McFadden v. United States*, 135 S. Ct. 2298, 2304 (2015).

But the Court has not gone so far as to hold that a criminal statute that opens with "knowingly" invariably requires each element be proven by that level of intent. It is commonplace that "different elements of the same offense can require different mental states." *Staples v. United States*, 511 U.S. 600, 609 (1994). Even in *Flores-Figueroa*, the Court acknowledged that "knowingly" does not always modify every element, particularly where the statutory sentences at issue "involve special contexts or . . . background circumstances that call for such a reading." 556 U.S. at 652. The Court emphasized that "the inquiry into a sentence's meaning is a contextual one." *Id.*; *see also Avis Rent A Car Sys., Inc. v. Hertz Corp.*, 782 F.2d 381, 385 (2d Cir. 1986) ("Fundamental to any task of interpretation is the principle that text must yield to context.") (Friendly, J.).

Our duty is to determine legislative intent, and the text of the statute is often the best evidence of that intent. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Yet the text "must be construed in context and in light of the intended purpose of the statute in a manner which harmonizes with its subject matter and

[1] We suspect the bar for causing grammarians to recoil is low.

accords with its general purpose." *Cabiness v. Town of James Island,* 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011) (citation and internal quotations omitted).

We find that by using "knowingly" in subsection (e), the Legislature did not intend to require the State to prove a defendant knew the specific type of illegal drug he was trafficking. Section 44-53-370 is concerned with criminalizing numerous forms of conduct involving illegal drugs. Thus, subsection (c) decrees "[i]t shall be unlawful for any person knowingly or intentionally to possess a controlled substance," subject to certain exceptions not relevant here. S.C. Code Ann. § 44-53-370(c) (Supp. 2016). Our supreme court has held the language now codified in subsection (c) requires the State to prove beyond a reasonable doubt that the defendant knew he possessed a "controlled substance." *State v. Attardo*, 263 S.C. 546, 549, 211 S.E.2d 868, 869 (1975). Subsection (d) then sets forth the penalties for possession based on the type of controlled substance. S.C. Code Ann. § 44-53-370(d) (Supp. 2016).

This brings us to trafficking, subsection (e). Tellingly, our supreme court has explained "[i]t is the amount of [the controlled substance], rather than the criminal act, which triggers the trafficking statute, and distinguishes trafficking from distribution and simple possession." *State v. Raffaldt,* 318 S.C. 110, 117, 456 S.E.2d 390, 394 (1995). While the court in *Raffaldt* was not confronted with the mental state required for a trafficking conviction, that issue was addressed in *State v. Taylor*, 323 S.C. 162, 166, 473 S.E.2d 817, 819 (Ct. App. 1996). In *Taylor*, the defendant was charged with trafficking more than ten grams of crank, in violation of section 44-53-375(C) of the South Carolina Code (Supp. 1995), which contains language nearly identical to section 44-53-370(e), including placement of the adverb "knowingly." Taylor argued the language required the trial court to charge the jury that "they could not find [her] guilty of trafficking in crank unless she knew there were ten grams or more." *Taylor*, 323 S.C. at 107, 473 S.E.2d at 819. Relying on *Raffaldt,* we disagreed. *Id*.

Raffaldt and *Taylor* illuminate the "special context" revealed by viewing section 44-53-370 as a whole. Because section 44-53-370(c) only requires knowledge that the substance is "controlled," and because *Raffaldt* and *Taylor* tell us the only difference between the elements of distribution and simple possession and the elements of trafficking is the amount of the controlled substance involved, there is no reason to suspect the Legislature meant to require knowledge of the specific type of controlled substance in trafficking prosecutions. Miles' interpretation depends upon isolating "knowingly" in subsection (e) and extending its modifying reach not only to "possession," but to the specific type of drugs listed. Magnifying individual

words of a statute and insisting they be interpreted concretely can lead to strange results. One could, for example, myopically diagram subsection (e)(3) and conclude it criminalizes the possession of more than four grams of table salt, or even the conduct of the delivery person in this case. Further, were we to adopt Miles' version of subsection (e), the State would have to convince the jury beyond a reasonable doubt the defendant not only knew the drugs were oxycodone, but also knew that oxycodone is a "morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin, as described in Section 44-53-190 or 44-53-210, or . . . any mixture containing any of these substances." We doubt the Legislature, in passing the drug trafficking laws, meant to create a scenario where a defendant is culpable only if armed with a proficiency in chemistry on par with a pharmacist or Walter White.[2] That is why considering the words in their surrounding environment is essential, especially here where the statute runs to nearly five-thousand words and represents the Legislature's will in the massive field of drug interdiction. Given this background, "[i]f ever we are justified in reading a statute, not narrowly as through a keyhole, but in the broad light of the evils it aimed at and the good it hoped for, it is here." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 557 (1943) (Jackson, J., dissenting).[3]

When a statute can be read in its ordinary sense, courts have no right to engineer an extraordinary one. That the Legislature titled the offense defined by subsection (e) as "trafficking in illegal drugs" affirms our conclusion that a defendant need not know the precise identity of the controlled substance to be guilty. *See Univ. of S.C. v. Elliott*, 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966) ("[I]t is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature."). This sense becomes inescapable when we consider subsection (e)'s reference to sections 44-53-190 and 44-53-210 of the South Carolina Code (Supp. 2016), which set forth Schedules I and II governing classification of controlled substances. While we can interpret statutes by bringing in rules of grammar, logic, and other tools, we must be careful not to construe common sense out.

Courts in many other states share our conclusion that proving the defendant knew the specific type of drug is not required in trafficking and other controlled substance offenses. *See, e.g.*, *State v. Stefani*, 132 P.3d 455, 461 (Idaho Ct. App. 2005); *People v. Bolden*, 379 N.E.2d 912, 915 (Ill. 1978); *Com. v. Rodriguez*, 614 N.E.2d 649, 653

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[2] *Breaking Bad* (AMC 2008–13).

[3] Our emphasis on context and structure bears on the threshold decision of whether the statute is ambiguous, and is not meant to dilute the rule of lenity, as we later discuss.

(Mass. 1993); *State v. Ali*, 775 N.W.2d 914, 919 (Minn. Ct. App. 2009); *State v. Edwards*, 607 A.2d 1312, 1313 (N.J. Super. Ct. App. Div. 1992); *State v. Engen*, 993 P.2d 161, 170 (Or. 1999*)*; *State v. Sartin*, 546 N.W.2d 449, 455 (Wis. 1996).

We cannot leave this issue without discussing the important canon of statutory construction that penal statutes are to be strictly construed. This rule of lenity applies when a criminal statute is ambiguous, and requires any doubt about a statute's scope be resolved in the defendant's favor. *Berry v. State*, 381 S.C. 630, 633, 675 S.E.2d 425, 426 (2009). But the rule of lenity is not a device to create ambiguity, nor should a court invoke it before considering the words of the statute in context. *State v. Dawkins*, 352 S.C. 162, 166–67, 573 S.E.2d 783, 785 (2002); *State v. Firemen's Ins. Co. of Newark, N.J.,* 164 S.C. 313, 162 S.E. 334, 338 (1931) ("The rule that a penal statute must be strictly construed does not prevent the courts from calling to their aid all the other rules of construction and giving each its appropriate scope, and is not violated by giving the words of the statute a reasonable meaning according to the sense in which they were intended, and disregarding . . . even the demands of exact grammatical propriety." (citation and internal quotations omitted)); *see also United States v. Bass,* 404 U.S. 336, 347 (1971) (court should rely on lenity only if, "[a]fter 'seiz[ing] every thing from which aid can be derived,'" it is "left with an ambiguous statute" (quoting *United States v. Fisher*, 6 U.S. 358, 386 (1805) (Marshall, C.J.))).

One of the foundations of the rule of lenity is the concept of fair notice—the idea that those trying to walk the straight and narrow are entitled to know where the line is drawn between innocent conduct and illegality. *McBoyle v. United States*, 283 U.S. 25, 27 (1931) ("[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."). The line for conduct involving contraband is not merely clear but fluorescent. At least since *State v. Freeland,* 106 S.C. 220, 91 S.E. 3 (1916), we have required a defendant to know or be willfully ignorant that he was dealing with contraband drugs to satisfy criminal intent. This removes innocent activity, inadvertence or accident from the law's grasp. At any rate, we need not apply the rule of lenity here, as context has convinced us section 44-53-370(e)(3) does not require proof of knowledge of the specific identity of the controlled substance. *Carter v. United States,* 530 U.S. 255, 269 (2000) (courts are required "to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct'").

Another foundation of the rule of lenity is the separation of powers. Our Constitution commits the task of defining criminal offenses solely to the Legislative Branch.

Bass, 404 U.S. at 347-48; *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). If the Legislature believes our interpretation expands or is otherwise contrary to the scope it intended section 44-53-370(e)(3) and its harsh penalty scheme to have, they can amend the statute.

The trial judge's instructions—including his initial charge that criminal intent consists of "conscious wrongdoing"—conveyed the pertinent legal standards to the jury. He further correctly charged that the State still bore the burden of proving the drug quantity and identity.

III.

Miles next argues he was entitled to a directed verdict because the State presented insufficient evidence that he knowingly trafficked oxycodone. As we have held, the State needed only to prove Miles knew the item was a controlled substance. Because there was evidence Miles possessed the box, the jury was free to infer he knew what was in it. As the assistant solicitor pointed out, the evidence was literally lying at Miles' feet. *See State v. Gore*, 318 S.C. 157, 163, 456 S.E.2d 419, 422 (Ct. App. 1995) ("Possession gives rise to an inference of the possessor's knowledge of the character of the substance."). Of course, Miles also admitted he knew the box contained drugs. Viewing the evidence in the light most favorable to the State, these circumstances go far beyond mere suspicion. There was ample direct and substantial circumstantial evidence from which Miles' guilt could be fairly and logically deduced. Rule 19, SCRCrimP; *State v. Odems,* 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

IV.

Miles contends the series of three statements he gave to law enforcement should have been suppressed because the agents engaged in the "question-first" manipulation of *Miranda* forbidden by *Missouri v. Seibert*, 542 U.S. 600 (2004), and *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010). He asserts Agent Edmonson's immediate questioning of him upon arrest was a custodial interrogation triggering *Miranda*. At trial, the State conceded as much and agreed not to present evidence of Miles' first two statements. But, during a later bench conference, Miles agreed to their admissibility, which is unsurprising as this strategy allowed Miles to get his theory of the case—that he didn't know what kind of drugs were in the package—before the jury without having to take the stand. *See State v. Bryant*, 372 S.C. 305, 642 S.E.2d 582 (2007) (stating an issue conceded at trial cannot be argued on appeal).

The issue of whether admission of Miles' third, written statement violated *Seibert* and *Navy* is unpreserved. Miles did not raise these cases or the "question-first" principle to the trial court. *See State v. Byers*, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) ("For an admissibility error to be preserved, the objection must include a specific ground 'if the specific ground was not apparent from the context.'" (quoting Rule 103(a)(1), SCRE)); *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court. In other words, the trial court must be given an opportunity to resolve the issue before it is presented to the appellate court." (citation omitted)).

Even if the issue was preserved, any error in admitting the redacted written statement was harmless. The statement was cumulative and could not have reasonably contributed to the verdict. It did not contradict Miles' earlier statements that he did not know the type of drugs in the box, and added he was paid one-hundred dollars to retrieve it. *See State v. Martucci*, 380 S.C. 232, 261, 669 S.E.2d 598, 614 (Ct. App. 2008) ("The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence."). We cannot imagine the vague references to others involved packed any punch with the jury.

V.

The trial court did not err in its supplemental instruction to the jury that the State was only required to prove Miles knowingly trafficked in a controlled substance. There was sufficient evidence to carry the case to the jury, and even if the *Miranda* issue was preserved, we find no prejudice. Miles' conviction is therefore

AFFIRMED.

GEATHERS and MCDONALD, JJ., concur.