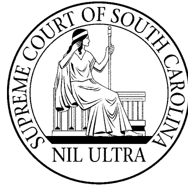

The Supreme Court of South Carolina

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N O T I C E

In the Matter of Gregory Alan Newell

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

The Committee on Character and Fitness has now scheduled a hearing in this regard on August 29, 2018, beginning at 3:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

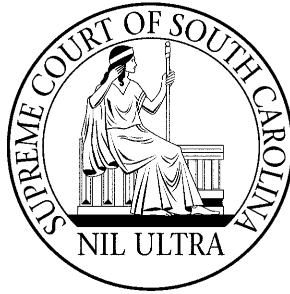
Any individual may appear before the Committee in support of, or in opposition to, the petition.

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

Columbia, South Carolina

July 30, 2018

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



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 32
August 8, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Transportation, Respondent,

v.

David Franklin Powell, Petitioner.

Appellate Case No. 2016-000594

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 27827
Heard January 31, 2018 – Filed August 8, 2018

REVERSED

Howell V. Bellamy, Jr. and Robert S. Shelton, both of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., of Myrtle Beach, for Petitioner.

John B. McCutcheon, Jr., of Thompson & Henry, PA, of Conway, and Beacham O. Brooker, Jr., of Brooker Law Offices LLC, of Columbia, for Respondent.

JUSTICE HEARN: In this case we review the propriety of a grant of partial summary judgment in a condemnation action. The court of appeals affirmed the circuit court's ruling that the landowner, David Powell, was not entitled to compensation for any diminution in value of his remaining property due to the rerouting of a major highway which previously was easily accessible from his property. *S.C. Dep't of Transp. v. Powell*, 415 S.C. 299, 781 S.E.2d 726 (Ct. App. 2015). We reverse and remand for a jury trial.[1]

FACTUAL/PROCEDURAL BACKGROUND

South Carolina Department of Transportation (SCDOT) condemned a portion of Powell's 2.5 acre property in connection with its upgrade to U.S. Highway 17 Bypass (the Bypass) near the Backgate area of Myrtle Beach. His unimproved parcel, located on the corner of Emory Road and Old Socastee Highway, was originally separated from the Bypass by a power line easement and a frontage road; access to that major thoroughfare was via Emory Road, which intersected with the Bypass. Because Powell's property was zoned "highly commercial," his easy access to the Bypass significantly enhanced its value.

To improve traffic flow in the area, SCDOT converted the Bypass into a controlled access highway whereby entrance and exit ramps provided the only access to motorists. These ramps alleviated the need for several intersections, including the intersection of Emory Road and the Bypass (the Intersection), which SCDOT subsequently closed. To facilitate the closure of the Intersection, SCDOT filed a condemnation notice in August of 2010, informing Powell of its plan to acquire 0.183 acres of his property to reroute the abutting road.

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[1] Powell raises three additional issues: (1) whether the court of appeals affirmed factual conclusions not supported in the record, (2) whether the court relied upon an expert that Powell purportedly did not have the opportunity to question, and (3) whether the court of appeals erred by holding Powell was not entitled to recover compensation without first determining whether the diminution in value constituted a material injury. Because we hold Powell is entitled to present evidence of the diminution in value of his remaining property, we decline to reach these issues. *State v. Rivera*, 402 S.C. 225, 250, 741 S.E.2d 694, 707 (2013) (stating that once an issue is dispositive, an appellate court does not need to address any remaining arguments).

SCDOT's expert appraiser, Corbin Haskell, authored three reports, each estimating Powell's loss between $68,000 and $71,000. Rather than accepting SCDOT's offer of compensation, Powell demanded a jury trial pursuant to Section 28-2-310 of the South Carolina Code (2007). A few days before the commencement of trial, SCDOT informed Powell's attorney that the construction plans had changed, with SCDOT deciding to eliminate the frontage road and turn it into a cul-de-sac. As a result, SCDOT moved for a continuance, allowing Haskell time to draft a fourth report that accounted for the cul-de-sac. According to the new construction plan, access from the Bypass to Powell's property would be substantially restricted. Travelers on the Bypass could reach Powell's property via the Farrow Parkway exit south of the property and travel north for about one mile, or they could exit one mile north of Powell's property and travel south, a distance of 2.24 miles for northbound travelers and 1.25 miles for southbound travelers.

In Haskell's fourth report, he appraised the 0.183 acres at $72,000; however, he opined the closure of the Intersection and the addition of the cul-de-sac would cause a fifty percent diminution in value to the remaining property. He calculated this substantial loss in value to the remainder at $445,000, bringing the total projected compensation to $517,000. When Haskell submitted the report to SCDOT, counsel for SCDOT informed him that Powell was not entitled to compensation for the loss of indirect access to the Bypass. As a result, SCDOT sought to withdraw his fourth report and replace it with a fifth appraisal, correcting what it viewed as compensation for a loss not cognizable under the law. Thereafter, following the instructions from SCDOT's attorney, Haskell revised his figure to $72,000 and issued his fifth report, returning to his original finding that Powell only was entitled to compensation for the loss of 0.183 acres. SCDOT then filed a motion in limine to exclude Haskell's report which estimated compensation at $517,000. With the parties' consent, the circuit court converted the motion in limine into a motion for partial summary judgment so as to permit an immediate appeal, and ruled that under *Hardin*,[2] the loss of indirect access to the Bypass was not compensable even though the court acknowledged the remainder of Powell's property would suffer a diminution in value.

The court of appeals affirmed, holding that although the circuit court erred in its application of *Hardin*, it nevertheless reached the proper conclusion that the loss

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[2] *Hardin v. S.C. Dep't of Transp.*, 371 S.C. 598, 641 S.E.2d 437 (2007)

of indirect access to the Bypass was not compensable. *Powell*, 415 S.C. at 306–07, 781 S.E.2d at 730. Specifically, the court of appeals relied on *South Carolina State Highway Department v. Carodale Associates*, 268 S.C. 556, 235 S.E.2d 127 (1977), where this Court held a landowner could recover for damages derived from the physical appropriation of his property, but he could not recover for the diversion of traffic flow as a result of SCDOT's decision to reconfigure an abutting road under the state's police powers. Additionally, the court of appeals distinguished *South Carolina State Highway Department v. Wilson*, 254 S.C. 360, 175 S.E.2d 391 (1970), where this Court held the landowner could not only recover for the direct taking, but also for loss of access when SCDOT blocked off a median, under the rationale that but for the direct taking, no loss of access to the abutting roadway would have occurred. The court of appeals ultimately concluded this case aligned more with *Carodale* than with *Wilson* because SCDOT's decision to close the Intersection was independent, and not incidental, to its eminent domain power. *Powell*, 415 S.C. at 310, 781 S.E.2d at 731. Finding that South Carolina Code Section 28-2-370 (2007) permits the consideration of any diminution in the value when determining just compensation for a taking, we now reverse for a jury to determine the amount of damages Powell is entitled to receive from SCDOT.

STANDARD OF REVIEW

An appellate court reviews a motion for summary judgment under the same lens employed by the circuit court whereby all facts are viewed in favor of the nonmoving party. *Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, 391 S.C. 429, 434, 706 S.E.2d 501, 504 (2011). Summary judgment should not be granted if further development of the facts would assist in the application of the law. *Mosteller v. Cty. of Lexington*, 336 S.C. 360, 362, 520 S.E.2d 620, 621 (1999). The interpretation of a statute is a question of law reviewed de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

ANALYSIS

We begin our analysis with the South Carolina Constitution, which states, "[P]rivate property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property." S.C. Const. art. I, § 13. Prior to the adoption of our state constitution, the State exercised the power of eminent domain by taking private property without compensating its owner. *S.C. State Highway Dep't v. Miller*, 237 S.C. 386, 390, 117 S.E.2d 561, 562 (1960). In Section 28-2-370 of the South Carolina Code (2007), the

General Assembly established how just compensation should be ascertained in an eminent domain proceeding: "In determining just compensation, only the value of the property to be taken, any diminution in the value of the landowner's remaining property, and any benefits as provided in Section 28-2-360 may be considered." Powell asserts the court of appeals erred in upholding the circuit court's order for summary judgment because under the plain language of this statute, he is entitled to any diminution in value to the remaining property as a result of the taking. Powell's argument is that because SCDOT acquired a portion of his property through condemnation—admittedly a taking—our analysis is different than that employed in determining *whether* a taking has occurred. *See Hilton Head Auto., LLC v. S.C. Dep't of Transp.*, 394 S.C. 27, 33, 714 S.E.2d 308, 311 (2011) ("[W]e find no taking has occurred, and therefore, we do not reach the issue of damages. *Wilson* does not apply."). Because our focus should be only on the damages that arise from the taking, Powell argues that section 28-2-370 allows him to present to the jury evidence of the diminution in value of the remainder of his property.

SCDOT, on the other hand, urges a more restrictive interpretation of the just compensation statute whereby only damages resulting from the actual taking of the 0.183 acres are recoverable. To support its reading of section 28-2-370, SCDOT points to this Court's construction of a prior statute[3] governing compensation for takings. *S.C. State Highway Dep't v. Bolt*, 242 S.C. 411, 417, 131 S.E.2d 264, 267 (1963) ("[Damages to the remainder] which are the direct and proximate consequence of the acquisition of the right of way [are compensable]. In other words, as a general rule, special damages include all injuries or damages which cause a diminution in the value of the remaining property."). Essentially, SCDOT contends the analysis of whether a taking has occurred must be conducted with respect to *each action* that produces a diminution of value in the remaining property. Under SCDOT's theory, there are two distinct actions here: (1) the physical appropriation of 0.183 acres, and (2) the closure of the Intersection and the creation of the cul-de-sac. According to SCDOT, while the first act constitutes a taking, the second does not, and therefore, the statute governing compensation applies only to the first action.

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[3] Section 33-135 of the 1962 Code states: "In assessing compensation and damages for rights of way, only the actual value of the land to be taken therefor and any special damages resulting therefrom shall be considered."

Finally, SCDOT argues that under this Court's jurisprudence, whether a property owner is entitled to compensation for loss of indirect access depends on whether the condemnor exercises its police powers—where no compensation is due—versus its eminent domain powers—where compensation is required. SCDOT relies on *Carodale* and *Hardin* to support its assertion that Powell is not entitled to compensation for the closure of a nearby intersection, which is simply an exercise of the State's police powers.

We disagree with SCDOT that inverse condemnation cases, which are concerned with the threshold question of whether a taking has occurred, preclude recovery to Powell. Here, a taking has indisputably occurred and the jury should determine whether the closure of the Intersection proximately caused a diminution in the value to the remainder of Powell's property. Thus, as the court of appeals properly held, the principles enunciated in *Hardin* are not applicable.

Here, there is no question that a taking has occurred—SCDOT acquired 0.183 acres of Powell's property as part of its overall road improvement project. Accordingly, rather than the jurisprudence governing whether a change in roadway access constitutes a taking, section 28-2-370 controls, and the lone question is the amount of compensation which may be awarded to Powell. That statute explicitly authorizes compensation for "any diminution in value to the remaining property," and we see no reason why a jury should not decide the extent of Powell's damages.

We believe *Wilson* supports our view that whether Powell is entitled to recover damages related to the closure of the Intersection and the installation of the cul-de-sac is a jury question. There, the Court upheld a jury verdict in favor of a landowner over the Highway Department's objection to evidence of a diminution in property value caused by the installation of a median which prevented left turns onto a highway abutting Wilson's property. *Wilson*, 254 S.C. at 368, 175 S.E.2d at 396. As part of that project, the Highway Department acquired a small portion of Wilson's property and relocated a county road over the property, thus resulting in a direct taking. *Id.* at 364, 175 S.E.2d at 393. In addition to the county road, another highway abutted his property, which had previously allowed Wilson to turn left from his property onto the highway. *Id.* However, as part of the plan to reconfigure the county road, the Highway Department constructed a median on the highway, thereby preventing Wilson from accessing the highway except from the relocated county road. *Id.* An expert testified Wilson's remaining property value was significantly impaired as a result of this loss of access, and the Highway Department objected, contending only the actual acquisition of his property for the county road was

compensable. *Id.* at 365, 175 S.E.2d at 394. Additionally, the Highway Department requested the jury be instructed that evidence related to the construction of the median could not be considered in awarding compensation for the diminution in value to the remainder of his property. *Id.* However, in affirming the trial court's decision to reject the charge, this Court focused on the fact that but for the acquisition of the landowner's property used for the reconfiguration of the county road, the Highway Department would not have installed a median. *Id.* at 369, 175 S.E.2d at 396. The Court acknowledged,

> While the construction of a median, with nothing more, may very well be an exercise of the police power with no resulting compensable damage to an abutting property owner, in the instant case the proposed median is only an incidental part of the overall Department plans and contemplated construction. There is no suggestion of the need for, or the contemplated construction of, a median except as an incidental part of the major relocation and construction plans of the Department. But for such overall construction and relocation, and condemnation under the power of eminent domain for such purposes, there would have been no median and, of course, no damage to the abutting landowner. It logically follows, we think that any damage attributable to the planned median is an incidental result of the exercise of the power of eminent domain.

Id. at 368–69, 175 S.E.2d at 396. Thus, because the direct taking of the landowner's property occurred under the Highway Department's power of eminent domain—requiring compensation to the property owner—the Court held the closure of the median was an incidental result and therefore, the landowner could recover compensation as part of the remaining property's fair market value despite the general rule that the mere closure of a road or lane does not constitute an inverse condemnation. *Id.*

However, SCDOT argues that *Carodale* supports its position that Powell is not entitled to recover for the diminution in value of his property because of the loss of easy access to the Bypass. In *Carodale*, a portion of land was acquired to construct an exit ramp off I-77 and the reconfiguration of U.S. Highway 1, which fronted the landowner's property. *Carodale*, 268 S.C. at 560, 235 S.E.2d at 128. SCDOT objected to testimony about the loss of frontage on U.S. Highway 1, arguing that it was irrelevant because only the property taken to build the exit ramp was compensable. *Id.* While the Court agreed with SCDOT, it recognized, "[T]he

restriction of ingress or egress to and from one's property is the right which must be compensated if infringed when a highway is closed by condemnation." *Id.* at 561, 235 S.E.2d at 129.

Although the court of appeals held *Carodale* limited Powell's right to compensation, that case addressed damages stemming from *loss of traffic flow*, rather than those flowing from loss of access as involved in *Wilson*. We find Powell's case more analogous to *Wilson* because he claims the closure of the Intersection and the termination of the frontage road into a cul-de-sac impaired his *access* to the Bypass which, according to SCDOT's own appraiser, resulted in a fifty percent reduction in value to his nearly $1 million piece of property.[4] Furthermore, *Wilson*

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[4] We find the dissent's narrow interpretation of *Wilson* misses a critical principle—that is, when determining just compensation, the inquiry extends not just to the value of the land taken, but also to "'how much has the particular public improvement decreased the fair market value of the property, *taking into consideration the use for which the land was taken* and *all the reasonably probable effects of its devotion to that use*.'" *Wilson*, 254 S.C. at 369, 175 S.E.2d at 396 (quoting *S.C. State Highway Dep't v. Bolt*, 242 S.C. 411, 131 S.E.2d 264 (1963) (emphasis added)). Thus, *Wilson* requires that a court look at the consequential diminution in value to the landowner's property caused by the public improvement and the reasonably probable effects of its use. *See S.C. State Highway Dept. v Touchberry*, 248 S.C. 1, 7, 148 S.E.2d 747, 749 (1966) (explaining "the different elements of damage to remaining land recoverable when part of a tract is taken are as numerous as the possible forms of injury"). Our disagreement with the dissent is furthered by our differing views of the scope of section 28-2-370, which by its plain language entitles a landowner to compensation for *any* diminution in value to the remaining property as a result of the taking. Our holding does not change the threshold question of what constitutes a taking; however, once it is established that a taking has occurred, the unambiguous words of the statute allow a jury to consider whether and to what extent the property's value has been diminished. Effects which may not amount to a taking standing alone may nevertheless be considered when determining just compensation, provided they are a direct and proximate cause of the taking. *See id.* at 5, 148 S.E.2d at 748–49 ("In other words, he is entitled to full compensation for the taking of his land and all its consequences; and the right to recover for the damage to his remaining land is not based upon the theory that damage to such land constitutes a taking of it, [n]or is there any requirement that the damage be . . . such as would be actionable at common law; it is enough that it is a consequence of the taking.") (quoting 18 Am.

recognized that SCDOT cannot escape its constitutional and statutory obligations to tender just compensation for acquiring Powell's property under the power of eminent domain, and any acts carried out under its police power which are incidental to its eminent domain authority are compensable.

The record plainly shows each time SCDOT furnished construction plans to Powell—including the initial condemnation notice—the closure of the Intersection and the 0.183 acre acquisition were indicated on the same sketch. Additionally, when SCDOT changed the plans to terminate the frontage road into a cul-de-sac, it was indicated on the overall project plans. Moreover, SCDOT's counsel's request for a continuance on the eve of trial to permit a new appraisal accounting for the revised construction plans lends support to Powell's contention that there was a clear connection between the taking of his property and the closure of the Intersection and construction of the cul-de-sac. Consistent with *Wilson*, the closure of the Intersection, by itself, would likely result in no compensation to Powell because it would not constitute a taking under *Hardin* and its progeny; however, in this case, SCDOT acquired Powell's property as part of the overall project, as noted by the condemnation notice. Despite this, the court of appeals ruled as a matter of law that SCDOT could have closed the road without taking Powell's property. This was error because what is important to our analysis is what SCDOT actually did in this case, not what it *could* have done. The record contains evidence the condemnation of Powell's property, the closure of the intersection, and the curving of the frontage road over the condemned parcel were all integrally connected components of the project, creating a material issue of fact as to which of these acts is a direct and proximate cause of the taking, thus rendering summary judgment improper. Employing the clear language of our just compensation statute, we hold that a jury should be permitted to hear evidence on the diminution in value to the remaining property.

Jur. 905, Section 265). Applying *Wilson's* logic to the facts at hand, there is evidence in the record Powell's land was taken in conjunction with closing the Intersection and the installation of the cul-de-sac. Accordingly, he is entitled to have a jury decide the extent of the reasonably probable effects of the taking and the resulting diminution in value.

CONCLUSION

For the foregoing reasons, we hold the court of appeals erred in upholding partial summary judgment in favor of SCDOT. Accordingly, we **REVERSE** and **REMAND** to the circuit court for a jury trial to determine the just compensation to be awarded to Powell.

Acting Justices Doyet A. Early, III and Alison Renee Lee, concur. JAMES, J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

JUSTICE JAMES: I respectfully dissent. Under the facts of this case, Powell is not entitled to remainder damages arising from the closure of the intersection of Emory Road and the Highway 17 Bypass and is not entitled to remainder damages arising from the creation of the Old Socastee Highway cul-de-sac. The majority has fundamentally altered the law of eminent domain in South Carolina in concluding such damages are recoverable under the facts of this case. As held by the court of appeals, our decision in *South Carolina State Highway Department v. Carodale Associates*[5] is controlling. Our holding in *South Carolina State Highway Department v. Wilson*,[6] relied upon by the majority, is easily distinguished from the facts of this case. While I agree with the result reached by the court of appeals, I would modify it slightly to affirm the circuit court solely pursuant to *Carodale* and other authorities cited herein.[7]

I. Facts

An understanding of the facts of this case is crucial to the correct application of our statutory and case law. For ease of reference, I have attached a copy of the Horry County Tax Map depicting the layout of Powell's property and surrounding roadways prior to the undertaking of the project. The Tax Map shows Emory Road where it formerly intersected with the Highway 17 Bypass several hundred feet away from Powell's property. That intersection was closed as part of the highway improvement project at issue in this case. The .183 acre sliver taken from Powell's 2.5 acre parcel was at the corner where Emory Road meets Old Socastee Highway, as shown on the Tax Map.

I have also attached a Google Map[8] showing that the result of the taking of the .183 acres was the creation of a slight curve at the formerly angled intersection

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[5] 268 S.C. 556, 235 S.E.2d 127 (1977).

[6] 254 S.C. 360, 175 S.E.2d 391 (1970).

[7] I agree with the majority and the court of appeals that *Hardin v. South Carolina Department of Transportation*, 371 S.C. 598, 641 S.E.2d 437 (2007), does not apply to the facts of this case.

[8] Google Maps, http://maps.google.com (search "Emory Road and Powell Lane, Myrtle Beach, SC 29577").

of Emory Road and Old Socastee Highway. The Google Map also shows where Old Socastee Highway now terminates into a cul-de-sac.

There is no question that SCDOT physically took .183 acres of Powell's property. There is no question that the Emory Road–Highway 17 Bypass intersection was closed. Before this project was undertaken, Powell's property *did not* abut that intersection and *did not* abut the Highway 17 Bypass; the significance of these two facts is discussed below. Several hundred feet from Powell's property, Old Socastee Highway has been terminated into a cul-de-sac. Before this project was undertaken, Powell's property *did not* abut the portion of Old Socastee Highway that no longer exists. Access to Powell's property to and from the Highway 17 Bypass is indirect, just as it was before the project was undertaken. It now takes longer to get to and from the Bypass. Powell's property still abuts Emory Road and Old Socastee Highway exactly as it did before the project was undertaken.

II. The Haskell Appraisals

I will first address the five appraisals submitted by Corbin Haskell, SCDOT's expert real estate appraiser. In reaching his various conclusions, Haskell considered section 28-2-370 of the South Carolina Code (2007), which provides that in condemnation cases of this kind, "In determining just compensation, only the value of the property to be taken, any diminution in the value of the landowner's remaining property, and any benefits as provided in § 28-2-360 may be considered."

From April 2010 through June 2011, Haskell authored three separate appraisal reports detailing his opinion of Powell's loss arising from the taking of the .183 acres; these three valuations of loss ranged from $68,000 to $71,000 and were confined solely to the physical taking of .183 acres. In other words, none of these appraisals included any damage to the remainder of Powell's property.

When Haskell completed these first three appraisals (again, none of which included damage to the remainder), he was aware that SCDOT's plans reflected the closure of the intersection of Emory Road and the Highway 17 Bypass. After the parties completed discovery, engaged in mediation, and prepared for trial, SCDOT realized it had not provided Powell's counsel with plans showing that Old Socastee Highway would be terminated into the aforementioned cul-de-sac several hundred feet from Powell's property. Haskell prepared yet another appraisal, his fourth overall and the first of two appraisals dated March 14, 2013.

In this fourth appraisal, Haskell included a loss from the physical taking totaling $72,000 and also included, for the first time, damage to the remainder totaling $445,000, for a total loss of $517,000. Haskell based his opinion of damage to the remainder upon what he termed "reduced access" to the Highway 17 Bypass arising from the closure of the Emory Road–Highway 17 Bypass intersection and from the creation of the cul-de-sac. This appraisal is at the center of the dispute between the parties on appeal.

SCDOT's counsel disclosed Haskell's fourth appraisal to Powell. SCDOT's counsel also notified Haskell that remainder damages for the closure of the intersection and the creation of the cul-de-sac were not recoverable under South Carolina law. As I will discuss below, this is a correct application of the law under the facts of this case. Haskell then submitted his second March 14, 2013 appraisal (overall, his fifth and final appraisal), in which he removed the remainder damages and opined that the sole damage Powell sustained was in the amount of $72,000, that being solely for the physical take of the .183 acres.

The majority attaches much significance to Haskell's inclusion of remainder damages in his fourth appraisal. However, Haskell's inclusion of a category of perceived damages in this appraisal does not make those perceived damages recoverable under our law. A real estate appraiser, even one retained by the condemning authority, does not dictate what particulars of damage are recoverable in a condemnation action. The <u>law</u> dictates what particulars of damage are recoverable. Under the facts of this case, the law does not permit Powell to recover damage to the remainder as opined by Haskell in his fourth appraisal.

III. Applicable Law and Analysis

The majority's analysis of applicable South Carolina case law and its relationship to our condemnation statute and the facts of this case is flawed. I agree with the court of appeals that *Carodale* controls our answer to the question of whether Powell is entitled to recover remainder damages for the closing of the intersection and the creation of the cul-de-sac.

Section 28-2-370 of the South Carolina Code (2007) provides:

> In determining just compensation, only the value of the property to be taken, any diminution in the value of the

> landowner's remaining property, and any benefits as provided in § 28-2-360 may be considered.

Powell claims the increased remoteness of his property and the increased complexity of access to his property resulting from the road project are appropriate for the jury's consideration in the determination of just compensation. In particular, Powell claims that since his property is zoned "highway commercial," the question of ease of access to his property is proper for consideration. He claims that pursuant to section 28-2-370, we must permit the introduction of *all* evidence of damage he might have sustained as a result of the road project. Powell argues that had the General Assembly intended to prevent consideration of this "access evidence" as part of the quest in determining damage to his remaining property, it could have included language in the Eminent Domain Procedure Act[9] limiting the consideration of damage to the remainder to the extent urged by SCDOT and held by the court of appeals. Powell is simply incorrect, at least under the facts of this case.

We have long-recognized the distinction between a governmental entity's valid exercise of police powers and its exercise of eminent domain. As we noted in *Wilson*, "just compensation is required in the case of the exercise of eminent domain but not for the loss by the property owner which results from the constitutional exercise of the police power." 254 S.C. at 365, 175 S.E.2d at 394 (citing *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955); *Edens v. City of Columbia*, 228 S.C. 563, 91 S.E.2d 280 (1956)).

There is no dispute that redesigning highways and redirecting traffic are valid exercises of police power. SCDOT claims that any diminution in value to the remainder of Powell's property after the closure of the Emory Road–Highway 17 Bypass intersection and the creation of the cul-de-sac on Old Socastee Highway (both several hundred feet away from Powell's property) is a result of its exercise of this police power, not a result of the taking of the .183 acres, and is thus not compensable. SCDOT is correct.

I will now review our holdings in *Carodale* and *Wilson* and explain their application, or lack thereof, to the instant case. The majority holds *Wilson* guides our analysis of compensability under section 28-2-370. I disagree. Once the

[9] S.C. Code Ann. §§ 28-2-10 to -510 (2007 & Supp. 2017).

distinguishing facts in these two cases are understood, it becomes clear that our holding in *Carodale* should control our analysis in the instant case.

A. *Carodale*

In *Carodale*, the highway department acquired .47 acres from the landowner for the construction of an exit ramp off Interstate 77 in Richland County. 268 S.C. at 560, 235 S.E.2d at 128. The landowner's property abutted U.S. Highway 1, but Highway 1 was relocated as part of the overall project. *Id.* The landowner's property regained its connection to Highway 1 by the construction of a new street connecting the property to Highway 1. *Id.* The landowner received a jury verdict for the physical taking of the .47 acres *and* for damage to the remainder of its land attributable to the diversion of traffic that previously passed its property on Highway 1. We reversed the award of damages to the remainder. *Id.* at 564, 235 S.E.2d at 130. We held:

> The landowner has no property right in the continuation or maintenance of the flow of traffic past its property. Traffic on the highway, to which they have access, is subject to the same police power regulations as every other member of the traveling public. Re-routing and diversion of traffic are police power regulations.

Id. at 561, 235 S.E.2d at 129. Here, Powell attempts to present essentially the same remainder damage claim we rejected in *Carodale*. The evidence clearly establishes Powell's property continues to abut both Emory Road and Old Socastee Highway exactly as it did before the taking of .183 acres of his property. *Carodale* simply does not permit the recovery of remainder damages flowing from the closing of the Highway 17 Bypass–Emory Road intersection and the creation of the cul-de-sac.

The closing of the Highway 17 Bypass–Emory Road intersection and the creation of the cul-de-sac on Old Socastee Highway will cause a diversion in traffic for Powell, both to and from the Highway 17 Bypass. However, as we noted in *Carodale*:

> *Closing a street inherently produces a diversion of traffic* and loss of frontage on a viable traffic artery. However, these repercussions *are not compensable elements of damage*. Succinctly, the restriction of ingress and egress

> to and from one's property is the right which must be compensated *if infringed* when a highway is closed by condemnation.

268 S.C. at 561, 235 S.E.2d at 129 (emphasis added) (citing *S.C. State Highway Dep't v. Wilson*, 254 S.C. 360, 175 S.E.2d 391 (1970)) (other citations omitted). Even though the closure of the Emory Road–Highway 17 Bypass intersection and the creation of the cul-de-sac on Old Socastee Highway will cause a diversion of traffic, *Carodale* requires us to hold this repercussion is not compensable, as Powell has the exact same access to and from his property by way of the same roads his property abutted before the project began.

B. *Wilson*

The majority accepts Powell's argument that *Wilson* is controlling. I respectfully submit this is error, as *Wilson* is fundamentally distinguishable from *Carodale* and from the instant case. In *Wilson*, the highway department took a piece of Wilson's property in order to align a Lee County road running alongside Wilson's property and connecting with U.S. Highway 15. 254 S.C. at 363, 175 S.E.2d at 393. Wilson's property abutted Highway 15. *Id.* During the project, the highway department also constructed a median in the center of Highway 15 running the length of Wilson's property, thereby eliminating Wilson's ability to make left turns from her property onto Highway 15. *Id.* at 363-64, 175 S.E.2d at 393. The highway department objected to evidence offered by Wilson to this effect, arguing that only the actual physical taking of Wilson's property was compensable. *Id.* at 365, 175 S.E.2d at 394. We disagreed, noting that "[w]hile the construction of a median, with nothing more, may very well be an exercise of the police power with no resulting compensable damage to an *abutting property owner*," the proposed median was a part of the highway department's overall plans and contemplated construction. *Id.* at 368, 175 S.E.2d at 396 (emphasis added). We further held:

> But for such overall construction and relocation, and condemnation under the power of eminent domain for such purposes, there would have been no median and, of course, no damage to the *abutting landowner*. It logically follows, we think that any damage attributable to the planned median is an incidental result of the exercise of the power of eminent domain . . . .

Id. at 369, 175 S.E.2d at 396 (emphasis added). In *Wilson*, one key to our analysis was that prior to condemnation, the landowner's tract abutted Highway 15 for a distance of 670 feet, and that as a result of the condemnation, this frontage was reduced to 330 feet. *Id.* at 368, 175 S.E.2d at 395. We also emphasized that the overall project severed the landowner's property into two tracts and that with respect to the smaller southern tract, there was no longer any access to either the northbound or southbound lanes of Highway 15 except via the county road; we further noted there was no access from the northern tract to the northbound lanes of Highway 15 except via the county road. *Id.* at 368, 175 S.E.2d at 395-96. The deprivation and diminution of access to Highway 15 directly to and from Wilson's property, coupled with the physical taking of a portion of Wilson's property, held the key to this deprivation and diminution of access being compensable.

In *Wilson*, we cited *South Carolina State Highway Department v. Allison*[10] in support of our conclusion. In *Allison*, we held:

> [A]n abutting property owner has a *right of access over a street adjacent to his property*, as an appurtenance thereto. And, that *an obstruction that materially injures or deprives the abutting property owner of ingress or egress to and from his property is a 'taking'* of the property, for which recovery may be had. The fact that other means of access to the property are available affects merely the amount of damages, and not the right of recovery.

246 S.C. at 393, 143 S.E.2d at 802 (emphasis added). Our reliance upon *Allison* demonstrates that our holding of compensability in *Wilson* was based upon (1) the physical taking of property and (2) the creation of an obstruction (the median directly in front of the remainder of Wilson's property) that materially diminished or deprived Wilson of ingress to and from the road adjacent to her property. Here, Powell has the same ingress to and from his property that he did before the project was undertaken. His "right of access over [the streets] adjacent to his property" has not been diminished.

Even more evidence that our holding in *Wilson* applies only to abutting property owners is found in our rejection of "considerable authority from other

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[10] 246 S.C. 389, 143 S.E.2d 800 (1965).

jurisdictions to the effect that, even though there be other taking or damaging of the property of an *abutting* landowner, under the power of eminent domain, the landowner is still not entitled to recover any damage resulting from the concomitant construction of a median or other traffic control device." *Wilson*, 254 S.C. at 366, 175 S.E.2d at 394 (emphasis added) (citing *Barnes v. N.C. State Highway Comm'n*, 126 S.E.2d 732 (N.C. 1962); C.C. Marvel, Annotation, *Power to Restrict or Interfere with Access of Abutter by Traffic Regulations*, 73 A.L.R.2d 689 (1960)). The key to our rejection of this "considerable authority" was our recognition that property owners who suffer a physical taking and who suffer significant restriction of access to roads which their property abuts should be permitted to recover damages resulting from such restriction. Wilson fell into this category of landowner. Powell does not.

The majority finds "Powell's case more analogous to *Wilson* because [Powell] claims the closure of the Intersection and the termination of the frontage road into a cul-de-sac impaired his *access* to the Bypass which, according to SCDOT's own appraiser, resulted in a fifty percent reduction in value to [the remainder of Powell's property]."[11] I disagree. Impairment of access to a road upon which Powell's property does not abut is not compensable under *Wilson*. Regardless of how Powell and the majority attempt to frame the issue, this case is not a case of deprivation of ingress and egress to and from a road which Powell's property formerly abutted. To repeat, *Wilson* is limited to instances in which a landowner's access to a road *abutting* his property has been diminished. As noted, Powell's property is several hundred feet away from the Bypass and the now-closed intersection and has never abutted either. Powell has exactly the same access to his abutting roads that he did before the taking of his .183 acres. Thus, no part of the *Wilson* analysis applies to the facts of this case.

Continuing with its insistence that *Wilson* applies, the majority writes:

> Consistent with *Wilson*, the closure of the [Highway 17 Bypass–Emory Road] Intersection, by itself, would likely result in no compensation to Powell because it would not constitute a taking under *Hardin* and its progeny; however, in this case, SCDOT acquired Powell's property as part of

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[11] Note again the majority's preoccupation with the SCDOT appraiser's inclusion of remainder damage. As noted above, the appraiser's misunderstanding of the law pertaining to recoverable damages is of no benefit to Powell.

> the overall project, as noted by the condemnation notice. Despite this, the court of appeals ruled as a matter of law that SCDOT could have closed the road without taking Powell's property. This was error because what is important to our analysis is what SCDOT actually did in this case, not what it *could* have done. The record contains evidence the condemnation of Powell's property, the closure of the intersection, and the curving of the frontage road over the condemned parcel were all integrally connected components of the project . . . .

This reasoning elevates form over substance and ignores our holding in *Carodale*, decided seven years after *Wilson*. If the majority's rationale is carried to its logical conclusion, SCDOT could have concocted a noncompensable scenario in which the same .183 acres was physically taken, the same gentle curve was routed, the same intersection was closed, and the same cul-de-sac was created. Pursuant to the majority's logic, Powell could not recover as long as SCDOT creatively (but inefficiently) planned and constructed the very same improvements piecemeal instead of in a fashion that efficiently deployed what the majority correctly terms "integrally connected components" of one project. Such an approach to highway development projects would reward inefficiency, and such an approach would invite confusion in the application of the majority's holding in this very case.

The majority emphasizes that every time "SCDOT furnished construction plans to Powell—including the initial condemnation notice—the closure of the Intersection and the .183 acre acquisition were indicated on the same sketch. Additionally, when SCDOT changed the plans to terminate the frontage road into a cul-de-sac, it was indicated on the overall project plans." It matters not to a proper analysis of compensability that SCDOT was diligent in preparing and amending construction plans that depicted the project as a whole. It would hardly be practical for SCDOT to design a highway project and prepare construction plans on separate sketches and distribute them separately, unless the overall plans had to be changed for unanticipated reasons. The majority's reasoning would allow SCDOT to do just that to thwart the prospect of compensability.

The majority also contends SCDOT's counsel's "request for a continuance on the eve of trial to permit a new appraisal accounting for the revised construction plans lends support to Powell's contention that there was a clear connection between the taking of his property and the closure of the [Highway 17 Bypass–Emory Road]

Intersection and construction of the cul-de-sac." I disagree. A lawyer's motivation for requesting a continuance has no bearing upon either a legal or a factual analysis of compensability.

The majority has significantly broadened the scope of recoverable damages in a condemnation case in which (1) property has been physically taken (here, .183 acres) and (2) roads upon which the landowner's property does not abut have been altered or closed. The majority has neutered our holding in *Carodale*, dramatically expanded the scope of compensability, and added an inverse condemnation flavor to section 28-2-370 that our case law—until now—has refused to allow. In addition, this decision significantly blurs the distinction between a noncompensable exercise of police power and a compensable exercise of eminent domain.

IV. Powell's Remaining Issues

Powell also argues the circuit court and the court of appeals reached conclusions of fact for which no evidence has been adduced. First, he claims there is no evidence in the record allowing the conclusion that his property was taken for the purpose of rounding the intersection of Old Socastee Highway and Emory Road. I disagree. There is no other reasonable conclusion to draw from the evidence. There is no reasonable inference to be derived from the evidence in the record that Powell's property was taken for the purpose of closing the Emory Road–Highway 17 Bypass intersection. Likewise, there is no evidence that would tend to establish that Powell's property was taken for the purpose of creating the cul-de-sac on Old Socastee Highway.

Finally, Powell argues the circuit court never allowed him the opportunity to question appraiser Haskell's qualifications, analysis, or opinions. The record indicates Powell deposed Haskell and had the opportunity to vet his qualifications. In addition, I find it curious that Powell would want to challenge Haskell's qualifications, especially since Powell's primary argument in this appeal necessarily relies upon the supposed validity of Haskell's fourth appraisal, which included a significant sum of damage to the remainder of Powell's property. This argument has no merit.

V. Conclusion

The court of appeals' decision should be affirmed. I would modify the court of appeals' opinion to note that the circuit court's grant of partial summary judgment should be affirmed solely pursuant to *Carodale* and other authorities cited herein.

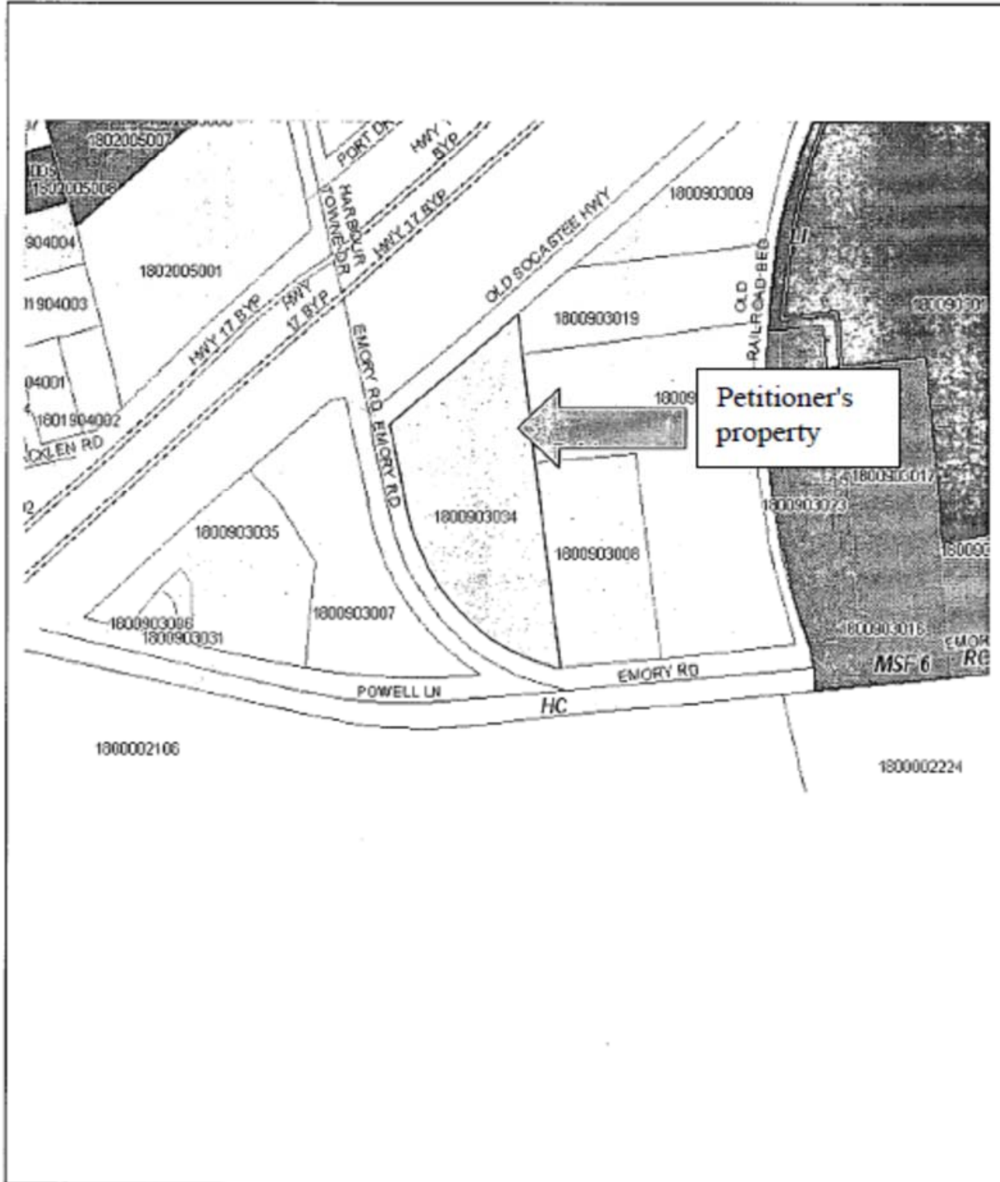
KITTREDGE, J., concurs.

SCDOT R/W Form 110A (04-09)

File #: 26.036774A **PIN #:** 36774 **Project #:** HORR **Tract #:** 13

ZONING MAP

Zoning Classification: H-C, Highway Commercial



Right of Way Section

ROA-155

155

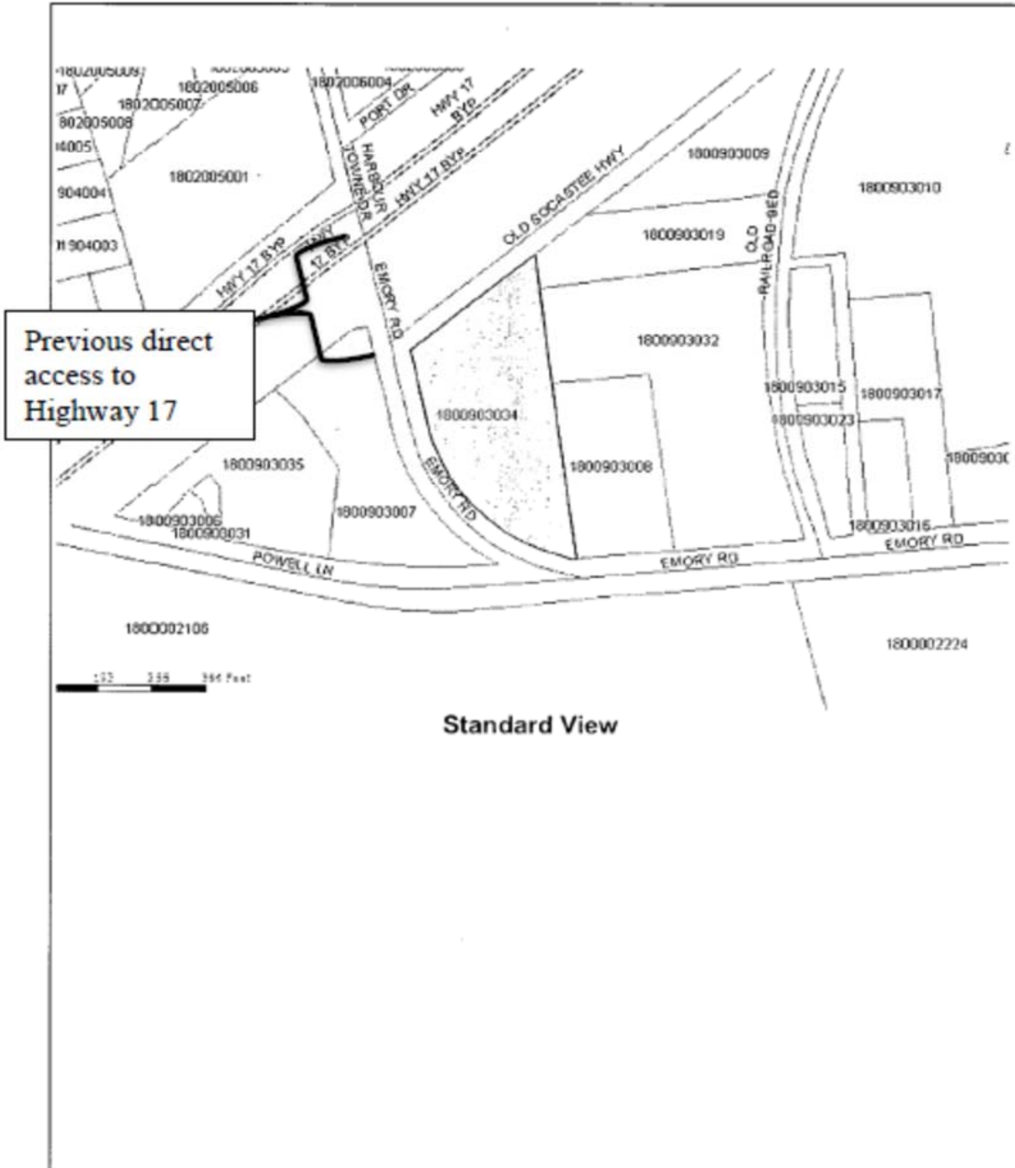
SCDOT

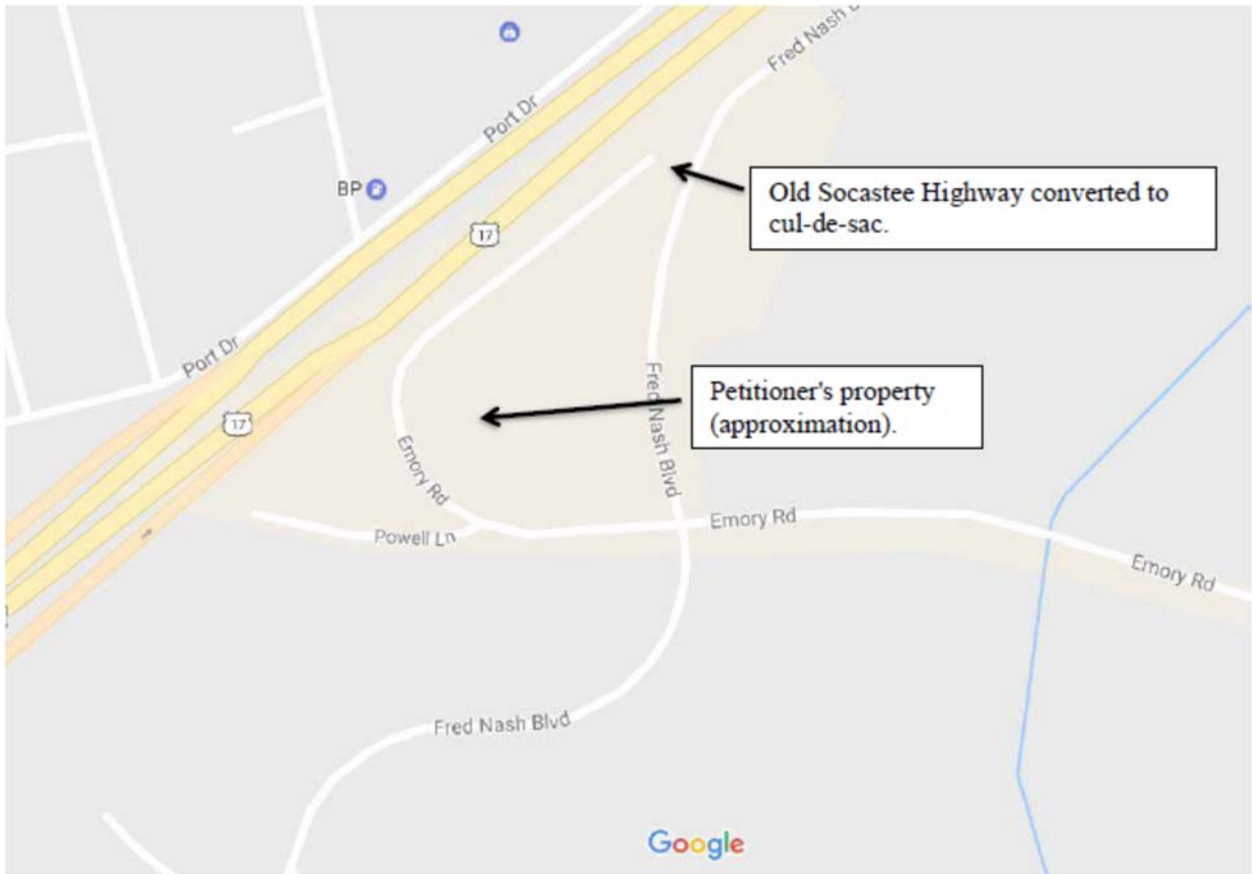
SCDOT R/W Form 110A (04-09)

File #: 26.036774A **PIN #:** 36774 **Project #:** HORR **Tract #:** 13

TAX MAP

Tax Map Number: 180-09-03-034




Port Dr
BP
17
Port Dr
17
Fred Nash
Old Socastee Highway converted to cul-de-sac.
Petitioner's property (approximation).
Emory Rd
Fred Nash Blvd
Powell Ln
Emory Rd
Emory Rd
Fred Nash Blvd
Google

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Frampton Durban, Jr., Respondent.

Appellate Case No. 2018-000591

Opinion No. 27828
Heard July 20, 2018 – Filed August 8, 2018

DEFINITE SUSPENSION

John S. Nichols, Disciplinary Counsel, and Julie K. Martino, Senior Assistant Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

Frampton Durban, Jr., pro se.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct and consents to the imposition of a definite suspension of nine months to three years or disbarment. Respondent requests that his sanction be made retroactive to June 24, 2016, the date of his interim suspension. ODC does not oppose this request. We accept the Agreement and suspend Respondent from the practice of law in this state for three years, retroactive to June 24, 2016. The facts, as set forth in the Agreement, are as follows.

Facts

Matter A

Husband A and Wife A (together, Clients A) retained Respondent in October 2015 for representation in a matter with the Department of Social Services. Clients A paid a retainer of $5,000. At that time, Respondent's office was located in space he rented from a law firm (Landlord Firm), whose address he shared.

On February 5, 2016, after attempting to contact Respondent by email and telephone without success, Clients A asked a paralegal at the Landlord Firm if she knew how to locate Respondent because Respondent was no longer renting space from the Landlord Firm. The paralegal provided a cell phone number and an email address for Respondent. On February 14, 2016, Husband A emailed Respondent that he and Wife A were filing a motion for substitution of counsel, requesting a statement of their account with Respondent and a check for the balance of their retainer. Respondent did not provide an accounting and did not return the unused portion of Clients A's retainer. Respondent did not contact Clients A. Clients A filed a complaint with ODC on March 24, 2016. Respondent admits he failed to adequately communicate with Clients A when he moved his law practice.

ODC sent a Notice of Investigation (NOI) to Respondent dated March 29, 2016. During this time, Respondent's primary mailing address in the Attorney Information System (AIS) was 3660 West Montague Avenue in North Charleston (Primary Mailing Address). Respondent's Primary Mailing Address in AIS has been 3660 West Montague Avenue in North Charleston during all times relevant to the disciplinary matters discussed in this opinion. Respondent's alternate mailing address in AIS has been 1474 Hamlin Park Circle in Mount Pleasant at all times relevant to these disciplinary matters, which is designated in AIS as the address of Respondent's residence (Residential Address).

When no response to the NOI was received by ODC and the NOI was not returned by the United States Postal Service, ODC sent a reminder letter dated April 21, 2016, to Respondent. This reminder letter was sent by certified mail to both Respondent's Primary Mailing Address and Residential Address. Respondent signed the certified mail receipt for the letter sent to his Residential Address.

On May 2, 2016, Respondent faxed a letter to ODC dated April 29, 2016 (Faxed Letter), indicating he had not received the NOI until he received the reminder letter dated April 21, 2016. He also stated he was prepared to respond to the complaints and that he intended to cooperate with ODC. Respondent believed he had changed his address on AIS, but "apparently, [the change] did not go through." He told ODC in the Faxed Letter that his Residential Address was the address where he could be reached. The Faxed Letter included a telephone number and an email address.

On May 4, 2016, ODC sent copies of four pending NOIs and their respective complaints to which Respondent had not replied, including the complaint filed by Clients A. On May 27, 2016, Respondent responded to two of the NOIs and complaints, including the NOI and complaint associated with Matter A.

Regarding Matter A, Respondent stated Husband A had been accused of physically abusing his children during visitation periods. He stated he represented Husband A in the DSS matter, while two other attorneys represented Husband A in the custody action. According to Respondent, he filed an answer and counterclaim in family court, appeared at two family court hearings, and participated in a lengthy telephone conference call with the judge to secure Husband A's visitation rights over the holidays. He stated he spent over 25 hours on the case and the fee deficit was over $2,500. Respondent stated his attorney-client relationship with Clients A began to deteriorate after the hearing, and he subsequently signed a substitution of counsel. Respondent admits he failed to adequately communicate with Clients A when he moved his law practice.

On June 1, 2016, ODC served Respondent with a Notice to Appear pursuant to Rule 19, RLDE (NTA), to answer questions under oath regarding Matter A and four other pending disciplinary matters. ODC also issued a subpoena for documents in the five matters. Respondent failed to appear as instructed and failed to respond to the subpoena. ODC left Respondent a voicemail message on June 22, 2016, and also sent email messages to Respondent at both email addresses listed in AIS. Respondent admits he did not respond to any of ODC's attempts to reach him.

On May 9, 2016, Clients A filed an Application for Resolution of Disputed Fee with the Resolution of Fee Disputes Board, alleging they paid $5,000 to Respondent and he did very little work. They also complained Respondent never

provided them with the accounting they requested. By letter dated September 20, 2016, the Resolution of Fee Disputes Board found Clients A were entitled to a refund of $4,400. Respondent admits he has not paid the refund.

Matter B

Respondent represented Client B in his divorce case. The final hearing was held on January 20, 2016. After the hearing, Client B, who was anxiously awaiting the final order, attempted to contact Respondent several times through telephone calls and emails, with no success. Client B contacted Landlord Firm, and Landlord Firm told Client B that Respondent was no longer at that address and it did not have a current address for him. Client B contacted the Berkeley County Family Court several times and ultimately learned Respondent had not submitted a final order.

Client B filed a complaint with ODC on March 3, 2016. As of February 26, 2016, he had paid $5,450 to Respondent for representation. He included a copy of a billing statement from Respondent indicating Client B was due a refund of $1,400. Client B never received his refund. He also complained Respondent failed to communicate with him.

ODC sent a NOI on March 4, 2016, to Respondent's Primary Mailing Address. When Respondent did not reply and the notice was not returned by the Post Office, ODC sent a reminder letter dated March 31, 2016, to Respondent via certified mail at his Primary Mailing Address. The reminder letter was returned to ODC on May 20, 2016, with a notice that there was no mail receptacle for Respondent at that address.

As part of the Faxed Letter sent by Respondent to ODC on May 2, 2016, Respondent stated he intended to cooperate with ODC regarding Matter B. On May 4, 2016, ODC sent to Respondent copies of four NOIs and their respective complaints, which Respondent had failed to answer. One of these unanswered NOIs and complaints was Client B's complaint.

On May 25, 2016, ODC prepared a subpoena and an NTA regarding five pending disciplinary matters. These documents were personally served on Respondent by an agent of the South Carolina Law Enforcement Division (SLED) on June 1, 2016, at his Residential Address. The subpoena required Respondent to produce

his file for Matter B. After Respondent failed to appear for the interview and failed to respond to the subpoena, ODC left a voicemail message for Respondent on June 22, 2016. ODC also emailed Respondent at both email addresses listed in AIS. Respondent did not respond to any of these attempts to reach him. Respondent admits he failed to respond and failed to cooperate with ODC's investigation. Respondent admits he failed to adequately communicate with Client B upon his departure from his former address and failed to provide Client B with a copy of the final order of divorce. He also admits he failed to provide Client B with a statement of his account and any refund due.

Matter C

Client C retained Respondent in November 2014 to represent him in an action for divorce. Client C paid $1,500 to Respondent. Client C never heard from Respondent again even though he called Respondent three times a week and left voicemail messages for him. Respondent did not file any motions or perform any of the actions he agreed to perform at his initial meeting with Client C.

Client C filed a complaint with ODC on March 15, 2016. ODC sent an NOI along with the complaint to Respondent on March 16, 2016, at his Primary Mailing Address. When ODC did not receive a response and the NOI and complaint were not returned to ODC, ODC sent a reminder letter to Respondent at his Primary Mailing Address on April 12, 2016. The reminder letter was returned to ODC as undeliverable.

Respondent sent the Faxed Letter expressing his intention to cooperate with ODC on all pending matters, including Matter C. As in the two previous matters, ODC sent copies of four NOIs and their respective complaints, including Client C's complaint, to Respondent. On May 25, 2016, ODC prepared a subpoena and an NTA referencing five pending disciplinary matters. These documents were personally served on Respondent by an agent from SLED on June 1, 2016, at his Residential Address. The subpoena required Respondent to produce his client file for Matter C.

Respondent failed to appear for the interview and failed to respond to the subpoena. ODC left a voicemail message for Respondent on June 22, 2016. ODC also emailed Respondent at both email addresses in AIS for Respondent. Respondent did not respond to any of these attempts to reach him.

Respondent admits he never responded to Client C's complaint and never cooperated with ODC. He also admits he did not keep records of Client C's retainer funds and did not refund Client C's unused retainer.

Matter D

Client D retained Respondent to represent him in a divorce action. The final order and decree of divorce was filed in Charleston County on July 28, 2015. Respondent filed a rule to show cause on behalf of Client D based on her ex-husband's failure to comply with the terms of the divorce decree. A hearing was scheduled for January 5, 2016. Respondent asked that the hearing be continued, and his request was granted on December 11, 2015.

Client D filed a complaint with ODC on March 18, 2016, stating that after Respondent filed the rule to show cause, he disappeared without leaving a forwarding address and without returning her telephone calls and emails.

ODC sent an NOI to Respondent dated March 21, 2016, at his Primary Mailing Address. When ODC did not receive a response and the NOI was not returned, ODC sent a reminder letter to Respondent dated April 12, 2016. The reminder letter was returned as undeliverable. On May 2, Respondent sent the Faxed Letter, indicating his intention to cooperate with ODC in this matter and the other pending matters. On May 4, 2016, ODC sent to Respondent copies of four NOIs and their respective complaints to which Respondent had not responded, including Client D's complaint. On May 25, 2016, ODC prepared a subpoena and an NTA referencing five disciplinary matters to Respondent. These documents were personally served on Respondent by an agent of SLED on June 1, 2016, at his Residential Address. The subpoena required Respondent to produce his client file for Matter D.

Respondent did not appear for his interview or respond to ODC's subpoena. ODC left a voicemail message for Respondent on June 22, 2016, and emailed Respondent at both email addresses listed in AIS. Respondent did not respond to any of these attempts to reach him.

Matter E

Lawyer represented Client E in an action for custody and visitation. Client E filed a complaint with ODC on March 30, 2016, after Respondent left his office at the Landlord Firm and Client E could no longer contact him. Respondent was not responding to her telephone calls and emails. Respondent admits he failed to adequately communicate with Client E after he left his rented office in the Landlord Firm.

ODC sent an NOI and a copy of the complaint to Respondent on March 31, 2016, to his Primary Mailing Address. When no response was received and the NOI was not returned, ODC sent a reminder letter dated April 21, 2016, by certified mail to Respondent at both his Primary Mailing Address and Residential Address. Respondent accepted the certified mail sent to his Residential Address. Respondent sent the Faxed Letter to ODC, indicating he had not received notice of Client E's complaint prior to the reminder letter. He also stated his intention to cooperate with ODC regarding Client E's complaint.

On May 4, 2016, ODC sent copies of four NOIs and their respective complaints to which Respondent had not responded. On May 27, 2016, Respondent provided a response to the NOI in two of the four pending matters, one of which was Matter E. Respondent stated he represented Client E in a domestic matter. He explained Client E had limited funds, so he agreed to accept a $500 deposit on a $5,000 flat fee, with Client E to make monthly payments thereafter. Respondent stated Client E only made one more payment of $300. In December 2016, he prepared and filed an Answer and Counterclaim, prepared and served discovery responses, and prepared and served discovery requests on opposing counsel, accruing 12.5 hours of attorney time and 6.5 hours of paralegal time. In the same month, Lawyer also negotiated and executed a consent order regarding visitation. Respondent was negotiating with opposing counsel over the custody of Client E's dog when Client E fired him. Substitute counsel did not get Client E's file for three months as Respondent would not respond to substitute counsel's attempts to communicate with him.

On May 25, 2016, ODC prepared a subpoena and NTA relating to five pending disciplinary matters, one of which was Matter E. These documents were

personally served on Respondent by an agent of SLED on June 1, 2016, at his Residential Address. The subpoena required Respondent to produce his file for Matter E.

After Respondent did not appear for his interview and did not respond to the subpoena, ODC left a voicemail message for Respondent on June 22, 2016. ODC also emailed Respondent at both email addresses in AIS. Respondent did not respond to any of these attempts to contact him.

Matter F

On December 30, 2015, a court reporting service sent Respondent an invoice for $333.49 for reporting time and transcription service. Respondent did not pay the invoice. Over the next year, the court reporting service tried to contact Respondent several times regarding the unpaid invoice, but Respondent never responded.

In a communication to this Court dated September 15, 2016, Respondent indicated his new address was 118 Black Forest Drive in Summerville. On October 2, 2016, ODC received a complaint from the court reporting service. ODC sent an NOI to the address in Summerville. The NOI was returned to ODC with notice from the Postal Service that the address was insufficient. ODC sent a reminder letter to Respondent dated November 15, 2016. This reminder letter was sent by certified mail to the address in Summerville and to Respondent's Residential Address. Both of these letters were returned to ODC. ODC learned through the Department of Motor Vehicles that Respondent's new address is 692 Peninsula Drive in Prosperity. On March 6, 2017, ODC sent a letter to Respondent at this address, except ODC mistakenly put Newberry as the city instead of Prosperity. Despite the error, the letter was not returned to ODC. Additionally, on April 20, 2017, ODC emailed Respondent and attached four NOIs and their related complaints, requesting responses. Respondent has not responded.

Law

Respondent admits his conduct violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.4 (a lawyer shall keep a client reasonably informed); Rule 1.15 (upon receiving funds from a client and upon request by the client, a lawyer shall promptly render a full accounting regarding the funds); Rule 1.16(d) (upon termination of representation, a lawyer shall surrender

papers and property to which the client is entitled and shall refund any advance payment of fee that has not been earned); Rule 4.4 (in representing a client, a lawyer shall not use means that have no substantial purpose other than to burden a third person); and Rule 8.1(b) (a lawyer shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority in connection with a disciplinary matter).

Respondent agrees his conduct constitutes grounds for discipline pursuant to the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it is a ground for discipline for a lawyer to violate the Rules of Professional Conduct); Rule 7(a)(3) (it is a ground for discipline for a lawyer to willfully fail to appear as directed, willfully fail to comply with a subpoena, or knowingly fail to respond to a lawful demand from a disciplinary authority); Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice, bring the legal profession into disrepute, demonstrate an unfitness to practice law); Rule 7(a)(10) (it is a ground for discipline to willfully fail to comply with a final decision of the Resolution of Fee Dispute Board).

Conclusion

We accept the Agreement and suspend Respondent from the practice of law in this state for three (3) years, retroactive to June 24, 2016. Within thirty (30) days of the date of this opinion, Respondent shall pay the following:

a. the costs incurred in the investigation and prosecution of these matters by ODC and the Commission on Lawyer Conduct;
b. $4,400 to Clients A;
c. $1,400 to Client B;
d. $1,500 to Client C; and
e. $333.49 to the Court Reporting Service.

Finally, Respondent shall complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Law Office Management School prior to reinstatement.

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.

DEFINITE SUSPENSION.

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

JUSTICE HEARN: I respectfully dissent as to the length of the sanction and instead would impose a nine-month suspension, retroactive to June 24, 2016.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Todd Olds, Petitioner,

v.

City of Goose Creek, Respondent.

Appellate Case No. 2017-000297

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Berkeley County
R. Markley Dennis Jr., Circuit Court Judge

Opinion No. 27829
Heard June 13, 2018 – Filed August 8, 2018

REVERSED

Thomas R. Goldstein, of Belk Cobb Infinger & Goldstein, PA, of Charleston, for Petitioner.

Timothy Alan Domin, of Clawson & Staubes, LLC, of Charleston, for Respondent.

Danny C. Crowe, of Crowe LaFave, LLC, of Columbia, for Amicus Curiae, Municipal Association of South Carolina.

JUSTICE JAMES: The City of Goose Creek (the City) collects a business license fee[1] on persons doing business within the city limits. The amount of the fee is based upon a business's gross income from the preceding year. This matter stems from Todd Olds' dispute with the City as to the meaning of "gross income" under the City's business license fee ordinance. Since Olds and the City differ on the definition of gross income, their calculations of the amount of the fee owed differ as well. The circuit court ruled the City's definition of gross income was correct, and the court of appeals affirmed. *Olds v. City of Goose Creek*, 418 S.C. 573, 795 S.E.2d 163 (Ct. App. 2016). We granted Olds a writ of certiorari to address whether the court of appeals erred in its interpretation of the term "gross income" as defined and used in the City's business license ordinance, §§ 110.001-.022. Under the very narrow facts of this case, we reverse.

I. FACTUAL AND PROCEDURAL HISTORY

Todd Olds is a licensed realtor. He is also in the business of flipping houses; he purchases residential real estate, improves it, and sells the properties—either in his name or that of his company, Prime Properties of Charleston, LLC. Over the years, Olds has purchased and sold several parcels of real property in the City. A duly enacted ordinance requires every person engaged in business within the City's limits to pay an annual license fee for the privilege of doing business within the City. The City's Business License Inspector audits sales records to determine whether the fee is being properly computed and paid.

In January 2011, Olds filed an application to renew his business license and reported his actual gross receipts (total receipts generated by the business regardless of source, without deduction) from January 2010 to December 2010 to be $58,432.46.[2] Based on this reported figure, Olds paid the City a business license fee of $460.40. In May 2011, the City discovered what it considered to be a discrepancy in the amount Olds paid to the City. The City sent Olds a letter stating: "It has come to our attention that you sold 123 Evergreen Magnolia Avenue, Goose Creek, South

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[1] The City's ordinance refers to this as a business license "fee"; however, a business license fee operates essentially as a tax.

[2] The City's business license renewal form uses the term "actual gross receipts" rather than "gross income." However, the form also includes a section for the applicant to certify he or she has accurately reported the business's "gross income."

Carolina. The sale price of 123 Evergreen Magnolia Avenue must be claimed as revenue on your 2011 City of Goose Creek Business License." The City informed Olds that he owed an additional $468.00 in business license fees to the City. Olds paid the excess amount under protest and appealed the City's calculation.

Under the ordinance, a business's business license fee is computed based upon that business's gross income from the preceding calendar or fiscal year. The dispute in this appeal centers upon the following provisions in the ordinance. The provisions relevant to the instant dispute are underlined for emphasis:

> ***GROSS INCOME.*** The total revenue of a business, received or accrued, for one calendar year, collected or to be collected by a business within the city, excepting, therefrom, business done wholly outside of the city on which a license tax is paid to some other municipality or county and fully reported to the city or county. The term ***GROSS RECEIPTS*** means the value proceeding or accruing from the sale of tangible personal property, including merchandise and commodities of any kind and character and all receipts, by the reason of any business engaged in, including interest, dividends, discounts, rentals of real estate or royalties, without any deduction on account for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid or any other expenses whatsoever and without any deductions on account of losses. The ***GROSS INCOME*** for business license purposes shall conform to the gross income reported to the State Tax Commission or the State Insurance Commission. In the case of brokers or agents, ***GROSS INCOME*** shall mean gross commissions received or retained, unless otherwise specified. ***GROSS INCOME*** for insurance companies means gross premiums collected. ***GROSS INCOME*** for business license tax purposes shall not include taxes collected for a governmental entity, escrow funds or funds, which are the property of a third party. The value of bartered goods or trade-in merchandise shall be included in ***GROSS INCOME***. The ***GROSS INCOME*** for business license

> purposes may be verified by inspection of returns and reports filed with the Internal Revenue Service, the South Carolina Department of Revenue, the South Carolina Insurance Commission or other government agency.

Goose Creek City Code § 110.001.

Olds argued the City was not applying the "plain and ordinary meaning" of the term "gross income," which he contended was the gain he realizes from the properties he flips. He further argued the City was improperly attempting to levy a business license fee upon his "gross receipts," rather than his "gross income." The City disagreed and argued that the language of the ordinance mandates that fee be calculated based on the total sales price of real estate. Olds pursued the appeals process delineated in the City's ordinance, and the City Administrator and City Council both found the City's calculation to be correct.

Olds appealed to the circuit court. The circuit court affirmed the City Council's definition of the term "gross income" under the ordinance and granted the City summary judgment as to Olds' additional claims.[3] The court of appeals affirmed the circuit court. *Olds v. City of Goose Creek*, 418 S.C. 573, 795 S.E.2d 163 (Ct. App. 2016). Olds contends the City misapplied its ordinance by levying the fee on the sales price of real property as opposed to the gain realized from the sale. He argues that pertinent provisions of the Internal Revenue Code (I.R.C.) allow his tax to be computed according to the gain realized from the sale.

The court of appeals disagreed with Olds. The court of appeals noted the ordinance provides gross income is "[t]he total revenue of a business, received or accrued, for one calendar year . . . ." *Olds*, 418 S.C. at 584, 795 S.E.2d at 169 (quoting Goose Creek City Code § 110.001). The court of appeals looked to Black's Law Dictionary, which defines "revenue" as "[i]ncome from any and all sources;

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[3] Olds brought additional causes of action against the City for (1) a violation of equal protection; (2) a violation of procedural due process; (3) abuse of process; (4) violations of 42 U.S.C. § 1983 and article I, section 22 of the South Carolina Constitution; and (5) a violation of the South Carolina Freedom of Information Act (FOIA). Olds also brought a civil conspiracy claim against the City Business License Inspector and the City Finance Director and a breach of contract claim against the City's Department of Public Works. None of Olds' additional causes of action is before this Court.

gross income or gross receipts." *Id.* (quoting *Revenue*, *Black's Law Dictionary* (10th ed. 2014)). The court of appeals reasoned:

> Notwithstanding the ordinance's later explanation that gross income for business license purposes shall conform to the gross income reported to the State Tax Commission and that gross income may be verified by the inspection of state and federal tax returns, we find the City intended to define gross income for business license tax purposes as the total revenue of the business. This is consistent with how our supreme court has historically defined gross income in the context of business license taxes. *See Columbia Ry., Gas & Elec. Co. v. Jones*, 119 S.C. 480, 494, 112 S.E. 267, 272 (1922) ("Gross income means the total receipts from a business before deducting expenditures for any purpose.").

Id. (footnote omitted). Thus, the court of appeals found the City intended the business license fee to apply to the total sales price of real property rather than merely the business's gain from the sale of real property. *Id.* We granted Olds a writ of certiorari to review the following question.

II. ISSUE

Did the court of appeals err in its interpretation of the term "gross income" as defined and used in the City's business license ordinance, §§ 110.001-.022?

III. STANDARD OF REVIEW

The issue before this Court is limited to the interpretation of the City's business license ordinance; therefore, we are free to decide this issue without any deference to the lower courts. *See CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below.").

IV. DISCUSSION

A business license fee is an excise tax—not an income or sales tax. *Town of Hilton Head Island v. Kigre, Inc.*, 408 S.C. 647, 649, 760 S.E.2d 103, 103 (2014).

Specifically, a business license fee is a tax on the privilege of doing business within a county or municipality. *Id.* There is no prohibition against the utilization of excise taxes, *Carter v. Linder*, 303 S.C. 119, 122, 399 S.E.2d 423, 424 (1990), and this Court has upheld the constitutionality of business license fees. *See Kigre*, 408 S.C. at 648, 760 S.E.2d at 103; *Carter*, 303 S.C. at 126, 399 S.E.2d at 427.

The General Assembly has specifically granted municipalities the authority to enact ordinances so long as the ordinances are not "inconsistent with the Constitution and general law of this State." S.C. Code Ann. § 5-7-30 (Supp. 2017). One such power possessed by a municipality is the power to "levy a business license tax on gross income." *Id.* "Gross income" is not defined within Title 5 of the South Carolina Code, which sets forth the laws governing municipal corporations.

The City enacted its ordinance pursuant to section 5-7-30, which allows a municipality to levy a business license fee on gross income; again, that term is not defined. Section 110.006 of the City's ordinance mandates that every person engaged in business within the City's limits pay an annual license fee for the privilege of conducting business within the City. Section 110.009(C) provides the license fee shall be computed based upon the gross income for the preceding calendar or fiscal year. The definitions section of the ordinance bears repeating:

> ***GROSS INCOME.*** The total revenue of a business, received or accrued, for one calendar year, collected or to be collected by a business within the city, excepting, therefrom, business done wholly outside of the city on which a license tax is paid to some other municipality or county and fully reported to the city or county. The term ***GROSS RECEIPTS***[4] means the value proceeding or accruing from the sale of tangible personal property, including merchandise and commodities of any kind and character and all receipts, by the reason of any business engaged in, including interest, dividends, discounts, rentals of real estate or royalties, without any deduction on account for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid or any other expenses whatsoever and without any deductions on

[4] Although defined in section 110.001, the term "gross receipts" does not appear elsewhere in the ordinance.

> account of losses. The ***GROSS INCOME*** for business license purposes shall conform to the gross income reported to the State Tax Commission or the State Insurance Commission. In the case of brokers or agents, ***GROSS INCOME*** shall mean gross commissions received or retained, unless otherwise specified. ***GROSS INCOME*** for insurance companies means gross premiums collected. ***GROSS INCOME*** for business license tax purposes shall not include taxes collected for a governmental entity, escrow funds or funds, which are the property of a third party. The value of bartered goods or trade-in merchandise shall be included in ***GROSS INCOME***. The ***GROSS INCOME*** for business license purposes may be verified by inspection of returns and reports filed with the Internal Revenue Service [(IRS)], the South Carolina Department of Revenue [(SCDOR)], the South Carolina Insurance Commission or other government agency.

Goose Creek City Code § 110.001 (emphasis added by underlining).

Section 110.003(C) of the ordinance provides, "The Business License Inspector, upon approval of the Finance Director, may disclose gross income of licenses to the [IRS], [SCDOR] and other municipal or county offices for the purpose of assisting tax assessments, tax collections and enforcement." Further, section 110.008(B) states the applicant must certify he has accurately reported gross income without any unauthorized deductions, and that he "may be required to submit copies of portions of state and federal income tax returns reflecting gross income figures."

The following definition of "gross income" set forth in the I.R.C. is integral to our analysis:

> **(a) General definition.**—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
>
> **(1)** Compensation for services, including fees, commissions, fringe benefits, and similar items;

(2) Gross income derived from business;

(3) *Gains derived from dealings in property*;

. . . .

I.R.C. § 61(a) (2012) (emphasis added).[5] Section 1001(a) of the I.R.C. explains how to calculate gains and losses derived from dealings in property. Further, Treasury Regulation section 1.61-6(a) provides:

> Gain realized on the sale or exchange of property is included in gross income, unless excluded by law. For this purpose property includes tangible items, such as a building, and intangible items, such as goodwill. Generally, the gain is the excess of the amount realized over the unrecovered cost or other basis for the property sold or exchanged. The specific rules for computing the amount of gain or loss are contained in section 1001 and the regulations thereunder.

Similarly—for income tax purposes—South Carolina has adopted the federal definition of and method for calculating gross income; therefore, Olds' reported gross income to the IRS and the SCDOR—at least regarding his dealings in real property—would be identical. *See* S.C. Code Ann. §§ 12-6-50, -1110, -1120 (2014 & Supp. 2017).

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Mikell v. Cty. of Charleston*, 386 S.C. 153, 160, 687 S.E.2d 326, 330 (2009). "When interpreting an ordinance, the legislative intent must prevail if it can be reasonably discovered in the language used." *Id.* "An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 68, 459 S.E.2d 841, 843 (1995). "In construing a

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[5] Certain I.R.C. code sections are not adopted in South Carolina; however, section 61 is not one of those sections. *See* S.C. Code Ann. § 12-6-50 (2014 & Supp. 2017) (providing a list of I.R.C. sections that are specifically not adopted in South Carolina). Therefore, we must take into account the provisions of section 61 in interpreting the ordinance.

statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *City of Myrtle Beach v. Juel P. Corp.*, 344 S.C. 43, 47, 543 S.E.2d 538, 540 (2001).

Olds argues the lower courts' interpretation of the term "gross income" does not conform to the definition used by the City in the ordinance. Olds contends the City has erroneously required his business license fee to be calculated on "gross receipts"/"sales price" rather than a properly calculated "gross income." He argues that the ordinance—as written—requires the City to define his gross income as "[g]ains derived from dealings in property." *See* I.R.C. § 61(a)(3). Olds argues the court of appeals did not interpret the ordinance but essentially rewrote it to comport with its own notion of the meaning of the term.

Again, pursuant to section 5-7-30 of the South Carolina Code, the City is permitted to "levy a business license tax on gross income." The City's ordinance first defines gross income as "<u>[t]he total revenue of a business</u>, received or accrued, for one calendar year, collected or to be collected by a business within the city . . . ." Goose Creek City Code § 110.001 (emphasis added). As noted by the court of appeals, Black's Law Dictionary defines revenue as "[i]ncome from any and all sources; gross income or gross receipts." *Revenue*, *Black's Law Dictionary* (10th ed. 2014). This Court and other municipalities across our state have previously allowed gross income to be equated with total revenue when calculating the amount of a business license fee. *See Town of Hilton Head Island v. Kigre, Inc.*, 408 S.C. 647, 760 S.E.2d 103 (2014) (rejecting a constitutional challenge to a business license fee calculated using a business's gross income which was defined as the "total revenue of a business").

However, the City's ordinance goes from broadly defining gross income as "the total revenue of a business" to narrowly mandating that the gross income figure reported to the City "shall conform" to the gross income reported to the State Tax Commission.[6] *See Mikell*, 386 S.C. at 160, 687 S.E.2d at 330 ("[W]here two

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[6] The State Tax Commission was subsumed into the South Carolina Department of Revenue. *See* S.C. Code Ann. § 12-4-10 (2014) (declaring "[t]he South Carolina Department of Revenue is created to administer and enforce the revenue laws of this State"). Effective July 1, 1993, the State Tax Commission formerly provided for in section 12-3-10 of the South Carolina Code (1976), was transferred to, and incorporated in, the South Carolina Department of Revenue and Taxation. *See* S.C. Code Ann. § 1-30-95 (2005). Thereafter, on February 1, 1995, the duties and powers

provisions deal with the same issue, one in general and the other in a more specific and definite manner, the more specific prevails."). We find such a clear mandate made by the City in its ordinance requires Olds' gross income figure to conform to the gross income figure he reported to the SCDOR.

When determining South Carolina gross income for income tax purposes, certain modifications are made to federal gross income. *See* S.C. Code Ann. § 12-6-560 (2014) ("A resident individual's South Carolina gross income . . . is computed as determined under the [I.R.C.] with the modifications provided in Article 9 of this chapter and subject to allocation and apportionment as provided in Article 17 of this chapter."). However, none of the modifications provided are applicable to Olds' situation. *See* S.C. Code Ann. § 12-6-1120 (2014) (providing a list of modifications to gross income under the I.R.C.). Additionally, section 12-6-50 of the South Carolina Code (2014 & Supp. 2017) lists I.R.C. sections that are specifically rejected in South Carolina. Section 61 of the I.R.C. has not been rejected; therefore, the definitions of gross income under section 61 are determinative. Thus, under the facts of this case, South Carolina gross income (for income tax purposes) is equal to federal gross income (for income tax purposes). Since section 61(a)(3) of the I.R.C. defines gross income as "[g]ains derived from dealings in property," the plain language of this narrow provision in the ordinance requires Olds to report the same gross income figure to the City as he would report to the IRS and SCDOR. His gross income under the ordinance is therefore equal to his "[g]ains derived from dealings in property." *See* Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992) ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.").

The City addressed the impact of the "shall conform" language by arguing it "appears to be a historical artifact" and "it is impossible for the Court to give effect to this provision."[7] Although this sentence may indeed be a historical artifact due to the South Carolina Tax Commission having been replaced by the SCDOR, we disagree with the City's contention that this Court should not give any effect to the language of this provision. *See State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("A statute should be so construed that no word, clause, sentence,

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given to the commissioners of the Department of Revenue were transferred to the director of the Department of Revenue. *See* S.C. Code Ann. § 12-2-5 (2014).

[7] The City amended the ordinance in 2017, and this provision was deleted.

provision or part shall be rendered surplusage, or superfluous." (quoting *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)). The City conceded at oral argument that its interpretation of the ordinance would be incorrect if the "shall conform" language referred to the SCDOR rather than the State Tax Commission. There is no practical difference between the two.

The City places great emphasis upon how business license fees have historically been calculated by the City and by other municipalities throughout the state. The City included in the record the business license ordinances of forty municipalities throughout the state. Of these other ordinances, thirty-one do not include the language that gross income "for business license purposes shall conform to the gross income reported to" the Tax Commission/SCDOR or the IRS. How other municipalities calculate business license fees under differently-worded ordinances, or even under identically-worded ordinances, is of no import to our conclusions in this case. The plain language of the City's ordinance mandates that a business's gross income comport to the gross income reported to the State Tax Commission (now SCDOR).

Support for the position that the plain language of the City's ordinance adopted the federal definition can be found elsewhere in the ordinance. *See Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 623, 611 S.E.2d 297, 302 (Ct. App. 2005) ("Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and given effect, if it can be done by any reasonable construction."). Section 110.001 of the ordinance further provides, "The ***GROSS INCOME*** for business license purposes may be verified by inspection of returns and reports filed with the [IRS], the [SCDOR], the South Carolina Insurance Commission or other government agency." Section 110.003(C) states, "The Business License Inspector, upon approval of the Finance Director, may disclose gross income of licenses to the [IRS], [SCDOR] and other municipal or county offices for the purpose of assisting tax assessments, tax collections and enforcement." Additionally, section 110.008(B) of the ordinance requires the applicant to certify that he has accurately reported gross income without any unauthorized deductions, and that he "may be required to submit copies of portions of state and federal income tax returns reflecting gross income figures." Because the City's ordinance allows for the use of IRS and SCDOR tax return figures for verification and disclosure purposes, it logically follows that the City wanted the reported gross income figures to match.

Further support for the position that the plain language of the ordinance adopted the I.R.C. definition of gross income can be found in statements made by the City during litigation. For example, in a letter written by the City's attorney to City Council prior to Olds' municipal appeal hearing, the City's attorney stated, "[T]he City's definition is in accord with the [I.R.C.]. [I.R.C.] Section 61 defines gross income. [I.R.C.] Section 61(a) states that [e]xcept as otherwise provided in this subtitle, gross income means **all income from whatever source derived**." Although the City's attorney contended the City's interpretation of its ordinance was congruent with section 61, the City's attorney did not address the narrower definition of gross income (argued by Olds) several lines down in section 61(a)(3). Similarly, the City Council's meeting minutes indicate it based its decision in Olds' municipal appeal on the fact that the City's definition of gross income complied with the federal definition as explained in the City's attorney's letter.

V. CONCLUSION

Based on the plain language of this particular ordinance, we find the City adopted the definition of gross income as provided in section 61(a)(3) of the I.R.C. for Olds' particular business. For Olds' business, "gross income" therefore means "[g]ains derived from dealings in property." For the years in dispute, Olds' business license fee must be calculated according to Olds' gains derived from dealings in property.[8] We therefore **REVERSE** the court of appeals.

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

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[8] As we have noted several times, the first line in the disputed section of the ordinance defines gross income as "the total revenue of a business." Olds argues that he should prevail under that portion of the ordinance as well, as he claims the term "total revenue" should not be defined as his total receipts but rather should be defined as only the gains he realizes from his real estate endeavors. We need not address that 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 disposition of a prior issue is dispositive).

The Supreme Court of South Carolina

Re: Amendments to Rules for Lawyer Disciplinary Enforcement

Appellate Case No. 2018-001065

ORDER

The Office of Commission Counsel and the Office of Disciplinary Counsel have requested amendments to Rule 5(b) and Rule 7(b) of the Rules for Lawyer Disciplinary Enforcement, which are located in Rule 413 of the South Carolina Appellate Court Rules. The requested amendment to Rule 5(b) would confirm that the Office of Commission Counsel, rather than the Office of Disciplinary Counsel, is charged with supervising the receiver. *See* Rule 6(b)(3), RLDE, Rule 413, SCACR. The requested amendment to Rule 7(b) would correct a scrivener's error in referring to the Lawyer's Oath.

Pursuant to Article V, Section 4 of the South Carolina Constitution, Rule 5(b) of the Rules for Lawyer Disciplinary Enforcement is amended to delete paragraph (b)(10) and renumber the relevant paragraphs to reflect the change. Additionally, Rule 7(b)(6) of the Rules for Lawyer Disciplinary Enforcement is amended to delete the reference to paragraph (k) in the citation to Rule 402 of the South Carolina Appellate Court Rules.

These amendments are effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
August 8, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Concord and Cumberland Horizontal Property Regime, And Thomas R. Mather, And Betty Y. Segal, And Signature Charleston, LLC and Wade Robinson, And James C. Kirkpatrick, And Paul A. Brim, And Fred Rappaport and Joyce Rappaport, And Thomas R. Debnam, as Trustee of The Trust Agreement of Thomas R. Debnam, And Pamela L. Vaughan, And 304 Concord & Cumberland, LLC, And 402 Concord & Cumberland, LLC, And Avant & Associates, LLC and Oakland Holding, LLC, And Mattison J. MacGillivray and Teresa E. MacGillivray And Pamela Queen, And Stuart Reeves, Plaintiffs,

v.

Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC, Estates, Inc., Estates Management Company, Superior Construction Corporation, Weather Shield Mfg., Inc., The Muhler Company, Inc., In The Wind, Inc., J. Davis Architects, PLLC, Wall Craft Construction, Inc., Weatherholtz Masonry, LLC, Philip Gasque d/b/a Philip Gasque Construction, Architectural Stone Company, Southern Mechanical, Inc., Greg Gasque Metal Works, Keating Roofing and Sheet Metal, Inc., Lowcountry Tile Contractors, Inc., Safeco Insurance Company of America, Companion Property and Casualty of America, Companion Property and Casualty Group, Watts Builders, LLC, Elias Duffy d/b/a Masonry Pros, Renaissance Steel, LLC, American Drywall Construction, Inc., Turner Electrical of SC, Inc., and Metro Waterproofing, Inc., Defendants,

Of which Superior Construction Corporation is the Appellant,

And The Muhler Company, Inc. is the Respondent.

Appellate Case No. 2016-000076

Appeal From Charleston County
Clifton Newman, Circuit Court Judge

Opinion No. 5585
Heard April 9, 2018 – Filed August 8, 2018

AFFIRMED

Christopher Alton Majure and Timothy J. Newton, both of Murphy & Grantland, PA, of Columbia, for Appellant.

Curtis Lyman Ott and Janice Holmes, both of Gallivan, White & Boyd, PA, of Columbia, and Peter Gunnar Nistad, of Shelly Leeke Law Firm, LLC, of North Charleston, all for Respondent.

THOMAS, J.: This case involves the alleged negligent construction of a condominium project in Charleston, which resulted in numerous construction defects. Appellant Superior Construction Corporation (Superior) appeals the circuit court's partial grant of summary judgment in favor of Respondent The Muhler Company, Inc. (Muhler), arguing the circuit court erred by misconstruing its argument and finding the relevant contracts between the parties did not require Muhler to indemnify Superior for Superior's own concurrent negligence. We affirm.

FACTS

The plaintiff, Concord and Cumberland Horizontal Property Regime (Regime), filed this action in March 2010, alleging the existence of construction defects resulting in water intrusion in the condominium units.[1] Specifically, Regime asserted numerous defects with the windows and doors, including design and installation defects. Regime alleged Superior was the general contractor who subcontracted with Muhler for installation of the windows and doors. Regime claimed Weathershield, Inc. designed, manufactured, marketed, sold, and distributed the windows and exterior doors used in the construction.

Superior admitted it was the general contractor and also claimed Weathershield manufactured and supplied the windows and exterior doors. Superior claimed Muhler installed all of the windows and doors as a subcontractor for Superior. Superior alleged it was "entitled by contractual provisions, to the fullest extent permitted by law, full indemnity from" its various subcontractors, including Muhler. Superior also claimed it was entitled to equitable indemnification. However, Muhler denied it was contractually required to indemnify Superior.

Superior and Muhler executed a contract (the Subcontract) in May 2006. The Subcontract called for Muhler to provide labor and materials for the installation of all windows and exterior doors. Article 12.1 of the Subcontract contained an indemnification clause:

> 12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect, the Contractor (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from

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[1] Regime filed its first complaint in March 2010, but the allegations we restate in this opinion are from Regime's Second Amended Complaint, which it filed in June 2012.

> the performance of the Subcontractor's Work provided that
>
> > (a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, regardless of whether it is caused in part by a party indemnified hereunder.
> > (b) such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this [a]rticle [12.1].

In early 2007, after the water intrusion around the windows and doors began, Superior, Muhler, and Weathershield entered into a second contract (the 2007 Agreement). The 2007 Agreement acknowledged some of the windows and doors did not comply with certain warranties. The 2007 Agreement stated it did not amend or affect "any party's contractual rights and responsibilities except to the extent specifically stated." Weathershield agreed to perform testing of some of the windows and remedy any defects in the design of the windows. Muhler agreed "to remedy any defects in the installation of the windows." The 2007 Agreement contained another indemnification clause relating to Muhler.

> 11. In the event either Superior or Concord and Cumberland, LLC are sued hereafter by or on behalf of any subsequent owner, alleging that one or more of the windows and/or doors do not comply with the original and amended [c]ontract [d]ocuments, or are defectively installed[,] Muhler agrees to unconditionally indemnify both Superior and Concord and Cumberland, LLC against these allegations and will pay all damages

> (including reasonable [attorney's] fees) incurred by either or both, as determined by a court of competent jurisdiction or award of arbitration, liability incurred by either or both as consequence including, but not limited to, costs and [attorney's] fees, any remedial costs of expert witnesses, cost of arbitration and all other damages incurred.

Following years of litigation and extensive discovery, Superior and Muhler reached separate settlements with Regime and the individual owners. Superior settled for $775,000 and also claimed approximately $630,000 in attorney's fees and expenses related to its defense of the window and door claims. Following these settlements, Superior pursued its indemnity claims against Muhler. In May 2014, Superior filed a motion for partial summary judgment. Superior claimed it was entitled to contractual indemnity from Muhler for the settlement amount along with attorney's fees and expenses.[2] Specifically, Superior argued the Subcontract, "as modified by the terms of the [2007 Agreement]," required Muhler to indemnify Superior, and the "right to indemnity was not lessened by any concurrent negligence of or causation by Superior."

In response, Muhler moved for partial summary judgment. Muhler argued neither the Subcontract nor the 2007 Agreement obligated it to indemnify Superior for Superior's "own wrong-doing." Muhler claimed such an indemnity clause must be clear and unequivocal in the contract, and the contracts at issue failed to meet that burden.

The circuit court found Superior, in order to prevail, must show the language in the Subcontract or the 2007 Agreement "can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee's own negligence." The circuit court found the Subcontract's language did not clearly and unequivocally require Muhler to indemnify Superior for Superior's own negligence and limited indemnification to damages resulting from the work Muhler performed. Likewise, the circuit court determined the 2007 Agreement did not

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[2] It is undisputed that because Superior did not extinguish Muhler's liability in its settlement, it has no right of contribution against Muhler. It is also undisputed Superior has no claim for equitable indemnity, as it acknowledges it was partially negligent.

clearly and unequivocally require Muhler to indemnify Superior for Superior's own negligence. The circuit court also found, to the extent the 2007 Agreement purported to indemnify Superior "unconditionally," it was unconscionably broad. Thus, the circuit court denied Superior's motion for partial summary judgment and granted Muhler's motion to the extent Muhler sought a declaration the Subcontract and 2007 Agreement did not require Muhler to indemnify Superior for Superior's own negligence. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err by applying the clear and unequivocal standard based on its improper conflation of indemnification for Superior's own negligence with indemnification for Superior's sole negligence?

2. Did the circuit court err by finding the indemnity clause in the Subcontract did not require Muhler to indemnify Superior for Superior's own concurrent negligence?

3. Did the circuit court err by failing to reconcile the Subcontract and the 2007 Agreement and construe them in conjunction when determining whether Muhler was obligated to indemnify Superior for Superior's own concurrent negligence?

STANDARD OF REVIEW

The circuit court should grant a motion for summary judgment when the evidence shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. An appellate court "reviews the grant of a summary judgment motion under the same standard as the [circuit] court." *Montgomery v. CSX Transp., Inc.*, 376 S.C. 37, 47, 656 S.E.2d 20, 25 (2008).

SOLE VS. CONCURRENT NEGLIGENCE

Superior argues the circuit court erred by conflating the idea of sole negligence and concurrent negligence under the broad term of "own negligence." Superior claims this error led the circuit court to apply an improper standard when interpreting the

indemnification clause in the contracts at issue. Specifically, Superior argues because it was seeking indemnification for its concurrent negligence and not its sole negligence, the indemnification clauses were subject to the general rules of contract construction, rather than strict construction and the heightened standard of clear and unequivocal. Muhler argues the circuit court properly applied the clear and unequivocal standard when interpreting the indemnification clauses at issue. Muhler claims this heightened standard applies whether Superior is seeking indemnification for Superior's sole or concurrent negligence.

We find the circuit court properly applied the clear and unequivocal standard because it applies whether Superior sought indemnification for its sole or concurrent negligence. Our courts "have consistently defined indemnity as 'that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party.'" *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003) (quoting *Campbell v. Beacon Mfg. Co.*, 313 S.C. 451, 454, 438 S.E.2d 271, 272 (Ct. App. 1993)). "A right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting *Town of Winnsboro v. Wiedeman-Singleton, Inc.* (*Winnsboro I*), 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (*Winnsboro II*)).

"Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties." *Rock Hill Tel. Co. v. Globe Commc'ns, Inc.*, 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005).

Typically, courts will construe an indemnification contract "in accordance with the rules for the construction of contracts generally." *Campbell*, 313 S.C. at 453, 438 S.E.2d at 272. However, when an indemnity clause purports "to relieve an indemnitee from the consequences of its own negligence," our case law requires strict construction of the clause. *Laurens*, 355 S.C. at 111, 584 S.E.2d at 378–79. "Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms." *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989).

In *Federal Pacific*, the respondent leased a building to the appellant for commercial purposes, and subsequently, an electrical switchgear exploded and injured an employee of the appellant. *Id.* at 25–26, 378 S.E.2d at 57. The respondent manufactured and installed the switchgear, and the employee sued only the respondent based solely on products liability causes of action, including negligence. *Id*. at 26, 378 S.E.2d at 57. The employee did not make any allegations against the appellant. *Id*. The respondent demanded indemnification from the appellant based on a clause in the lease agreement. *Id*. This Court found the indemnity clause was subject to the clear and unequivocal standard because the respondent was seeking indemnification for its "own negligence." *Id*. Although, it appears the respondent was seeking indemnification for its sole negligence because the employee made no allegations against the appellant, the Court did not distinguish between sole and concurrent negligence. *Id*.

In *Laurens*, a hospital contracted with Laurens Emergency Medical Specialists, P.A. (EMS) to provide emergency services for the hospital. 355 S.C. at 106, 584 S.E.2d at 376. Under the contract, EMS was responsible for hiring physicians and the hospital was responsible for employing personnel for support and administrative work. *Id*. The hospital employed Anita Raines as support staff, and she stole thousands of dollars from EMS resulting in EMS suing the hospital. *Id*. at 106–07, 584 S.E.2d at 376. EMS sought indemnification from the hospital for Raines's thievery based on a clause in the contract. *Id*. at 107, 584 S.E.2d at 376. The hospital defended by claiming EMS was contributorily negligent because it failed to have procedural safeguards against theft or to detect theft. *Id*. First, our supreme court found EMS could not recover under the indemnification clause because a third party claim is a prerequisite to indemnification, unless the contract "explicitly contemplate[s]" indemnification for second party claims. *Id*. at 110–11, 584 S.E.2d at 378. Next, the *Laurens* court examined whether the allegation of EMS sharing in the negligence impacted whether the hospital was obligated to indemnify EMS. *Id*. at 111–12, 584 S.E.2d at 378–79. The court found strict construction of the indemnity clause was required because EMS claimed the clause could relieve it "from the consequences of its own negligence." *Id*. Although the court did not expressly discuss a distinction between sole and concurrent negligence, it applied the clear and unequivocal standard despite the hospital's claim that EMS was partially negligent in allowing Raines to steal the money. *Id*. Thus, the *Laurens* court applied the clear and unequivocal standard to EMS's attempt to obtain indemnification for its concurrent negligence.

Furthermore, our supreme court has recently declared deterrence is the policy basis for the heightened standard of clear and unequivocal. *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 409 S.C. 487, 490–91, 763 S.E.2d 19, 21 (2014).

> The policy basis for the negligence rule is simple—barring indemnification when the indemnitee is at fault for the damages serves to deter negligent conduct in the future, for the indemnitee will know that the indemnification agreement will not save it from liability if it fails to act with due care.

Id. The *Ashley II* court noted our supreme court has declined to apply the negligence rule[3] "when application of the rule would have no deterrent value." *Id*. at 491, 763 S.E.2d at 21.

In this case, the circuit court properly applied the clear and unequivocal standard because the standard applies when an indemnitee seeks indemnification for its own concurrent negligence. Based on our reading of *Laurens*, the clear and unequivocal standard applies any time an indemnitee is seeking indemnification for its negligence, whether sole or concurrent. Thus, the standard applies in this case to Superior's claim for indemnification for its concurrent negligence. Furthermore, applying this heightened standard serves the policy goal of encouraging Superior to act with due care in the future because the indemnity clause may not shield it from liability. *See Ashley II*, 409 S.C. at 490–91, 763 S.E.2d at 21 (explaining the policy basis for the negligence rule is to serve as a deterrent to future negligent conduct). The goal of deterrence is applicable whether the indemnitee is seeking indemnification for its sole or concurrent negligence. We fail to find any important distinction between sole and concurrent negligence with regard to our supreme court's policy basis for applying the clear and unequivocal standard.

Additionally, Superior's reliance on this Court's decision in *Campbell* is misplaced. Although the *Campbell* court did not expressly state it was applying the clear and unequivocal standard, it ultimately found the indemnitee could recover for its concurrent negligence "under the clear terms of the contract." 313 S.C. at 455, 438

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[3] The clear and unequivocal standard is also known as the negligence rule. *Ashley II*, 409 S.C. at 490–91, 763 S.E.2d at 21.

S.E.2d at 273. Thus, *Campbell* relied on the "clear" terms in the contract and, in effect, applied the clear and unequivocal standard. Accordingly, the circuit court in this case properly applied the clear and unequivocal standard to Superior's attempt to obtain indemnification for its concurrent negligence.

INDEMNIFICATION CLAUSE IN THE SUBCONTRACT

Under South Carolina law, a contract that purports to indemnify an indemnitee for the indemnitee's sole negligence is unenforceable. *See* S.C. Code Ann. § 23-2-10 (2007). Superior argues the circuit court erred by finding the indemnification clause in the Subcontract did not require Muhler to indemnify Superior for Superior's concurrent negligence. After parsing the language in the indemnification clause in detail, Superior concludes the language in article 12.1 "broadly assumes a duty to indemnify for anything connected to Muhler's scope of work under the Subcontract." Next, Superior claims article 12.1(a) "narrows the scope of Muhler's indemnification obligation to property damage caused by Muhler's sole or concurrent negligence." Superior asserts the last phrase in article 12.1(a) "clarifies that when the negligence is concurrent, Muhler assumes a duty to indemnify for the concurrent negligence" of Superior.

Muhler argues the circuit court properly determined the Subcontract's language failed to meet the heightened burden of showing, in clear and unequivocal terms, it was required to indemnify Superior for Superior's concurrent negligence. Muhler claims the Subcontract obligates it to indemnify Superior only for claims and expenses caused by Muhler's negligent acts or omissions. Muhler contends the phrase in article 12.1(a) of the Subcontract stating "to the extent caused" expresses an intent to limit Muhler's liability to its concurrent negligence and specifically excludes liability for Superior's concurrent negligence.

The circuit court properly found the Subcontract failed to clearly and unequivocally show an intention by the parties to indemnify Superior for its own concurrent negligence. Generally, we will construe an indemnification contract "in accordance with the rules for the construction of contracts." *Campbell*, 313 S.C. at 453, 438 S.E.2d at 272. However, as explained above, when an indemnity clause purports "to relieve an indemnitee from the consequences of its own negligence," our case law requires strict construction of the clause. *Laurens*, 355 S.C. at 111, 584 S.E.2d at 378–79. "Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against

losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms." *Fed. Pac. Elec.*, 298 S.C. at 26, 378 S.E.2d at 57.

In *Federal Pacific*, the indemnification clause was broad and comprehensive. *Id.* at 25, 378 S.E.2d at 57.

> [The appellant] shall indemnify [the respondent] and hold it harmless from and against any damage suffered or liability incurred on account of bodily injury to any person or persons . . . or any loss or damage of any kind in connection with the [l]eased [p]remises during the term of this lease.

Id. (brackets removed). This Court explained other jurisdictions differed as to whether, to meet the clear and unequivocal standard, a specific reference in the contract to the indemnitee's negligence is required or "words of general import are sufficient." *Id*. at 26–27, 378 S.E.2d at 57. It examined a previous case from our supreme court and found "general terms," although broad and comprehensive, were inadequate to satisfy the clear and unequivocal standard. *Id*. at 29, 378 S.E.2d at 58–59. Specifically, this Court found the use of general terms such as "'indemnify . . . against any damage suffered or liability incurred . . . or any loss or damage of any kind in connection with the [l]eased [p]remises during the term of the lease' [did] not disclose an intention to indemnify for consequences arising from [the indemnitee]'s own negligence." *Id*. (brackets removed).

The indemnification clause at issue in *Laurens* was also broad and comprehensive: "The [h]ospital will indemnify and hold EMS . . . harmless from and against any and all claims, actions, liability, or expenses . . . caused by or resulting from allegations of wrongful acts or omissions of [h]ospital employees, servants, [and] agents." 355 S.C. at 110, 584 S.E.2d at 378 (brackets removed). Under the clear and unequivocal standard, our supreme court found this "standard language" did not "disclose an intention by the parties to relieve EMS of the consequences of its own negligence." *Id*. at 112, 584 S.E.2d at 379.

In *Mautz*, a New Jersey court examined almost identical language as that used in the Subcontract, including the phrase "to the extent caused in whole or in part by any negligent act or omission of the [indemnitor]." *Mautz v. J.P. Patti Co.*, 688 A.2d 1088, 1090–91 (N.J. Super. Ct. App. Div. 1997). The *Mautz* court found the

phrase beginning with "to the extent" was a clear term limiting the indemnitor's promise to indemnify to only the losses resulting from the indemnitor's negligence. *Id*. at 1092–93. The court concluded, "The clause states [the indemnitor]'s obligation to indemnify [the indemnitee] but only *to the extent* that the claim is caused by [the indemnitor]'s own negligence. The clause does not provide indemnity to [the indemnitee] for [the indemnitee]'s own negligence, but only to the extent of [the indemnitor]'s negligence." *Id*.; *see also Braegelmann v. Horizon Dev. Co.*, 371 N.W.2d 644, 646 (Minn. Ct. App. 1985) (finding, in a nearly identical indemnity clause, "[t]he additional phrase, 'to the extent caused,' . . . suggests a 'comparative negligence' construction under which each party is accountable 'to the extent' their negligence contributes to the injury").[4]

In this case, the language in article 12.1 of the Subcontract is broad but fails to require Muhler to indemnify Superior for Superior's own concurrent negligence. First, we agree with Superior the language in article 12.1, "arising out of or resulting from," is a broad and comprehensive term. Under the language of article 12.1 alone, Muhler broadly agreed to indemnify for any damages resulting from the scope of work in the Subcontract, which was installation of windows and doors. However, we cannot ignore the language in article 12.1(a), which limits the broad language from article 12.1. Specifically, we agree with the *Mautz* and *Braegelmann* courts that the phrase, "to the extent caused . . . in whole or in any part by any negligent act or omission of [Muhler]," limits Muhler's obligation to indemnify to damages and losses but only to the extent they were caused by the negligence of Muhler and its subcontractors. Muhler's indemnity obligation extends to losses Muhler only causes in part, but does not clearly and unequivocally require Muhler to indemnify for the negligence of others that contributed to the same loss.

Indeed, Superior admitted the limiting function of this phrase multiple times in its brief: "The function of the phrase 'to the extent that . . .' is to limit Muhler's indemnity obligation to only that damage caused by, or allegedly caused by,

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[4] Superior claims *Braegelmann* is inapplicable because it involves "a factually distinguishable situation—an on-the-job personal injury claim." Superior argues an employer has a different duty than a general contractor on a construction site and a general contractor's negligence is not independent of the subcontractor's negligence. We fail to see how this distinction impacts or changes the analysis of contractual terms regarding indemnification.

Muhler and its subcontractor's negligent performance of its scope of work." Subsequently, Superior explained, "The second key phrase, 'to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of [Muhler and its subcontractors]' narrows the scope of Muhler's indemnification obligation to property damage caused by Muhler's sole or concurrent negligence." Despite these statements, Superior then claims this limiting phrase beginning with "to the extent" is applicable "only when indemnity is sought for damages associated with multiple trades" such as damages from windows and roofing. We disagree this limiting phrase is applicable only to prevent Muhler from being obligated to indemnify Superior for damages associated with other trades. The Subcontract's terms do not limit the phrase's applicability to such situations and, instead, plainly state Muhler's obligation to indemnify is limited to claims and damages "to the extent caused . . . in whole or in any part by any negligent act or omission of [Muhler]."

Furthermore, construing this limiting phrase as Superior suggests would result in the limiting phrase being redundant. As noted above, article 12.1 limits Muhler's obligation to indemnify to damages "arising out of or resulting from the performance of [Muhler]'s work." Thus, although article 12.1 is broad and comprehensive, it limits Muhler's obligation to indemnify to damages arising from installation of windows and doors and, by itself, would prevent Superior from receiving indemnification from Muhler for damages arising from other trades such as roofing, siding, or landscaping. As a result, contrary to Superior's argument, the limiting phrase in article 12.1(a) beginning with "to the extent" must have a meaning other than limiting Muhler's exposure to damages associated with windows and doors. Otherwise, the limiting phrase in article 12.1(a) would be redundant to the limitation already contained in article 12.1. We find the meaning of the limiting phrase in article 12.1(a) is to limit Muhler's obligation to indemnify to damages and losses caused by the negligence of Muhler and its subcontractors.

Also, the final phrase of article 12.1(a), which states "regardless of whether it is caused in part by a party indemnified hereunder," fails to alter the "to the extent" limiting phrase and provide the clear and unequivocal language Superior needs. *See Braegelmann*, 371 N.W.2d at 646 (finding the phrase, "regardless of whether it is caused in part by a party indemnified hereunder" failed "under the strict construction standard"). We read this phrase to mean whatever level of indemnification article 12.1 provides is not negated simply because Superior's negligence contributed to the loss. Thus, if the Subcontract said, "Muhler agrees to

indemnify for all damages, regardless of whether the damages are caused in part by a party indemnified hereunder," Superior may have had a valid claim that such language showed an intent to indemnify Superior for its own concurrent negligence. However, as noted above, the phrase beginning with "to the extent" in article 12.1(a) limits Muhler's obligation to indemnify to damages and losses caused by Muhler's negligence. Thus, reading article 12.1 as a whole, the final phrase of article 12.1(a) shows only the parties' intent that Muhler's obligation to indemnify for Muhler's negligence is not diminished or affected in the event Superior is concurrently negligent. Contrary to Superior's claims, this final phrase does not show an intention by the parties to indemnify Superior for its concurrent negligence.

Superior cites many cases from other jurisdictions that interpret indemnification clauses with what it labels as "substantially identical language."[5] Superior claims all of these cases reach the same conclusion and support Superior's bid for indemnification for its own concurrent negligence. Although the indemnification clauses in these cases are indeed similar to the clause in the Subcontract, they lack the key phrase, "to the extent caused . . . by any negligent act or omission of the [indemnitor]." The indemnification clauses in all of the cases cited by Superior and noted in footnote four lack this key phrase and, instead, broadly require the indemnitor to indemnify for all damages "arising out of or resulting from the performance of the work." *See Camp*, 853 So.2d at 1076. As noted above, "arising out of or resulting from" is broad and comprehensive. However, unlike the indemnification clause in the Subcontract, the clauses at issue in these other

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[5] *See United States v. Seckinger*, 397 U.S. 203 (1970); *McBro, Inc. v. M & M Glass Co.*, 611 So.2d 283 (Ala. 1992); *Washington Elementary Sch. Dist. No. 6 v. Baglino Corp.*, 817 P.2d 3 (Ariz. 1991) (en banc); *Cumberbatch v. Bd. of Trustees, Del. Tech. & Cmty. Coll.*, 382 A.2d 1383 (Del. Super. Ct. 1978); *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*, 853 So.2d 1072 (Fla. Dist. Ct. App. 2003); *Simon Prop. Grp., L.P. v. Brandt Constr., Inc.*, 830 N.E.2d 981 (Ind. Ct. App. 2005); *Thornton v. Guthrie Cty. Rural Elec. Co-op. Ass'n*, 467 N.W.2d 574 (Iowa 1991); *Payne Plumbing & Heating Co. v. Bob McKiness Excavating & Grading, Inc.*, 382 N.W.2d 156 (Iowa 1986); *Berry v. Orleans Par. Sch. Bd.*, 830 So.2d 283 (La. 2002); *Wallace v. Slidell Mem'l Hosp.*, 509 So.2d 69 (La. Ct. App. 1987); *Robinson v. A. Z. Shmina & Sons Co.*, 293 N.W.2d 661 (Mich. Ct. App. 1980); *Oster v. Medtronic, Inc.*, 428 N.W.2d 116 (Minn. Ct. App. 1988); *Gunka v. Consol. Papers, Inc.*, 508 N.W.2d 426 (Wis. Ct. App. 1993).

cases lack the subsequent term limiting the indemnitor's obligation to indemnify to the damages caused by the indemnitor's negligence. As a result, we are unpersuaded by the extensive list of well-reasoned, but factually and meaningfully distinguishable, cases cited by Superior.

Thus, strictly construing the Subcontract, the circuit court properly found it fails to indemnify Superior for losses resulting from its own concurrent negligence. *See Laurens*, 355 S.C. at 111, 584 S.E.2d at 378–79 (requiring "strict construction of a contract" when a party seeks indemnification for its own concurrent negligence). We affirm the circuit court's ruling on this issue.

CONSTRUING THE SUBCONTRACT AND 2007 AGREEMENT IN CONJUNCTION

Superior argues the circuit court erred by failing to "reconcile the Subcontract with the 2007 Agreement and construe them in conjunction." Superior argues the 2007 Agreement "alters" the Subcontract and "expands the scope of recovery" under article 12.1. Specifically, Superior claims the phrase, "all damages," in the 2007 Agreement conflicts with and replaces the phrase, "to the extent caused," in the Subcontract. Superior appears to argue the circuit court should have merged the indemnification clauses together to create one indemnification clause. However, Muhler argues the circuit court properly construed the Subcontract and 2007 Agreement separately based on a term in the 2007 Agreement stating it "ha[d not] amended or affected any party's contractual rights and responsibilities except to the extent specifically stated." Regardless, Muhler claims the 2007 Agreement did not broaden the scope of the indemnity clause within the Subcontract.

The circuit court properly found the 2007 Agreement did not rescue the Subcontract's failure to clearly and unequivocally provide for indemnification for Superior's own concurrent negligence. First, to the extent Superior advocates merging article 12.1 from the Subcontract and paragraph eleven from the 2007 Agreement to create one indemnity clause, we disagree. Muhler agreed to the two indemnity clauses with different language as part of separate contracts with Superior. Merging the indemnity clauses into one clause by replacing some language but leaving other language in place would amount to rewriting the indemnity clauses into a contractual term to which Muhler did not agree. In the absence of clear and express language in the 2007 Agreement instructing what phrases replace specific terms in the Subcontract, we decline Superior's invitation

to rewrite the indemnity clauses. The circuit court properly interpreted each indemnity clause according to its own terms. *See Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 410, 656 S.E.2d 775, 781 (Ct. App. 2008) ("Courts only have the authority to specifically enforce contracts that the parties themselves have made; they do not have the authority to alter contracts or to make new contracts for the parties."); *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) ("It is not the function of the court to rewrite contracts for parties.").

Next, the indemnity clause in the 2007 Agreement fails to show an intent, in clear and unequivocal terms, to indemnify Superior for its own concurrent negligence. Arguably, the 2007 Agreement is broader than the Subcontract by claiming Muhler will "unconditionally indemnify" and "pay all damages" while omitting the phrase from the Subcontract beginning with "to the extent caused." However, the 2007 Agreement also fails to include any reference to indemnification for Superior's own concurrent negligence. The broad, comprehensive, and general terms in the 2007 Agreement are inadequate to show the parties intended Muhler to indemnify Superior for Superior's own concurrent negligence. Although there is no verbatim phrase that must be used to meet the clear and unequivocal standard, there must be some language in an indemnity clause that clearly shows the parties' intent to absolve the indemnitee of the consequences of its own concurrent negligence. *See Snohomish Cty. Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc.*, 271 P.3d 850, 854 (Wash. 2012) (en banc) (applying a "clear and unequivocal" standard and finding, although "formulaic language" is not required, the contract must contain "language unquestionably showing the parties' intent to indemnify in the event of losses resulting from the indemnitee's negligence").

The language in the 2007 Agreement is similar to the indemnity clauses in *Laurens* and *Federal Pacific*, both of which failed to meet the clear and unequivocal standard. *See Laurens*, 355 S.C. at 110–12, 584 S.E.2d at 378–79 (finding the language "[t]he [h]ospital will indemnify and hold EMS . . . harmless from and against any and all claims, actions, liability, or expenses . . . caused by or resulting from allegations of wrongful acts or omissions of [h]ospital employees, servants, [and] agents" did not "disclose an intention by the parties to relieve EMS of the consequences of its own negligence"); *Fed. Pac.*, 298 S.C. at 28–29, 378 S.E.2d at 58–59 (finding the use of broad and general terms, including "indemnify . . . against any damage suffered or liability incurred . . . or any loss or damage of any kind in connection with the [l]eased [p]remises," failed to "disclose

an intention to indemnify for consequences arising from [the indemnitee]'s own negligence"). Thus, the language in the 2007 Agreement failed to clearly and unequivocally show the parties intended Muhler to indemnify Superior for Superior's own concurrent negligence. We find the circuit court properly considered the 2007 Agreement separate from the Subcontract and correctly found the 2007 Agreement did not clearly and unequivocally require Muhler to indemnify Superior for Superior's own concurrent negligence.

CONCLUSION

Based on the foregoing, we affirm the circuit court's order because the court did not err by applying the clear and unequivocal standard. Also, neither the language in the Subcontract nor the language in the 2007 Agreement revealed an intent, in clear and unequivocal terms, by the parties for Muhler to indemnify Superior for Superior's own concurrent negligence.[6]

AFFIRMED.

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[6] We recognize the challenges lawyers often face in drafting indemnity provisions that can meet the strict "clear and unequivocal" test. In fact, none of our precedents appear to have found a provision that has met the standard. The provision here derived from an American Institute of Architects (AIA) form. The AIA is a respected organization, and its forms are used regularly in the construction industry. Nevertheless, the indemnity clause at issue here may have been influenced by the "clear and unequivocal" standard. As the Texas Supreme Court has observed, this strict construction test has caused drafters of indemnity provisions to write them in a way that can be read as indemnifying the indemnitee for its own negligence, "yet be just ambiguous enough to conceal that intent from the indemnitor." *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 707–08 (Tex. S. Ct. 1987). What results are law suits that burden courts with deciding whether the parties' intent was camouflaged or "clear and unequivocal." Because South Carolina appellate courts have never upheld an indemnity clause as "clear and unequivocal," parties and their lawyers have little guidance. This is why the Texas Supreme Court discarded the "clear and unequivocal" standard in favor of one they call "express negligence," although we are uncertain how much that clears things up. *See id.* at 708. There may be better alternatives to the "clear and unequivocal" standard, but we must leave that to our legislature or supreme court.

SHORT and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Sha'quille Washington, Appellant.

Appellate Case No. 2015-002668

Appeal From Berkeley County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5586
Heard March 15, 2018 – Filed August 8, 2018

AFFIRMED

Katherine Carruth Goode, of Winnsboro, and Jack B. Swerling, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General David A. Spencer, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

HUFF, J.: Sha'quille Washington appeals his conviction and sentence for voluntary manslaughter. He raises numerous arguments concerning the admission or exclusion of evidence and the charging of the jury. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On August 25, 2013, twenty year-old Herman Manigault (Victim) died after being shot in a parking lot at a club located in a secluded area of Berkeley County known as "A Place in the Woods" (the Club). Victim's cousin, Larry Jenkins, who was with Victim at the Club, described the events of that night. Jenkins testified he and Victim arrived at the Club between 11:00 and 11:30 p.m. At some point, Victim and Jenkins picked up Victim's girlfriend, Arianna Coakley, along with Christina "Taj" Lockwood, and brought them to the Club. Jenkins first saw Washington at the Club when Washington bumped into Jenkins, and Washington, thereafter, began to "stare[] us down for a little bit." Jenkins felt a "bad vibe or [that] something wasn't right" from this behavior. Near the end of the night, Jenkins and Victim went outside. At the entrance of the Club, Victim took off his shirt, at which point Victim was "[hit] from behind." Jenkins acknowledged that removal of a shirt suggested there was going to be a fight. Jenkins indicated Victim was struck by more than one person and Jenkins "got into it" with a second individual, because he was not going to let his cousin get jumped. The fight started as a "two-on-one" situation and evolved into "two-on-two" once Jenkins joined the row. Jenkins was wrestling on the ground with the second person, and toward the end of the altercation, Jenkins heard a couple of shots. Jenkins first checked himself to make sure he did not have any stab or bullet wounds. He then observed Victim on the ground and saw Washington shooting toward the ground. Jenkins stated at least one of these shots missed, because he saw the "ground spark up." He clarified he heard one or two shots and then observed Washington shoot at least three more times toward the ground while Victim was on the ground. Jenkins explained that Washington had the gun concealed in his hand, he was shooting like he was not really paying attention, and he was shooting from high and shooting down as he was walking away from Victim. Jenkins could not tell whether the person he fought had a weapon. After the shooting, Jenkins ran to Victim and observed Victim had been shot in the back. By then, Washington was gone. The last time Jenkins saw Washington, it looked like he was headed toward a car. Jenkins did not see where the individual he had been fighting went. Jenkins noticed, aside from being shot in the back, Victim's eye was bruised where he had been hit, and he was bleeding from his face. Jenkins identified Washington in a

photo line-up. He testified he was "a hundred percent sure" Washington was the person who shot Victim.[1]

Coakley, who was dating Victim, testified she went to the Club with Victim, Jenkins, and Lockwood on the night in question. While there, she saw Washington, who she had known for about eight years. Washington was at the Club with his uncle, Larry Kinloch. The week before this incident, Kinloch had approached Coakley asking for her number and hitting on her. Victim kept coming up to Coakley while at the Club, telling her "[Washington] keep looking at me," and Coakley advised Victim not to pay any attention to Washington. Around the third time that Victim approached Coakley and noted the situation with Washington, Victim stated to her that he was "going to snap in a moment."

When Victim went outside, Coakley observed Washington and Kinloch immediately trail behind Victim and Jenkins, so Coakley followed them. While still inside the Club, Coakley picked up a glass beer bottle. Once outside, Coakley could not hear what Washington said to Victim, but she heard Victim say "what's up," at which point Washington started hitting Victim with his left hand. Washington hit Victim on the side of his face, and as Victim started sliding down to get away, Washington continued to hit him. Coakley saw Washington hit Victim twice; once in his eye and the other in the back of his head as Victim was spinning around to get away. Victim was on the ground toward the back of a van. Coakley saw Washington initiate the fight, throwing the first punch at Victim. She observed Kinloch hit Jenkins right after Washington hit Victim. The fight moved to the front of the van. Washington turned around and put a gun in Coakley's face when he saw Coakley was about to hit him with the beer bottle, and he said, "I ain't playing, I ain't playing." Coakley, who had been standing on a stoop, dropped the bottle, put up her hands, and slowly backed up to the door. After Washington pointed the gun in Coakley's face, he jumped off the stoop and ran around the right side of the van, which obstructed Coakley's view. Before Coakley could get to the ground to see what was happening, she heard four gunshots. After the shooting stopped, Coakley went around the road to find Victim. Washington and Kinloch

[1] On cross-examination, Jenkins stated he was "ninety-five percent" sure Washington shot Victim. However, on recross-examination, Jenkins stated he could "a hundred percent say [Washington] shot [Victim]," and it was a fact that he saw Washington shoot Victim.

were not around the van by the time she got there, apparently having run from the vicinity. Victim did not have a gun, and she did not see anyone else with a gun that night. Coakley acknowledged she could not see the shooting because the van was in her way, and she did not see Washington shoot Victim. There were about four or five people in the vicinity when she heard the shots. Coakley gave police a statement, identifying Washington as the shooter. She also picked Washington out in a photo line-up because he was the person who pointed a gun in her face.

Darius Alls, a cook at the Club that night, testified Victim told him someone was bothering him and he thought his life was in danger. Alls suggested Victim stay at the bar until it closed and they would make sure he got to his car. Victim did not tell Alls who was bothering him.

The State also presented the testimony of Kinloch, who acknowledged being at the Club that night and seeing his nephew—Washington—there a couple of times and talking to him. When asked what he remembered about the shooting, Kinloch stated he did not know there was a commotion going on, and he was just outside smoking a cigarette. Kinloch testified he was standing on the stoop with a bunch of people, he knew nothing about a fight, and he did not see anybody with a gun. While smoking his cigarette, he heard three gunshots. The solicitor then inquired whether Kinloch talked on the phone to his brother—Patrick—on August 27, 2013, while Patrick was locked up in the detention center. Kinloch initially denied talking to him, then admitted talking to Patrick, but denied discussing this incident. Kinloch further denied ever telling anyone he drove Washington away from the scene or telling Patrick he saw Washington with a gun. The solicitor then confronted Kinloch with a recorded jail phone call—ostensibly between Kinloch and Patrick occurring two days after the shooting—which was played for the jury. The solicitor questioned Kinloch regarding the following language used in the call: "I fighting with this fuck -- big fucking light-skinned dude, man, tussling with this mother fucker. He got me on the car. I got [Victim] on the car. Me and him going back and forth. Dow, dow, dow." Kinloch agreed the "dow, dow, dow" represented the three shots he either saw or heard. The solicitor asked Kinloch if he knew at least two shots hit Victim, and Kinloch stated he was not sure. The solicitor then asked if it was just coincidence Victim suffered two gunshots, noting the following that Kinloch said in the recorded call: ". . . that n-word shoot three damn times, man, and they been like -- yeah. Head up, boy. I ain't know all that. But I know he had at least two of the three. He hit at least two of the three." Kinloch replied that he was not sure. The solicitor also asked Kinloch whether the

word "strap" in the recorded phrase "he keep his strap" referred to a gun. Kinloch denied it was a reference to a gun and, when asked what it meant, stated he did not know.

On cross-examination, defense counsel questioned whether Kinloch's phone conversation with Patrick was really a self-serving means to protect himself by clearing himself and "put[ting] it squarely on the shoulders of [his] nephew," knowing that phone conversations in the detention center were recorded. He also asked Kinloch whether the jailhouse phone conversation's reference to Washington being "already strapped" and Kinloch responding "you know how we do," suggested that Kinloch had "strapped [himself] with a firearm" such that both Washington and Kinloch were "strapped." Kinloch denied this, claiming it was "[j]ust a little figure of speech." Kinloch testified he was not sure when Washington arrived at the club, and he denied the two of them went outside or that he retrieved a .357 Magnum weapon from the car. Defense counsel confronted Kinloch with a part of the conversation in which Kinloch relayed to Patrick, who was in jail on a murder charge, that someone must remain on the outside and that they both could not be in prison for murder. Kinloch agreed he said that, but stated it happened so long ago that he did not remember the phone call. When asked if he shared with an individual named Quinton Grant that he "did the shooting," Kinloch denied doing so. He likewise denied telling Darlene Washington that he "did the shooting." He further denied saying he had a .357 Magnum in his possession, and disagreed that, from the outset, he had been described in the streets as the person who did the shooting. Defense counsel asked Kinloch if he recalled fighting a chubby, light-skinned guy that night, and Kinloch replied that he was drunk. When asked again if he got into an altercation with a chubby, light-skinned boy that night, Kinloch agreed that the individual "[h]ooked up to [him] and [they] just grabbed," but denied any punches were thrown.

Christina Lockwood was also called to testify by the State. She and Coakley were transported to the Club on the night in question by Victim and Jenkins. She saw Washington there that night with Kinloch and another man, whose name she did not know. When asked if she saw Washington shoot Victim, Lockwood said she did not remember. Lockwood testified she observed Coakley get a beer bottle and walk outside. Coakley said something about Victim, and Lockwood walked behind Coakley. She stated she did not see the actual fight, but knew they were

fighting because "she said that and Larry also said that, too."[2] She testified she did not see anyone shoot anybody, but she heard the gunshots. Lockwood acknowledged that in her statement to police she indicated Washington shot Victim, but claimed she did not remember that. She also maintained she did not remember including in her statement that she heard Washington talk about shooting someone that night or that Washington and Victim were fighting and "then he pointed the gun and shot." Lockwood stated she was not saying what she wrote in her statement was not the truth, but she did not remember. She also agreed, "If it's written on paper, it's the truth." Lockwood did remember Victim commenting that night about Washington looking or staring at him. When asked about the portions of her statement indicating Washington said he was going to get Victim, that she followed Washington and asked what he was talking about but Washington kept walking, and that Washington and Kinloch followed Victim and Jenkins outside, Lockwood stated she did not remember. When asked what Coakley did once the fight started, Lockwood stated she grabbed a beer bottle and went outside. She did not see Washington point a gun at Coakley, and though her statement indicated he pulled out a gun and said, "Back up, I ain't playing, for real," Lockwood claimed she was "only going off what [Coakley] said." Lockwood admitted her statement said she was standing in the doorway of the Club when she "saw [Washington] shoot [Victim]." When asked if what was on paper was true, Lockwood stated, "As I remember." Lockwood agreed that she stated in her statement that she witnessed the shooting of Victim, that Washington had the gun, and that she saw Washington shoot Victim. She also acknowledged she identified Washington as the shooter of Victim multiple times. Lockwood picked Washington out of a photo line-up and wrote in a statement concerning the line-up that she recognized Washington because she knew him and he was the person she saw kill Victim. Lockwood testified she remembered making the statements, but she did not remember the things she said in the statements.

On cross-examination, when asked if she witnessed Washington shooting Victim, Lockwood stated she did not remember "a lot of stuff," and "[i]f it's on paper and I wrote it that night, if it's true — — I don't know what to say." Lockwood agreed she heard Victim state that he was "about to snap." When asked if she saw the

[2] It appears the "she" Lockwood referred to was Coakley, but it is not clear if she was referring to Kinloch or Jenkins when she indicated "Larry" said they were fighting, too.

shooting, Lockwood stated she did not remember. However, she thereafter testified she did not see anybody get shot. Although she acknowledged writing in her statement that Washington, Victim, Kinloch and Jenkins were fighting in the Club parking lot, she testified, "I really don't remember anything." She did recall, however, her statement that, after being at the Club about ten minutes, Victim commented, "That 'n' keep looking at me," and Coakley told Victim to pay him no attention.

Jenkins, Coakley and Lockwood all identified Washington as the shooter in a photo line-up. The bullets recovered from Victim's body were fired from the same gun, which was either a .357 Magnum or a .38 Special. After the authorities received information indicating Washington was involved in the shooting, Washington called them and told them he had some information about the matter. He gave a written statement indicating he was outside when he heard a commotion; three people were involved in a fight; the victim's friend was helping him fight the suspect; the suspect had a revolver; after the fight was over, the victim walked away and the suspect fired a shot at him; and as Washington ran, he heard two more shots. Washington denied he had a gun that night and also told the officers neither the victim nor Jenkins had a gun. A gunshot residue test was performed on Washington, but it was done about six hours after the shooting and Washington stated he had washed his hands.[3] No gunshot residue test was performed on Kinloch because he was not identified as being there and possibly involved until much later in the afternoon, well outside the time limits for the test. From their investigation, authorities understood there was a fight involving Jenkins, Kinloch, Victim and Washington on the night in question.

Victim's autopsy revealed he suffered two gunshot wounds to his body, a rectangular shaped laceration to the back of his head and a chipped skull bone caused by blunt force trauma, and lacerations near his left eye. The fatal injury was a close-range gunshot wound to his back, and Victim would have died within minutes of receiving the wound.

After the State rested, the defense called Aja Williams, who testified she was bartending that night at the Club and she served alcohol to Victim. According to Williams, she saw Kinloch at the Club that night, and observed him "walking

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[3] SLED ultimately did not perform an analysis on the kit collected from Washington due to the fact it was collected more than six hours after the incident.

everywhere [Victim] went." She stated that everywhere Victim went in the Club, Kinloch and Washington followed. The last thing Victim said to Williams was "[Kinloch] going to shoot me, they going to kill me." Williams asked him why, and Victim replied that he did not know. When the Club was shutting down and everyone was walking out, Williams heard gun shots. On cross-examination, Williams confirmed that both Kinloch and Washington followed Victim around that night, and that when Victim spoke to her, he said that "they" were going to kill him. Williams clarified that when Victim said "they," he was referring to Washington and Kinloch. Williams testified that when Victim walked out the door, Washington and Kinloch were six feet behind him.

The defense also called Renard Deveaux, who testified he was walking through the parking lot of the Club that night and was going to the door when he observed a young man standing there with his back to him. As he walked past this person, a guy with short pants, who was standing in front of the first individual, pulled off his shirt like he was about to engage in a fight. The person who pulled off his shirt was in proximity to and standing in the opposite direction of Kinloch. Deveaux "heard them fussing." As he went through the first door of the Club and got to a second door, Deveaux overheard gunshots. He did not see who fired the shots and did not witness the fight.

Robin Williams also testified on behalf of Washington. Robin stated she was walking out of the Club when she looked up and saw a woman holding a glass bottle in Washington's face. Approximately five seconds later, she heard four shots. She observed Washington run on the second shot. When she heard the last two shots, Washington was running away, and was "not in that proximity" when the last shots were fired. According to Robin, Washington was not near the fight. Robin testified she did not see Washington point a gun in the woman's face, and Washington did not have a gun. She saw Kinloch inside the Club that night, but did not see him when she heard the shots. She did not know if Kinloch was outside during the shooting.

Tyson Singleton was also called by the defense. Singleton testified he was in the parking lot when everyone was leaving the Club and he heard three shots. Washington was in his sight at that time, and Washington was not anywhere near where the shots were fired. Singleton stated that Washington was in the road before the first shot was fired.

Finally, the defense sought the admission of testimony from other witnesses, which the trial court denied. In particular, the defense called Washington's cousin, Kenneth Grant,[4] and elicited testimony from Grant that after the shooting occurred, Kinloch said "he did it." However, the trial court sustained the solicitor's hearsay objection to the testimony and instructed the jury to strike it from consideration. The defense also called Kevin Watson as a witness. Upon determining Watson was in violation of the court's sequestration order, defense counsel was allowed only to proffer his testimony. In his proffer, Watson testified he was at the Club that night when he went outside to smoke a cigarette and observed some fighting and then left. He did not see Kinloch, Washington, or any individuals with a weapon. The defense also recalled the forensic pathologist who performed Victim's autopsy in an attempt to admit a toxicology report and testimony concerning Victim's blood alcohol level. The trial court, however, sustained the solicitor's objection to such.

Following closing arguments, the trial court charged the jury, including an instruction on "the hand of one is the hand of all" at the behest of the State. However, the court declined to charge the jury on self-defense, as requested by the defense. After the matter was submitted to the jury, following several hours of deliberation and toward late afternoon, the jury sent a note indicating it was deadlocked. Over defense counsel's objection, the trial court gave the jury an *Allen* charge and instructed the jurors to return in the morning to resume deliberations. The next day the jury returned a verdict, finding Washington guilty of voluntary manslaughter. The trial court sentenced him to thirty years in prison.

ISSUES

1. Whether the trial court erred in refusing to admit the testimony of defense witness Grant that Kinloch told Grant he committed the shooting.

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[4] The record indicates Kenneth Grant's full name is Kenneth Gordon Grant. Nevertheless, Washington and the State both refer to this witness as Quentin Kenneth Grant in their briefs and acknowledge this to be the same person referred to in Kinloch's testimony, wherein he denied stating to that individual that he had been the shooter.

2. Whether the trial court erred in refusing to admit a toxicology report and testimony of the forensic pathologist concerning the report's findings as to Victim's blood alcohol level.

3. Whether the trial court erred in excluding the testimony of defense witness Watson, who had been present in the courtroom briefly in violation of the trial court's sequestration order.

4. Whether the trial court erred in refusing the defense's request for a jury charge on self-defense.

5. Whether the trial court erred in granting the State's request for a jury charge on accomplice liability.

6. Whether the trial court erred in giving an *Allen* charge at the close of the day's deliberations, then excusing the jury for the night.

STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only and is bound by the trial court's factual findings unless those findings are clearly erroneous. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission or exclusion of evidence is within the discretion of the trial court, and its decision will not be disturbed on appeal absent an abuse of discretion. *State v. Winkler*, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010). An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or they are controlled by an error of law. *Id.* "An appellate court will not reverse the trial [court's] decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010).

LAW/ANALYSIS

I. Refusal to Admit Testimony of Defense Witness Grant

As noted, defense counsel asked Kinloch if he shared with Grant that "[he] did the shooting." Kinloch denied this. Defense counsel also asked if, when the shooting took place, he ran and Grant assisted him in getting away from the shooting, and Kinloch likewise denied this. Kinloch also disputed that he saw Grant after the

shooting that night. Later, the defense called Grant to the stand. When asked if he had any information concerning this case, Grant stated "[T]hat night after it happened . . . I came back because [Kinloch] called me." The solicitor promptly objected on hearsay grounds. The trial court asked defense counsel if there was an applicable exception to the rule against hearsay, and counsel responded there was, stating, "[Kinloch] already testified." The trial court sustained the solicitor's objection. When defense counsel began to ask Grant, "As a result of the conversation with a specific individual, you — —," the solicitor again objected on hearsay grounds, but the trial court noted defense counsel may be able to ask the question without eliciting hearsay. Defense counsel then asked Grant, "so you returned to the club," to which Grant responded, "Yes. Yes. Larry Kinloch told — — said he did it."[5] Defense counsel then asked, "Larry [Kinloch] said he did it?" Grant responded, "He said he did it." Following the solicitor's objection, Grant again stated, "He told me he did it." The trial court asked counsel to approach, and an off-the-record bench conference was held. Thereafter, the trial court instructed the jury to strike the last statement the witness made. Defense counsel asked that they be allowed to approach the bench, and another off-the-record bench conference was held. Defense counsel then resumed questioning Grant. Grant stated he did not witness the shooting, but learned of it ten to fifteen minutes after it happened. He further stated he saw Kinloch twenty to twenty-five minutes after the shooting. Defense counsel then asked, "And that's when you heard what he said?" Grant replied, "Yes." Defense counsel asked, "That, in fact, he had [sic] did it?" Grant replied, "Yes." The solicitor again objected, and the trial court sustained the objection and instructed the jury to strike the testimony from consideration.[6] On redirect, defense counsel asked Grant why he was there, and Grant began to respond, "To say that [Kinloch] — —," at which point the solicitor objected. The trial court sustained the objection, instructing the witness, "You cannot testify as to what someone told you, unless there is an exception and I have established there is no exception." Defense counsel then inquired, "Judge, what

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[5] Grant thereafter stated he never went back to the Club, claiming he went to Kinloch's house and that was where he saw Kinloch.

[6] We note, although the trial court sustained the solicitor's objection and twice instructed the jury to disregard the testimony, Grant testified four times before the jury that Kinloch told him he had committed the shooting, with defense counsel patently eliciting the testimony after the trial court had already ruled it inadmissible.

about Rule 803, presence [sic] sense — —," at which point a bench conference was held off the record. No further evidence was elicited on the subject and no more arguments were made at that time. However, after the State and the defense rested, during the charge conference defense counsel, in arguing against inclusion of a "hand of one" charge, maintained the evidence did not support an accomplice liability charge because there was no evidence Kinloch shot anyone. In making the argument, defense counsel maintained, "The only possible witness that had a chance to say that under an utter excited [sic] exception to the hearsay rule, the jury was instructed to disregard that completely from their deliberation and . . . [could not] discuss the fact that . . . Grant said . . . I heard [Kinloch] say he did it."

Washington contends the trial court erred in refusing to admit Grant's testimony that Kinloch told him he committed the shooting. He first argues Grant's testimony to that effect was not hearsay because it qualified as a prior inconsistent statement under Rule 801 of our rules of evidence. He further contends, even if the trial court correctly found the statement was hearsay, it erred in its conclusion that it did not fit into any hearsay exception. In particular, Washington argues the statement Kinloch made to Grant was admissible under evidentiary Rule 803 exceptions (1) present sense impression and (2) excited utterance. In response to the State's appellate argument that the only preserved argument with respect to this issue is that premised on the present sense impression under Rule 803, Washington argues the other two bases are preserved because they are apparent from the record. He asserts the trial court limited defense counsel in placing objections on the record, repeatedly informing counsel it would not allow "speaking objections," cutting off counsel before the objection could be fully stated for the record, and requiring the objection be argued in off-the-record bench conferences. Washington maintains defense counsel's specific reference to Kinloch already having testified clearly reveals the basis of the argument was that of a prior inconsistent statement. He contends defense counsel's excited utterance argument was made during the bench conference on the matter, as was revealed on the record during his argument on jury charges when he noted his "utter excited [sic] exception to the hearsay rule."

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "The rule against hearsay prohibits the admission of evidence of an out of court statement to prove the truth of the matter asserted unless an exception to the rule applies." *State v. Price*, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006). A statement that is admissible because it is "not hearsay" under Rule

801(d), SCRE, or because it falls within a Rule 803, SCRE exception may be used substantively to prove the truth of the matter asserted. *State v. Stahlnecker*, 386 S.C. 609, 622-23, 690 S.E.2d 565, 572-73 (2010); *State v. Dennis*, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999).

A. Prior Inconsistent Statement

We question whether Washington's prior inconsistent statement argument is preserved for our review. There is no indication from the record that defense counsel ever raised this as a basis for admission of Grant's testimony in the face of the State's hearsay objection. We acknowledge, and find problematic, that the trial court did, throughout the trial, indicate it would not allow "speaking objections," and numerous bench conferences were held off the record. However, it does not appear the trial court implemented its "no speaking objections" rule concerning this particular matter. After the State objected to the proposed testimony on the basis of hearsay, the trial court asked defense counsel if he had any exceptions, to which counsel only replied, "[Kinloch] already testified." Though a party need not use the exact name of a legal doctrine in order to preserve it, it must be clear by the record that the argument has been presented on the ground argued on appeal. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). We acknowledge three bench conferences were held off the record during this testimony, however, one was instigated by defense counsel asking if he could approach the bench and another occurred in regard to defense counsel's on-the-record assertion that Rule 803's present sense impression exception applied, an argument which is clearly preserved and is addressed below. Further, there is no indication the trial court prohibited defense counsel from stating his arguments on the record. *See Smalls v. State*, 422 S.C. 174, 182 n.3, 810 S.E.2d 836, 840 n.3 (2018) ("When a conference takes place off the record, it is trial counsel's duty to put the substance of the discussion and the trial court's ruling on the record.").

At any rate, even assuming for the sake of argument that the issue is properly preserved, we find no abuse of discretion by the trial court because no proper foundation was laid for admission of the evidence as a prior inconsistent statement. "A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with the declarant's testimony." Rule 801(d)(1)(A), SCRE. "The South Carolina rule differs from the federal rule in that a proper foundation must be laid before admitting a prior inconsistent statement." *State v. McLeod*, 362 S.C.

73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004). "Under the rules of evidence, a prior inconsistent statement may be admitted when the proper foundation has been laid" pursuant to Rule 613(b), SCRE. *State v. Stokes*, 381 S.C. 390, 398, 673 S.E.2d 434, 438 (2009). This rule states in pertinent part as follows:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.

Rule 613(b), SCRE.

Rule 613(b) specifically requires that *the witness* be advised of these matters and be given the opportunity to explain or deny the statement before extrinsic evidence of a prior inconsistent statement may be admitted into evidence on this basis. During cross-examination of Kinloch, defense counsel asked him only if he shared with Grant that he "did the shooting," whether he ran and Grant assisted him in getting away from the shooting, and whether he saw Grant "[a]fter the shooting that night." These general questions are insufficient to lay the proper foundation. Even if defense counsel's question of whether Kinloch shared with Grant that he did the shooting was sufficient to advise Kinloch of the substance of the statement and provide him an opportunity to explain or deny the statement, counsel did not lay the foundation as to the *time and place the statement was allegedly made*. Though defense counsel asked Kinloch if Grant assisted him in getting away after the shooting and whether he saw Grant that night, these questions did not reference his alleged statement to Grant and did not advise Kinloch of the time and place he allegedly made the statement to Grant. Additionally, Grant testified that the statement was not made to him at the Club, but was made at Kinloch's home some twenty to twenty-five minutes after the shooting. Accordingly, while Washington argues the question concerning whether Grant assisted Kinloch in getting away from the shooting provided advisement concerning the place the statement was made, this is contrary to Grant's testimony as to the place the statement was allegedly made.

B. Present Sense Impression

Rule 803, SCRE, provides a "present sense impression" exception to the rule against hearsay, which is defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Rule 803(1), SCRE. "There are three elements to the foundation for the admission of a hearsay statement as a present sense impression: (1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event." *State v. Parvin*, 413 S.C. 497, 503, 777 S.E.2d 1, 4 (Ct. App. 2015) (quoting *State v. Hendricks*, 408 S.C. 525, 533, 759 S.E.2d 434, 438 (Ct. App. 2014).

As previously noted, it is clear trial counsel argued to the trial court that Grant's testimony concerning Kinloch's statement was admissible under the present sense impression exception of Rule 803, SCRE. Accordingly, this argument is preserved on appeal. However, we find no error in the trial court's denial of admission of Grant's testimony on this basis.

"The rationale for admissibility [under the present sense impression exception] is that the statement is reliable, since it is contemporaneous with the event or occurrence and there was no time for reflection, faulty recollection, or deliberate misrepresentation." 31A C.J.S. *Evidence* § 505 (2018). "The rule[] generally refer[s] to a declaration made 'immediately thereafter,' but this does not necessarily mean 'instantly thereafter' or precisely at the same moment." *Id.* However, "[s]tatements of past events are excluded, because it is more likely that statements that are not contemporaneous are calculated interpretations of events rather than near simultaneous perceptions." *Id.* "Present sense impression evidence differs from the excited utterance exception, since the excited utterance exception requires that the shock or excitement of an incident or event trigger the outburst, while the present sense impression exception does not require that the declarant be excited." *Id.* "The present sense impression exception requires a closer time proximity than the excited utterance one." *Id.*

"The theory supporting the present sense impression exception is that substantial contemporaneity of the event and the statement negates the likelihood of memory deficiencies or deliberate misstatements." 2 *Wharton's Criminal Evidence* § 6:19 (15th ed.) "Its use is limited to statements made while the witness is perceiving an

event or condition or immediately thereafter." *Id.* "If the statement describes something that happened at an earlier time, it does not fit within this exception and will not be admitted as a present sense impression." *Id.* "The basis of the present sense impression exception is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation." *State v. Pickens*, 346 N.C. 628, 644, 488 S.E.2d 162, 171 (1997).

Here, the alleged statement to Grant was not made *while Kinloch was perceiving the event or immediately thereafter* such that it could be said to meet the requirement that it was contemporaneous with the event in order to be admissible under the present sense impression exception. The alleged statement clearly was not made while Kinloch was perceiving the event. Thus, it could only be admissible under the rule if made "immediately thereafter." Rule 803(1), SCRE. This court has noted, "[o]ur courts have not delineated a time frame that would constitute 'immediately thereafter'; however, this court has held a statement given nearly ten hours after the perceived incident cannot be admitted under Rule 803(1)." *Parvin*, 413 S.C. at 503, 777 S.E.2d at 4 (citing *State v. Burroughs*, 328 S.C. 489, 499, 492 S.E.2d 408, 413 (Ct. App. 1997))[7]. However, *Parvin* and *Burroughs* certainly do not provide that anything less than ten hours would qualify the statement as having been made contemporaneous with or immediately after the event or condition was perceived. Grant's testimony indicates the alleged statement was not made until Kinloch had left the scene and arrived at his home, well after the shooting. While twenty to twenty-five minutes is clearly a significantly shorter amount of time than ten hours, we find, under the circumstances, such time frame does not qualify as "immediately" after the event. Notably, the time between the event and the alleged statement does not negate or reduce the likelihood of deliberate misstatements. Additionally, *Burroughs* provides it is appropriate for the appellate courts to look to South Carolina pre-Rules *res gestae* cases—prior to the adoption of Rule 803—in analyzing the present sense impression exception to the hearsay rule. *Burroughs*, 328 S.C. at 499, 492 S.E.2d at 413. In *Wilson v. Childs*, 315 S.C. 431, 439, 434 S.E.2d 286, 291-92 (Ct. App. 1993)—a case dealing with *res gestae* issues prior to the adoption

[7] In *Parvin*, this court found error in the admission of statements under the present sense impression exception because the witness gave no indication of the amount of time that lapsed between the alleged statements and the event. *Id.* at 504, 777 S.E.2d at 4.

of Rule 803(1)—this court upheld the trial court's ruling excluding testimony that the decedent told his daughter shortly before his death that he told the defendant doctor about his bleeding condition. We noted the trial court reasoned the testimony was hearsay and was not admissible as a present sense impression because the decedent had made the statement in "reflection of past events." Here, the statement attributed to Kinloch was a statement reflecting something that occurred in the past; i.e., that he had shot Victim. It was not the revelation of a contemporaneous event. Considering that the alleged statement was made some twenty to twenty-five minutes after the event and after Kinloch had left the scene and gone home, there was time for reflection and deliberate misrepresentation, and it was not made within such time as to negate the likelihood of a deliberate misstatement. Thus, the alleged statement was not contemporaneous with the event and, therefore, does not qualify as a present sense impression exception to the rule against hearsay. Accordingly, we find no abuse of discretion in the trial court's refusal to admit the testimony under the present sense impression exception to the hearsay rule. *See State v. Johnson*, 413 S.C. 458, 466, 776 S.E.2d 367, 371 (2015) ("The admission or exclusion of evidence rests in the sound discretion of the trial [court], and will not be reversed on appeal absent an abuse of discretion.").

C. Excited Utterance

As with Washington's prior inconsistent statement argument, there is some question as to whether his assertion that Grant's testimony was admissible under the excited utterance exception to the rule against hearsay is sufficiently preserved for our review. There is no indication defense counsel raised the excited utterance exception to the hearsay rule at the time the trial court ruled Grant's testimony concerning Kinloch's alleged statement was inadmissible. However, defense counsel's argument on the propriety of an accomplice liability charge does provide some indication that defense counsel may have, at some point during discussion of the matter, made an argument to the trial court that Grant's testimony regarding Kinloch's alleged statement was admissible under this exception. Given the trial court's propensity to hold off-the-record bench conferences and the fact that there is some indication from trial counsel's argument during the charge conference that an excited utterance exception to the rule against hearsay may have been raised as a basis for admission of Grant's testimony, we find it appropriate to address the argument. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) (finding it to be "good practice for [the appellate court] to reach the merits of an issue when error preservation is doubtful)"; *id.* at

333, 730 S.E.2d at 287 (Toal, C.J., concurring in result in part and dissenting in part) ("[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation."). On the merits, however, we find no error.

Evidentiary Rule 803 also provides an "excited utterance" exception to the rule against hearsay. An "excited utterance" is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE.

> Three elements must be met for a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition.

Stahlnecker, 386 S.C. at 623, 690 S.E.2d at 573. "In determining whether a statement falls within the excited utterance exception, a court must consider the totality of the circumstances." *State v. Sims*, 348 S.C. 16, 20, 558 S.E.2d 518, 521 (2002). The passage of time between the startling event and the statement is one factor to consider, but it is not the dispositive factor. *Stahlnecker*, 386 S.C. at 623, 690 S.E.2d at 573. "Other factors useful in determining whether a statement qualifies as an excited utterance include the declarant's demeanor, the declarant's age, and the severity of the startling event." *Id.* (quoting *Sims*, 348 S.C. at 22, 558 S.E.2d at 521). "The excited utterance exception is based on the rationale that 'the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication.'" *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007) (quoting *Dennis*, 337 S.C. at 284, 523 S.E.2d at 177). The determination of whether a statement qualifies as an excited utterance exception "is left to the sound discretion of the trial court." *Sims*, 348 S.C. at 21, 558 S.E.2d at 521.

In the present case, there is no evidence Kinloch made the alleged statement while under the stress of excitement. *See Stahlnecker*, 386 S.C. at 623, 690 S.E.2d at 573 (holding the following three elements must be met for a statement to qualify as an excited utterance: "(1) the statement must relate to a startling event or condition; (2) *the statement must have been made while the declarant was under the stress of excitement*; and (3) the stress of excitement must be caused by the startling event

or condition (emphasis added)). According to Grant, the statement was not made at the scene of the shooting, but was made at least twenty to twenty-five minutes later at Kinloch's house. Though not dispositive, time is a factor to be considered in the totality of the circumstances. *See id.* (noting, though not dispositive, the passage of time between the startling event and the statement is a factor to consider in determining whether a statement is an excited utterance). Further, there is no evidence Kinloch's demeanor was such as to indicate the alleged statement was an excited utterance. *See id.* (noting one of the factors useful in determining whether a statement qualifies as an excited utterance is the declarant's demeanor). Nor is there evidence that the shooting suspended Kinloch's process of reflective thought, reducing the likelihood of fabrication. *See Ladner*, 373 S.C. at 116, 644 S.E.2d at 691 ("The excited utterance exception is based on the rationale that 'the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication.'" (quoting *Dennis*, 337 S.C. at 284, 523 S.E.2d at 177)). Accordingly, we find no abuse of the trial court's discretion in declining to find the statement fell within the excited utterance exception.

II. Refusal to Admit Toxicology Evidence

Washington challenges the trial court's refusal to admit evidence of Victim's intoxication. The record reflects the following in regard to Victim's alcohol consumption and level of intoxication on the night in question: Aja Williams testified she was bartending at the Club that night, she served alcohol to Victim, and she did not believe Victim was "heavily intoxicated" that night when she served him. Jenkins testified he did not witness Victim drinking that night. Coakley, however, confirmed that Victim was drinking that night. Alls, the cook at the Club, testified he could not say whether Victim appeared to be under the influence that night, because he—Alls—"was probably under the influence [himself]." The defense re-called the forensic pathologist who performed Victim's autopsy in an attempt to admit a toxicology report and testimony concerning Victim's blood alcohol level. The solicitor objected, citing Rule 404, SCRE.[8] The trial court sustained the objection, stating "[t]here has been abundant testimony as to the fact that there was drinking or not drinking by the victim." In a proffer, the doctor testified Victim had a blood alcohol level of .235, which was high. While

[8] While the State recognizes the solicitor objected to admission of the evidence based on Rule 404, it contends the trial court's ruling nonetheless reflects it sustained the objection based on Rule 403, SCRE.

the forensic pathologist surmised Victim would have acted intoxicated and his judgment would have been impaired, she noted she could not predict, from that level, whether Victim would have acted in an aggressive manner or one that was subdued.

Washington argues the trial court erred in refusing to admit the toxicology report and testimony concerning Victim's blood alcohol content. He argues the .235 level was relevant, as it was probative of the issue of whether Victim provoked the altercation or instigated the fight outside the Club. Washington contends Rule 404 is inapplicable, asserting intoxication is not a matter of character, nor is it a crime, wrong, or other bad act. He further contends the erroneous ruling was prejudicial inasmuch as a person with such a high alcohol content would have a decreased sensitivity to pain, lowered inhibitions, a tendency toward overreaction to a perceived affront, and aggressive or violent behavior. Washington maintains evidence of Victim's extreme intoxication likely would have influenced the jury's deliberations as to who instigated the fight, and it likely would have altered the outcome of the trial.

Generally, all relevant evidence is admissible. Rule 402, SCRE. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling [on such] will be disturbed only upon a showing of an abuse of discretion." *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). An appellate court reviews a trial court's Rule 403, SCRE ruling pursuant to an abuse of discretion standard and gives great deference to the trial court's determination. *State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014). Thus, "[a] trial [court's] decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *Id.* (quoting *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003)). "To warrant reversal based on the admission or exclusion of evidence, the complaining party

must prove both the error of the ruling and the resulting prejudice." *State v. Howard*, 384 S.C. 212, 221, 682 S.E.2d 42, 47 (Ct. App. 2009) (quoting *State v. Douglas*, 367 S.C. 498, 508, 626 S.E.2d 59, 64 (Ct. App. 2006)).

Initially, we find no preservation problem with this issue, as implied by the State. Notably, the State argues the trial court's ruling reflects it sustained the objection to the evidence based on Rule 403, and this is the issue addressed on appeal.

On the merits, we find no abuse of discretion in the trial court's refusal to admit toxicology evidence of the Victim. First, we question the relevance of the toxicology evidence. *See* Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Washington asserts the evidence is relevant as it is probative of the issue of whether Victim provoked the altercation or instigated the fight outside the Club and would show Victim had a decreased sensitivity to pain, lowered inhibitions, a tendency toward overreaction to a perceived affront, and aggressive or violent behavior. There is no evidence in the record that Victim was the aggressor in the physical altercation. Rather, the evidence adduced at trial demonstrates that Victim was followed by Washington and stared at by him in the Club that night, he expressed fear that Washington and Kinloch were going to kill him, Victim was followed outside by Washington and Kinloch, and, once outside, Washington struck the first blow, hitting Victim from behind. While there is evidence Victim removed his shirt, this is probative of his willingness to fight but not necessarily that he provoked the fight. Nonetheless, even assuming removal of his shirt is evidence that Victim was the aggressor, no evidence was offered to support Washington's assertion that Victim's intoxication would have exhibited in him a decreased sensitivity to pain, lowered inhibitions, a tendency toward overreaction to a perceived affront, and aggressive or violent behavior. Rather, this is mere speculation. In fact, the forensic pathologist's proffered testimony was that she could not predict from Victim's high alcohol level whether Victim would have acted in an aggressive manner or in a subdued one. Finally, even assuming there was some relevance to evidence of Victim's toxicology at the time of his death, we conclude the minimal probative value was substantially outweighed by the danger of unfair prejudice under Rule 403. Notably, while Washington was not successful in admission of the extent of Victim's intoxication, he did elicit evidence that Victim had been drinking that night. Further, as noted, there is no evidence Victim's intoxication would have led him to provoke the fight, so the evidence is of

minimal probative value. Based on our standard of review and the deference accorded the trial court, we find no abuse of discretion. Finally, we question whether Washington can show prejudice from the exclusion of this evidence. As noted by the State, the jury returned a voluntary manslaughter verdict, acquitting Washington of murder. Accordingly, it necessarily found Washington had sufficient legal provocation. *See State v. Smith*, 391 S.C. 408, 412-13, 706 S.E.2d 12, 14 (2011) ("Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.").

III. Violation of Sequestration Order

Washington next challenges the trial court's exclusion of a defense witness' testimony based on violation of the court's sequestration order. The record reflects the trial court ordered sequestration of the witnesses. Thereafter, during a pretrial hearing, the solicitor noted some of the defense witnesses were in the courtroom. Defense counsel countered that some of the witnesses in there were witnesses of the State. The trial court then read a list of witnesses and asked them to stand if their name was called. Included in the list was Kevin Watson, although it does not appear he responded. The court then instructed the three witnesses who stood about the sequestration order. The court noted there were many names on the list called to which no one responded and asked the solicitor and defense counsel to look around the courtroom for any of those individuals. Defense counsel responded, if his witnesses did not stand when called, they were not present. The solicitor did not believe any of the State's witnesses were still present. Shortly before opening arguments the next day, the trial court again noted the sequestration order was in effect and instructed the solicitor and defense counsel to ensure no one was in the courtroom who should not be.

After the State rested, the defense called Kevin Watson as its first witness. After a couple of preliminary questions, the solicitor interrupted the examination, informing the court he had been informed Watson was present in violation of the sequestration order. When questioned by the trial court, Watson initially stated he had not been in the courtroom to hear any testimony, the first time he came into the courtroom was that day, and he had not sat and listened to any of the testimony. The State then presented the testimony of Lieutenant Mark Hamilton, who stated he thought he saw Watson in the courtroom earlier on a break. When asked by the court if he was in the courtroom, Watson replied that he was "here today" and acknowledged he saw "a thing on the screen." Watson agreed he was there when

Detective Shuler was testifying and he saw a video being played. The record reflects the video being played during Shuler's testimony was that of Washington's interview, which included his statement to the authorities.

The trial court found Watson indicated he saw the video, which was exactly what the rule of sequestration was in place to prevent, and declined to permit Watson to testify, but it allowed defense counsel to proffer his testimony for the record. Defense counsel protested that when the matter commenced Watson "was not listed as one of the witnesses" on the State's witness list or the defense's witness list and, therefore, Watson would not have been in a position to receive the sequestration instruction. The trial court noted defense counsel, as an officer of the court, knew about the rule of sequestration and should have advised accordingly. Defense counsel maintained that Watson did not come to him "until today and share with [him] he was going to testify," so counsel did not believe there was a need to consider him sequestered. The trial court nevertheless affirmed its ruling.

On appeal, Washington contends the trial court erred in excluding Watson's testimony, arguing violation of the order was minor since Watson was present only for the playing of the video but heard no testimony. He further argues, because Watson had not been present in the earlier days of the trial, he had not been made aware of the sequestration order. Thus, his violation of the order was unknowing and unintentional. Washington maintains, under these circumstances, the trial court abused its discretion in excluding the witness. He also contends exclusion of Watson's testimony was prejudicial, as his proffer showed Watson witnessed the fight and did not see Washington or Kinloch with a weapon, which was in sharp contrast to Coakley and Jenkins' testimony concerning Washington having a gun.

"Whether a witness should be exempted from a sequestration order is within the trial court's discretion." *State v. Singleton*, 395 S.C. 6, 15-16, 716 S.E.2d 332, 337 (Ct. App. 2011) (quoting *State v. Tisdale*, 338 S.C. 607, 616, 527 S.E.2d 389, 394 (Ct. App. 2000)). "The decision whether to waive a sequestration order for witnesses present during the trial rests in the sound discretion of the trial [court]." *State v. Huckabee*, 388 S.C. 232, 240, 694 S.E.2d 781, 785 (Ct. App. 2010) (quoting *State v. Saltz*, 346 S.C. 114, 126, 551 S.E.2d 240, 247 (2001)).

> The purpose of the exclusion rule is, of course, to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at the trial; and if a

> witness violates the order he may be disciplined by the court. The question of the exclusion of the testimony of the offending witness, however, depends upon the particular circumstances and lies within the sound discretion of the trial court.

Id. at 241, 694 S.e.2d at 785 (quoting *U.S. v. Leggett*, 326 F.2d 613, 613–14 (4th Cir. 1964)).

We find no reversible error in the trial court's exclusion of Watson's testimony. First, though it does not appear that Watson was aware of the sequestration order, the trial court found defense counsel, as an officer of the court, was responsible for enforcing the order involving its witnesses. Washington does not challenge this determination by the trial court on appeal. Though defense counsel asserted at trial that Watson was not on any of the witness lists when the matter commenced, the record clearly shows that Watson was, in fact, listed as a witness and his name was called by the court in an attempt to enforce the sequestration order. Further, while Watson denied he heard any testimony, he acknowledged he was present while the officer was on the stand and the video of Washington's interview was played for the jury. Accordingly, the potential existed for Watson to conform his testimony to information presented in Washington's video-recorded statement. Given the trial court's discretion in deciding whether to exclude testimony of a witness in violation of a sequestration order, we find no error. At any rate, even assuming *arguendo* the trial court abused its discretion, we do not believe Washington was prejudiced by the exclusion. Watson's proffered testimony established only that he was present at the Club that night, he observed some fighting, and he did not see Kinloch, Washington, or any individuals with a weapon. This testimony does not establish that no one had a weapon, but only that Watson did not see anyone with a weapon. Further, Watson's testimony was, at best, cumulative to witness Robin's testimony that Washington did not have a gun.

IV. Refusal to Charge Self-Defense

Washington next contends the trial court erred in refusing to charge the jury on the law of self-defense. We disagree.

Washington argues the evidence was sufficient to support a charge of self-defense. He asserts testimony was presented tending to establish Victim provoked the

altercation based on testimony that Kinloch had "hit" on Victim's girlfriend, Coakley, the week before and Victim was bothered and was about to snap before he went outside and removed his shirt. Further, he maintains Coakley's testimony establishes he drew the gun to defend himself after Coakley raised a beer bottle to strike him.

"The law to be charged to the jury is determined by the evidence presented at trial." *State v. Gaines*, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008). "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial [court's] refusal to do so is reversible error." *State v. Light*, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008). "A self-defense charge is not required unless the evidence supports it." *State v. Santiago*, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006). To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. *Id.*

Though self-defense was, at one time, an affirmative defense in this State which placed the burden on a defendant to establish it by a preponderance of the evidence, our law now "requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt." *State v. Wiggins*, 330 S.C. 538, 544, 500 S.E.2d 489, 492-93 (1998). To raise self-defense, the defendant must produce some evidence from which the jury could have a reasonable doubt as to guilt. *See State v. Grooms*, 343 S.C. 248, 254, 540 S.E.2d 99, 102 (2000) ("A defendant is not required to establish self-defense by a preponderance of the evidence; instead, the defendant must only produce evidence which causes the jury to have a reasonable doubt as to his guilt.").

> To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained

> the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger.

State v. Slater, 373 S.C. 66, 69-70, 644 S.E.2d 50, 52 (2007).

"Any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." *State v. Bryant*, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). "Mutual combat exists when there is 'mutual intent and willingness to fight.'" *Jackson v. State (D. Jackson)*, 355 S.C. 568, 571, 586 S.E.2d 562, 563 (2003) (quoting *State v. Graham*, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973)). "Mutual intent is 'manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat.'" *Id.* "Mutual combat bars a claim of self-defense because it negates the element of 'not being at fault.'" *Id.*

"A defendant is not required to retreat if he has 'no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in [the] particular instance.'" *State v. Dickey*, 394 S.C. 491, 502, 716 S.E.2d 97,102 (2011) (alteration in original) (quoting *Wiggins*, 330 S.C. at 545, 500 S.E.2d at 493). In order to satisfy the fourth element of self-defense, there must be evidence the defendant:

> had no other probable means of escape except to take the life of his assailant or stated another way, that he had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily harm than to act as he did in the particular instance; that it is one's duty to avoid taking human life where it is possible to prevent it even to the extent of retreating from his adversary unless by doing so the danger of being killed or suffering serious bodily harm is increased or it is reasonably apparent that such danger would be increased.

State v. Jackson (H. Jackson), 227 S.C. 271, 279, 87 S.E.2d 681, 685 (1955). "The law says if one can give back or step aside, or retreat without increasing his danger, and thus avoid taking human life, it is his duty to do so, and unless he has done so, it will not permit his plea of self-defense." *State v. Burriss*, 334 S.C. 256, 268, 513 S.E.2d 104, 111 (1999) (Burnett, J., dissenting) (quoting *State v. George*, 119 S.C. 120, 121, 111 S.E. 880, 880 (1921). "Unless the incident occur[s] in the accused's home or business or on the curtilage thereof, the accused generally has a duty to retreat." *State v. Jackson (C. Jackson)*, 384 S.C. 29, 37, 681 S.E.2d 17, 21 (Ct. App. 2009).

First, we find there is no evidence Washington was without fault in bringing on the difficulty. We acknowledge there is a wide range of evidence—from Washington not having been the person who shot Victim to Washington shooting Victim after Coakley attempted to hit him with a beer bottle and after Washington and Victim engaged in a physical altercation. Accepting evidence that Washington was not the individual who shot Victim, self-defense would not be applicable. The only evidence regarding Washington's interaction with Victim that night shows Washington followed Victim around in the Club and stared him down throughout the night; Washington followed Victim out the door as everyone was leaving the Club; Washington threw the first punch, hitting Victim from behind once Victim removed his shirt and hitting Victim at least twice; Victim was on the ground, and after Washington pointed the gun in Coakley's face, Washington jumped off the stoop and ran around the van, and before Coakley could get to the ground to see what was happening, four gunshots rang out; and immediately after Victim was shot, Washington was seen heading toward a car. Based upon evidence that Washington shot Victim only after the two engaged in a fight upon Victim removing his shirt, we agree with the State that this evidence, at best, indicates mutual combat, which defeats a claim of self-defense. *See D. Jackson*, 355 S.C. at 571, 586 S.E.2d at 563 ("Mutual combat exists when there is 'mutual intent and willingness to fight.' Mutual intent is 'manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat.' Mutual combat bars a claim of self-defense because it negates the element of 'not being at fault.'" (citations omitted) (quoting *Graham*, 260 S.C. at 450, 196 S.E.2d at 495 (1973))). Further, we do not believe evidence that Coakley attempted to strike Washington with the beer bottle is sufficient to show Washington was not at fault in bringing on the difficulty. We agree with the State that Coakley's testimony demonstrates she raised the bottle in an attempt to hit Washington only after he had already struck Victim, and Washington threw the first punch at Victim. We also

note there is no evidence Victim was aware that Kinloch had recently "hit" on his girlfriend. Rather, Coakley stated to the contrary.

Second, there is no evidence Washington was in actual imminent danger of losing his life or sustaining serious bodily injury or that he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury. As noted, the only evidence regarding Washington's interaction with Victim shows Washington followed Victim around the Club staring at him and followed Victim out the door as he left the Club that night. Even though there is evidence Victim removed his shirt, Washington threw the first punch, hitting Victim from behind. He continued to hit Victim, causing him to fall to the ground and, after pointing the gun in Coakley's face, Washington jumped off the stoop and ran around the van, at which point Victim was shot. There is no evidence that Victim ever struck Washington, much less that Washington was in actual imminent danger of losing his life or sustaining serious bodily injury. Further, there is no evidence Washington believed he was in actual imminent danger of losing his life or sustaining serious bodily injury. *See State v. Bruno*, 322 S.C. 534, 536, 473 S.E.2d 450, 452 (1996) ("[Appellant] was not entitled to a self-defense charge, because he presented no evidence that he believed he was in imminent danger of losing his life or sustaining serious bodily injury.").

Third, even assuming there is evidence Washington believed he was in imminent danger, the evidence does not show a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life. As noted above, the only evidence concerning the altercation between Washington and Victim reveals Washington struck Victim and Victim ended up on the ground before he was shot. Further, even considering the fact that Coakley raised a glass bottle in an attempt to strike Washington as he was fighting Victim, the evidence shows Coakley dropped the bottle and backed away toward the door after Washington put the gun in her face, and Washington then ran back toward the Victim, firing the weapon before Coakley could even get off the stoop and around to the area.

Fourth, there is no evidence Washington had no other probable means of avoiding the danger than to shoot Victim. The evidence concerning the fight engaged in between Washington and Victim shows only that Washington hit Victim. There is

nothing to indicate Victim ever placed Washington in a position that required him to shoot Victim in order to avoid the danger of losing his own life or sustaining serious bodily harm. *See State v. Lockamy*, 369 S.C. 378, 383-84, 631 S.E.2d 555, 558 (Ct. App. 2006) (holding, because appellant was no longer in danger when he fired the shot at the victim, he failed to meet the fourth element of the defense—that he had no other probable means of avoiding the danger—and, accordingly, was not entitled to a charge on self-defense). Further, the only evidence concerning Washington's participation in the fight shows Washington had the opportunity, and in fact did remove himself momentarily from the fight when he came up to the stoop and pulled a gun on Coakley. Thus, he could have retreated at that moment. *See C. Jackson*, 384 S.C. at 37, 681 S.E.2d at 21 ("Unless the incident occur[s] in the accused's home or business or on the curtilage thereof, the accused generally has a duty to retreat."); *H. Jackson*, 227 S.C. at 279, 87 S.E.2d at 685 (holding one who pleads self-defense "must show that he had no other probable means of escape except to take the life of his assailant or stated another way, that he had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily harm than to act as he did in the particular instance; that it is one's duty to avoid taking human life where it is possible to prevent it even to the extent of retreating from his adversary unless by doing so the danger of being killed or suffering serious bodily harm is increased or it is reasonably apparent that such danger would be increased"); *Burriss*, 334 S.C. at 268, 513 S.E.2d at 111 ("The law says if one can give back or step aside, or retreat without increasing his danger, and thus avoid taking human life, it is his duty to do so, and unless he has done so, it will not permit his plea of self-defense." (Burnett, J., dissenting) (quoting *George*, 119 S.C. at 121, 111 S.E. at 880 (1921))).

Accordingly, we find there is no evidence to support any of the four requirements for a charge on self-defense and conclude the trial court did not commit error in refusing to charge the same.

V. Charge on Accomplice Liability

The solicitor requested the trial court charge the jury on the "hand of one is the hand of all." He argued the theory that Kinloch was the shooter had been presented in this case based on "multiple indications from the defense." He further argued, under the "hand of one is the hand of all" doctrine, if someone participates in an altercation, he is responsible for the end result, and even if Kinloch shot Victim, Washington was part of the assault. Defense counsel disagreed, arguing

the State's theory was that Washington was the shooter, and though the defense tried to make suggestions or have the jury infer Kinloch was the shooter, there was no evidence in the record Kinloch shot anybody. Defense counsel reminded the trial court it had instructed the jury to strike Grant's testimony that Kinloch said "he did it." The trial court noted evidence from the bartender, Williams, in which Victim referred to "they"—Washington and Kinloch—as planning to kill Victim, and the State also noted there was evidence in the record that "they" followed Victim out of the Club. Thereafter, the trial court charged the jury in part as follows:

> If a crime is committed by two or more persons who were acting together in committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a natural and probable consequence of the act - - carrying out the common plan and purpose. For example, two people can be guilty of killing another person when only one of the two fired the shots that caused the death. If two or more people are together, acting together, assisting each other in committing the offense, the act of one is the act of all, or as it is sometimes said, the hand of one is the hand of all.

It further charged the jury the law concerning mere knowledge and mere presence, as well as the requirement of a prior arranged plan or scheme before one may be found guilty as a principal.

Washington argues the trial court erred in granting the State's request to charge the jury on accomplice liability, asserting the record is devoid of any evidence to support such a charge. He contends there is no evidence that a co-conspirator was the shooter and that he was acting with the co-conspirator when the crime took place. Washington maintains, although he attempted to introduce evidence that a co-conspirator shot Victim, the trial court refused to admit Grant's testimony that Kinloch stated he did the shooting. Washington cites to this court's decision in *Wilds v. State*, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014) arguing, like *Wilds,* it was error to give an accomplice liability charge in the absence of any evidence that someone else was the shooter. Washington also argues giving such a charge was

confusing to the jury as evidenced by the fact that the jury requested clarification on the "hand of one is hand of all" law and maintains this confusion was also reflected in a later note from the jury that confused the "hand of one is the hand of all" doctrine with that pertaining to "acting in concert with the victim." Washington complains the trial court did not act to correct this confusion.[9]

"Under the 'hand of one is the hand of all' theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *State v. Harry*, 420 S.C. 290, 299, 803 S.E.2d 272, 276-77 (2017) (alteration in original) (quoting *State v. Thompson*, 374 S.C. 257, 261-62, 647 S.E.2d 702, 704-05) (Ct. App. 2007)). "Under an accomplice liability theory, 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.'" *State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002) (quoting *State v. Langley*, 334 S.C. 643, 648-49, 515 S.E.2d 98, 101 (1999)). "In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by circumstantial evidence and the conduct of the parties." *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010). "[A]n alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011). Although a jury may have doubts about witness testimony, "an alternate theory of liability, such as accomplice liability, 'may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence.'" *Wilds*, 407 S.C. at 439, 756 S.E.2d at 390 (quoting *Barber*, 393 S.C. at 236, 712 S.E.2d at 438).

In *Barber*, evidence was presented that Barber and three other individuals—Kimbrell, Walker, and Kiser—gathered together and discussed plans to rob a minor drug dealer, Alan Heintz. 393 S.C. at 234, 712 S.E.2d at 437. The four

[9] Although the record contains the note Washington seems to refer to in this argument, there is nothing in the record to indicate defense counsel objected to the court's response to the note, raised any concern about jury confusion, or argued the note supported the impropriety of an accomplice liability charge.

individuals procured a semi-automatic handgun and drove to Heintz's house. *Id.* Upon learning more people than expected were at the house, the individuals left to procure a rifle and returned to the house. *Id.* Kimbrell remained in the vehicle while Barber, Walker, and Kiser entered the house to rob the drug dealer. *Id.* Once inside, the three men demanded money and drugs. *Id.* One of the suspects, who was armed with a semiautomatic handgun, shot and killed Heintz and shot and wounded another man in the house. *Id.* at 234, 712 S.E.2d at 438. Kimbrell, Walker, and Kiser implicated Barber in the planning and execution of the robbery and as the individual who shot and killed the drug dealer. *Id.* at 234-35, 712 S.E.2d at 438. All three also testified at Barber's trial that Barber was armed with the semi-automatic handgun and had shot both victims. *Id.* at 235, 712 S.E.2d at 438. Testimony was presented at trial that only two guns were brought to the robbery, with Barber carrying the semi-automatic handgun and Kiser carrying a rifle. *Id.* However, defense counsel elicited testimony that Walker was also in possession of a semi-automatic handgun and all three of the men were armed—one with a rifle and two with semi-automatic handguns. *Id.* at 235, 237, 712 S.E.2d at 438, 439. Over defense counsel's objection, the trial court instructed the jury on accomplice liability. *Id.* at 235, 712 S.E.2d at 438. Barber appealed, arguing the charge was improper because the evidence presented at trial did not support a jury charge on accomplice liability as to the murder charge. *Id.* at 236, 712 S.E.2d at 438. Our supreme court disagreed, finding there was evidence to support the conclusion that Barber was acting with the other men during the robbery, and there was also evidence presented at trial to support a finding that one of the other robbers was the shooter. *Id.* at 237,712 S.E.2d at 439.

In *Wilds*, the victim was robbed and shot while walking down a street. 407 S.C. at 435, 756 S.E.2d at 388. During the trial, evidence was presented from Wilds' co-defendants, Simmons and Dungee, that they were walking down the street with Wilds when they saw the victim walking toward them. *Id.* As they approached the victim, Wilds commented that he bet the victim had some money. *Id.* Additionally, Wilds told them before they saw the victim that he was "going to stick somebody or jack somebody," and Wilds had a pistol. *Id.* at 435-36, 756 S.E.2d at 388. When they met the victim on the road, while Wilds stopped to talk to him, Simmons and Dungee continued walking. *Id.* at 436, 756 S.E.2d at 388. After talking to the victim for a few minutes, Wilds pulled out a gun and pointed it at the victim. *Id.* Thereafter, Wilds ordered Simmons and Dungee to hit the victim, which they did. *Id.* at 436, 756 S.E.2d at 389. Simmons and Dungee removed some items from the victim's pockets. *Id.* When the victim refused to let go of his

wallet, Wilds shot him in the chest. *Id.* Wilds, Simmons, and Dungee ran, but stopped across the street from the scene, at which time Wilds gave Simmons and Dungee some money from the victim's wallet. *Id.* Simmons told Wilds he should get rid of the gun. *Id.* In his defense, Wilds presented alibi testimony from several of his relatives. *Id.* "During jury deliberations, the jury sent a note to the trial court asking, '[I]f we say [Wilds is] guilty of murder, are we saying he of the three [alone] actually pulled the trigger?'" *Id.* at 437, 756 S.E.2d at 389 (alteration in original). Over Wild's objection, the trial court responded to this question by instructing the jury on accomplice liability. *Id.* Following a post-conviction relief hearing, the PCR court found Wilds' appellate counsel was ineffective for failing to appeal the trial court's accomplice liability jury charge, and granted Wilds' application on that ground. *Id.* The State filed a petition for certiorari, arguing the PCR court erred in finding Wilds' appellate counsel was ineffective for failing to raise the issue of accomplice liability. *Id.* at 438, 756 S.E.2d at 390. This court affirmed the PCR court's grant of relief, citing the law in *Barber* —that "an alternate theory of liability may only be charged when the evidence is equivocal on some integral fact and the jury has been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." *Id.* at 438-39, 756 S.E.2d at 390. We noted our supreme court found in *Barber* that the evidence presented at trial was equivocal as to who was the shooter, while in Wilds' case, there was no evidence to indicate anyone other than Wilds was the shooter. *Id.* at 439, 756 S.E.2d at 390.

Washington does not argue that there is no evidence he and Kinloch joined together to accomplish an illegal purpose or that the two aided, abetted, or assisted in the commission of a crime. Rather, he argues the accomplice liability charge was improper because there is no evidence an accomplice—Kinloch—was the shooter instead of him. In other words, Washington essentially maintains that there is no evidence to support the alternate theory of accomplice liability—that he was an accomplice to Kinloch who was the shooter. Thus, the question becomes whether there was evidence adduced at trial that Kinloch, rather than Washington, shot Victim, such that Washington could be convicted on the basis of accomplice liability. We agree with the State that, unlike *Wilds*, there is evidence presented in this case to support an accomplice liability charge. We find this case more akin to *Barber*.

First, as in *Barber*, there is evidence to support the conclusion that the defendant, Washington, was acting with another in assaulting Victim, "join[ing] with another

to accomplish an illegal purpose." *Harry*, 420 S.C. at 299, 803 S.E.2d at 276-77. Specifically, there was evidence that Washington and Kinloch were together at the Club that night; Washington continuously stared at Victim inside the Club and Kinloch and Washington were seen following Victim everywhere he went in the Club; Victim expressed to one of the witnesses that Kinloch was going to shoot him and that Kinloch and Washington were going to kill him; when Victim walked out the door that night, Washington and Kinloch walked out behind him; and Washington and Kinloch both got into a physical altercation with Victim outside the Club.

Second, as in *Barber*, there was evidence presented at trial that could support a finding that Washington had an accomplice who was the shooter. Aside from the above evidence that Washington and Kinloch joined together to assault Victim, evidence was presented that Kinloch stated in the detention center phone call that during the altercation that night he—Kinloch—"got [Victim] on the car." Additionally, defense witness Deveaux testified that as he was walking into the Club that night, he saw the individual who pulled off his shirt—Victim—standing in proximity to and in the opposite direction of Kinloch and heard them "fussing." As Deveaux went through the first door of the Club and got to the second, he heard gunshots. Finally, the defense presented witness Robin—who testified Washington was not near the fight and Washington did not have a gun—and witness Singleton—who testified he was in the parking lot at the time of the incident, Washington was in his sight when he heard three shots being fired, and Washington was not anywhere near where the shots were fired and was in the road before the first shot was fired. Accordingly, there was equivocal evidence as to who shot Victim, and from which the jury could have found Washington's accomplice was the shooter.

Based on the above, we find evidence was presented to support an accomplice liability charge and the trial court, therefore, did not err in giving such a charge. *See Barber*, 393 S.C. at 236, 712 S.E.2d at 439 (2011) (finding no error in the trial court's decision to give an accomplice liability jury instruction because "the sum of the evidence presented at trial, both by the State and defense, was equivocal as to who was the shooter").

VI. *Allen* Charge

The case was submitted to the jury at 11:55 a.m. At 4:58 p.m. that afternoon, the jury sent a note indicating it was deadlocked. The trial court indicated its intention

to give the jurors an *Allen* charge and then release them for the evening. Defense counsel objected, stating he desired the *Allen* charge be given in the morning, and if the charge were given that night then the jury should go back and continue to deliberate the matter that night. He noted he was "contrary to an *Allen* charge and disbursement," he would prefer an *Allen* charge be given in the morning and the jury continue from there, and he was "leery" of the trial court's proposed approach. The solicitor stated he preferred the *Allen* charge be given that night and that they reconvene in the morning. The trial court noted defense counsel's objection but gave the jury an *Allen* charge at that time. Following the *Allen* charge, the trial court instructed the jurors to return in the morning to resume deliberations. It further admonished them that in breaking for the evening, they "must stop [their] deliberations," and they "must not consider any issue in this case until all twelve of [them] [were] back together."

Defense counsel noted he had no exception to the *Allen* charge itself, but he continued to object to the proposed procedure of allowing the jury to be disbursed and to commence deliberations in the morning. He argued "the whole integrity of these twelve people should be in line that they stay together until a decision has been reached." When asked by the court if he had any law to support his position, counsel replied that all he had was his thirty-three years of experience and in similar situations they stayed "until the wee, wee hours in the morning." The trial court asked if defense counsel was requesting that the court send the jury back to continue deliberations, and counsel clarified he had no objection to the jury leaving. However, he noted he told the trial court before it gave the *Allen* charge that he preferred that not occur until the morning, and at that point his objection was to the fact that they had received the *Allen* charge that night and not that they were leaving that evening. The trial court stated that once the jury indicated it was unable to reach a verdict, she could not tell them to continue their deliberations without an *Allen* charge. The court noted it was after 5:00, it thought it best to break for the evening, and in order to break for the evening, the jury "had" to be given the *Allen* charge. When pressed by the trial court as to why he objected to the giving of the *Allen* charge that night, defense counsel stated, "[Y]ou have given instructions as a group now to ponder individually for the next twelve hours or more. . . ," and the jurors had been given instruction as a group to adhere to their own individual "moral conscientiousness," allowing them to disburse and ponder individually, not as a group.

The next morning, when the jury returned, the trial court asked the jurors if they had each complied with the court's "instructions over the evening hour," and the jurors indicated they had so complied. A little over five hours later, the jury returned a verdict finding Washington guilty of voluntary manslaughter.

Washington contends the trial court erred in giving an *Allen* charge at the close of the day's deliberations and then excusing the jury for the night. He contends, contrary to the trial court's ruling, the law does not require the jury to be given an *Allen* charge before it could be sent home for the evening. He argues the practice in a situation like this is to send the jury home with instructions to return the next day and to give the *Allen* charge the next day immediately before the jury resumes deliberations. Washington cites two cases—*Harvey v. Strickland*, 350 S.C. 303, 566 S.E.2d 529 (2002) and *State v. Tillman*, 304 S.C. 512, 405 S.E.2d 607 (Ct. App. 1991)—as examples of cases in which the jury was excused for the day, but then brought back the next morning for further deliberations following an *Allen* charge. Washington further argues the procedure adopted by the trial court was prejudicial, as it undermined the purpose of an *Allen* charge, which directs jurors to continue to deliberate and consult with each other. He contends the effect of the trial court's procedure was to separate the jurors and send them home to contemplate the case individually.

It does not appear our courts have addressed whether, when a jury indicates it is unable to reach a verdict late in the day, an *Allen* charge should be given prior to allowing the jury to go home and have the jury resume deliberations the following day, or whether the trial court should send the jury home without the *Allen* charge and then give the charge upon their return the next day before they resume deliberations. While Washington cites two cases that indicate the latter procedure was used, neither of those cases address the issue of the timing of the *Allen* charge. *Harvey*, 350 S.C. at 307-08, 566 S.E.2d at 532; *Tillman*, 304 S.C. at 521, 405 S.E.2d at 612. Rather, they are simply part of the procedural history of the case and do not provide any guidance on this issue. Though we believe this decision was in the discretion of the trial court,[10] we recognize that, if the procedure

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[10] *See State v. Sinclair*, 275 S.C. 608, 614, 274 S.E.2d 411, 414 (1981) ("In this State, the conduct of a criminal trial is left largely to the sound discretion of the [trial court] and [an appellate] court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way.").

suggested by defense counsel was appropriate, the trial court may have committed an abuse of discretion in indicating it was *required* to give the *Allen* charge to the jury before releasing them that evening. *See State v. Bryant*, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007) ("An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or *controlled by an error of law*." (emphasis added)).

However, because we do not believe Washington was prejudiced, we need not decide whether, under such circumstances, the trial court was required to give the *Allen* charge before releasing the jury for the evening and then allowing the resumption of deliberations the next morning. *See Sinclair*, 275 S.C. at 614, 274 S.E.2d at 414 ("In this State, the conduct of a criminal trial is left largely to the sound discretion of the [trial court] and [an appellate] court will not interfere *unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way*." (emphasis added)). Washington's argument concerning the impropriety of the process used by the trial court centers on concern that the purpose of the *Allen* charge was undermined when the jurors were charged and then went home for the evening because they were directed to continue to deliberate and consult with each other by the charge but were then separated and sent home to individually deliberate. However, review of the record reveals the trial court specifically instructed the jury at the end of the *Allen* charge that they must stop their deliberations at that point and could not consider any issue in the case until all twelve of them were back together to resume deliberations. "[J]urors are presumed to follow the law as instructed to them." *State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999). Accordingly, we find no reversible error.

For the foregoing reasons, Washington's conviction and sentence are

AFFIRMED.

GEATHERS, J., concurs. MCDONALD, J., concurs in result only.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of Tynslee Elizabeth Fields, Deceased,

Lauren Murphy, as statutory beneficiary, Appellant,

v.

Mark Collins, and The Estate of Tynslee Elizabeth Fields, Defendants,

Of Whom Mark Collins is the Respondent.

Appellate Case No. 2016-000536

Appeal From Greenville County
Debora A. Faulkner, Probate Court Judge
Perry H. Gravely, Circuit Court Judge

Opinion No. 5587
Heard May 22, 2018 – Filed August 8, 2018

REVERSED

Charles W. Marchbanks, Jr., of The Marchbanks Law Firm, of Greenville, for Appellant.

Jessica Ann Salvini, of Salvini & Bennett, LLC, and John Magruder Read, IV, of The Read Law Firm, both of Greenville, for Respondent.

HILL, J.: This appeal concerns the scope of S.C. Code § 15-51-40 (Supp. 2017) as it relates to an unwed father's right to share in the proceeds of the settlement of a

wrongful death action arising out of a child's tragic death during delivery. Because we find evidence supporting the finding of the probate court that the father failed to reasonably support or otherwise provide for the needs of the child, we reverse the order of the circuit court and reaffirm the ruling of the probate court.

I.

Lauren Murphy and Mark Collins met in July 2011 while working together at Wal-Mart. They were both unmarried, but dating other people. They became romantically involved in August 2011, around the time Murphy ended her relationship with Jeremy Fields. Their intimate relationship continued until early October 2011, when Murphy informed Collins she was pregnant. According to Collins, Murphy told him at the time she "did not think" Fields was the father because of a previous health diagnosis Fields had received. Collins assured Murphy he would be an active father.

The pair soon broke up, however. Murphy reunited with Fields, and Collins pursued another relationship. Murphy then advised Collins that Fields was her child's father, and listed Fields as the father at her initial pre-natal doctor's visit in November 2011.

In December 2011, Collins and Murphy attended the first trimester ultrasound together. Although the evidence is conflicting, Collins claims he desired to continue supporting Murphy's pregnancy, but she blocked his calls and prohibited him from attending further medical appointments. It is undisputed Collins did not attend any more appointments. Nor did he pay or offer to pay for any pre-natal care, although there is evidence Murphy was covered by Medicaid.

On June 12, 2012, Murphy delivered a baby girl, Tynslee. Tragically, Tynslee died about an hour after her birth. Murphy listed Fields as the father on Tynslee's birth and death certificates, and in the obituary. Collins, unaware Murphy had gone to the hospital, learned of Tynslee's death from his sister.

In July, Murphy and Collins met and agreed to split the cost of a DNA paternity test, which ultimately proved Collins was Tynslee's father. After being appointed personal representative for Tynslee's estate, Murphy brought a wrongful death and survival action against Tynslee's medical providers for malpractice. Murphy listed both Fields and Collins as Tynslee's possible father in her August 2012 petition to be appointed personal representative, although Fields was later dismissed.

In February 2014, the circuit court approved partial settlement of the wrongful death and survival action. Murphy then petitioned to deny Collins any interest in the wrongful death proceeds, relying on § 15-51-40, which governs allocation of the

proceeds in a wrongful death action, and authorizes a parent to move to deny or limit another parent's interest in the proceeds. The probate court granted the petition, ruling in a thoughtful written order that the greater weight of evidence established Collins had failed to provide Tynslee reasonable support or otherwise provide for her needs within the meaning of §15-51-40.

Collins appealed the probate court order. The circuit court reversed the probate court, reasoning the statute required Collins only to provide reasonable support during Tynslee's minority, which it interpreted as the time between her birth and death. Given the brevity of Tynslee's life, Collins' uncertainty at the time he was her father, and finding Tynslee's medical costs had been borne by Medicaid, the circuit court found there was no evidence supporting the ruling of the probate court. The circuit court succinctly ruled:

> Pursuant to the statute, the period of time relevant to the Court's determination of whether Appellant Collins provided reasonable support for the needs of his daughter was during her "minority." In this case, Tynslee's minority was a period that consisted of mere minutes to hours between her birth and her death, during which time emergency medical care was being administered.
>
> The Probate Court found that the burial, funeral, memorial and legal expenses and time spent in pursuit of the wrongful death action constituted "unusual necessities" under S.C. Code § 63-5-20([A]) which, if not provided by the statutory beneficiary, would justify the divestment of proceeds. This court finds that none of these were incurred within the statutorily-defined relevant time period under S.C. Code § 15-51-40. Therefore, evidence of the failure to pay these expenses is not evidence which reasonably supports the findings of the Probate Court.

Murphy appeals this ruling, challenging the circuit court's interpretation of § 15-51-40.

II.

Because a proceeding under § 15-51-40 is an action at law, we must affirm the probate court's factual findings unless no evidence supports them. *In re Howard*, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993). We are free to decide questions of law de novo. *See Neely v. Thomasson*, 365 S.C. 345, 350, 618 S.E.2d 884, 886 (2005). Statutory construction is a question of law, *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013), which we may approach with no deference due the probate or circuit court; but we are bound by the probate court's findings of fact if any evidence supports them.

III.

A. __Development of S.C. Code § 15-51-40 since 1994__

Before we journey into the meaning of § 15-51-40, we take a step back and view the statute in context, revisiting its telling recent history. As of our supreme court's decision in *Ballard v. Ballard*, 314 S.C. 40, 443 S.E.2d 802 (1994), the statute read in pertinent part as follows:

> In every such action the jury may give such damages . . . as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought. And the amount so recovered shall be divided among the before-mentioned parties in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate.

S.C. Code Ann. § 15-51-40 (1976).

In *Ballard*, a mother obtained a wrongful death settlement arising out of her 18-year-old daughter's death. *Ballard*, 314 S.C. at 41, 443 S.E.2d at 802. Mother petitioned to bar Father from sharing in the proceeds, on the ground they had been divorced for three years, during which time Father had not visited daughter or contributed to daughter's support. *Id.* Our supreme court affirmed the trial court's denial of Mother's petition, holding §15-51-40

> allow[s] a total recovery equal to those damages proved to have been sustained by the statutory beneficiaries in a wrongful death action; the distribution of those damages

> among the statutory beneficiaries, however, is controlled strictly by the share each would take as an heir in intestacy regardless of the proportion of damages suffered by each.

Id. at 42, 443 S.E.2d at 803.

Less than three months after *Ballard* was decided, the General Assembly amended § 15-51-40 by adding the following sentence to the end of the statute:

> However, in the event of a wrongful death of a minor, upon motion by either parent, the probate court may deny or limit either parent's entitlement for a share of the proceeds if the court determines, by a preponderance of the evidence, that the parent has refused to reasonably support the decedent as defined in Section 20-7-40 and has otherwise not provided for the needs of the decedent.

1994 S.C. Acts 470, sec. 2, § 15-51-40 (1994).

In 1996, this final sentence was amended to its current form, which reads:

> However, upon motion by either parent or any other party of potential interest based upon the decedent having died intestate, the probate court may deny or limit either or both parent's entitlement for a share of the proceeds if the court determines, by a preponderance of the evidence, that the parent or parents failed to reasonably provide support for the decedent as defined in Section 63-5-20 and did not otherwise provide for the needs of the decedent during his or her minority.

S.C. Code Ann. § 15-51-40 (Supp. 2017). As we shall later see, the comparative wording of these amendments bears on resolution of this appeal.

B. Elements of S.C. Code § 15-51-40

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). The plain language of § 15-51-40 allows the probate court, upon motion,

to deny or limit wrongful death proceeds a parent would otherwise be entitled to for the wrongful death of a decedent if the court determines two elements by the greater weight of the evidence: that the parent (1) failed to reasonably provide support for the decedent as defined in S.C. Code § 63-5-20, *and* (2) did not otherwise provide for the needs of the decedent during his or her minority.

i. <u>Reasonable Support</u>

To construe the first element, we must consider the language of § 63-5-20(A):

> Any able-bodied person capable of earning a livelihood who shall, without just cause or excuse, abandon or fail to provide reasonable support to his or her . . . minor unmarried legitimate or illegitimate child dependent upon him or her shall be deemed guilty of a misdemeanor . . . . As used in this section "reasonable support" means an amount of financial assistance which, when combined with the support the member is reasonably capable of providing for himself or herself, will provide a living standard for the member substantially equal to that of the person owing the duty to support. It includes both usual and unusual necessities.

S.C. Code Ann. § 63-5-20(A) (Supp. 2017).

The probate court found Tynslee's pre-natal and birth-related medical expenses were usual necessities, none of which Collins paid or offered to pay, even after his paternity was established. The circuit court disagreed, finding there was no necessity to pay the medical expenses because they were covered by Medicaid, there was no evidence of any unpaid medical bills, and Medicaid has not sought reimbursement.

We agree with the probate court. Collins is able-bodied and capable of earning a livelihood; he works for a major corporation. Although the record is silent about whether Collins had health insurance benefits that could have covered his child's medical expenses, that silence results from Collins' own: he never spoke up to ask what he could do to contribute, content to rely on Medicaid. The "reasonable support" § 63-5-20 speaks of is the obligation of the parent—not the government—to provide financial assistance to one's child. The law imposes a duty on parents to pay their children's reasonable and necessary medical expenses, *see Trident Reg'l Med. Ctr. v. Evans*, 317 S.C. 346, 352, 454 S.E.2d 343, 346 (Ct. App. 1995), and a parent's duty of support does not vanish just because public assistance appears. *See*

S.C. Code § 63-3-530(A)(14) (2010) (empowering the family court "to order support of a spouse or child, or both, irrespective of whether they are likely to become a public charge").

The record is not entirely mute, though. In her wrongful death settlement petition, Murphy agreed to satisfy any outstanding medical bills and Medicaid liens, and to withhold $3,331.50 in trust to pay them. The order of the circuit court granting her petition, and approving the settlement, required Murphy, individually and as personal representative of Tynslee's estate, to pay any such liens out of the settlement proceeds. From this we infer and find there were outstanding medical expenses Tynslee incurred that Collins did not pay. *See Patton v. Miller*, 420 S.C. 471, 484, 804 S.E.2d 252, 259 (2017) (describing breadth of a Medicaid lien and noting "a child's representative who seeks damages for a child's medical expenses that were paid by Medicaid or some other insurer is almost certainly under a legal duty to reimburse the actual payor for at least part of the recovery").

Neither the probate court nor the circuit court found Collins was obligated to contribute to pre-natal care. We note, though, that the family court may order child support to include "the providing of necessary shelter, food, clothing, care, medical attention, expenses of confinement, *both before and after the birth*, the expense of educating his or her child and other proper and reasonable expenses." S.C. Code Ann. § 63-3-530 (A)(15) (2010) (emphasis supplied). And, our supreme court has held an unwed father's consent to adoption of a child placed with the prospective adoptive parents six months or less after birth was not necessary where father contributed only $11 to Mother during her pregnancy. *See Roe v. Reeves*, 392 S.C. 143, 154–55, 708 S.E.2d 778, 784 (2011). Rejecting father's excuse that Medicaid covered Mother, the court observed "[s]imply because she was receiving some government benefits to cover her basic needs does not relieve Father of his obligation to provide for Mother during her pregnancy." *Id.* at 155, 708 S.E.2d at 784.

The circuit court concluded Collins' failure to contribute to Tynslee's burial, funeral, memorial and legal expenses was immaterial to the § 15-51-40 determination because they were not incurred during Tynslee's minority. We find the circuit court's view too narrow. To illustrate, we need only consider the funeral and burial costs. The circuit court did not dispute the probate court's characterization of these expenses as necessities, and neither do we. We confirm and hold Tynslee's funeral and burial expenses are necessities her parents were obligated to provide. *See In re Terrell*, 357 N.E.2d 1113, 1116 (Ohio Ct. App. 1976) ("The providing of a decent burial for a deceased minor child is no less a necessity arising out of the parent-child relationship than is the providing of food, shelter, clothing and other needs of a child

while the child is alive. The public interest requires that a parent assume responsibility not only for a minor child's needs while that child is living, but also for the funeral expenses of a minor child. Therefore, we conclude that a father's duty to support a minor child includes an obligation to pay such child's reasonable funeral expenses in the event of the child's death prior to reaching the age of majority." (citation omitted)); *Rose Funeral Home v. Julian*, 176 Tenn. 534, 144 S.W.2d 755, 757 (1940) ("We have little hesitation in concluding that the funeral expense incident to the burying of a minor child is to be classed as a necessity for which the parents of such child are liable."). *See also Jewell v. Jewell*, 255 S.W.3d 522, 523 (Ky. Ct. App. 2008); *Jones v. Jones*, 883 So. 2d 207, 213 (Ala. Civ. App. 2003).

The circuit court erred in reading into § 63-5-20(A) a requirement that the necessities be incurred during the child's minority. We hold the term "minority" as used in § 15-51-40 does not limit or affect the duty § 63-5-20 imposes on parents to provide for their child's necessities. To rule otherwise would insulate a parent from liability not only for a minor child's funeral and burial expenses, but also for pre-natal care. Such a result would undercut the clear legislative intent to the contrary expressed in similar statutes addressing parental support obligations. *See* S.C. Code § 63-3-530 (2010); S.C. Code Ann. § 63-9-310(A)(5)(b) (Supp. 2017) (noting unwed father's consent to or relinquishment of child for adoption required when, inter alia, "the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses."). Statutes addressing similar subjects should be similarly construed. *See Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) ("[I]t is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result."). The legislature meant to parallel, not distort, the parental support obligations found in other statutes. We do not think by amending § 15-51-40 as it did, the legislature meant to endorse some notion that a parent has no legal obligation of support for a child's expenses except those incurred after birth but before death, a notion that has no support in our statutory law nor in the reality of how responsible parents act. We therefore hold the probate court correctly found the greater weight of the evidence showed Collins failed to reasonably support Tynslee.

ii. *<u>Needs of Decedent</u>*

This brings us to the second element: whether Collins failed to "otherwise provide for the needs" of Tynslee during her minority. The circuit court found that, due to

Tynslee's short life and Collins' lack of certainty during it that he was her father, there was no evidence he failed to provide for her needs while she was alive. To reach this conclusion, the circuit court reached beyond the plain language of § 15-51-40 and implied an exception excusing Collins from compliance. In essence, the circuit court transported § 63-5-20's "just cause or excuse" provision to the second element of the § 15-51-40 test.

We understand how the circuit court could have arrived at this result, but find the route unwarranted. And this is where the significance of the 1994 and 1996 amendments to § 15-51-40 enacted in the wake of *Ballard* comes into view, and how the mischief the changes aimed to avoid spotlights legislative intent. The 1994 amendment stated that upon motion a parent could be divested of wrongful death proceeds "in the event of the wrongful death of a minor" if the parent failed to provide reasonable support and "has otherwise not provided for the needs of the decedent." Note the 1994 amendments applied only in the event of a minor's wrongful death, and did not limit the parent's obligation to provide for his child's needs to the period of minority. The 1996 amendments, however, expanded the divestment provision from "minor" decedents to any "decedent having died intestate." It retained the reasonable support element incorporating § 63-5-20, but recast the second element to require proof that the parent "did not otherwise provide for the needs of the decedent during his or her minority."

The 1996 amendment fixed a potential problem embedded in the 1994 amendment, which applied only to minor decedents. If the decedent was an adult, the 1994 amendment did nothing to strip an absent and non-supporting parent's right to share the wrongful death proceeds, the same windfall the statute allowed in *Ballard*.

The 1996 revision closed this loophole, but the circuit court's interpretation would reopen it. Using the circuit court's construction, if the father of an adult child whom he had not supported had died intestate by wrongful death, § 15-51-40 would not bar or limit the father's right to the wrongful death settlement proceeds as long as he could show that, during the child's minority, he had no knowledge he was the father.

We therefore hold § 15-51-40's final phrase, "did not otherwise provide for the needs of the decedent during his or her minority," means what it says, and contains no exception excusing compliance, including lack of knowledge of paternity. *See Roschen v. Ward*, 279 U.S. 337, 339 (1929) ("[T]here is no canon against using common sense in construing laws as saying what they obviously mean.") (Holmes, J.). When, as here, the words of the statute are plain and reflect legislative intent unambiguously, we must enforce them according to their terms. *See Cabiness v. Town of James Island*, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011). It was up to

the General Assembly to weigh a father's interest in these situations and strike the balance. A father may suffer profound loss in such circumstances, but § 15-51-40 nevertheless limits the father's right to compensate for the loss out of wrongful death proceeds. Because evidence supports the probate court's finding Collins did not provide for Tynslee's needs during her life, however brief, we uphold the probate court's ruling as to the second element of § 15-51-40.

We reverse the order of the circuit court and affirm the probate court's ruling denying Collins any interest in the wrongful death proceeds.

REVERSED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Brad J. Walbeck and Lea Ann Adkins, individually and derivatively on behalf of The I'On Assembly, Inc., and I'On Assembly, Inc., Respondents,

v.

The I'On Company, LLC, The I'On Club, LLC, The I'On Group, LLC f/k/a Civitas, LLC; and I'On Realty, LLC, Appellants.

Appellate Case No. 2015-001590

Appeal From Charleston County
Stephanie P. McDonald, Circuit Court Judge

Opinion No. 5588
Heard April 12, 2018 – Filed August 8, 2018

AFFIRMED IN PART AND REVERSED IN PART

Brian C. Duffy, Seth W. Whitaker, and Julie L. Moore, all of Duffy & Young, LLC, of Charleston, for Appellants.

Justin O'Toole Lucey and Joshua F. Evans, both of Justin O'Toole Lucey, P.A., of Mount Pleasant, for Respondents.

Timothy W. Bouch and Yancey Alford McLeod, III, both of Leath Bouch & Seekings of Charleston, for Respondent I'On Assembly, Inc.

GEATHERS, J.: In this action alleging violation of the Interstate Land Sales Full Disclosure Act (ILSA), 42 U.S.C. §§ 1701 to -1720 (1994), Appellants, The I'On Company, LLC, The I'On Club, LLC, The I'On Group, LLC f/k/a Civitas, LLC, and I'On Realty, LLC, seek review of the circuit court's orders (1) denying their motion for a judgment notwithstanding the verdict (JNOV) or new trial absolute and new trial nisi remittitur, (2) declaring a recreational easement invalid, (3) denying their motion for attorney's fees against Respondent Lea Ann Adkins, and (4) granting attorney's fees to Respondent Brad J. Walbeck.

Appellants argue (1) Walbeck and Adkins could not pursue this action as a derivative action; (2) Respondents' claims are barred by the statute of limitations; (3) the disputed recreational easement was valid and perpetual; (4) there was no fiduciary duty to convey certain common areas to the homeowners association, Respondent I'On Assembly, Inc.; (5) the directed verdict on Appellants' abuse of process counterclaim was improper because I'On presented ample evidence of an ulterior purpose and a willful act in the use of the process not proper in the regular conduct of the proceedings; (6) I'On was entitled to attorney's fees as the prevailing party on Adkins' breach of contract claim; (7) the attorney's fees award to Walbeck was unreasonable because he was awarded merely nominal damages on his ILSA claim; (8) the circuit court's ruling that Appellants were amalgamated was improper; and (9) Walbeck failed to show he relied on any representation made by I'On and, therefore, he failed to establish a claim under ILSA.

We reverse the denial of Appellants' JNOV motion as to the negligent misrepresentation and ILSA claims because they are barred by the statute of limitations, but we affirm the denial of Appellants' JNOV motion as to all other grounds. We affirm the order declaring the Recreational Easement invalid and the order denying Appellants' request for attorney's fees against Adkins. Finally, we reverse the award of attorney's fees to Walbeck.

FACTS/PROCEDURAL HISTORY

At the heart of this convoluted case is a developer's promise to convey certain recreational facilities in a residential community to a homeowner's association. Specifically, Respondents allege that Appellants promised they would convey the Community Dock and Creekside Park located on lot CV-6 in I'On Village to Respondent I'On Assembly, Inc. (the HOA) but instead sold these facilities to a third party. Appellants, however, allege they promised to convey a "generic" community dock and creekside park to the HOA but not the specific ones located on lot CV-6. Appellants also allege they conveyed the recreational facilities as promised.

I'On Village is located in Mount Pleasant. It was conceived by Thomas Graham and his son, Vince Graham. Thomas Graham's company, Graham Development, was the original majority owner of the I'On Company, LLC (the I'On Company), and Vince Graham was the company's manager. The I'On Company's subsidiary, I'On Realty, LLC (I'On Realty), employed real estate agents to market the lots in the I'On community.

On November 27, 1999, Walbeck entered into a contract to purchase a lot in I'On Village. Walbeck's purchase contract incorporated a property report (the 1998 Property Report) that the I'On Company had filed with the United States Department of Housing and Urban Development (HUD) on November 3, 1998, pursuant to ILSA.[1] The report set forth information deemed necessary to protect prospective purchasers, including the amenities that would be provided to lot owners.

Specifically, the report included a chart listing recreational facilities to be built during the first two phases of the development. Among the facilities to be built in Phase II was a "Creekside Park" and a "Community Dock." Under this listing was the following language:

> The recreational facilities listed in the chart above shall, upon completion of construction, be conveyed to the [HOA] by quitclaim deed free and clear of all monetary liens and encumbrances at no cost to the [HOA] or its members. Upon conveyance of these facilities to the [HOA], it shall assume full responsibility for the costs of ownership, operation, and maintenance of the facilities conveyed to it.

Throughout the years after Walbeck received the 1998 Property Report, Appellants built multiple community docks and parks in I'On Village. Nonetheless, Respondents considered the Community Dock and Creekside Park listed in the 1998 Property Report to be located on the civic lot on which the boat ramp was located (lot CV-6)—this lot had at least 300 feet of deep water access to Hobcaw Creek. The I'On Company also completed construction of a building on lot CV-6 that became known as the "Creek Club." The Creek Club was intended as a venue for wedding receptions and other events and hosted its first event circa 2003.

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[1] *See* 42 U.S.C. § 1707 (setting forth requirements for the contents of a property report, relating to the lots in a subdivision, to be made available to the public).

Appellants vacillated throughout the years concerning what they designated as the Community Dock and Creekside Park. At trial, Thomas Graham admitted that the Creek Club overlooked a park. He also admitted that when the I'On Company was planning its parks in 1999, the plans included "the Creek Club Park." In his deposition, Thomas Graham testified that the "Community Dock" listed in the 1998 Property Report referred to the main dock at the Creek Club that was adjacent to the boat ramp on lot CV-6; the boat ramp was built in 1999 or 2000, and the Creek Club dock was completed in 2000 or 2001.[2] However, at trial, he disputed that the "Community Dock" listed in the 1998 Property Report referred to the Creek Club dock. He explained the reference to a community dock in the 1998 Property Report "was to a generic community dock" and not to a specific property as Respondents contend. He stated, "[T]his was before we had designed anything -- got anything permitted or approved, even bought the land . . . . We didn't know whether -- at that time, . . . we thought sure we'd get one -- at least one community dock, but we didn't know how many, so that was a reference to that community dock."

On February 9, 2000, the I'On Club, LLC (the I'On Club) executed a "Recreational Easement and Agreement to Share Costs" (Recreational Easement) purporting to "provide access to the [HOA] members for them to use the docks and the boating ramp" off lot CV-6.[3] The Recreational Easement also included language purporting to grant an easement to the I'On Club for use and access to other common areas within I'On Village. On page three of the document, the easement is described as perpetual. However, section 4.2 of the Recreational Easement states that either party can terminate the easement after thirty years upon six months' notice. Thomas Graham described this language as a mistake because the I'On Club intended for the Recreational Easement to be permanent.

Section 3.1 of the Recreational Easement required the HOA to pay assessments "to cover a share of the costs incurred by [the I'On Club] in maintaining, repairing, replacing, operating[,] and insuring the Boating Facilities." The Boating Facilities were identified as "certain recreational facilities, including a boat ramp and dock and a driveway and parking area to serve them."

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[2] Vince Graham testified that the dock was completed in late 2000 or early 2001, before the Certificate of Occupancy was issued for the Creek Club itself on April 10, 2001.

[3] Curiously, the I'On Club did not obtain title to lot CV-6 until six months later.

On April 10, 2000, the I'On Company completed an amended property report for filing with HUD (first amended Property Report). Whereas the 1998 Property Report listed a "Creekside Park" and a "Community Dock" among the facilities to be built in Phase II, the first amended Property Report's list substituted "Marshwalk (park)" for "Creekside Park" and "Community Docks" for "Community Dock." (emphasis added). The first amended Property Report also changed the language regarding transfer of these facilities to the HOA—whereas the 1998 Property Report provided for transfer of the Creekside Park and Community Dock to the HOA, the first amended Property Report stated, "The recreational facilities listed in the chart above, other than the sidewalks and community dock, shall, upon completion of construction, be conveyed to [the HOA] by quitclaim deed free and clear of all monetary liens and encumbrances at no cost to [the HOA] or its members." (emphasis added).

Jo Anne Stubblefield, the I'On Company's attorney for ILSA compliance, explained the amendment to the Property Report this way:

> [I]n early 2000[,] the decision was made to have the I'On Club own and maintain a parking area, boat ramp[,] and dock as part of the Club Facilities and grant an easement to the [HOA] for use of all of these facilities so that property owners would have the same use rights they would have had in the "community dock" referenced in the original Property Report, but in addition would have rights to use the parking area and boat ramp (which had not been mentioned in the original Property Report and which the property owners would otherwise have had no right to use unless they joined the Club). The Recreational Easement was drafted to create that easement and to provide for the [HOA] to contribute to the costs incurred by the Club in maintaining the boat dock, boat ramp, and parking area. Once that was finalized and recorded, we amended the HUD Property Report (effective April 2000) to reflect that . . . .

Thomas Graham testified that the name of the Creekside Park was changed to Marshwalk after the 1998 Property Report was provided to Walbeck to avoid confusion with a nearby neighborhood called "Creekside Park." He also testified that the Marshwalk was not on lot CV-6 or adjacent to Hobcaw Creek but ran for

over two miles along the marsh, which was adjacent to a tributary of Hobcaw Creek. Vince Graham also testified that the "Creekside Park" was actually the Marshwalk.

On August 15, 2000, the I'On Company conveyed ownership of lot CV-6, including the Creek Club and boat ramp, to the I'On Club. Appellants conveyed the Marshwalk park to the HOA on November 21, 2000. Vince Graham testified that the conveyance included "docks two and three."

In late June 2007, in response to homeowner concern over "non-residents cutting bait and cleaning fish off the docks," Thomas Graham asked the I'On Company's then-current manager, Chad Besenfelder, to advise him "what rights" the HOA had "over the docks and boat ramp." Before receiving a response, Thomas Graham sent another e-mail to Besenfelder expressing his desire to keep ownership of the Community Dock. In a later e-mail, he expressed his intent to "capitalize [the] potential value" of the Community Dock.

In July 2008, Mike Russo with 148 Civitas, LLC (Russo) submitted a proposal to buy lot CV-6, together with overflow parking on an adjacent lot (CV-5). The proposal included a provision for transfer of the "boat docks" to the HOA. Subsequent communications between Appellants and Russo indicated an intent to ultimately convey ownership of the boat ramp and dock off lot CV-6 to the HOA. However, in November 2008, Russo and Appellants entered into an agreement that would include the boat ramp and Community Dock in the transfer of lot CV-6 to Russo, which was concerning to HOA members. The then-current president of the HOA's Board of Trustees (Board), Bruce Kinney, contacted Thomas Graham regarding modifying the Recreational Easement to protect the HOA members. One of the modifications Kinney sought was making the easement perpetual. However, on January 5, 2009, Thomas Graham notified Chad Besenfelder that Appellants would not modify the Recreational Easement while the Creek Club was under contract for sale to Russo.

On March 11, 2009, Board President Kinney sent an e-mail to Thomas Graham indicating the Board's discovery of the 1998 Property Report's representation that the Community Dock would be conveyed to the HOA. Kinney expressed the HOA's expectation that the Community Dock would be excluded from the sale to Russo. Kinney's e-mail also inquired about the 1998 Property Report's listing of the Creekside Park as an additional amenity to be conveyed to the HOA.

Later in March 2009, Russo advised Kinney that he was cancelling the purchase agreement, and subsequently, Thomas Graham advised Kinney that

Besenfelder was working out details for transferring ownership of the Community Dock to the HOA. Likewise, Besenfelder advised the HOA's management company that ownership of the Community Dock would be transferred to the HOA. However, by August 1, 2009, the HOA learned that Appellants and Russo had recently entered into a new contract for the sale of CV-6 to Russo, including the Creek Club, the boat ramp, and Community Dock.

On August 5, 2009, the I'On Club conveyed ownership of lot CV-6 to Russo in consideration of $1,400,000. On this same day, Thomas Graham, Vince Graham, and Geoff Graham conveyed ownership of lot CV-5 to Russo in consideration of $225,000.00.[4] The conveyance of lot CV-6 to Russo was expressly subject to the Recreational Easement, and the I'On Club executed a written assignment of its rights and obligations under the Recreational Easement to Russo.

On December 22, 2010, Walbeck filed his Complaint against Appellants and 148 Civitas, LLC, alleging causes of action for violation of ILSA, Breach of Contract, Breach of Fiduciary Duty, Fraud, Negligent Misrepresentation, Civil Conspiracy, violation of the South Carolina Unfair Trade Practices Act (UTPA), Unjust Enrichment, Promissory Estoppel, "Veil Piercing/Alter Ego," and Tortious Interference with Contract. On March 8, 2011, Walbeck filed an Amended Complaint adding Mike Russo (in his individual capacity) and I'On Realty as defendants. Appellants filed a motion to dismiss Walbeck's action on May 27, 2011, asserting, *inter alia*, Walbeck's claims were barred by the statute of limitations.

On February 7, 2012, Walbeck filed a Second Amended Complaint and Lea Ann Adkins joined Walbeck as a plaintiff. Walbeck and Adkins also asserted their claims derivatively on the HOA's behalf pursuant to Rule 23(b)(1), SCRCP (*see infra* Part IV), added the HOA as a defendant, and added an allegation that Appellants were amalgamated. On January 2, 2014, Respondents filed a Third Amended Complaint adding a cause of action for Aiding and Abetting against Russo. On January 13, 2014, Russo entered into a settlement agreement with Respondents. The terms of the settlement included Russo's sale of lot CV-6 to the HOA for $495,000 and the HOA's lease of the building, lawn, and three parking spaces back to Russo. The settlement terms also allowed the HOA access to the Creek Club for 13 dates per year and Russo's future conveyance of lot CV-5 to the HOA.

[4] Geoff is the son of Thomas and brother of Vince.

Subsequently, Respondents' action against Appellants proceeded to trial on January 14, 2014, but the action ended in a mistrial on January 17, 2014. On February 21, 2014, the HOA realigned its party status and adopted the other Respondents' claims set forth in the Third Amended Complaint. On May 12, 2014, Appellants filed a separate action against Respondents, seeking a declaration that the Recreational Easement was perpetual. The circuit court granted Appellants' motion to consolidate their action with the present action.

On June 16, 2014, Respondents filed their Fourth Amended Complaint reflecting the HOA's realignment as a plaintiff, Russo's dismissal from the action, and elimination of the claims for Tortious Interference and Aiding and Abetting. Exactly one year later, the circuit court issued an order declaring the Recreational Easement invalid and void ab initio because the I'On Club lacked title to lot CV-6 at the time it executed the easement. The circuit court also concluded the easement was not perpetual but was limited to a term of thirty years.

The parties re-tried the case from July 28 through August 1, 2014. The jury returned verdicts for Walbeck on his claims for violation of ILSA ($1), Negligent Misrepresentation ($20,000), and Breach of Contract ($10,000) and for the HOA on its claims for Breach of Contract ($1,000,000), Breach of Fiduciary Duty ($1,750,000), and Negligent Misrepresentation ($1,000,000). The HOA elected to recover on its Breach of Fiduciary Duty claim, and Walbeck elected to recover on his Negligent Misrepresentation claim. The circuit court denied Appellants' motion for a JNOV or new trial absolute and new trial nisi remittitur. The circuit court also denied Appellants' motion for an award of attorney's fees against Adkins and awarded attorney's fees to Walbeck pursuant to ILSA. This appeal followed.

ISSUES ON APPEAL

1. Were Respondents' claims barred by the statute of limitations?

2. Did the circuit court err by directing a verdict for Respondents on Appellants' abuse of process counterclaim?

3. Did the circuit court err by declaring the Recreational Easement invalid?

4. Did Respondents properly file and maintain a derivative action on the HOA's behalf?

5. Did the circuit court err by denying Appellants' JNOV motion as to the HOA's breach of fiduciary duty claim?

6. Did the circuit court err by concluding that Appellants were amalgamated?

7. Did the circuit court err by denying Appellants' JNOV motion as to Walbeck's ILSA claim?

8. Did the circuit court err by awarding attorney's fees to Walbeck?

9. Did the circuit court err by denying Appellants' request for attorney's fees against Adkins on her breach of contract claim?

STANDARD OF REVIEW

"In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Id.* The appellate court "will reverse the trial court's rulings on these motions only [when] there is no evidence to support the rulings or [when] the rulings are controlled by an error of law." *Hinkle v. Nat'l Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

"When considering a JNOV, 'neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.'" *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) (quoting *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 634, 500 S.E.2d 145, 154 (Ct. App. 1998), *abrogated on other grounds by Webb v. CSX Transp., Inc.*, 364 S.C. 639, 653, 615 S.E.2d 440, 448 (2005)). A "JNOV should not be granted unless only one reasonable inference can be drawn from the evidence." *Reiland*, 330 S.C. at 634, 500 S.E.2d at 154.

As to questions of law, this court's standard of review is de novo. *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

LAW/ANALYSIS

I. Statute of Limitations

Appellants assert that Walbeck's claims "are time-barred because they accrued before December 22, 2007," which was exactly three years before Walbeck filed the initial complaint.[5] Appellants also assert that the HOA's claims "are time-barred because they accrued before February 7, 2009," which was exactly three years before Walbeck and Adkins filed the Second Amended Complaint on the HOA's behalf. Therefore, Appellants argue, the circuit court erred in submitting the issue to the jury and in denying Appellants' JNOV motion on this ground. We agree as to the negligent misrepresentation and ILSA claims because the circuit court committed an error of law in submitting to the jury the question of when these claims accrued. *See Hinkle*, 354 S.C. at 96, 579 S.E.2d at 618 (holding the appellate court "will reverse the trial court's rulings on [directed verdict or JNOV] motions only [when] there is no evidence to support the rulings *or [when] the rulings are controlled by an error of law*" (emphasis added)).

The three-year statute of limitations, section 15-3-530(5) of the South Carolina Code (2005),[6] applies to the negligent misrepresentation and breach of fiduciary duty claims. With the exception of medical malpractice actions, "all actions initiated under [s]ection 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence *should have known* that he [or she] had a cause of action." S.C. Code Ann. § 15-3-535 (2005) (emphasis added). The "exercise of reasonable diligence" means "the injured party must act with some promptness [when] the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party *might* exist." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363–64, 468 S.E.2d 645, 647 (1996) (second emphasis added). In other words, the discovery rule does not "require absolute certainty a cause of action exists before the statute of

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[5] Appellants do not dispute the applicability of the twenty-year statute of limitations to the breach of contract claim because Walbeck's contract to purchase his lot was a sealed instrument. *See* S.C. Code Ann. § 15-3-520 (2005) (providing for a twenty-year statute of limitations for actions on a sealed instrument).

[6] Subsection 5 provides for a three-year limitation on "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law, and [medical malpractice actions]."

limitations begins to run." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 126, 542 S.E.2d 736, 741 (Ct. App. 2001).

> The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and *when the testimony is conflicting upon the question,* it becomes an issue for the jury to decide. However, when there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim *becomes a matter of law to be decided by the trial court*.

Turner v. Milliman, 381 S.C. 101, 110, 671 S.E.2d 636, 641 (Ct. App. 2009) (emphases added) (citation omitted), *aff'd in part, rev'd in part on other grounds*, 392 S.C. 116, 708 S.E.2d 766 (2011).

The statute of limitations for the ILSA claim is "three years after discovery of the violation or after discovery should have been made *by the exercise of reasonable diligence*." 15 U.S.C. § 1711(a)(2) (emphasis added). There is a dearth of published case law interpreting this provision, but the opinion in *Streambend Properties III, LLC v. Sexton Lofts, LLC*, 297 F.R.D. 349, 359 (D. Minn.), *aff'd*, 587 F. App'x 350 (8th Cir. 2014), indicates an interpretation similar to *Dean*'s interpretation of the identical standard in section 15-3-535, i.e., "three years after the person knew or *by the exercise of reasonable diligence* should have known that he [or she] had a cause of action." (emphasis added).

In the present case, the jury found the date that Respondents knew or should have known they had a claim against Appellants was August 5, 2009, the date Appellants sold the disputed property to Russo. However, Appellants argue the initial representation on which Respondents claim they relied was that Appellants would convey the disputed property to the HOA free of charge upon completion of construction, and Respondents knew or should have known upon completion of construction in early 2001 that they did not receive such a conveyance.[7] Thus,

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[7] The 1998 Property Report stated,

> The recreational facilities listed in the chart above shall, upon completion of construction, be conveyed to the [HOA] by quitclaim deed free and clear of all monetary

Appellants argue, Respondents knew or should have known they might have a claim against Appellants, and their claims accrued, at that time. The logical extension of this argument is that Walbeck, in his individual capacity and as a representative of the HOA, certainly should have known before December 22, 2007, approximately six years after the completion of construction, that he and the HOA had a claim against Appellants.

Even viewing the evidence in the light most favorable to Respondents, we agree with Appellants that the negligent misrepresentation and ILSA claims accrued well before December 22, 2007. However, the claims did not necessarily accrue upon completion of construction or even immediately thereafter. Further, we disagree with Appellants as to the HOA's breach of fiduciary duty claim because the allegations in that claim are not limited to the falsity of the representations in the 1998 Property Report. We base our determination of each claim's accrual on the particular claim's allegations concerning breach of duty.

Negligent Misrepresentation

In the negligent misrepresentation claim, Respondents alleged:

> 88. The I'On Defendants made oral and written representations that the Community Dock and Creekside Park would be transferred to the [HOA].
>
> . . .
>
> 90. The Defendants owed a *duty* of care to the Plaintiffs *to communicate truthfully all information regarding [their] purchase in I'On*, without material omission.

> liens and encumbrances at no cost to the [HOA] or its members. Upon conveyance of these facilities to the [HOA], it shall assume full responsibility for the costs of ownership, operation, and maintenance of the facilities conveyed to it.

It is undisputed that construction of the Community Dock and Creekside Park was completed in early 2001, no later than April 10, 2001.

> 91. The Defendants[] breached that duty owed *by misrepresenting facts* [that], in conjunction with other representations, *induced the Plaintiffs and other lot purchasers to enter into contracts for the purchase of lots* in I'On.
>
> 92. The Plaintiffs, the [HOA], and its members have suffered a pecuniary loss as a direct and proximate result of [their] *reliance* on the Defendants' false representations.

(emphases added). Paragraph 88 referred to the representation made in the 1998 Property Report. Paragraph 91 designates the breach of Appellants' duty of care as misrepresenting facts that induced Walbeck to purchase his lot. Thus, as to the negligent misrepresentation claim, the question is when Walbeck, in his individual and representative capacity, knew or should have known of the falsity of the representation that induced him to buy his lot, i.e., the statement in the 1998 Property Report.

To accept Appellants' argument that the negligent misrepresentation claim accrued upon completion of construction would require the conclusion that Walbeck's purported reliance on the 1998 Property Report was accompanied by a duty to inquire about the conveyance immediately after construction was completed. Such a conclusion is unrealistic and unreasonably harsh. Rather, this claim accrued when Walbeck first received information indicating the HOA did not own the Community Dock and Creekside Park.

Walbeck admitted receiving copies of the HOA's proposed annual budgets, which began including a "Creek Club Dock usage Fee" as early as October 10, 2004, for the 2005 budget year, if not earlier. The proposed 2005 budget was mailed to HOA members on November 1, 2004. The listing of a fee being paid by the HOA for use of the Community Dock should have alerted Walbeck to the fact that the HOA did not have title to the Community Dock. Therefore, the only reasonable inference that can be drawn from the evidence is that the negligent misrepresentation claim accrued in early November 2004. *See* § 15-3-535 (stating that with the exception of medical malpractice actions, "all actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or *by the exercise of reasonable diligence* should have known that he had a cause of action." (emphasis added)); *Turner*, 381 S.C. at 110, 671 S.E.2d at 641 ("[W]hen there is no conflicting evidence or only one reasonable inference can be drawn from the

evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court.").

In its order denying Appellants' JNOV motion, the circuit court concluded that even if the date Respondents should have discovered their claims preceded the three-year limitations period, equitable estoppel would have served to toll the statute of limitations in light of Appellants' misrepresentations and efforts to conceal their negotiations with Russo. The circuit court did not refer to any exhibits or testimony showing the referenced misrepresentations or concealment, except for a quotation from an April 18, 2007 e-mail written by Chad Besenfelder, the I'On Company's manager. The circuit court also found that Appellants repeated their promise to convey the disputed property "over the course of many years" and included the June 2005 Handover Agreement in the list of exhibits to support this finding. However, this agreement does not reference any specific common areas. The other exhibits cited by the circuit court are e-mails that were written in the years 2006 through 2009.

Yet, there is no evidence that Appellants made any representations that could be construed as an expression of intent to convey the property between the time Walbeck received the 1998 Property Report and early November 2004, when he received the HOA's proposed budget for 2005. Therefore, the doctrine of equitable estoppel is not availing to Respondents as to the representation in the 1998 Property Report.

The circuit court also stated that it was "concerned with the existence of any evidence supporting the jury's findings and ha[d] no authority to resolve conflicts purportedly created by the jury's disregard of other evidence," citing *Curcio* as supporting authority. *See Curcio*, 355 S.C. at 320, 585 S.E.2d at 274 ("When considering a JNOV, 'neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.'" (quoting *Reiland*, 330 S.C. at 634, 500 S.E.2d at 154)). However, in the present case, there were no conflicts in the testimony or other evidence as to when Walbeck should have known Respondents might have a claim against Appellants for the representation in the 1998 Property Report. In any event, there was only one reasonable inference from the evidence on this question. Therefore, this question was one of law to be decided by the circuit court. *See Turner*, 381 S.C. at 110, 671 S.E.2d at 641 ("[W]hen there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court.").

Based on the foregoing, the negligent misrepresentation claim accrued no later than early November 2004 as a matter of law, and therefore, the circuit court erred in submitting this question to the jury. Because Walbeck failed to file the Complaint until December 22, 2010 and failed to file the Second Amended Complaint on the HOA's behalf until February 7, 2012, the negligent misrepresentation claim is barred by the statute of limitations. Accordingly, we reverse the corresponding denial of Appellants' JNOV motion as to this claim.

ILSA

In the ILSA claim, Respondents alleged:

> 60. Defendants have violated [ILSA] by: (1) issuing a Property Report that made representations to prospective purchasers of lots that were false; . . . (2) continually distributing copies of the Property Report to potential purchasers, with knowledge that it contained false representations and that these representations would likely be relied upon, and were in fact relied upon by numerous lot purchasers in I'On; [or] (3) failing to honor the representations therein.

Like the negligent misrepresentation claim, the question as to the ILSA claim is when Walbeck knew or should have known of the falsity of the representations in the 1998 Property Report. As we previously explained, the only reasonable inference from the evidence is that Walbeck should have known of the falsity of these representations by early November 2004. Therefore, the circuit court erred in submitting this question to the jury. Accordingly, we reverse the corresponding denial of Appellants' JNOV motion as to this claim.

Breach of Fiduciary Duty

The HOA's breach of fiduciary duty claim included the following allegations:

> 72. Defendants have a fiduciary relationship to the Plaintiffs by virtue of their capacity as the developer and steward of the I'On community amenities and their former capacity controlling the Board of [the HOA].

> 73. Defendants breached the fiduciary relationship by failing to honor their trust, by failing to disclose their breach of duty, by failure to enforce [the HOA's] rights, and by self-dealing.

Unlike the allegations in Walbeck's negligent misrepresentation claim, the allegations of paragraph 73 cover more than one breach, i.e., failing to honor their trust, failing to disclose their breach of duty, failure to enforce the HOA's rights, and self-dealing. While these breaches include the representation in the 1998 Property Report that induced certain homeowners to purchase their lots, they are not limited to that one act of wrongdoing. Thus, the question is when should the HOA's representatives (Walbeck and Adkins) have known of these other breaches.

More than one reasonable inference exists as to when Walbeck and Adkins should have known of Appellants' alleged failures and their alleged self-dealing beyond the alleged false promise in the 1998 Property Report. HOA members learned of Russo's November 2008 agreement to purchase lots CV-5 and CV-6, including the Community Dock and boat ramp. However, in March 2009, Russo advised the HOA's president, Bruce Kinney, that he had abandoned his agreement. Appellants then advised Kinney and the HOA's management company that ownership of the Community Dock would be transferred to the HOA. Yet, on August 1, 2009, the HOA's members learned of a new contract of sale between Appellants and Russo when Kinney posted an "I'On Community Bulletin" advising members of the contract. Appellants and Russo then closed the deal on August 5, 2009.

Based on the foregoing, the circuit court properly submitted to the jury the question of when the HOA's breach of fiduciary duty claim accrued. *See Sabb*, 350 S.C. at 427, 567 S.E.2d at 236 ("In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions."); *id.* ("The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt."). Therefore, we affirm the denial of Appellants' JNOV motion as to the accrual of the HOA's breach of fiduciary duty claim.

II. Abuse of Process

Pursuant to Rule 220(b), SCACR, and the following authorities, we affirm the circuit court's directed verdict on Appellants' counterclaim for abuse of process:

Pallares v. Seinar, 407 S.C. 359, 370–71, 756 S.E.2d 128, 133 (2014) (holding that the ulterior or improper purpose element of abuse of process "exists if the process is used to secure an objective that is *'not legitimate in the use of the process'*" (emphasis added) (quoting *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 551, 730 S.E.2d 340, 352 (Ct. App. 2012))); *Swicegood v. Lott*, 379 S.C. 346, 353, 665 S.E.2d 211, 214 (Ct. App. 2008) ("The improper purpose usually takes the form of coercion to obtain a *collateral* advantage, *not properly involved in the proceeding itself*, such as the surrender of property or the payment of money, by the use of the process as a threat or club." (emphases added) (quoting *Huggins v. Winn–Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967))).

III. Recreational Easement

Appellants maintain the circuit court erred in (1) finding that section 4.2 of the Recreational Easement limited the term of the easement to thirty years, superseding previous language stating the easement was perpetual, and (2) concluding that the Recreational Easement was invalid. However, Appellants did not appeal all of the grounds on which the circuit court based its declaration of invalidity. Namely, they failed to challenge the circuit court's conclusion that the Recreational Easement was not an arms-length transaction. Therefore, this court will affirm the circuit court's declaration under the two-issue rule. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the [two-issue] rule, [when] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); *id.*, 692 S.E.2d at 903–04 (noting that the two-issue rule can be applied to situations not involving a jury); *Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (affirming the trial court's decision because the plaintiff did not appeal all grounds for the decision); *see also* Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 214 (3rd ed. 2016) ("It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling.").

Even if Appellants had challenged the conclusion that the Recreational Easement was not an arms-length transaction, we agree with the circuit court. The evidence shows that the same individual, Joe Barnes, the I'On Company's general manager, signed the Recreational Easement on behalf of all three parties to the transaction, the I'On Company, the I'On Club, and the HOA. Therefore, we may affirm on this basis as well. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

As we affirm the circuit court's declaration of invalidity, we need not address Appellants' challenge to the finding that the Recreational Easement was limited to a term of thirty years. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

IV. Derivative Action

Appellants argue the circuit court erred by concluding Walbeck and Adkins properly filed and maintained their derivative claims against Appellants. Appellants request this court to dismiss the derivative claims on the grounds that (1) Walbeck and Adkins neither pleaded nor proved that they made a demand on the HOA to initiate litigation or that such a demand would have been futile, and (2) Walbeck and Adkins did not fairly and adequately represent the interests of other HOA members similarly situated in enforcing the HOA's rights. We disagree.

Rule 23(b)(1), SCRCP, addresses the procedural requirements for individuals seeking to file a derivative action. It states,

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. *The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority* and, if necessary, from the shareholders or members, *and the reasons for his failure to obtain the action or for not making the effort*. The derivative action may not be maintained if it appears that the plaintiff *does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association*.

(emphases added).

The demand requirement referenced in Rule 23 originated in our state's substantive law. *See Grant v. Gosnell*, 266 S.C. 372, 374, 223 S.E.2d 413, 414 (1976) ("Generally, in order for a stockholder to be able to sue for corporate injuries, he must allege that he has exhausted his remedies within the corporation or show a sufficient reason for not doing so." (citing *Latimer v. Richmond & D.R. Co.*, 39 S.C. 44, 17 S.E. 258 (1893) and *Thompson v. Thompson*, 214 S.C. 61, 51 S.E.2d 169 (1948))); *Latimer*, 39 S.C. at 52–53, 17 S.E. at 261 ("[B]efore the shareholder is permitted, in his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. . . . [H]e must show a case, if this is not done, where it could not be done, or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts, should be stated with particularity . . . ."); Rule 23(b)(1), Note ("This Rule 23(b)(1) is the language of present Federal Rule 23.1. *Existing State practice* permits a class action in these circumstances. The Rule simply provides more specific guidance for the procedure." (emphasis added) (citations omitted)).[8]

In *Grant*, our supreme court held that the question of whether the plaintiff's failure to seek redress within the bank of which he was a stockholder was excusable was "a factual question, the resolution of which . . . should be affirmed unless unsupported by the evidence or influenced by error of law." 266 S.C. at 375, 223 S.E.2d at 414. The court evaluated the circuit court's conclusion that the plaintiff's pursuit of redress within the bank would have been futile and held it was supported by the evidence because "[t]he record reflect[ed] that [the defendant] was chairman of the board of directors, and the owner of a majority of [the bank's] stock" when the plaintiff filed his derivative action alleging the defendants' fraud and mismanagement. *Id.* at 375–77, 223 S.E.2d at 414–15. "Possessed of this control of the stock of the corporation, *it is reasonable to infer* that [the defendant] would not voluntarily permit corporate action designed to grant relief for the grievances

[8] This court's opinion in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 188, 539 S.E.2d 402, 409 (Ct. App. 2000), *certiorari granted* August 23, 2001, has been cited in all of the parties' appellate briefs. After our supreme court granted certiorari in *Whittle*, the parties settled the case and the court issued an order on January 10, 2003, stating that this court's opinion would "remain viable in result only." Therefore, we do not view *Whittle* as binding precedent.

alleged in the complaint in which he is named as a wrongdoer." *Id.* at 376, 223 S.E.2d at 415 (emphasis added).

In the present case, Walbeck's and Adkins' derivative claims survived Appellants' motion to dismiss and motion for summary judgment. Undoubtedly, "the denial of a motion for summary judgment is not appealable, even after final judgment." *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003). On the other hand, when judicial economy is served, the denial of a motion to dismiss may be considered in an appeal from other appealable rulings in the same action. *See Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) ("Here, an [appealable] order . . . is before the [c]ourt and, in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy), we will consider [the respondent's] cross-appeal."). However, judicial economy would not be served by limiting our review to the record as it existed when the circuit court denied the motion to dismiss. Rather, as a result of surviving the motion to dismiss and the summary judgment motion, Walbeck and Adkins endured the time and expense of a lengthy trial on the derivative claims. Therefore, it would be wasteful, not to mention unfair, to ignore the evidence generated at trial on this issue.

Therefore, we will look to the record before the circuit court at trial. The documentary evidence, namely the Declaration of Covenants, Conditions, and Restrictions (Covenants), as well as the testimony before the circuit court showed that Appellants had a veto power over the decisions of the Board. Section 9-104(c) of the Covenants states, in pertinent part,

> So long as the [the I'On Company] Membership exists, the [the I'On Company] shall have a right to disapprove any action, policy[,] or program of [the HOA, the Board,] and any committee [that], in the sole judgment of [the I'On Company], would tend to impair rights of [the I'On Company] or Builders under [the Covenants] or the Bylaws, or interfere with development or construction of any portion of I'On, or diminish the level of services being provided by [the HOA].

Further, one Board member, Debra Bedell, testified regarding her understanding that the veto power would have prevented the Board from initiating

litigation.[9] Therefore, the evidence shows that a demand on the Board to initiate litigation against Appellants would have been futile.

Additionally, the circuit court properly found Walbeck and Adkins fairly and adequately represented the interests of the other HOA members because Walbeck and Adkins were represented by highly qualified counsel and were similarly situated to the other HOA members. *See* Rule 23(b)(1) ("The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members *similarly situated* in enforcing the right of the corporation or association." (emphasis added)); *cf. Runion v. U.S. Shelter*, 98 F.R.D. 313, 317 (D.S.C. 1983) (interpreting the fourth class action requirement under Rule 23(a), FRCP, and holding, "In determining whether [the plaintiff] would be an adequate class representative, this court should look at two criteria—(1) the representative must have common interests with the unnamed members of the class; and (2) it must appear that the representative will vigorously prosecute the interests of the class through qualified counsel."); *Jordon v. Bowman Apple Prod. Co.*, 728 F. Supp. 409, 412 (W.D. Va. 1990) ("Rule 23.1 places no minimum numerical limits on the number of shareholders who must be 'similarly situated.' In appropriate circumstances a single shareholder may be situated in a unique position and thus constitute a legitimate 'class of one.'" (citation omitted) (quoting *Halsted Video, Inc. v. Guttillo*, 115 F.R.D. 177, 180 (N.D. Ill. 1987))); *Halsted*, 115 F.R.D. at 180 ("Rule 23.1[, FRCP] does not require a derivative action plaintiff to represent the interests of shareholders with whom he is not similarly situated.").

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[9] At oral argument, Appellants stated that Bedell "recanted" her testimony. However, we do not view her clarification of her initial testimony as a recantation. Counsel for the HOA had initially asked Bedell if there was anything in the HOA's controlling documents preventing the Board from filing suit against Appellants. Bedell responded that any attempt by the Board to file suit against Appellants would have been subject to Appellants' veto power. Later in the trial, Appellants' counsel recalled Bedell to the witness stand, outside the jury's presence, to question her regarding Appellants' veto power. At this time, Bedell clarified that she did not serve on the Board until after Walbeck and Adkins had already filed suit against Appellants on the HOA's behalf. Bedell explained that she was not a Board member when a decision on filing suit would have first presented itself to the Board. She added that even if such a decision had been an issue while she was on the Board, the Board members "would not have thought about filing a suit, because it would be so clear that it would be vetoed."

According to the circuit court, the testimony of three HOA members, Julie Hussey, Tim Eble, and Deborah Bedell, indicated that Walbeck's and Adkins' assertion of the derivative claims advanced the interests of the HOA's members. The testimony of these witnesses supports the circuit court's finding. *See Hinkle*, 354 S.C. at 96, 579 S.E.2d at 618 (holding an appellate court may reverse the circuit court's rulings on JNOV motions only when there is no evidence to support the rulings or when the rulings are controlled by an error of law).

Appellants also allege that Walbeck and Adkins were required to make another demand following the settlement of their claims against Russo. Appellants argue the settlement resulted in the HOA gaining ownership of the disputed property and realigning its party status to join Walbeck and Adkins as plaintiffs.[10] Appellants further argue, "[t]he nature of the relief sought against Appellants thus changed substantially . . . enough that Respondents' claims are new claims." Appellants refer to damages claimed "based on the cash price of the settlement, the alleged leasehold value of the Creek Club building, and the alleged price of the buyout of years 21-30 of that lease." We disagree.

A new demand was unnecessary following the settlement because the resulting change to the damages sought did not change the nature of the original claims. Moreover, the HOA's realignment as a plaintiff allowed the jury to award damages to the HOA as if Walbeck and Adkins had never brought a derivative action.

Based on the foregoing, we affirm the circuit court's ruling that Walbeck and Adkins properly maintained a derivative action on the HOA's behalf.

V. Fiduciary Duty

Appellants argue the circuit court erred in concluding they owed a fiduciary duty to convey title to the disputed property to the HOA. We agree, but we conclude that Appellants owed a fiduciary duty to protect the rights of the HOA's members to the unfettered use and enjoyment of the disputed property and there was evidence showing Appellants breached this duty. Therefore, we affirm the circuit court's denial of the JNOV motion as to the fiduciary duty claim. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

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[10] The order realigning the HOA as a party plaintiff was made upon Appellants' motion.

In its order denying Appellants' JNOV motion, the circuit court stated, "When considering facts similar to those presented here, South Carolina courts have found a fiduciary relationship exists between developers and property owners."[11] The circuit court further stated,

> [A] developer's failure to convey community properties in their entirety is at least the equivalent of conveying them in "substandard condition" (if not worse), and thus, any distinction between properties which *should have been conveyed* and *properties which were actually conveyed in a substandard condition* is a distinction without a difference. . . . In other words, by failing to convey the community properties *as promised* to the [HOA, Appellants] failed to act in the best interest of the [HOA], and therefore, breached at least one of the fiduciary duties it owed the [HOA].

(circuit court's emphases). As the circuit court's ruling concerns a question of law, this court reviews the ruling de novo. *See Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003) ("Whether the law recognizes a particular duty is an issue of law to be decided by the [c]ourt."); *Fesmire*, 385 S.C. at 302, 683 S.E.2d at 807 ("This [c]ourt reviews all questions of law de novo.").

Appellants maintain the circuit court confused the contractual duty allegedly created by the 1998 Property Report with a fiduciary duty to the HOA. "An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Hendricks*, 353 S.C. at 456, 578 S.E.2d at 714. "Ordinarily, the common law imposes no duty on a person to act. [When] an act is *voluntarily undertaken*, however, the actor assumes the duty to use due care." *Id.* at 456–57, 578 S.E.2d at 714 (emphasis added). Consistent with this proposition is this court's explanation of the foundation for a fiduciary duty: "A

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[11] The circuit court was referring to *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 562 S.E.2d 633 (2002) and *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993). Both cases involved a developer conveying to a homeowners association title to common areas that were in substandard condition. We will discuss these two opinions further below.

confidential or fiduciary relationship exists when one reposes 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." *Goddard*, 310 S.C. at 414, 426 S.E.2d at 832 (quoting *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987)). "Courts of equity have been careful to define fiduciary relationships so as not to exclude new cases that may give rise to the relationship." *Id.*

In *Goddard,* this court compared the duty of a developer of a planned unit development (PUD) to its villa owners, prior to the formation of the villa owners association, to the duty of the promoters of a corporation: "Both are entrusted by interested investors to bring about a viable organization to serve a specific function. Both should be expected to use good judgment and act in utmost good faith to complete the formation of their organizations." 310 S.C. at 415, 426 S.E.2d at 832. The court found merit in the appellants' argument that the developer had a responsibility to ensure the common areas were in good repair when they were conveyed to the villa owners' association. *Id.* The court also recognized the evidence showing that the common areas were substandard when the developer turned them over to the association. *Id.*

The court highlighted evidence that the developer "seized the opportunity . . . to 'unload' the common areas on the [a]ssociation without a plan to establish a reserve or a plan to fund the [a]ssociation until such time as assessments were adequate to cover maintenance expenses." *Id.* The court stated, "It seems unfair to the villa owners for the [d]eveloper to burden them with substandard or deteriorated common areas that required an immediate expenditure of funds to bring them up to standard without a plan or a reserve fund to cover the expenditures." *Id.* In *Concerned Dunes West*, our supreme court adopted this court's analysis in *Goddard* and held, "The developer of a PUD owes a duty to [a homeowners association] to turn over common areas that are not substandard and that are in good repair. Failure to do so subjects the developer to liability for bringing the common areas up to standard." 349 S.C. at 256–57, 562 S.E.2d at 637.

Here, the evidence shows Appellants met their promoter-like duty to bring about a viable homeowners association, complete with a funding mechanism and guidance for self-governance through the Covenants. We do not view the failure to honor the contractual commitment allegedly created by the 1998 Property Report as a violation of Appellants' promoter-like fiduciary duty. Rather, as we explain below, Appellants' retention of control over the HOA throughout the years preceding the

sale of lot CV-6 to Russo created a continuing fiduciary relationship between Appellants and the HOA.

Prior to recognizing the fiduciary duty a developer owes to homeowners as the development's promoter, the *Goddard* court addressed the appellants' argument that a fiduciary duty arose from the developer's control of the villa owners' association. 310 S.C. at 413, 426 S.E.2d at 831. Specifically, the villa owners asserted that the superior voting strength of the developer and its president created "a fiduciary obligation to assess the villa owners at a level necessary to maintain sufficient reserves to adequately maintain the common areas." *Id.* The court stated, "*Assuming a fiduciary relationship exists* between the appellants and respondents because of their superior voting power, it is clear that the respondents have refrained from exercising their superior voting strength to effectuate higher assessments in deference to the wishes of the appellants to keep the assessments low." *Id.* at 414, 426 S.E.2d at 832 (emphasis added). Rather than rejecting the existence of a fiduciary duty at this stage in the relationship, the court declined to hold that this particular conduct of the developer violated a fiduciary duty to the villa owners. *Id.*

Again, the court recognized, "Courts of equity have been careful to define fiduciary relationships so as not to exclude new cases that may give rise to the relationship." *Id.* Instead, the court invoked the business judgment rule *as to the developer's determination of assessments only*.[12] When the court turned to the developer's transfer of the common areas to the association, it detected a fundamental unfairness in the developer's seizing of the opportunity "to 'unload' the common areas" on the association in substandard condition and without adequate funding. *Id.* at 415, 426 S.E.2d at 832. The court indicated that this particular conduct triggered the rule set forth in *Island Car Wash*: "A confidential or fiduciary relationship exists when one reposes 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." *Id.* at 414, 426 S.E.2d at 832 (quoting *Island Car Wash,* 292 S.C. at 599, 358 S.E.2d at 152).

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[12] The business judgment rule states, "In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." *Id.*

Here, Appellants retained continuing control of the HOA up to and including the date they conveyed lot CV-6 to Russo. The Covenants provided that the I'On Company, as Founder, had the authority to "appoint, remove[,] and replace the members of [the HOA's] Board of Trustees" for a limited period of time not to exceed twenty years after the Covenants' recording. The I'On Company also had the authority to

> disapprove any action, policy[,] or program of the [HOA], the Board of Trustees, and any committee [that], in the sole judgment of the [I'On Company], would tend to impair rights of [the I'On Company] or Builders under [the Covenants] or the Bylaws, or interfere with development or construction of any portion of I'On, or diminish the level of services being provided by the [HOA].

At trial, Thomas Graham testified that the I'On Company still retained these veto rights.

Appellants contend there were no developer-appointed directors serving on the HOA's Board after December 2005 and Appellants have never exercised any of the I'On Company's veto rights.[13] However, as in *Goddard*, Appellants' asserted restraint does not speak to the *existence* of a duty arising from their veto power but rather to the manner in which they carried out such a duty. *See id.* (assuming arguendo the existence of a fiduciary duty and declining to find a violation of any such duty by invoking the business judgment rule). Therefore, we reject Appellants' argument that their restraint from exercising the veto power precludes the existence of a fiduciary duty.

Nonetheless, the circuit court's denial of Appellants' JNOV motion was based on its extrapolation of a duty *to convey title* to all common areas from the duty pronounced in *Goddard* and *Dunes West*, i.e., the duty to turn over common areas that are not substandard and that are in good repair. Current South Carolina case law does not recognize the precise duty to convey title to all common areas, and thus, the denial of Appellants' JNOV motion was based on an error of law. *See Hinkle*, 354 S.C. at 96, 579 S.E.2d at 618 ("[The appellate court] will reverse the [circuit] court's rulings on [directed verdict and JNOV] motions only [when] there is no

[13] Appellants admit that in 2014, the I'On Company appointed a Board member, Chad Besenfelder, but he was excluded from participating in "Board decisions that would potentially be adverse to the I'On Company."

evidence to support the rulings or [when] the rulings are controlled by an error of law.").

Rather, we view Appellants' fiduciary duty as a duty to "act in good faith and with due regard to the interests of the" HOA's members. *See Goddard*, 310 S.C. at 414, 426 S.E.2d at 832 ("A confidential or fiduciary relationship exists when one reposes 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." (quoting *Island Car Wash*, 292 S.C. at 599, 358 S.E.2d at 152)). Because of Appellants' retention of continuing control of the HOA and their representations in 2008 and 2009 that they would convey the disputed property to the HOA, they are governed by standards set forth in *Island Car Wash*:

> [A]nyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests. . . . [C]ourts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage *at the expense of the person under his influence*.

292 S.C. at 599, 358 S.E.2d at 152 (emphasis added).

In the present case, all parties considered the disputed property to be common areas, designated by the Covenants as "Commons," because the HOA purportedly held "use rights," via the Recreational Easement,[14] "for the common use and enjoyment of Titleholders." Hence, the HOA was "exclusively responsible for the control and management" of the disputed property, and the I'On Company's control of the HOA undoubtedly required the I'On Company to preserve the rights of the HOA's members to the unfettered use and enjoyment of these common areas.

Yet on at least two occasions, Appellants placed the HOA's members in a position of having to compete with non-members for access to the disputed property. First, in 1998 and 1999, the I'On Group, then known as Civitas, negotiated with a

[14] Before the present action was filed, the parties believed the Recreational Easement was valid. Therefore, the instrument's invalidity did not affect the parties' actual treatment of the disputed property as common areas for purposes of the fiduciary duty analysis.

neighboring subdivision's developer for the sale of access rights to the Community Dock and the boat ramp on lot CV-6, which was owned by the I'On Company at the time. This occurred without the knowledge of the HOA's members. While the Covenants allow the HOA to grant easements over common areas, the purpose of such an easement must be "consistent with the interests of the [HOA]."[15]

Next, the I'On Company relinquished its ownership interest in lot CV-6 to the I'On Club and ultimately to Russo. While the I'On Club made the conveyance of lot CV-6 to Russo expressly subject to the Recreational Easement when its validity was not being questioned, this easement was "nonexclusive." Again, this placed the HOA's members in a position of having to compete with non-members for access to the disputed property. Further, there is evidence in the record from which the jury could have reasonably inferred Appellants' bad faith. In the light most favorable to Respondents, the evidence shows Appellants' intent to profit from the disputed property at the expense of the HOA's members. *See Sabb*, 350 S.C. at 427, 567 S.E.2d at 236 ("In ruling on directed verdict or JNOV motions, the [circuit] court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions."); *id.* ("The [circuit] court must deny the motions when the evidence yields more than one inference or its inference is in doubt.").

In late June and early July 2007, Thomas Graham asked Chad Besenfelder to advise him "what rights" the HOA had "over the docks and boat ramp." Before receiving a response, Thomas Graham sent another e-mail to Besenfelder expressing his desire to keep ownership of the Community Dock. In a later e-mail, he expressed his intent to "capitalize [the] potential value" of the Community Dock. Yet, Appellants continued to assure the HOA's members that they intended to convey the Community Dock and boat ramp to the HOA. These assurances led the HOA's members to "repose[] a special confidence in" Appellants, binding Appellants to "act in good faith and with due regard to the interests of" the HOA's members. *See Goddard*, 310 S.C. at 414, 426 S.E.2d at 832 ("A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due

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[15] On April 8, 2000, Appellants amended the Covenants to state that the I'On Company had an easement over the common areas for the purpose of conducting parades, sporting events, and "other activities of general community interest." We do not interpret this provision as encompassing the regular, continuing access of non-members to the amenities on lot CV-6.

regard to the interests of the one imposing the confidence." (quoting *Island Car Wash*, 292 S.C. at 599, 358 S.E.2d at 152)).

In the light most favorable to Respondents, the foregoing evidence shows Appellants acted in bad faith and profited at the expense of the HOA's members. In sum, there is sufficient evidence of Appellants' breach of their fiduciary duty to the HOA's members to affirm the denial of Appellants' JNOV motion as to this claim.

VI. Amalgamation

Appellants next argue the circuit court's ruling that Appellants were amalgamated was improper because the circuit court failed to consider the factors required by *Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984) for "piercing the corporate veil" to hold a corporation's principals personally liable for the corporation's wrongdoing. We disagree.

Our supreme court recently examined the "amalgamation of interests theory" in *Pertuis v. Front Roe Restaurants, Inc.*[16] The court recognized this court's previous applications of the theory in *Magnolia North Property Owners' Ass'n v. Heritage Communities, Inc.*[17] and *Kincaid v. Landing Development Corp.*[18] as well as its own reference to the theory in *Kennedy v. Columbia Lumber & Manufacturing Co.*[19] In *Magnolia*, this court analyzed the relationship of the defendant corporations to their officers, directors, headquarters, employees, functions, written representations, and admissions of liability to determine whether there existed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." 397 S.C. at 358–60, 725 S.E.2d at 117–18 (quoting *Kincaid*, 289 S.C. at 96, 344 S.E.2d at 874). We concluded the evidence supported the trial court's ruling that the corporations were amalgamated. *Id.* at 360, 725 S.E.2d at 118.

In *Pertuis*, the court formally recognized the amalgamation of interests theory for the first time and indicated a preference for the term "single business enterprise theory." *Id.* at 33–34. Notably, the court held, "the single business enterprise theory

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[16] Op. No. 27823 (S.C. Sup. Ct. filed July 5, 2018) (Shearouse Adv. Sh. No. 27 at 22). A petition for rehearing in this case is currently pending before the supreme court.
[17] 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012).
[18] 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986).
[19] 299 S.C. 335, 340–41, 384 S.E.2d 730, 734 (1989).

requires a showing of more than the various entities' operations are intertwined," as the theory had previously been applied by our courts. *Id.* at 34. Rather, "[c]ombining multiple corporate entities into a single business enterprise requires further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Id.* In comparison, the *Sturkie* requirements for holding a corporation's principals personally liable for the corporation's wrongdoing are (1) the failure to observe corporate formalities and (2) "an element of injustice or fundamental unfairness if the" corporation's acts are "not regarded as the acts of" its principals. *See Mid-S. Mgt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597–98, 649 S.E.2d 135, 140–41 (Ct. App. 2007) (explaining *Sturkie*'s "two-prong[ed] test to determine whether a corporate veil should be pierced").

Therefore, the requirements for the single business enterprise theory as adopted by our supreme court overlap with the *Sturkie* requirements for piercing the corporate veil. The single business enterprise theory does not require a showing of the corporate defendants' failure to observe corporate formalities. However, the theory dovetails with the second prong of the *Sturkie* test, i.e., an element of injustice or fundamental unfairness, to place accountability where it belongs.

Here, in its order denying Appellants' JNOV motion, the trial court discussed in detail the fundamental unfairness inherent in Appellants' "misuse of [their] collective control" of the amenities promised to the HOA. Further, there is evidence of both an intertwining of the entities' operations and Appellants' bad faith. In particular, there was evidence of Appellants' common employees, principals, and activities as well as the confusion displayed by those who dealt with Appellants as to which entity they were dealing with. *Cf. Mid-S.*, 374 S.C. at 605, 649 S.E.2d at 145 (rejecting the appellants' amalgamation argument and noting, *inter alia*, there was no evidence that the plaintiffs could confuse a corporate defendant with its parent companies).

Further, the evidence shows that Appellants' common employees and principals acted in concert to profit at the expense of the HOA's members. The intertwining of the operations of Appellants' entities undoubtedly facilitated this behavior, making it fundamentally unfair to assign liability to any one or more of these entities to the exclusion of the others. For example, in 1998 and 1999, the I'On *Group*, then known as Civitas, negotiated with a neighboring subdivision's developer for the sale of access rights to the Community Dock and the boat ramp on Lot CV-6, although the rights were owned by the I'On *Company* at the time. This occurred without the knowledge of the HOA's members. In 2000, the I'On Company

transferred lot CV-6 to the I'On Club, LLC, for inadequate consideration ($5.00) before it was ultimately sold to Russo.

This intertwining also played a role in Besenfelder's March 2009 representation to the HOA's management company that the I'On Company would deed the Community Dock on lot CV-6 to the HOA when, in fact, the I'On *Club* owned lot CV-6. Besenfelder's other communications likewise show that he referred to the various entities interchangeably. Also preceding the sale of lot CV-6 to Russo was Thomas Graham's secret expression of a desire to "capitalize [the] potential value" of the Community Dock. The realization of Graham's intent through the sale to Russo, in addition to the 1999 sale of access rights, placed the HOA's members in a position of having to compete with non-members for access to the disputed property. In other words, the secret sale of access rights to a neighboring subdivision's developer as well as the surprise sale of ownership to Russo benefitted Appellants at the expense of the HOA's members.

Based on the foregoing, we affirm the circuit court's conclusion that Appellants were amalgamated.

VII. ILSA Claim

Appellants maintain that Walbeck's ILSA claim fails because Walbeck did not rely on any representations made in the 1998 Property Report. We need not address this argument because the ILSA claim is barred by the statute of limitations. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

VIII. Attorney's Fees for Walbeck

We need not address Appellants' challenge to the amount of fees awarded to Walbeck pursuant to 15 U.S.C. § 1709(c) because his ILSA claim is barred by the statute of limitations and, thus, he may not recover attorney's fees under § 1709(c). We reverse the circuit court's award under this statute.

IX. Attorney's Fees against Adkins

Appellants claim they were entitled to an award of attorney's fees against Adkins on her breach of contract claim because they were the prevailing party pursuant to the fee-shifting provision in Adkins' lot purchase agreement. We affirm the circuit court's order denying attorney's fees against Adkins.

Appellants sought an award of attorney's fees against Adkins pursuant to the following provision in her lot purchase agreement: "If either party requires services of an attorney to enforce obligations under this Agreement, the prevailing party shall be due from the non-prevailing party reasonable attorneys' fees, costs[,] and expenses actually incurred." The circuit court denied the requested award because Adkins prevailed on three of her derivative claims against Appellants and there was "no practical or legal way to separate the derivative verdicts from Adkins or to attribute them more to Walbeck[] just because he prevailed on his claim for personal damages and Adkins did not." The circuit court also noted that while Adkins did not prevail on her breach of contract claim, she prevailed as to Appellants' counterclaim for abuse of process, "resulting in a draw on the individual claims."

In *Heath v. County of Aiken*, our supreme court interpreted the term "prevailing party" within the context of section 15-77-300 of the South Carolina Code (Supp. 1989), which authorizes the recovery of attorney's fees and costs by a party contesting state action. 302 S.C. 178, 182–83, 394 S.E.2d 709, 711–12 (1990). The determination of whether the movant was a prevailing party was one of the factors under the statute examined by the court, which reviewed the circuit court's award under an abuse of discretion standard of review. *Id.* at 182, 394 S.E.2d at 711. The court stated, "A prevailing party has been defined as:

> [t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered.

Id. at 182–83, 394 S.E.2d at 711 (quoting *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (Alaska 1964)).

The "prevailing party" analysis in *Heath* lends support to the circuit court's analysis of Appellants' request for attorney's fees pursuant to the fee-shifting provision in Adkins' lot purchase agreement, even considering that one of the three derivative claims (negligent misrepresentation) is barred by the statute of limitations. Further, this court may affirm for any ground appearing in the record. Rule 220(c), SCACR. Here, Appellants' petition for attorney's fees does not indicate that the addition of Adkins as a plaintiff required any significant increase in the efforts of counsel to defend this case. While the petition requests one-half of the total fees and expenses incurred from the date of the Second Amended Complaint's filing through

the end of trial, it does not state that Adkins' presence in the case actually generated a corresponding amount of time or money expended. Moreover, counsel's attorney's fee affidavit is not in the record.

Based on the foregoing, we affirm the denial of Appellants' request for attorney's fees against Adkins.

CONCLUSION

We reverse the denial of Appellants' JNOV motion as to the negligent misrepresentation and ILSA claims because they are barred by the statute of limitations, but we affirm the denial of Appellants' JNOV motion as to all other grounds. We affirm the order declaring the Recreational Easement invalid and the order denying Appellants' request for attorney's fees against Adkins. Finally, we reverse the award of attorney's fees to Walbeck.

AFFIRMED IN PART and REVERSED IN PART.

LOCKEMY, C.J., and HUFF, J., concur.