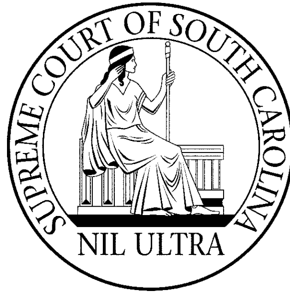

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 7
February 12, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jimmie Aiken, Leila Brown, Vernonda Cohen, Carla David, Anthony Sabb, James Ginn, and Shirley Rice, as named Plaintiffs representing a class of South Carolina citizens, Respondents,

v.

South Carolina Department of Revenue, Appellant.

Appellate Case No. 2017-001790

Appeal from Orangeburg County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 27944
Heard September 25, 2019 – Filed February 12, 2020

REVERSED AND REMANDED

General Counsel Jason P. Luther, Counsel for Litigation Dana R. Krajack and Counsel for Litigation Sean G. Ryan, all of Columbia, for Appellant.

Robert N. Hill, of Lexington, Mark B. Tinsley, of Gooding & Gooding, PA, of Allendale, Daniel W. Williams, of Bedingfield & Williams, LLC, of Barnwell and Charles H. Williams, of Williams & Williams, of Orangeburg, for Respondents.

JUSTICE JAMES: Respondents, individually and as members of a putative class, brought this declaratory judgment action against the Department of Revenue seeking refunds of amounts garnished from their wages by the Department to satisfy delinquent debts they allegedly owe to other governmental entities. The merits of the case are not before the Court, as the sole issue on appeal arises from the circuit court's grant of Respondents' motion to strike one defense from the Department's answer to Respondents' second amended complaint.

In the stricken defense, the Department alleges subsection 12-60-80(C) of the South Carolina Revenue Procedures Act (the RPA)[1] prohibits this action from proceeding as a class action against the Department. The Department appealed the circuit court's order to the court of appeals, and we certified the Department's appeal pursuant to Rule 204(b) of the South Carolina Appellate Court Rules. We reverse the circuit court and hold this case cannot proceed as a class action against the Department.

I.

Each named Respondent allegedly owes or owed money to either Allendale County Hospital or The Regional Medical Center in Orangeburg. Both hospitals are governmental entities. The hospitals contracted with the Department to collect the alleged debts pursuant to section 12-4-580 of the South Carolina Code (2014). Section 12-4-580 is known as the Governmental Enterprise Accounts Receivable (GEAR) program and provides in pertinent part:

> The department and another governmental entity may contract to allow the department to collect an outstanding liability owed the governmental entity. In administering the provisions of those agreements, the department has all the rights and powers of collection provided pursuant to [Title 12] for the collection of taxes and all the rights and powers authorized the governmental entity to which the liability is owed.

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[1] S.C. Code Ann. §§ 12-60-10 to -3390 (2014 & Supp. 2019).

S.C. Code Ann. § 12-4-580(A). Respondents contend the Department's use of section 12-4-580 (the GEAR program) and section 12-54-130 of the South Carolina Code (2014) (the wage garnishment statute) to collect these debts is unlawful for various reasons; the particulars of this contention are not before us.

Respondents seek to represent a class of all persons similarly situated to them, and also seek to include in the class those persons whose wages were garnished to collect other types of delinquent debts, including student loan debt, tenant debt, and child care debt. In its answer, the Department alleged subsection 12-60-80(C) of the RPA prohibits this action from proceeding as a class action. Subsection 12-60-80(C) provides:

> Notwithstanding subsections (A) and (B), a claim or action for the refund of taxes may not be brought as a class action in the Administrative Law Court or any court of law in this State, and the department, political subdivisions, or their instrumentalities may not be named or made a defendant in any other class action brought in this State.

Respondents moved to strike this defense. The Department argued the delinquent debts it collects are "taxes" under subsection 12-60-30(27) of the RPA (2014); therefore, the Department contended, the first clause in subsection 12-60-80(C) prohibits Respondents' putative class action because it is an action seeking "the refund of taxes." The Department also argued that even if the delinquent debts are not "taxes," the second (or "catchall") clause of subsection 12-60-80(C) bars "any other" class action against the Department.

In granting Respondents' motion to strike, the circuit court ruled the first portion of subsection 12-60-80(C) does not apply to this case because the delinquent debts garnished from Respondents' wages are not "taxes" as that term is defined in subsection 12-60-30(27) of the RPA or as that term is commonly understood. The circuit court also rejected the Department's contention that the catchall clause of subsection (C) bars any other class actions against the Department. The circuit court's reasoning was threefold. First, the circuit court ruled this interpretation runs afoul of the one-subject rule set forth in Article III, section 17 of the South Carolina Constitution because it "multiplies the number of subjects within the same Act" that enacted subsection (C). In support of this ruling, the circuit court noted subsection

(C) was enacted as part of Act No. 69 of 2003, and the title to Act 69 contains no reference to the RPA barring all class actions against the Department. Second, the circuit court ruled that had the General Assembly intended to bar class actions over non-tax debt, the General Assembly would have placed the bar in the GEAR statute (section 12-4-580) and not in the RPA. Third, the circuit court ruled that interpreting the second clause of subsection 12-60-80(C) to prohibit any and all other class actions against the Department would violate the doctrine of *ejusdem generis*.

The Department raises two basic arguments in this appeal. First, the Department argues the debts it has collected from Respondents fall within the definition of "taxes" as set forth in subsection 12-60-30(27) of the RPA. As such, the Department contends, Respondents' action is an action for the refund of "taxes," thereby invoking the prohibition of class actions for the refund of taxes as set forth in the first clause of subsection 12-60-80(C) of the RPA. Second, the Department contends that even if Respondents' action is not an action for the refund of "taxes," the second, or "catchall," clause of subsection 12-60-80(C) prohibits this and all other class actions against the Department. We hold the catchall clause of subsection 12-60-80(C) of the RPA prohibits this action from proceeding as a class action against the Department.

II.

"An issue regarding statutory interpretation is a question of law." *Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 363, 798 S.E.2d 555, 558 (2017) (quoting *Univ. of S. Cal. v. Moran*, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005)). "[T]his Court reviews questions of law de novo." *Id.* (alteration in original) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)).

"Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). What the General Assembly says in the text of the statute is the best evidence of its intent, and this Court is bound to give effect to the legislature's expressed intent. *Id.*

Again, subsection 12-60-80(C) provides:

> Notwithstanding subsections (A) and (B), a claim or action for the refund of taxes may not be brought as a class action in the Administrative Law Court or any court of law in this State, and *the department, political subdivisions, or their instrumentalities may not be named or made a defendant in any other class action brought in this State.*

(emphasis added to catchall clause). The answer to the question of whether this action may proceed as a class action is found in our analysis of the catchall clause of subsection (C). Therefore, we need not address the issue of whether the debts purportedly owed by Respondents to the hospitals are "taxes" as that term is defined in subsection 12-60-30(27) of the RPA. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing an appellate court need not address remaining issues when the disposition of a prior issue is dispositive of the appeal).

The Department argues the catchall clause of subsection (C) unambiguously provides the Department may not be named or made a defendant in any other class action brought in this State. Respondents argue we should adopt the circuit court's reasoning and affirm. As noted above, the circuit court's ruling that subsection (C) cannot be interpreted to bar all class actions against the Department was threefold: (1) the doctrine of *ejusdem generis* prohibits the Department's interpretation of the catchall clause of subsection 12-60-80(C), (2) had the General Assembly intended subsection (C) to apply to the instant case, it would have put the clause in the GEAR statute, and (3) subsection (C)'s purported prohibition of all class actions against the Department would violate Article III, section 17 of the South Carolina Constitution. We will now review the circuit court's reasoning.

A.

The circuit court ruled the doctrine of *ejusdem generis* prohibits the catchall clause of subsection (C) from being broadly interpreted to prohibit all class actions against the Department. "Under the [*ejusdem generis*] doctrine, ordinarily when general words follow the enumeration of particular classes or subjects, the general words should be construed as limited only to those of the general nature or class enumerated." *State v. Wilson*, 274 S.C. 352, 355, 264 S.E.2d 414, 415 (1980). "However, the doctrine of '*ejusdem generis*' is only a rule of construction to be applied as an aid in ascertaining intent and has no application where it clearly appears that no such limitation was intended." *Id.* We hold subsection 12-60-80(C)

indicates no intent to limit or restrict the general words "any other class action" in the catchall clause of subsection (C) to the specific subject of "taxes" set forth in the first portion of subsection (C). To interpret the catchall clause in this fashion would simply amount to an unnecessary re-recitation of the first portion of subsection (C); this would be an absurd and forced construction of the catchall clause of subsection (C). *See Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . . ." (alteration in original) (quoting 82 C.J.S. *Statutes* § 346)).

B.

Next, the circuit court reasoned that had the General Assembly intended for the catchall clause of subsection 12-60-80(C) to apply to the instant case (in which Respondents seek a refund of amounts collected under the GEAR statute), it would have placed the catchall clause in the GEAR statute. The Department contends we should consider the timing of the General Assembly's enactment of subsection 12-60-80(C) in relation to our decision in *Gardner v. South Carolina Department of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003). The plaintiffs in *Gardner* sought to be certified as representatives of a class of all taxpayers who suffered a reduction in their state income tax refunds after the Department collected debts under the auspices of the Setoff Debt Collection Act (S.C. Code Ann. §§ 12-56-10 to -120 (2014)). The Setoff Debt Collection Act, like the GEAR statute, is a vehicle by which the Department is allowed to collect debts owed to various governmental agencies. The circuit court granted the plaintiffs' request for class certification pursuant to Rule 23 of the South Carolina Rules of Civil Procedure. This Court reversed the circuit court on January 27, 2003, holding the plaintiffs failed to establish the element of commonality required by Rule 23. 353 S.C. at 22-23, 577 S.E.2d at 201. Four months after *Gardner* was decided, the General Assembly passed legislation that included subsection 12-60-80(C). *See* Act No. 69, 2003 S.C. Acts 718, 744. The Department argues the General Assembly intended to add subsection (C) to section 12-60-80 on the heels of *Gardner* to make it clear that (1) an action for the refund of taxes may not be brought as a class action in the administrative law court or in any court of law in this State, and (2) the Department may not be named or made a defendant in any other class action brought in this State. We need not consider the timing of the General Assembly's introduction and enactment of subsection 12-60-80(C), as we conclude the plain language of

subsection (C), by itself, clearly prohibits the instant action from proceeding as a class action.

C.

Next, the circuit court concluded subsection 12-60-80(C)'s prohibition of all class actions against the Department violates the one-subject rule of Article III, section 17 of the South Carolina Constitution. This was error. Article III, section 17 provides, "Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." Even if we were to agree that the inclusion of subsection (C) multiplied the number of subjects in Act No. 69, the one-subject rule does not apply because that act has been duly codified. *See S.C. Tax Comm'n v. York Elec. Coop.*, 275 S.C. 326, 333, 270 S.E.2d 626, 629-30 (1980) (holding an act's constitutional defect under Article III, section 17, was eliminated by "the proper inclusion" of that act in the codification of the code of laws); *Colonial Life & Accident Ins. Co. v. S.C. Tax Comm'n*, 233 S.C. 129, 148, 103 S.E.2d 908, 917 (1958) (holding the deficiency that existed in the title of an act was of no consequence after the provisions of the act were codified), *superseded on other grounds by* Rule 208(b)(2), SCACR, *as recognized in I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).

III.

We hold the plain language of subsection 12-60-80(C) prohibits this action from proceeding as a class action. We therefore reverse the circuit court and remand this case for further proceedings consistent with this opinion. We express no opinion on the merits of this case, and we express no opinion as to whether the Revenue Procedures Act applies to other issues in this case.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Eric Terrell Spears, Respondent.

Appellate Case No. 2017-001933

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27945
Heard January 30, 2019 – Filed February 12, 2020

REVERSED

Attorney General Alan McCrory Wilson, Senior Assistant Attorney General David A. Spencer, and Interim Solicitor Heather Savitz Weiss, all of Columbia, for Petitioner.

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Respondent.

JUSTICE JAMES: Eric Terrell Spears was indicted for trafficking crack cocaine between ten and twenty-eight grams. Spears moved to suppress the evidence of the

drugs seized from his person on the ground he was seized in violation of the Fourth Amendment. The trial court denied the motion to suppress, and Spears was convicted as charged. The trial court sentenced Spears to thirty years in prison. A divided court of appeals reversed Spears' conviction. *State v. Spears*, 420 S.C. 363, 802 S.E.2d 803 (Ct. App. 2017). We granted the State's petition for a writ of certiorari to review the court of appeals' decision. We now reverse the court of appeals and uphold Spears' conviction. We hold there is evidence in the record to support the trial court's finding that Spears engaged in a consensual encounter with law enforcement and that Spears' subsequent actions created a reasonable suspicion that he may have been armed and dangerous—justifying law enforcement's *Terry*[1] frisk that led to the discovery of the offending crack cocaine in Spears' pants.

I. FACTUAL AND PROCEDURAL HISTORY

Law enforcement officers from Immigration Customs Enforcement (ICE), the Drug Enforcement Agency (DEA), and the Lexington and Richland County Sheriffs' Offices were investigating a tip that two black males (Tyrone Richardson and Eric Bradley) were transporting drugs into South Carolina via one of the "Chinese bus lines." These bus lines depart from the Chinatown district in New York City, dropping off passengers in major cities along the East Coast. Because of the lack of security measures and required identification, these buses are frequently exploited by wanted criminals and people trafficking in narcotics and counterfeit merchandise. There are no traditional bus stations for the "Chinese bus line"; the buses usually stop at a couple of different locations in Columbia to allow passengers to disembark.

On March 29, 2012, Agents Dennis Tracy, Briton Lorenzen, and Frank Finch were dispatched, pursuant to the tip, to conduct surveillance at one of the bus stops. As the passengers were exiting the bus, most of the passengers were being greeted by relatives or friends, being picked up by cabs, or talking on the phone (presumably making arrangements to be picked up). However, the agents observed a man and a woman with four large suitcases who "stuck out" because "they were paying an excess amount of attention" to the plain-clothed agents. A few minutes later, the man and woman began walking down the road away from the agents. The agents followed, and while walking briskly behind the man and woman to catch up with them, the agents observed the woman remove an unknown object from her purse and pass it to the man. When the agents were approximately ten feet from the couple,

[1] *See Terry v. Ohio*, 392 U.S. 1 (1968).

they asked the couple to stop and speak with them. The couple complied and engaged the agents in a conversation. The man was identified as Spears. As they spoke, Spears kept placing his hands inside his untucked shirt near his waistband. Fearing Spears might have a weapon, Agent Tracy repeatedly asked Spears to stop. Spears persisted in this movement, so Agent Tracy frisked Spears for safety reasons.

During the frisk, Agent Tracy felt a small, hard object about the size of a golf ball with jagged edges tucked into Spears' waistband. Based on his training and experience, Agent Tracy believed the object was crack cocaine, and he removed it from Spears' pants. The object field-tested positive for crack cocaine, and Spears was arrested. Spears told law enforcement he was paid to bring the crack cocaine from New York to South Carolina because of the drug's higher street value in South Carolina. Spears admitted he did so out of "stupidity" and because he needed the money.

Spears was indicted for trafficking crack cocaine more than ten grams and less than twenty-eight grams. Prior to trial, Spears moved to suppress the drug evidence. Spears argued he was seized by the agents in violation of the Fourth Amendment. Specifically, he contended a seizure occurred because a reasonable person would not have felt free to walk away from the initial encounter. Spears also contended the agents did not have a reasonable suspicion to stop him. The State argued the encounter between the couple and the agents was consensual and the agents therefore did not need a reasonable suspicion to initiate the stop. The State contended Agent Tracy properly frisked Spears for safety reasons.

Agent Tracy, a nineteen-year law enforcement veteran with ten years' experience in narcotics and certified in the field of narcotics interdiction, testified during the suppression hearing. Agent Tracy testified that on the day of the incident, he and Agents Lorenzen and Finch were dressed in plain clothes and were observing passengers disembarking a bus in a parking lot near I-20. Agent Tracy testified he was carrying a concealed handgun.[2] He testified most of the passengers did not appear suspicious; however, he noted Spears and a woman appeared nervous and "kept looking at us and talking amongst themselves." Agent Tracy testified as to why the agents wanted to make contact with the couple:

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[2] Agents Lorenzen's and Finch's guns were holstered but visible. This fact was disclosed during trial testimony in front of the jury, not during the suppression hearing.

> The reason . . . was to first of all identify them, and second of all to ascertain if they were involved in any criminal activity, specifically under our ICE authority it would be trafficking counterfeit goods. They have four large bags coming out of a known source area for counterfeit goods, we thought that might be something we wanted to take a look at.

Agent Tracy conceded the agents wanted to make contact with the couple solely based on their activity and not based on the original narcotics tip. Agent Tracy testified Spears and the woman began walking down the street towards the post office and that the woman appeared to reach into her bag and pass an unknown item to Spears. Agent Tracy testified that because Spears never lifted his hands above his waist, the agents believed the object would be in Spears' hands, waistband, or pockets.

Agent Tracy testified Spears and the woman continued to look back at the agents as they were walking away and that when the agents got close enough to Spears and the woman, he requested to speak with the couple. Agent Tracy testified he said something "nonthreatening" such as, "Excuse us, do you mind if we have a word with you?" Agent Tracy testified the couple complied. Agent Tracy described how the agents caught up with the couple: "They're walking, we're walking behind them, we didn't run. However, [] we [did] walk a little faster than they did to make contact with them." Agent Tracy testified Spears and the woman were not handcuffed and would have been free to walk away if they had initially refused to speak to the agents. Agent Tracy testified:

> We identified ourselves, made small talk with them about their travel itinerary, asked them how the bus ride was, if they got any bad weather[.] . . . We then asked them if they had -- or we told them the bus lines, that we had problems in the past with drugs and wanted subjects and counterfeit merchandise, and we asked them for ID.

Spears handed the agents his ID. However, the record does not reflect whether the agents retained his ID or gave it back to him. Agent Tracy testified Spears' answers about the trip were "very forthcoming"; however, when he asked Spears whether he had any illegal weapons, Spears hesitated before answering "no." Agent Tracy testified that based on his training in narcotics interdiction, people traditionally

hesitate when they are confronted with a question they do not want to answer truthfully.

Agent Tracy testified about Spears' subsequent behavior, which is of particular importance to the issues on appeal:

> I noted that while I was speaking with [Spears,] he continued to put his hands underneath his shirt and I guess the motion would be like puff his shirt away from his waistband. . . . I asked him to keep his hands where I could see them . . . because I didn't know what if he was reaching in his pockets. He did it a couple more times, and I kept reminding him to cease putting his hands in his pockets . . . for officer safety regards[.] . . . So he continued to get frustrated, or he continued to put his hands in his pockets or pulled his shirt out, and I told him I was going to conduct a pat down of him so I could be sure he didn't have any weapons on him or anything that was going to hurt me.

Agent Tracy testified he frisked Spears for his and the other agents' safety. He testified it was during the frisk in which he discovered the crack cocaine and a small amount of marijuana.

Traci Jenkins (referred to as Traci Williams by the court of appeals), the woman with Spears at the time of the incident, also testified at the suppression hearing. She testified Spears was her boyfriend at the time of the incident. Jenkins testified she and Spears were waiting on a ride when they first disembarked the bus but decided to walk when the ride was taking too long to arrive. Jenkins testified she and Spears were told by the agents to "stop." She testified the encounter lasted probably less than twenty minutes and that she did not believe she was free to walk away. Jenkins testified she was told by the agents to sit down; however, she recalled that particular instruction was likely given to her after Spears was searched and handcuffed. She was unsure as to whether the agents' guns were visible. Spears did not testify at the suppression hearing.

The trial court denied Spears' motion to suppress the crack cocaine. The trial court found the agents engaged Spears in a consensual encounter and that Agent

Tracy "pointed to specific and articulable facts [that] warranted a search of Spears' person."

During trial, Agents Tracy, Lorenzen, and Finch testified about their encounter with Spears. Tara Kinney, a forensic chemist, identified the seized drug as crack cocaine and determined it had a net weight of 11.43 grams. When the State moved the drug into evidence, Spears renewed his pretrial objection to its admissibility. The jury convicted Spears of trafficking crack cocaine, and because this was Spears' third offense, the trial court imposed a thirty-year sentence pursuant to section 44-53-375(C)(1)(c) of the South Carolina Code (2018).

Spears appealed, and a divided court of appeals reversed his conviction. *State v. Spears*, 420 S.C. 363, 802 S.E.2d 803 (Ct. App. 2017). The majority held Spears was seized under the Fourth Amendment at the time of the initial encounter because a reasonable person would not have felt free to walk away from the agents at that point. *Id.* at 369-72, 802 S.E.2d at 806-08. The majority found Spears was arguably seized the moment the agents made initial contact with him, but, at the latest, he was seized when Agent Tracy asked whether Spears had any weapons or illegal items. *Id.* at 371, 802 S.E.2d at 807. The majority recognized the trial court did not rule as to whether the agents had a reasonable suspicion to stop Spears since the trial court's ruling was based on the premise that Spears and the agents engaged in a consensual encounter. *Id.* at 372 n.3, 802 S.E.2d at 808 n.3. However, in the interest of judicial economy, finding a remand unnecessary, the majority held the agents did not have a reasonable suspicion to seize Spears—thereby violating Spears' Fourth Amendment rights. *Id.* at 372-76, 802 S.E.2d at 808-10. The majority held the trial court erred in denying Spears' suppression motion. *Id.* at 376, 802 S.E.2d at 810.

The dissent at the court of appeals believed the appellate court's deferential standard of review in Fourth Amendment cases required the court of appeals to affirm. The dissent noted "a faithful adherence to the 'any evidence' standard of review will prevent any misconception that we have substituted our own findings in place of those of the [trial] court." *Id.* at 377, 802 S.E.2d at 810 (Williams, J., dissenting). This Court granted the State's petition for a writ of certiorari to review the court of appeals' decision.

II. ISSUE

Did the court of appeals err in reversing the trial court's denial of Spears' motion to suppress?

III. STANDARD OF REVIEW

"On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error." *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). "[T]his deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." *Id.* If there is any evidence to support the trial judge's decision, this Court will affirm. *State v. Brockman*, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). "The 'clear error' standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." *State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005) (citing *Easley v. Cromartie*, 532 U.S. 234, 242 (2001)).

IV. DISCUSSION

The State argues the court of appeals erred in reversing the trial court's decision to deny Spears' suppression motion. The State contends the court of appeals failed to properly apply the standard of review and substituted its own findings in place of the trial court's findings. The State argues there is evidence in the record to support the trial court's finding that law enforcement engaged Spears in a consensual street encounter that only became a seizure when law enforcement necessarily performed a *Terry* frisk. We agree.

A. Seizure

Spears unquestionably possessed Fourth Amendment rights as he walked down the street, for "the Fourth Amendment protects people, not places." *See Katz v. United States*, 389 U.S. 347, 351 (1967). "The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Evidence seized in violation of the Fourth Amendment must be excluded from trial." *State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002). The Fourth Amendment guarantee "protects against unreasonable searches and seizures,

including seizures that involve only a brief detention." *Pichardo*, 367 S.C. at 97, 623 S.E.2d at 847 (citing *United States v. Mendenhall*, 446 U.S. 544, 551 (1980)). "This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968).

"A person has been seized within the meaning of the Fourth Amendment at the point in time when, in light of all the circumstances surrounding an incident, a reasonable person would have believed that he was not free to leave." *Robinson v. State*, 407 S.C. 169, 181, 754 S.E.2d 862, 868 (2014). In other words, when law enforcement "accosts an individual and restrains his freedom to walk away, [law enforcement] has 'seized' that person." *Terry*, 392 U.S. at 16. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.* at 19 n.16.

However, not all personal intercourse between law enforcement and citizens triggers Fourth Amendment concerns. *Id.* The United States Supreme Court has made it clear that "a seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." *Id.* at 434 (quoting *Florida v. Royer*, 460 U.S. 491, 497 (1983)). "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984). "What has evolved from our cases is a determination that an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, 'if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Id.* at 215 (quoting *Mendenhall*, 446 U.S. at 554).

There is not "a litmus-paper test for distinguishing a consensual encounter from a seizure." *Royer*, 460 U.S. at 506. Rather, "there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to

the question whether there has been an unreasonable . . . seizure in violation of the Fourth Amendment." *Id.* at 506-07.

Here, in denying Spears' motion to suppress, the trial court pointed to certain facts in the record to support a finding that the encounter was consensual. The trial court found: (1) law enforcement initiated a conversation with Spears; (2) Spears willingly stopped and spoke with law enforcement; (3) law enforcement notified Spears they were law enforcement; (4) law enforcement never told Spears he was not free to leave; and (5) Spears was originally forthcoming with his answers to law enforcement's questions until he was asked about having anything illegal on his person.

The court of appeals held the trial court's characterization of the evidence ignored the totality of the circumstances. *See Spears*, 420 S.C. at 371, 802 S.E.2d at 807. The court of appeals concluded a reasonable person in Spears' position would not have felt free to terminate the encounter and go about his business. *Id.* at 372, 802 S.E.2d at 807. In so concluding, the court of appeals cited the framework it employed in *State v. Williams*, 351 S.C. 591, 600, 571 S.E.2d 703, 708 (Ct. App. 2002), to determine whether a seizure had occurred:

> Although no single factor dictates whether a seizure has occurred, courts have identified certain probative factors, including the time and place of the encounter, the number of officers present and whether they were uniformed, the length of the detention, whether the officer moved the person to a different location or isolated him from others, whether the officer informed the person he was free to leave, whether the officer indicated to the person that he was suspected of a crime, and whether the officer retained the person's documents or exhibited threatening behavior or physical contact.

The court of appeals concluded most of the factors it enumerated in *Williams* to be probative of whether Spears had been seized:

> Spears and [Jenkins] were approached by three agents, two of whom had their guns visible; the agents waited to engage Spears and [Jenkins] until they were alone; the agents did not inform Spears and [Jenkins] they were free

> to leave; Agent Tracy indicated Spears was suspected of a crime by following Spears, telling him the bus lines were known for illegal activity, and asking him if he had any illegal weapons or items on his person or in his property; and the agents exhibited threatening behavior by following Spears and [Jenkins] for several hundred feet before the agents increased their pace to catch up with Spears and [Jenkins].

Spears, 420 S.C. at 371, 802 S.E.2d at 807. The court of appeals found "particularly significant" the fact that "the agents increased their speed to catch up with Spears," indicating Spears was no longer free to continue to walk away. *Id.* at 371-72, 802 S.E.2d at 807. The court of appeals held that although Spears was arguably seized when the agents made contact with him, Spears was seized, at the latest, when Agent Tracy inquired as to whether Spears had any weapons or illegal items on his person or in his property. *Id.* at 371, 802 S.E.2d at 807. Even though Traci Jenkins was unsure whether the officers' guns were visible, the court of appeals found the visibility of the guns to be a factor in the analysis. *Id.*

We disagree with the court of appeals and find the facts and circumstances as a whole support the trial court's finding that Spears engaged in a consensual encounter with law enforcement and was not seized until he was frisked by Agent Tracy. The court of appeals erred in finding that the trial court ignored the totality of the circumstances; the trial court simply considered the facts of this case and, in its broad discretion, determined Spears' encounter with law enforcement was consensual up until the moment Agent Tracy frisked Spears. The deferential standard for reviewing the trial court's ruling compels our reversal of the court of appeals. When facts in the record support the trial court's decision, an appellate court cannot reweigh the facts to support its own conclusions.

Specifically, there is evidence in the record to support a finding that a reasonable person would have felt free to walk away from the encounter up until the point of being told an agent was going to frisk him. The evidence supports the conclusion that after Spears and Jenkins disembarked a bus known for harboring illegal activity, they paid undue attention to the three plain-clothed agents. The three agents followed Spears and Jenkins down a public street and sped up to a brisk walk to catch up with the couple to see if the couple would answer some questions. The agents did not move Spears and Jenkins to an isolated place to speak to them. The record supports the conclusion that when the agents reached Spears and Jenkins,

Agent Tracy, in a "nonthreatening" manner, asked if the couple would stop and speak with the agents. Spears complied, engaged in small-talk with the agents, and gave them his ID; Agent Tracy informed Spears in general terms about prior issues involving illegal activity on the buses and did not accuse Spears of committing a crime. Agent Tracy then inquired as to whether Spears had any weapons or illegal items. Again, the trial court's ultimate finding that a reasonable person would have felt free to walk away from the encounter is supported by the evidence.

We reject Spears' contention that the only conclusion the trial court could have reached was that a reasonable person would not have felt free to walk away from the encounter. The evidence supports a finding that the agents' goal was not to impede Spears' movement and that he was free to walk away from the encounter up until the time he was frisked. As noted previously, Jenkins testified she felt she was not free to walk away from the encounter; however, she testified her impression she was not free to leave arose only *after* Spears was searched, the drugs were found, and Spears was handcuffed. Even if Jenkins believed she was not free to leave before then, the law requires us to discount her subjective belief, as our analysis must be based upon whether a "reasonable person" would have felt free to decline the agents' requests or otherwise terminate the encounter. *See Bostick*, 501 U.S. at 436.

While we acknowledge many of the *Williams* factors might apply in any given case, we decline to expressly adopt the specific factor test enumerated in *Williams*; we believe a proper determination of whether a seizure occurred involves a broader analysis of the totality of circumstances and does not lend itself to what might be construed as a rigid test. Nevertheless, even when we apply the *Williams* factors to this case, our deferential review of the evidence supports the trial court's conclusion:

- <u>Time and place of the encounter</u>: Here, it was daylight, and Spears and Jenkins were walking down a public street. *See United States v. Weaver*, 282 F.3d 302, 312 (4th Cir. 2002) ("Unlike those situations that may occur in the traffic stop context, pedestrian encounters are much less restrictive of an individual's movements.").

- <u>The number of officers present and whether they were uniformed</u>: Three plain-clothed agents spoke with Spears and Jenkins.

- <u>The length of the detention</u>: The record is not clear as to the exact length; Jenkins was unsure but believed the detention likely lasted less than twenty minutes; in this case, that is not an excessive length of time.

- Whether the officer moved the person to a different location or isolated him from others: Spears was not moved into an isolated location; he walked away from the bus on his own accord. Once they caught up with Spears, the agents did not move him to a more isolated location and did not separate him from Jenkins.

- Whether the officer informed the person he was free to leave: The agents did not inform Spears he was free to leave; however, the agents did not inform Spears he was not free to leave. *See Delgado*, 466 U.S. at 216 ("While most citizens will respond to a police request, the fact that people do so, *and do so without being told they are free not to respond*, hardly eliminates the consensual nature of the response." (emphasis added)); *United States v. Ringold*, 335 F.3d 1168, 1172 (10th Cir. 2003) (refusing to view any one factor as dispositive).

- Whether the officer indicated to the person that he was suspected of a crime: Agent Tracy informed Spears in general terms of the illegal activity that often occurs on the bus line. Agent Tracy asked Spears whether he had any weapons or illegal items.

- Whether the officer retained the person's documents: Agent Tracy asked for Spears' identification. The record does not indicate whether it was or was not returned to Spears. *See Weaver*, 282 F.3d at 312 (differentiating a pedestrian encounter from an encounter involving a traffic stop because a pedestrian can refuse to cooperate when asked for identification).

- Whether the officer exhibited threatening behavior or physical contact: The agents did not physically touch Spears until he was frisked, and Spears was frisked only after he refused to comply with Agent Tracy's instruction to stop reaching under his shirt. The agents did not run after Spears but walked briskly at an accelerated rate so they could reach him. Agent Tracy politely asked if Spears would speak with him, and Spears complied. Agent Tracy testified his firearm was concealed. Jenkins testified she was unsure as to whether the agents' guns were visible.

The court of appeals found important to its reasonable person analysis the fact that the agents increased their walking speed before speaking with Spears. *Spears*,

420 S.C. at 371-72, 802 S.E.2d at 807. In *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988), the United States Supreme Court held law enforcement officers' pursuit of the defendant did not constitute a seizure implicating the protections of the Fourth Amendment. The officers observed a man get out of a car and approach the defendant at a street corner. *Id.* at 569. The defendant saw the officers in their patrol car and ran, and "[t]he cruiser quickly caught up with [the defendant] and drove alongside him for a short distance." *Id.* The officers observed the defendant discarding pills from his pockets as he ran. *Id.* At a pretrial hearing, the defendant moved to suppress the drugs, arguing he was seized during an "investigatory pursuit." *Id.* at 570-71. The Supreme Court disagreed with the lower court's suppression of the drugs, holding the officers' conduct would not have communicated to a reasonable person "an attempt to capture or otherwise intrude upon [the defendant's] freedom of movement." *Id.* at 575. The Supreme Court noted the record did not show "the police activated a siren or flashers; or that they commanded [the defendant] to halt, or displayed any weapons; or that they operated the car in an aggressive manner to block [the defendant's] course or otherwise control the direction or speed of his movement." *Id.* The Supreme Court provided, "While the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does not, standing alone, constitute a seizure." *Id.*

Here, the agents briskly walking behind Spears is similar—but much less "threatening"—to the police cruiser's "investigatory pursuit" discussed in *Chesternut*. The brisk approach of the agents in the instant case did not automatically morph a street encounter into a seizure. A finding of a seizure in this context could create the absurd result of law enforcement officers only being able to ask questions of individuals who were standing still, walking slowly, or walking toward the officers. Law enforcement does not have unlimited license to deploy interdiction efforts or engage in general policing; however, legitimate efforts in these areas would be unrealistically restricted if law enforcement was not permitted to walk fast in an effort to speak to a pedestrian on a public street. Walking briskly towards a suspect may, in any given case be interpreted differently based on the totality of the circumstances; however, in this case, the record supports the finding that the agents walked briskly to catch up with Spears and Jenkins as a matter of practicality—not as a show of authority to restrain Spears' liberty. Spears was free to continue walking and to refuse the agents' request that he speak with them. *See Mendenhall*, 446 U.S. at 554 ("[C]haracterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the

Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices.").

The asking of incriminating questions by law enforcement does not automatically trigger Fourth Amendment protections. *See Bostick*, 501 U.S. at 434-35 ("[E]ven when [police] officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification, and request consent to search his or her luggage—as long as the police do not convey a message that compliance with their requests is required." (internal citations omitted)). There is no evidence in the record that the agents asked incriminating questions in a forceful or persistent manner to compel Spears' compliance. *See Ringold*, 335 F.3d at 1173 ("[T]he mere fact that officers *ask* incriminating questions is not relevant to the totality-of-the-circumstances inquiry—what matters instead is 'the manner' in which such questions were posed."); *United States v. Little*, 60 F.3d 708, 712 (10th Cir. 1995) ("Accusatory, persistent, and intrusive questioning can turn an otherwise voluntary encounter into a coercive one." (internal quotation marks omitted)). The record supports the finding that the tone of the agents' interaction with Spears was not aggressive but conversational. The evidence supports the finding that the agents simply noted to Spears, in general terms, issues in the past with people transporting illegal items on the bus line and inquired as to whether Spears had any illegal weapons or other items in his luggage or on his person. *See United States v. Wilson*, 895 F.2d 168, 170 (4th Cir. 1990) (finding no seizure occurred when a narcotics agent stopped the defendant in an airport, informed the defendant he was investigating drug trafficking, and asked the defendant if he had anything illegal in his possession).

Spears dwells on the fact that Agents Lorenzen's and Finch's firearms were visible. The court of appeals also found this fact important to its analysis. Spears argues, "It was not consensual because Spears did not feel free to leave with police guns facing him." First, the fact that Agents Lorenzen's and Finch's firearms were visible was never argued to the trial court during the suppression hearing. This fact did not surface until trial. Second, even if it had been argued during the suppression hearing, Spears' statement improperly characterizes and inflates the impact of the agents' firearms and ignores the fact that both agents' firearms remained holstered during the entire encounter. It is common knowledge a law enforcement officer carries a holstered weapon, concealed or visible. The record does not indicate the agents displayed their firearms in a manner that would cause a reasonable person to feel he could not walk away. This conclusion is supported by the fact that Traci

Jenkins was unsure if the officers' guns were even visible. It would be unrealistically restrictive and unsafe for a law enforcement officer to have to remove his firearm and leave it elsewhere before approaching and questioning a person on the street. We hold, under the facts of this case, the court of appeals erred in concluding the "display" of handguns in Lorenzen's and Finch's holsters would have caused a reasonable person to feel he was not free to leave the encounter.

Spears is a black male. During oral argument, this Court inquired as to whether Spears' race was a factor to be considered in determining whether a reasonable person would have felt free to terminate the encounter with law enforcement and continue walking. Spears did not argue this point during the suppression hearing or to the court of appeals or in his brief to this Court; in fact, he contended *no one* would have felt free to leave this encounter. Even though the issue is not before us, we will briefly address it.

In *Mendenhall*, the defendant, a black female, was approached by DEA agents in the concourse of the Detroit Metropolitan Airport after she exhibited behavior the agents believed to be characteristic of a person carrying illegal drugs. 446 U.S. at 547. The agents approached the defendant and began asking her questions about her flight documentation. *Id.* at 548. The defendant appeared "extremely nervous" and, according to the agents, provided inconsistent accounts about her flight documentation. *Id.* An agent asked the defendant if she would accompany him to the airport DEA office for further questions. *Id.* The defendant acquiesced and, after being escorted to a private office, consented to a search of her person by a female agent. *Id.* at 548-49. Two packages of heroin were found, and the defendant was arrested. *Id.* at 549. The district court denied the defendant's motion to suppress, and the defendant was convicted of possessing heroin with the intent to distribute. *Id.*

The United States Supreme Court held the original encounter did not constitute a seizure. *Id.* at 555. When discussing whether the agent's request for the defendant to accompany him to the airport DEA office constituted a seizure, the Court concluded, "The question whether the [defendant's] consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances." *Id.* at 557. The Court noted the defendant's age and education and stated, "It is additionally suggested that the [defendant], a [black female], may have felt unusually threatened by the officers, who were white males. While these factors were not irrelevant, . . . neither were they decisive[.]" *Id.* at 558. The United States Supreme Court

ultimately held the totality of the evidence was sufficient to support the trial court's finding that the defendant voluntarily consented to accompany the agents to the DEA office. *Id.*

In *United States v. Smith*, the defendant argued the Fourth Amendment reasonable person analysis should consider the defendant's race. 794 F.3d 681, 687 (7th Cir. 2015). The defendant specifically argued "no reasonable person in his 'position'—as a young black male confronted in a high-crime, high-poverty, minority-dominated urban area where police-citizen relations are strained—would have felt free to walk away from the encounter" with the law enforcement officers. *Id.* at 687-88. The Seventh Circuit Court of Appeals stated:

> We do not deny the relevance of race in everyday police encounters with citizens in Milwaukee and around the country. Nor do we ignore empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system. But today we echo the sentiments of the Court in *Mendenhall* that while [the defendant's] race is "not irrelevant" to the question of whether a seizure occurred, it is not dispositive either.

Id. at 688.

The Tenth Circuit Court of Appeals has concluded differently, rejecting the argument that race is an appropriate consideration in the reasonable person analysis. *See United States v. Easley*, 911 F.3d 1074, 1081-82 (10th Cir. 2018), *cert. denied*, 2019 WL 1886117 (U.S. Apr. 29, 2019). The Tenth Circuit distinguished *Mendenhall*, finding its discussion of race was limited to the context of assessing voluntariness, not seizure. *Id.* at 1081. The Tenth Circuit explained:

> Requiring officers to determine how an individual's race affects her reaction to a police request would seriously complicate Fourth Amendment seizure law. As the government notes, there is no easily discernable principle to guide consideration of race in the reasonable person analysis. . . . There is no uniform life experience for persons of color, and there are surely divergent attitudes toward law enforcement officers among members of the

> population. Thus, there is no uniform way to apply a reasonable person test that adequately accounts for racial differences consistent with an objective standard for Fourth Amendment seizures.

Id. at 1082.

We need not consider whether Spears' race is a factor to be considered when resolving the issue of whether the encounter was consensual. The trial record contains no evidence on this point other than the fact that Spears is a black male, and Spears advanced no argument on this point to the trial court, thus rendering the issue unpreserved.

There is evidence in the record to support the trial court's conclusion that the encounter was consensual. We reverse the court of appeals on this point and hold Spears was not seized until he was frisked by Agent Tracy. Consequently, until the frisk, the Fourth Amendment was not implicated, and there was no requirement of a showing of reasonable suspicion that Spears was engaged in criminal activity. *See Bostick*, 501 U.S. at 434 (providing as long as the encounter remains consensual, it does not trigger Fourth Amendment scrutiny, and there is no requirement of a showing of reasonable suspicion of criminal activity).

B. Legality of the Frisk

We next address the legality of the frisk. Giving due consideration to the evidence in the record, we conclude the law requires us to sustain the trial court's finding that the frisk was justified.

"[B]efore the police may frisk a defendant, they must have a reasonable belief the defendant is armed and dangerous." *State v. Fowler*, 322 S.C. 263, 267, 471 S.E.2d 706, 708 (Ct. App. 1996). "In other words, a reasonable person in the position of the officer must believe the frisk was necessary to preserve the officer's safety." *Id.* "In assessing whether a suspect is armed and dangerous, the officer need not be absolutely certain the individual is armed." *State v. Blassingame*, 338 S.C. 240, 248-49, 525 S.E.2d 535, 540 (Ct. App. 1999). A protective frisk may be employed after either an investigative stop or a consensual encounter. *United States v. Ellis*, 501 F.3d 958, 961 (8th Cir. 2007) (citing *United States v. Davis*, 202 F.3d 1060, 1063 (8th Cir. 2000)). *Terry* dictates that even in the setting of a protective frisk, "it is imperative that the facts be judged against an objective standard: would the facts

available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" 392 U.S. at 21-22 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

The trial court concluded Agent Tracy had a reasonable suspicion that Spears was armed and dangerous and was therefore justified in frisking Spears. The trial court stated, "Now the only justification for patting down the defendant is a reasonable belief that his safety or the safety of others was in danger. Law enforcement has pointed to specific and articulable facts which warranted a search of the defendant's person." Evidence in the record supports the trial court's finding. First, Agent Tracy was a veteran law enforcement officer with a certification in interdiction. *See State v. Moore*, 415 S.C. 245, 255, 781 S.E.2d 897, 902 (2016) (citing a law enforcement officer's "extensive experience" in drug interdiction in support of common sense judgments); *United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993) ("Courts are not remiss in crediting the practical experience of officers who observe on a daily basis what transpires on the street."). Such experience in law enforcement and interdiction lends support to the common sense judgments Agent Tracy made during the encounter. Also, Agent Tracy's testimony supports a finding that Spears kept placing his hands underneath his shirt near his waistband and "would puff his shirt away from his waistband." Agent Tracy asked Spears not to do this because he wanted to see Spears' hands to make sure Spears was not reaching for a weapon. Despite being asked several times to not make this "puffing" motion under his shirt, Spears did not comply. Only after Spears continued to disobey Agent Tracy's request did Agent Tracy fear for his safety and find it necessary to frisk Spears. We affirm the trial court's ruling that the frisk was justified.

V. CONCLUSION

There is evidence in the record to support the trial court's finding that Spears engaged in a consensual encounter with law enforcement, and there is evidence in the record to support the trial court's finding that Agent Tracy was justified in frisking Spears. Consequently, the trial court properly denied Spears' motion to suppress evidence of the crack cocaine seized during the frisk. We reverse the court of appeals and reinstate Spears' conviction and sentence.

REVERSED.

FEW, J., concurs. HEARN, J., concurring in a separate opinion. BEATTY, C.J., dissenting in a separate opinion in which Acting Justice John D. Geathers, concurs.

JUSTICE HEARN: I concur but write separately because I share many of the dissent's concerns regarding whether Eric Spears—an African-American male—*actually* felt free to walk away from the encounter with law enforcement. While I am skeptical that he did, this does not change the fact that our standard of review requires us to affirm unless there is clear error, meaning we cannot substitute our judgment for that of the trial court. *State v. Cardwell*, 425 S.C. 595, 599, 824 S.E.2d 451, 453 (2019) ("The 'clear error' standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently."). Further, as pointed out by the majority, Spears never raised the argument the dissent advances to the trial court, where it would have had the opportunity to specifically address this issue when deciding whether he was seized pursuant to the totality of the circumstances. Indeed, had Spears raised this issue to the trial court and briefed it before this Court, we would be in a position to consider the reasoning of the dissent. Instead, this important discussion originated from the bench, and the record contains nothing to enable us to alter our jurisprudence as the dissent suggests. Accordingly, I concur.

CHIEF JUSTICE BEATTY: I respectfully dissent. I agree with the majority of the Court of Appeals and would find: (1) Spears was seized under the Fourth Amendment because a reasonable person would not have felt free to terminate the encounter with law enforcement; and (2) law enforcement did not have reasonable suspicion to justify the seizure. Accordingly, I would conclude the trial court erred in denying Spears's motion to suppress.

A. Seizure

The Fourth Amendment to the United States Constitution protects a person's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. Not every interaction between law enforcement and a citizen constitutes a seizure. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry*, 392 U.S. at 19 n.16.

"[T]o determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 439 (1991); *see Robinson v. State*, 407 S.C. 169, 181, 754 S.E.2d 862, 868 (2014) ("A person has been seized within the meaning of the Fourth Amendment at the point in time when, in light of all the circumstances surrounding an incident, a reasonable person would have believed that he was not free to leave." (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980))).

The threshold question in this case is whether Spears was seized. The determination of this issue hinges on how a reasonable person would perceive the encounter with law enforcement. Our Fourth Amendment jurisprudence does not take into account personal characteristics such as race, sex, age, disability, and so forth when making this determination. The test does, however, consider the totality of the circumstances. In my view, a true consideration of the totality of the circumstances cannot ignore how an individual's personal characteristics—and accompanying experiences—impact whether he or she would feel free to terminate an encounter with law enforcement.

Spears is an African-American male. Scholars have examined ad nauseam the dynamics between marginalized groups—particularly African-Americans—and

law enforcement.[3] African-Americans generally experience police misconduct and brutality at higher levels than other demographics.[4] Consequently, it is no surprise that scholars have also found African-Americans often perceive their interactions with law enforcement differently than other demographics. "For many members of minority communities, however, the sight of an officer in uniform evokes a sense of fear and trepidation, rather than security." Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person*", 36 How. L.J. 239, 247 (1993). Moreover, "[g]iven the mistrust by certain racial, ethnic, and socioeconomic groups, an individual who has observed or experienced police brutality and disrespect will react differently to inquiries from law enforcement officers . . . ."). *Id.* at 253. Unfortunately, under our existing framework, this can result in the evisceration of Fourth Amendment protections for many people of color.

Courts have also noted the existence of racial disparities in policing.

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[3] *See, e.g.*, Charles R. Epp et al., *Beyond Profiling: The Institutional Sources of Racial Disparities in Policing*, 77 Pub. Admin. Rev. 168 (2017); Emily Ekins, The Cato Inst., *Policing in America: Understanding Public Attitudes Toward the Police. Results from a National Survey* (2016).

[4] *See, e.g.*, Epp, *supra*, at 174 ("Simply put, investigatory stops of vehicles especially target minority communities and people of color."); Ekins, *supra*, at 30 ("African Americans are about twice as likely as whites to report profanity or knowing someone physically mistreated by the police."); Scottie Andrew, *Police Are Three Times More Likely to Kill Black Men, Study Finds: 'Not a Problem Confined to a Single Region'*, Newsweek (July 23, 2018, 1:41 PM), https://www.newsweek.com /black-men-three-times-likely-be-killed-police-1037922 ("Across the country, black men are over three times more likely to be killed by police than white men, according to a study . . . ."); Maggie Fox, *Police Killings Hit People of Color Hardest, Study Finds*, NBC News (May 8, 2018, 8:00 AM), https://www.nbcnews.com/health/ health-news/police-killings-hit-people-color-hardest-study-finds-n872086 ("While just over half of people killed by police are white, Hispanics and African-Americans are on average younger, the researchers found. And people of black, Hispanic and Native American background are disproportionately killed by police, they reported.").

> [O]ur court addressed at length "the burden of aggressive and intrusive police action that falls disproportionately on African-American, and sometimes Latino, males" and observed that "as a practical matter neither society nor our enforcement of the laws is yet colorblind." There is little doubt that uneven policing may reasonably affect the reaction of certain individuals—including those who are innocent—to law enforcement.

United States v. Brown, 925 F.3d 1150, 1156 (9th Cir. 2019) (quoting *Washington v. Lambert*, 98 F.3d 1181, 1187–88 (9th Cir. 1996)). United States Supreme Court Justice Sonia Sotomayor has intimated:

> But it is no secret that people of color are disproportionate victims of this type of scrutiny. For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.

Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (internal citations omitted); *see Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (finding the City of New York liable for the New York Police Department's stop-and-frisk policy, which violated plaintiffs' constitutional rights, and noting the racial disparities in the policy's implementation).

In spite of these academic findings and judicial observations, our current framework fails to meaningfully consider the ways in which a person's race can influence their experience with law enforcement. As a result, I fear minority groups are not always afforded the full protections of the Fourth Amendment. Given the interests at stake, one would expect our criminal justice system to forcefully resist marginalizing the experiences of people of color by insisting on a "color-blind" reasonable person standard. *See* Ward, *supra*, at 241 ("Because the reasonable person test assumes that a person's interactions with the police is a generic experience, the test is biased."). In my opinion, the seizure analysis should consider whether a reasonable *Black* person felt free to end an encounter with police. At the

very least, I believe courts should consider a person's race (and other personal characteristics) in examining the totality of the circumstances in a seizure analysis.[5]

Notwithstanding the foregoing, Spears's status as an African-American male is not the only circumstance militating against a conclusion that this was a consensual encounter. I agree with the Court of Appeals' determination that Spears was seized at the earliest when the officers made contact with him, and at the latest when the officers asked him whether he possessed any illegal items. Prior to the stop, the police followed Spears approximately 500 feet from the bus stop and walked at a brisk pace to catch up to him. Once Spears stopped to engage with the police, an officer explained there had been "problems in the past with drugs and wanted subjects and counterfeit merchandise." The officer also inquired about Spears's trip and asked for his identification. Subsequently, the officer asked Spears whether he had any illegal items on him or his property.

Under the totality of the circumstances, a reasonable person in Spears's shoes would not feel free to terminate the encounter with law enforcement. Spears was aware that he was being followed by three police officers.[6] The agents followed him to a more isolated area and quickened their pace to catch up to him. In my view, a reasonable person in this situation would not feel free to continue walking and disregard the agent's request to talk.[7] As the Court of Appeals pointed out—

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[5] For example, in analyzing the totality of the circumstances to determine whether a defendant was seized, the Ninth Circuit acknowledged, among other things, "the publicized shooting by white Portland police officers of African-Americans" and "the widely distributed pamphlet with which [the defendant] was familiar, instructing the public to comply with an officer's instructions." *United States v. Washington*, 490 F.3d 765, 773 (9th Cir. 2007).

[6] Agent Tracy testified that Spears kept looking back at the agents as they were following him. Agents Finch and Lorenzen testified that their guns and badges were visible.

[7] I question what would have happened had Spears continued walking and ignored the agent's request to speak with him. Indeed, had Spears continued to walk away, the agents may have interpreted this as furtive behavior that created reasonable suspicion for a stop. *See State v. Taylor*, 401 S.C. 104, 736 S.E.2d 663 (2013) (finding reasonable suspicion existed where the defendant attempted to avoid

correctly, in my opinion—the agents signaled to Spears that he was no longer free to continue walking when they increased their speed to catch up to him. Accordingly, Spears was arguably seized as soon as the police initiated contact.

Even assuming the initial contact between Spears and the agents did not amount to a seizure, Spears was undoubtedly seized when the agent asked Spears whether he possessed any illegal items. As mentioned, when Spears stopped to talk with the agents, he was aware the agents had been following him.[8] After asking a few general questions, the agent stated there had been "problems" on the bus lines with "drugs and wanted subjects and counterfeit merchandise." The agent then asked Spears for identification and inquired whether Spears possessed any illegal items.

In my view, under these circumstances, a reasonable person would feel like he or she was suspected of wrongdoing and thus obligated to comply with the agent's requests.[9] Indeed, this is the only logical conclusion a person in Spears's situation

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officers by riding away on his bicycle). The Fourth Amendment could not possibly intend to place citizens in this impossible catch-22 situation.

[8] In *United States v. Jones*, the Fourth Circuit examined whether a defendant was seized when the officers blocked his car from leaving the scene. 678 F.3d 293 (2012). While the facts in *Jones* obviously differ and can be distinguished from the instant case, I find the Fourth Circuit's analysis compelling. In *Jones*, the court noted "the encounter here began with a citizen knowing that the police officers were conspicuously following him, rather than a citizen, previously unaware of the police, being approached by officers seemingly at random." *Id.* at 300. The court also made much of the fact that the defendant in *Jones* was seemingly *targeted* by the officers. "[H]ere, the totality of the circumstances would suggest to a reasonable person in Jones's position that the officers suspected him of some sort of illegal activity in a 'high crime area,' which, in turn, would convey that he was a target of a criminal investigation and thus not free to leave or terminate the encounter." *Id.* at 304.

[9] In *State v. Contreras*, a New Jersey appellate court concluded an encounter between the defendants and police officers was a seizure. In making this determination, the court stated:

> The officers proceeded to explain that there are 'problems' with drugs, weapons, and other contraband being transported on the trains between New York and New Jersey. They then asked defendants if they were

could draw. This was not a situation in which the officers questioned passengers at random as they disembarked—Spears was singled out, followed, and questioned. Therefore, under the totality of the circumstances, I do not believe a reasonable person in this situation would feel at liberty to terminate the encounter with law enforcement. Accordingly, I would find Spears was seized under the Fourth Amendment.

I also wish to address the State's and majority's reliance on *Michigan v. Chesternut*, 486 U.S. 567 (1988), as I believe that case is readily distinguished. In *Chesternut*, the police observed a man get out of a car and approach the defendant. 486 U.S. at 569. When the defendant saw the marked police cruiser approach the corner where he was standing, he turned and ran. *Id.* The cruiser caught up to the defendant and "drove alongside him for a short distance." *Id.* As the cruiser drove alongside the defendant, he retrieved several packets from his pocket and discarded them. *Id.* An officer got out of the car to examine the packets (which contained pills), and the defendant stopped running while the officer was examining the packets. *Id.*

The majority compares the agents' brisk walk behind Spears to the police cruiser's "investigatory pursuit" in *Chesternut* and finds the agents' behavior here "much less 'threatening.'" At the outset, I note the United States Supreme Court expressly limited its holding in *Chesternut* to the particular facts in that case. *Id.* at 572–73 ("Rather than adopting either rule proposed by the parties and determining

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> carrying any such contraband, a question that clearly conveyed to defendants the message that the officers suspected them of criminal activity.

742 A.2d 154, 160 (1999). Similarly, in *State v. Pitts*, the Supreme Court of Vermont detailed several cases in other jurisdictions and noted there has been "a recognition among many courts that while 'mere questioning' may not constitute a seizure per se, pointed questions about drug possession or other illegal activity in circumstances indicating that the individual is the subject of a particularized investigation may convert a consensual encounter into a *Terry* stop requiring objective and articulable suspicion under the Fourth Amendment." 978 A.2d 14, 19–21 (Vt. 2009). The court ultimately found the defendant was seized, stating: "Although the officers' first few questions to [the defendant] were the kind that courts have uniformly held to be innocuous and nonconfrontational, they rapidly progressed to inquiries indicating a particularized suspicion of criminal activity."). *Id.* at 21.

that an investigatory pursuit is or is not necessarily a seizure under the Fourth Amendment, we adhere to our traditional contextual approach, and determine only that, in this particular case, the police conduct in question did not amount to a seizure."). Additionally, there are significant factual differences between *Chesternut* and this case. In *Chesternut*, the officers never commanded or asked the defendant to stop. Here, the agents effectuated a seizure when they asked Spears if they could speak with him. Unlike the police officers in *Chesternut*, the agents in this case singled Spears out (among many disembarking passengers), followed him to a more isolated location, accelerated their pace to catch up to him, and initiated conversation.

Furthermore, the State and majority assert a finding of seizure in this case would lead to the "absurd result" of a blanket prohibition on an officer's ability to walk briskly. I disagree. Here, the agents' pursuit of Spears is just one of many circumstances to be considered, and the case does not turn solely on the speed at which the agents walked. Because a court must always examine the totality of the circumstances in determining whether a seizure occurred, the specific manner in which an officer approaches a defendant will remain just one of many facts a court must consider.

The State also contends upholding the Court of Appeals' decision will jeopardize officer safety if police can no longer ask a person whether they possess any illegal weapons. However, the agents did not ask Spears whether he had any illegal *weapons*. Rather, the agents asked Spears whether he had any illegal *items*.

B. Reasonable Suspicion

After determining Spears was seized, the question becomes whether law enforcement had a reasonable suspicion of criminal activity to warrant the seizure. *See Florida v. Royer*, 460 U.S. 491, 512 (1983) ("To justify such a seizure an officer must have a reasonable suspicion of criminal activity based on 'specific and articulable facts . . . [and] rational inferences from those facts . . . .'" (quoting *Terry*, 392 U.S. at 21)).

Law enforcement initially grew suspicious of Spears because he appeared to pay an "excessive" amount of attention to the officers and seemed "nervous." According to one officer's testimony at trial, this was unusual because the agents were dressed in plain clothes. However, two officers testified that their guns and badges were visible, and one officer speculated that Spears noticed the police were

not "just off the bus or . . . there to pick anybody up." In my opinion, this would suggest the presence of law enforcement at the bus stop was indeed "obvious." And, practically speaking, once a person recognizes the presence of police, they are likely to pay attention irrespective of the officers' dress. Nonetheless, there is nothing particularly incriminating about *looking* at law enforcement.

In addition to paying the agents an "excessive" amount of attention, the officers made only the following observations prior to stopping Spears: Spears and his companion arrived on a bus line known to be used by criminals; the pair retrieved four large pieces of luggage; Spears did not appear to be meeting anyone at the bus stop; Spears began walking down the road away from the bus stop; and, while walking away, Spears's companion handed him an unidentified item. In my view, none of these facts, standing alone or together, provide articulable and reasonable suspicion to justify a seizure.

Several of the aforementioned facts are entirely reasonable given the context of the situation. One would expect two people traveling to South Carolina from New York to have several pieces of luggage. Further, walking away from a bus stop after disembarking is not suspicious activity. Indeed, Spears's companion testified the pair decided to walk when their ride failed to show up. In addition, Spears walked at a normal pace even though he knew he was being followed. Moreover, not one agent could testify regarding the specifics of what Spears's companion handed him—or even if she actually handed Spears anything at all. Therefore, these facts cannot be relied upon to establish a reasonable suspicion that criminal activity was afoot.

Once these facts are dispensed with, law enforcement was left with only two facts: (1) Spears's arrival on the bus line; and (2) Spears kept looking at the agents. In *Illinois v. Wardlow*, the United States Supreme Court recognized that "presence in an area of expected criminal activity" and "nervous, evasive behavior" are both relevant—though not dispositive—in a reasonable suspicion analysis. 528 U.S. 119, 124 (2000). When considering the totality of the circumstances, these two factors alone are woefully inadequate to provide an officer with any reason to suspect Spears was engaged in criminal activity.

The Fourth Amendment requires a police officer to have more than a mere, unsupported hunch before subjecting a citizen to police intrusion. *See Robinson*, 407 S.C. at 182, 754 S.E.2d at 868 ("Reasonable suspicion is something more than an 'inchoate and unparticularized suspicion' or hunch." (quoting *Terry*, 392 U.S. at 27)). Although I am sympathetic to the everyday realities police officers face, the

courts must be careful to strike an equitable balance between the needs of law enforcement and the constitutional rights of citizens. In *Schneckloth v. Bustamonte*, Justice Thurgood Marshall aptly noted the following in his dissent:

> Of course it would be 'practical' for the police to ignore the commands of the Fourth Amendment, if by practicality we mean that more criminals will be apprehended, even though the constitutional rights of innocent people also go by the board. But such a practical advantage is achieved only at the cost of permitting the police to disregard the limitations that the Constitution places on their behavior, a cost that a constitutional democracy cannot long absorb.

412 U.S. at 288 (Marshall, J., dissenting). Although *Schneckloth* addressed a different Fourth Amendment issue, I believe Justice Marshall's words are equally applicable here.

The United States population includes 42 million Americans of African descent. Inexplicably, these Americans are basically invisible to those of us who apply the analytical framework for reasonable behavior or beliefs. Somehow the judiciary, intentionally or not, excludes these Americans' normal behaviors, responses, and beliefs in circumstances involving law enforcement agents. For most, the "totality of the circumstances" does not include consideration of the reasonable behavior or response of African-Americans when confronted with certain stimuli. Thus, the regrettable and unsettling conclusion is that the question of what is "reasonable" is viewed solely from the perspective of Americans who are White. I shudder to think about the probable result had the defendant continued to walk and ignore the police.

This unassailable observation is not intended as an indictment of my colleagues who wear the robe. I do not believe their obliviousness is due to intentional disregard. I prefer to assign their selective blindness to a lifetime of being repeatedly subjected to episodes of minimizing the African-American experience. Life experiences influence the way that we all view the world and legal issues. We should be cognizant of this fact and attempt to view the issue truly with an objective eye. An objective eye would acknowledge the fact that African-Americans are being reasonable when they respond in accordance with their collective experiences gained over two hundred years.

This fact of life observation has no bearing on the actual guilt or innocence of the defendant in this case. However, it has great significance to our Constitution, due process, equal protection, and what it means to be an American.

Based on the foregoing, I would find the trial court erred in denying Spears's motion to suppress because Spears was seized pursuant to the Fourth Amendment without any articulable and reasonable suspicion. Therefore, I would affirm the decision of the Court of Appeals.

Acting Justice John D. Geathers, concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jeffrey S. Kagan, Appellant,

v.

D. Renee Simchon, Respondent.

Appellate Case No. 2017-000810

Appeal From Greenwood County
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 5713
Heard May 16, 2019 – Filed February 12, 2020

AFFIRMED

Clarence Rauch Wise, of Greenwood, for Appellant.

J. Walker Coleman, IV, Meg Elizabeth Sawyer, and Jennifer Hess Thiem, all of K&L Gates LLP, of Charleston; and Edward S. McCallum, III, of Law Offices of Edward S. McCallum, III, of Greenwood, all for Respondent.

WILLIAMS, J.: In this civil matter, Jeffrey S. Kagan appeals the circuit court's order granting summary judgment to D. Renee Simchon on Kagan's breach of contract and promissory estoppel claims for repayment of a loan in the amount of $210,000. On appeal, Kagan argues the circuit court erred in finding the statute of frauds and statute of limitations barred his claims. We affirm.

FACTS/PROCEDURAL HISTORY

The facts in the light most favorable to Kagan are as follows.[1] From 1993 to 2013, Kagan periodically worked as an independent contractor for Bay Island Sportswear, Inc. (Bay Island Sportswear), a company owned by Simchon's husband, Sam Simchon (Husband). Simchon owned a realty company, Greenwood Realty, next door to Husband's business. Over the years, Kagan maintained a close relationship with the Simchons and lent them money on occasion, including a loan to Bay Island Sportswear for $129,000 in June 2009 (First Loan).

On October 26, 2010, Kagan loaned Simchon $210,000 (Second Loan), which Simchon used to pay off a balloon payment on a mortgage that she held for her clients—the Wagners—on a property in Waterloo, South Carolina. Pursuant to an oral agreement between Kagan and Simchon, Kagan would collect six and a half percent annual interest on the Second Loan from the Wagners, and Simchon would repay the principal amount upon the sale and closing of the Waterloo property.

On March 11, 2011, Simchon closed on the sale of the Waterloo property. Upon receiving the proceeds of the sale, Simchon wrote Kagan a check for $31,616.46 on March 21, 2011, and transferred the remainder of the principal—$180,000—to Husband to invest in cotton futures on Kagan's behalf. In his deposition, Kagan testified he went to see Simchon after the closing on the Waterloo property. When asked about repayment of the remainder of the Second Loan, Simchon informed him that she transferred the remaining $180,000 to Husband to invest. Kagan averred he did not authorize Simchon's transfer of the funds to Husband. In response, Kagan contacted Husband about the repayment of the remainder on the Second Loan. By Kagan's own account, he thereafter looked to Husband for repayment of the Second Loan.[2] Over the next couple of years, Husband made

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[1] *See Bennett v. Carter*, 421 S.C. 374, 379–80, 807 S.E.2d 197, 200 (2017) (providing that on appeal from an order granting summary judgment, this court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party).

[2] At this point, Kagan believed the parties had agreed to consolidate the First and Second Loans.

periodic payments on the loans. Kagan did not receive any further payments from Simchon.

In November 2013, Kagan made another loan to Husband and Bay Island Sportswear for $52,000 (Third Loan), which Kagan believed to be consolidated with the remaining principal on the prior loans. The last payment Kagan received from Husband was on November 6, 2013. In April 2014, Husband terminated Kagan's employment with Bay Island Sportswear.

On August 31, 2015, Kagan filed a summons and complaint against Simchon, Husband, Bay Island Sportswear, and Bay Island, LLC (collectively, Defendants), seeking repayment of all three loans and alleging breach of contract, breach of contract accompanied by a fraudulent act, promissory estoppel, and intentional infliction of emotional distress. In his complaint, Kagan admitted the parties never reduced the First Loan to a writing but alleged Simchon drafted a written agreement regarding the terms of the Second Loan.[3] As to the Third Loan, Kagan alleged the parties agreed to modify the terms of the prior consolidated loans to include the principal of the Third Loan plus interest, but he did not assert the parties reduced this agreement to a writing. On November 15, 2015, Defendants filed a motion to dismiss Kagan's claims, and the circuit court held a hearing on the matter on February 8, 2016. At the hearing, Kagan alleged a writing evidencing the terms of the Second Loan existed, and he believed discovery was necessary to locate the document.

Via a Form 4 order dated February 8, 2016, the circuit court granted Defendants' motion to dismiss in part pursuant to Rule 12(b)(6), SCRCP. Specifically, the court granted Defendants' motion to dismiss with respect to the First Loan and the Third Loan, finding both loans clearly violated section 37-10-107 of the South Carolina Code (2015).[4] The court additionally dismissed Kagan's claim for intentional infliction of emotional distress as to all three loans.

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[3] Kagan did not attach this alleged writing to his complaint.

[4] § 37-10-107(1) (providing that a party may not maintain legal or equitable actions for an alleged promise to lend or borrow money in excess of fifty thousand dollars where there is no writing signed by the party to be charged and evidencing the material terms of the agreement).

On March 28, 2016, Defendants moved to amend the caption to reflect the court's prior dismissal of all claims against Husband, Bay Island Sportswear, and Bay Island, LLC, which the circuit court granted by order dated April 12, 2016. Simchon subsequently filed an answer and counterclaim to Kagan's remaining breach of contract and promissory estoppel claims as to the Second Loan.

Following the completion of discovery, Simchon filed a motion for summary judgment on October 26, 2016, arguing Kagan's remaining claims were barred by the statute of frauds enumerated in section 37-10-107 or, alternatively, by the statute of limitations enumerated in subsection 15-3-530(1) of the South Carolina Code (2005). The circuit court held a hearing on January 24, 2017, and issued an order granting summary judgment to Simchon on February 21, 2017.[5] This appeal followed.[6]

ISSUES ON APPEAL

I. Did the circuit court err in finding the statute of frauds enumerated in section 37-10-107 applied to the Second Loan?[7]

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[5] The circuit court did not make specific findings of fact or law in its order granting summary judgment to Simchon.

[6] Kagan neither challenges the circuit court's dismissal of his intentional infliction of emotional distress claim nor the dismissal of the remaining claims regarding the First and Third Loans.

[7] As an initial matter, Kagan argues the circuit court erred in finding section 37-10-107 barred his claims because his action does not fall within the purview of the statute. Kagan maintains the legislature enacted section 37-10-107 as a means of limiting actions against commercial lenders. Kagan therefore asserts section 37-10-107 does not apply to the instant case because it is not an action against the lender seeking to enforce an alleged promise to lend money; rather, it is an action against the borrower seeking repayment of a loan that has already occurred. Kagan further argues enforcement of the statute of frauds in the case at bar would be "a miscarriage of justice" because both parties admit the loan occurred and only dispute whether the loan was repaid. We find this argument is unpreserved for appellate review as Kagan's argument regarding the applicability of section 37-10-107 to the Second Loan differs on appeal from what he argued below. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have

II. Did the circuit court err in finding Kagan's claims regarding the Second Loan were not exempt from the statute of frauds pursuant to subsection 37-10-107(3)(a)?

III. Did the circuit err in finding the statute of limitations enumerated in subsection 15-3-530(1) barred Kagan's claims regarding the Second Loan?

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Prince v. Liberty Life Ins. Co.*, 390 S.C. 166, 169, 700 S.E.2d 280, 281 (Ct. App. 2010). "We review the granting of summary judgment under the same standard applied by the [circuit] court under Rule 56(c) of the South Carolina Rules of Civil Procedure." *Bennett*, 421 S.C. at 379, 807 S.E.2d at 200. "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, 391 S.C. 429, 434, 706 S.E.2d 501, 504 (2011). "Summary judgment is not appropriate whe[n] further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.* "However, it is not sufficient for a party to create an inference that is not

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been raised to and ruled upon by the [circuit court] to be preserved for appellate review."); *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 302 n.11, 737 S.E.2d 601, 612 n.11 (2013) (providing that a party may not raise one argument below and an alternate argument on appeal). Kagan raises this argument for the first time in his appellate brief. In his memorandum in opposition to Simchon's motion for summary judgment and at the subsequent hearing, Kagan argued section 37-10-107 did not apply to his case because Kagan's loan to Simchon was not a "consumer loan" as contemplated by the Consumer Protection Code. This argument is without merit. *See* S.C. Code Ann. § 37-10-101 (2015) ("Except as otherwise provided in other chapters of this title, *this chapter* applies to designated loan transactions *other than* consumer loan transactions." (emphasis added)). Additionally, at the circuit court level, Kagan argued (1) the checks issued between the parties provided sufficient writings to evidence the agreement between Kagan and Simchon and (2) the circuit court should apply the lost memorandum exception as used in other jurisdictions. However, Kagan does not address these arguments on appeal.

reasonable or an issue of fact that is not genuine." *McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 453–54 (Ct. App. 2014) (quoting *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *Carolina Chloride*, 391 S.C. at 434, 706 S.E.2d at 504.

LAW/ANALYSIS

I. Statute of Frauds

Kagan argues the circuit court erred in granting summary judgment to Simchon because the court improperly found section 37-10-107 barred his claims regarding the Second Loan. Specifically, Kagan argues the circuit court erred in finding section 37-10-107 barred his claims because Simchon used the loaned funds for personal purposes, and therefore, the loan was exempt from the statutory bar pursuant to subsection 37-10-107(3)(a). He asserts, at a minimum, the court erred in finding a question of fact regarding the purpose of the loan did not exist. We disagree.

"Section 37-10-107 precludes certain actions regarding loans for money whe[n] there is no writing evidencing the alleged promise or agreement." *Sea Cove Dev., LLC v. Harbourside Cmty. Bank*, 387 S.C. 95, 102, 691 S.E.2d 158, 161 (2010). It provides:

> *No person may maintain an action for legal or equitable relief* or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement . . . *to lend or borrow money* . . . or . . . to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, *unless* the party seeking to maintain the action or defense *has received a writing from the party to be charged* containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party

to be charged, or its duly authorized agent, has signed the writing.

§ 37-10-107(1) (emphasis added).[8] Subsection 37-10-107(2)(b) further provides a party's failure to comply with subsection 37-10-107(1) precludes an action based on the theory of promissory estoppel.

Subsection 37-10-107(3)(a) provides the provisions of subsections (1) and (2) do not apply to loans of money "used primarily for personal, family, or household purposes." Although our jurisprudence has not directly addressed this exemption, we find Kagan has failed to show a genuine issue of material fact existed regarding the Second Loan's underlying purpose or that the circuit court erred in its conclusion that Simchon was entitled to summary judgment as a matter of law.

Simchon is the owner and broker-in-charge of Greenwood Realty; as part of her business, Simchon provides her clients with the option to finance a property directly through her when they are unable to obtain a mortgage through a conventional mortgage lender or bank. In her deposition testimony, Simchon referred to these agreements as "owner financed agreements" and alleged she had entered into several of these agreements with Kagan in the past. Regarding the real estate transaction underlying the Second Loan, Simchon testified she obtained a mortgage for the Waterloo property because County Bank would not lend to the Wagners directly. Simchon explained the recorded deed listed her and the Wagners as titleholders to the property, but she recorded the owner finance agreement with the deed to show she was merely the mortgage holder to the property. According to Simchon, the Wagners had a balloon payment due pursuant to the owner finance agreement, which coincided with a balloon payment due on the mortgage through County Bank. Simchon testified the Wagners were unable to make the balloon payment and that pursuant to the owner finance agreement, she would take over ownership of the property if they defaulted on the loan. Simchon testified Kagan entered into an agreement with the Wagners wherein he would provide the money for the balloon payment to Simchon—the Second Loan—and the Wagners would pay him six and a half percent interest. Simchon explained that pursuant to this agreement, she would transfer the Wagners's interest payments to Kagan, and he would receive a repayment of the

[8] Subsection 37-1-301(20) provides "'Person' includes a natural person or an individual, and an organization." S.C. Code Ann. § 37-1-301(20) (2015).

principal amount upon the sale and closing of the property. Simchon testified she and Kagan never reduced this agreement to a writing but noted she did not know whether Kagan had a written agreement with the Wagners.[9]

Although Kagan contends a factual inquiry existed as to the purpose of the Second Loan, his deposition testimony regarding the underlying facts of the loan was consistent with that of Simchon. Accordingly, we find further inquiry into the facts of this case was not necessary, and the circuit court did not err in finding the case appropriate for summary judgment. *See Prince*, 390 S.C. at 169, 700 S.E.2d at 281 ("The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder."); *Carolina Chloride*, 391 S.C. at 434, 706 S.E.2d at 504 ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.").

As to the circuit court's conclusion of law, Kagan argues the Second Loan is exempt from the statute of frauds because neither he nor Simchon are commercial lenders, and therefore, Simchon's use of the Second Loan was for personal purposes. Kagan further contends that because Simchon obtained the mortgage from County Bank in her name rather than that of Greenwood Realty, her use of the Second Loan to pay off the balloon payment was for personal purposes.[10] We

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[9] Regarding Kagan's assertion that he and Simchon had a written agreement evidencing the terms of the Second Loan, Simchon testified she believed Kagan was confusing a separate contract evidencing an owner finance agreement between them as to a separate property.

[10] Kagan additionally argues this court should interpret the meaning of "personal, family, or household purposes" consistently with the interpretation employed in the federal Truth in Lending Act. *See* 15 U.S.C. §§ 1601–1667(f) (2012 & Supp. V 2017). Kagan further argues that in determining the underlying purpose for the Second Loan, the court must look to his intention as the lender rather than the subjective intention of Simchon as the borrower. Kagan solely relies on authority from other jurisdictions to support these arguments. *See Tower v. Moss*, 625 F.2d 1161 (5th Cir. 1980); *Maddox v. St. Joe Papermakers Fed. Credit Union*, 572 So.2d 961 (Fla. Dist. Ct. App. 1990). However, Kagan neither presented these arguments in his opposition memorandum to Simchon's motion for summary judgment nor at the motion's hearing before the circuit court. Accordingly, we find Kagan failed to safeguard these arguments for appellate review. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for

find Kagan's interpretation of this exemption incorporates requirements not presented within the plain language of the statute. *See Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 231, 612 S.E.2d 719, 723 (Ct. App. 2005) ("When the terms of a statute are clear, the court must apply those terms according to their literal meaning."); *id.* at 231, 612 S.E.2d at 724 ("The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction."). The plain language of subsection 37-10-107(3)(a) states that the statute of frauds does not apply to "a loan of money *used* primarily for personal, family, or household purposes." § 37-10-107(3)(a) (emphasis added). Although Simchon obtained the mortgage for the Waterloo property from County Bank in her name, we find her testimony establishes that she routinely engages in this practice as a means of providing an alternate financing option for Greenwood Realty clients who are unable to obtain mortgages from commercial lenders; therefore, we find she primarily used the funds for business purposes. Further, in his deposition testimony, Kagan acknowledged that Simchon routinely entered into owner finance agreements with her clients. Thus, we hold the circuit court did not err in finding the Second Loan was not exempt from the statute of frauds enumerated in subsection 37-10-107(1).

Moreover, we find the circuit court did not err in finding the statute of frauds barred Kagan's breach of contract and promissory estoppel claims as to the Second Loan because Kagan failed to present a signed writing evidencing his loan to Simchon in the amount of $210,000. *See* § 37-10-107(1) (providing that a party may not maintain legal or equitable actions for an alleged promise to lend or borrow money in excess of fifty thousand dollars where there is no writing signed by the party to be charged and evidencing the material terms of the agreement).

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the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review."); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("[T]he losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."); *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 372–73, 628 S.E.2d 902, 919 (Ct. App. 2006) ("Error preservation principles are intended to enable the [circuit] court to rule after it has considered all relevant facts, law, and arguments. The rationale for the rule is that until the [circuit] court considers the matter and makes a ruling, an appellate court is unable to find error." (citation omitted)).

II. Statute of Limitations

Kagan argues the circuit court erred in granting summary judgment to Simchon because the court improperly found the statute of limitations barred his breach of contract claims. Specifically, Kagan contends Husband's payments on the loans tolled the statute of limitations until the payments ceased. We disagree.

"Summary judgment is appropriate when a plaintiff does not commence an action within the applicable statute of limitations." *McMaster*, 411 S.C. at 143, 767 S.E.2d at 453. Pursuant to section 15-3-530(1) of the South Carolina Code (2005), "[a]n action for breach of contract must be commenced within three years." *Prince*, 390 S.C. at 169, 700 S.E.2d at 282. "The discovery rule applies to breach of contract actions." *Id.* "Pursuant to the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence." *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998). "If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury." *Garner v. Houck*, 312 S.C. 481, 485, 435 S.E.2d 847, 849 (1993).

We find the circuit court properly found the statute of limitations barred Kagan's breach of contract claims as to the Second Loan. Here, Kagan's contention that Husband's payments on the loan tolled the triggering of the limitations period relies on the premise that the Second Loan was effectively consolidated with the First and Third Loans. This argument fails as the circuit court previously dismissed Kagan's claims as to the other loans pursuant to Rule 12(b)(6), SCRCP, and Kagan does not challenge their dismissal on appeal. *See In re Morrison*, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996) (noting an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal). Furthermore, we find the loans were not effectively consolidated as required under section 37-10-107(1)(c) of the South Carolina Code (2015). This section provides that for the modification or amendment of a loan in excess of fifty thousand dollars to be enforceable at law or in equity, the parties must reduce their agreement to a writing evidencing the material terms and conditions of the agreement and signed by the party to be charged. *Id.* Here, Kagan admits the First and Third loans were never reduced to a writing. Further, in his deposition testimony, he stated his

agreement with Husband to consolidate all three loans was based on "a handshake, a look in the eye and a personal relationship." Therefore, we hold Kagan did not effectively consolidate the loans, and thus, Husband's payments on the alleged consolidated loan did not toll the statute of limitations.

Accordingly, we find the statute of limitations began to run at the time Simchon breached her agreement with Kagan. *See* § 15-3-530(1) (providing an action for breach of contract must be commenced within three years); *Prince*, 390 S.C. at 169, 700 S.E.2d at 282 ("The discovery rule applies to breach of contract actions."); *Maher*, 331 S.C. at 377, 500 S.E.2d at 207 ("Pursuant to the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence."). By his own testimony, Kagan believed Simchon breached their agreement as to the Second Loan on March 21, 2011, when she failed to transfer the remainder of the principal after the closing on the Waterloo property and instead transferred the money to Husband to invest on Kagan's behalf. Therefore, section 15-3-530(1) required Kagan to file his action no later than March 21, 2014. Kagan did not file his complaint until August 31, 2015. Accordingly, we hold the circuit court properly found the statute of limitations barred Kagan's breach of contract claims and appropriately granted summary judgment to Simchon. *See McMaster*, 411 S.C. at 143, 767 S.E.2d at 453 ("Summary judgment is appropriate when a plaintiff does not commence an action within the applicable statute of limitations.").

CONCLUSION

Based on the foregoing, the circuit court's order granting summary judgment to Simchon is

AFFIRMED.

HILL, J., concurs.

GEATHERS, J., concurring in part and dissenting in part:

I concur in the majority opinion's conclusion that the applicable statute of limitations precludes Kagan's breach of contract claim. However, I write separately because I do not believe that section 37-10-107 of the South Carolina

Code (2015) (the lender statute of frauds) precludes Kagan's promissory estoppel claim as I do not find that the statute is applicable to the loan at issue in this case. I would therefore reverse the grant of summary judgment on Kagan's promissory estoppel claim and remand the case to the circuit court.

During argument before the circuit court, Kagan argued that his loan did not fall within the purview of section 37-10-107 because it was not a "consumer loan" as contemplated by the Consumer Protection Code. Specifically, in his memo in opposition to summary judgment, Kagan includes a subsection captioned, "The S.C. Consumer Protection Code does not apply to this loan," and generally argues that the agreement between he and Simchon is not controlled by section 37-10-107. On appeal, Kagan modifies his argument by taking the position that the statute does not apply because he is attempting to enforce a loan, not a promise to lend or borrow money. Because Kagan raises a different argument regarding the applicability of the statute on appeal, the majority finds the issue unpreserved. However, while the specific rationales are different, Kagan's argument that the statute does not apply to his loan is essentially the same. *See State v. Williams*, 417 S.C.209, 229, 789 S.E.2d 582, 593 (Ct. App. 2016) ("[I]t may be good practice for us to reach the merits of an issue when error preservation is doubtful." (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012))). Moreover, Kagan also argued that his loan was exempt from the statute under section 37-10-107(3)(a). Subsection 37-10-107(3)(a) provides the provisions of subsections (1) and (2) do not apply to loans of money "used primarily for personal, family or household purposes." In my view, by invoking the exemption to the statute, Kagan implicitly raised the applicability of 37-10-107(1) to the circuit court because, at first instance, the circuit court had to determine whether the statute was applicable to the loan at issue before determining whether the statutory exemption applied. Accordingly, I would find Kagan's argument regarding the applicability of 37-10-107 preserved for appellate review. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (observing that an issue must be raised to and ruled upon by the circuit court to be preserved for appellate review).

Based on my reading of the statute, the emphasis is on promises to lend or borrow money rather than loan contracts or the obligation to repay such loans. *See* S.C. Code Ann. § 37-10-107 (2015) (No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform *an alleged promise* . . . *to lend or borrow money* . . . in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be

charged containing the material terms and conditions of the promise . . . and the party to be charged, or its duly authorized agent, has signed the writing." (emphases added)). Accordingly, I understand the statute to preclude actions to enforce promises to lend or borrow money, rather than actions to require payment, if such promises or agreements are not in writing. This reading of the statute is supported by section 37-10-107(2)(b), which precludes a party from pursuing an action for promissory estoppel if the party cannot produce a writing evidencing a promise to lend money. In my view, the statute is applicable to situations where a lender allegedly promises to lend money and a party relies on that promise to their detriment by taking some action with the expectation of receiving a loan. In other words, the statute is meant to protect lenders from potential fraud perpetrated by prospective borrowers.

Our supreme court took a similar position regarding the statute in *Sea Cove Dev., LLC v. Harbourside Cmty. Bank*, 387 S.C. 95, 102, 691 S.E.2d 158, 161 (2010). In that case, the developer applied to the bank for a loan to finance the purchase of property and the anticipated construction. *Id*. at 98, 691 S.E.2d at 160. The bank sent the development company a letter notifying it that it was "conditionally qualified" for a mortgage loan. *Id*. The letter further provided that the prequalification was subject to certain conditions. *Id*. at 98–99, 691 S.E.2d at 160. Ultimately, the bank denied the loan application based on the developer's insufficient income and excessive obligations related to income. *Id*. at 99, 691 S.E.2d at 160. The development company filed a complaint for breach of contract and promissory estoppel against the bank asserting that it had a loan agreement with the bank, and that it had forfeited deposits and incurred expenses based on assurances from the bank. *Id*. at 99–100, 691 S.E.2d at 160.

The supreme court explained that section 37-10-107 is commonly referred to as a "lender liability limitation" provision, noting that such statutes had been enacted in many states around the country. *Id*. at 105, 691 S.E.2d at 163. Accordingly, the court ruled the statute "provides in relevant part that no person may maintain an action for failure to perform an alleged *promise or agreement to loan money* in excess of $50,000" unless the promise satisfies the writing requirements of the statute. *Id*. at 106, 691 S.E.2d at 164 (emphasis added). In affirming the circuit court's grant of summary judgment, the supreme court noted that the prequalification letters "indicated that the loan was not guaranteed and, further, none of the documents submitted to the circuit court show that [developer] had obtained [bank's] final approval for the loan." *Id*. at 107, 691 S.E.2d at 164. Under the facts of *Sea*

Cove, there was no loan issued or a corresponding obligation to repay. Rather, the development company asserted that the bank breached an agreement to provide the development company with a loan and that the development company relied on this agreement to its detriment. The court found that summary judgment was appropriate because the development company did not produce a signed writing evidencing a promise by the bank to lend the funds. *Id*.

Furthermore, the American Bar Association's (ABA) model statute provides historical context for the purpose of the lender liability limitation statute. *See id*. at 105, 691 S.E.2d at 163 ("The language in South Carolina's statute is based directly on the Model Lender Liability Limitation Statute prepared by the Joint Task Force of the Committees on Consumer and Commercial Financial Services."). In 1989, the ABA organized a task force to develop a model statute intended to bar the enforcement of oral lending agreements in the absence of a signed writing. *See* John L. Culhane, Jr. and Dean C. Gramlich, *Lender Liability Limitation Amendments to State Statutes of Frauds*, 45 Bus. Law. 1779, 1780–81 (1990). The necessity for such a statute stemmed from several cases in which banks were subject to liability based on oral promises to lend money. *Id*. at 1783–85. Consequently "[t]he practice of providing oral commitments to *prospective borrowers*, or, at least, persuasive allegations to that effect, has undoubtedly increased the liability exposure of banks and may in some instances have threatened their solvency." *Id*. at 1785 (emphasis added). Thus, "[t]he goal for any state legislature contemplating a lender liability limitation statute . . . should be to protect the lender against claims raised by sophisticated borrowers who were or could have been represented by counsel and who could have had any agreements reduced to written form." *Id*. at 1786.

Based on the foregoing, I find the purpose of section 37-10-107 is to limit a lender's liability when a borrower alleges that it has relied on the lender's promise to loan funds by requiring a signed writing evidencing the material terms of such promises. Thus, the statute does not apply to loan contracts or the corresponding obligation to repay. Therefore, I do not believe section 37-10-107(2)(b) precludes Kagan's promissory estoppel action.

Accordingly, as to the majority's conclusion on the promissory estoppel action, I respectfully dissent.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Martha M. Fountain and Curtis Fountain, Plaintiffs,

v.

Fred's, Inc. and Wildevco, LLC, Respondents,

v.

Tippins-Polk Construction, Inc. and Rhoad's Excavating Services, LLC, Third-Party Defendants,

Of whom Tippins-Polk Construction, Inc. is the Appellant.

Appellate Case No. 2017-000688

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

Opinion No. 5714
Heard May 15, 2019 – Filed February 12, 2020

AFFIRMED IN PART AND REVERSED IN PART

Morgan S. Templeton and John Joseph Dodds, IV, both of Wall Templeton & Haldrup, PA, of Charleston, for Appellant.

Regina Hollins Lewis and Lee Ellen Bagley, both of Gaffney Lewis, LLC, of Columbia, for Respondent Wildevco, LLC.

Matthew Clark LaFave, of Crowe LaFave, LLC, of Columbia, for Respondent Fred's, Inc.

WILLIAMS, J.: In this civil matter, Tippins-Polk Construction, Inc. (Tippins-Polk) appeals the circuit court's order entering judgment in favor of Fred's, Inc. (Fred's) and Wildevco, LLC (Wildevco) on Fred's and Wildevco's equitable indemnification claims asserted against Tippins-Polk. Fred's and Wildevco each brought equitable indemnification claims against Tippins-Polk for the cost of settling an underlying lawsuit brought against Fred's and Wildevco as a result of Tippins-Polk's alleged faulty construction of a Fred's store. On appeal, Tippins-Polk argues the circuit court erred in (1) finding a sufficient special relationship existed between Fred's and Tippins-Polk to support a claim for equitable indemnification; (2) finding Fred's and Wildevco were without fault in the underlying lawsuit; (3) awarding Fred's and Wildevco damages not requested in their pleadings; (4) awarding attorney's fees to Fred's and Wildevco for defending the underlying lawsuit and prosecuting the equitable indemnification action against Tippins-Polk; and (5) refusing to consider evidence of a similar incident at a Fred's store in another county. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

Fred's is a Tennessee corporation that operated a retail store in Williston, South Carolina. The Fred's store at issue in this case was located on property in Williston owned by a development company, Wildevco. Pursuant to a lease agreement, Wildevco agreed to construct a store for Fred's on the premises and lease the property to Fred's for a ten-year period beginning in 2005. Wildevco entered into a construction agreement with Tippins-Polk, a general contractor, to complete the Fred's project. Fred's opened the Williston store around October 2005.

On March 10, 2010, Martha Fountain tripped over the curb ramp outside the entrance to the Fred's store and fell, sustaining injuries to her head, wrist, and elbow. Martha's injuries required her to undergo several surgeries, including the implantation and removal of hardware in her wrist. Martha also missed work, and

she was ultimately unable to return to her prior employment due to lifting restrictions implemented as a result of her injuries. In May 2010, Martha and her husband, Curtis Fountain (collectively, the Fountains), filed a lawsuit against Fred's and Wildevco in which Martha claimed over $90,000 in medical damages and lost wages. Curtis also filed a loss of consortium claim.

Wildevco and Fred's filed third-party claims against Tippins-Polk for equitable indemnification, negligence, breach of contract, and breach of warranty.[1] In March 2016, Wildevco and Fred's settled with the Fountains for $290,000. Wildevco paid $250,000, and Fred's paid $40,000. On June 6-7, 2016, the circuit court held a bench trial solely on Wildevco and Fred's equitable indemnification claims against Tippins-Polk.

Wildevco and Fred's presented testimony from the Fountains detailing Martha's fall and consequential injuries. Martha stated she endured four different surgeries as a result of her fall, and she testified to the employment limitations she suffered due to her injuries. Curtis Fountain testified about the effect Martha's injuries had on the family's home life and financial situation.

Horace Tilden Hilderbrand, Jr. testified Wildevco hired his engineering company to prepare the survey and site plans for the Fred's store construction project. When shown a photograph of the finished sidewalk at the Fred's store, Hilderbrand noted an elevation change and a recessed ramp that differed from what the design called for in the site plans.[2] He mentioned the approximate two-inch height of the curb was not a typical curb height.[3] Hilderbrand explained the site plans contained general notes about standard procedures or installation, and he stated the general contractor should have read the notes. He confirmed the sidewalk and curb shown

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[1] Tippins-Polk also filed fourth-party claims against two of its subcontractors, Southern Asphalt and Rhoad's Excavating. Summary judgment was granted in favor of Southern Asphalt in July 2014. Rhoad's Excavating did not appear, and an order of default was entered against it in July 2013.

[2] Hilderbrand testified the site plans would have included a drawing of wings at the sidewalk if the plans had called for the construction of a handicap curb ramp.

[3] Hilderbrand stated curb heights are typically six inches.

in the picture of the Fred's store were not constructed in accordance with the site plans he prepared for the Fred's project.

Thaddeus Dill Barber testified he was the partner at Wildevco that managed the construction of the Fred's store project in Williston. Barber stated he hired the engineer, architect, and general contractor—Tippins-Polk—for the Fred's project. He explained the contract with Tippins-Polk dictated that Tippins-Polk would construct the Fred's store in accordance with building and site plans.
The circuit court qualified Fred's and Wildevco's next witness, James Steven Hunt, as an expert in codes, regulations, and standards relative to building construction and in fall safety investigation. Hunt testified he reviewed the architect's drawings for the building and the engineer's site plans for the piece of land where the building was located.[4] He stated the curb ramp on the sidewalk was not constructed in accordance with the site plans because the site plans never called for the construction of a ramp. Hunt further revealed the curb ramp was also improperly constructed. Hunt explained a normal curb step height is a minimum of four inches, but the curb step height in this case was only two inches.[5] Hunt testified the curb ramp design in the margins of the site plans called for a curb ramp to be constructed on a sidewalk with a six-inch curb height or rise. He stated a curb ramp built at a six-inch curb height, with a required slope of 1:12, should have six-foot flares (flared sides with six feet of run). In this case, Hunt explained the curb height was two inches, so the flare length should have been two feet; however, the flares were actually four feet long. Hunt clarified this longer flare length was not a gradual slope but a wavy and irregularly constructed slope. He mentioned the flare of the curb that Martha tripped over protruded thirteen inches into the walking zone.[6] Hunt testified the architectural drawings called for painting the curb, and the constructed curb ramp—as part of the curb—should have also been painted.

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[4] Hunt testified the site plans controlled the construction of the sidewalk.

[5] Hunt explained this was important because small changes in elevation are very difficult to see and perceive.

[6] Hunt testified he was unaware of any other trip and falls at the Williston Fred's store before Martha's fall in 2010.

Hunt asserted the constructed curb ramp violated the building codes and regulations cited in the architectural drawings for the Fred's project. He stated a general contractor would have the specialized knowledge and skill to read a site plan or architectural drawing and know what was called to be constructed. Hunt opined that Wildevco's representative did not have the specialized knowledge to be able to discern the construction defect in the constructed ramp. Hunt stated the defects in the constructed ramp were the direct cause of Martha's fall.

Tippins-Polk presented the testimony of Edward William Polk, the owner of Tippins-Polk. Polk explained the site plans did not call for the sidewalk to be completely flush across the front edge. Polk testified that both the site plans and architectural drawings called for the construction of a handicap curb ramp. Polk stated the detail on the site plans with notated elevations indicated a handicap ramp should be constructed. He claimed the constructed handicap ramp complied with both the site plans and the architectural drawings. Polk asserted the "black lines" on the sidewalk in the site plans called for a handicap ramp because they "would not be there for any other purpose." At the close of the case, the circuit court denied motions for directed verdict from Fred's and Wildevco, and it denied a renewed motion for directed verdict from Tippins-Polk.[7] The circuit court took the matter under advisement.

On August 1, 2016, the circuit court issued a written order entering judgment in favor of Wildevco and Fred's. In its order, the circuit court found: (1) Tippins-Polk to be solely responsible for Martha's injuries; (2) Tippins-Polk breached its contractual obligation and its duty of care to Wildevco and Fred's in failing to construct the premises free of latent defects; (3) Fred's and Wildevco were without fault in the incident; and (4) the settlement agreement between Wildevco, Fred's, and the Fountains was reasonable and entered into without fraud or collusion. The circuit court ordered Tippins-Polk to pay $305,418.30 as indemnification for the portion of the settlement paid by Wildevco.[8] The court further ordered Tippins-Polk to pay $76,691.82 as indemnification for the portion of the settlement

[7] Neither party presented testimony from the architect.

[8] The circuit court arrived at this figure by adding the $250,000 Wildevco paid in the settlement with the Fountains and the $55,418.30 Wildevco claimed in legal fees and costs in defending the Fountains' claims.

paid by Fred's.[9] Tippins-Polk subsequently filed a motion for reconsideration, which the circuit court denied. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in finding there was a sufficient special relationship between Fred's and Tippins-Polk to support a claim for equitable indemnification?

II. Did the circuit court err in finding Fred's and Wildevco were without fault?

III. Did the circuit court err in failing to find that Fred's and Wildevco were estopped from recovering damages not requested within the complaint?

IV. Did the circuit court err in awarding Fred's and Wildevco attorney's fees and costs?

V. Did the circuit court err in refusing to consider a similar incident at a Fred's store in a neighboring county?

STANDARD OF REVIEW

"Equitable indemnity is an action in equity." *Walterboro Cmty. Hosp. v. Meacher*, 392 S.C. 479, 484, 709 S.E.2d 71, 73 (Ct. App. 2011). "In an action in equity tried by a judge alone, the appellate court may find facts in accordance with its view of the preponderance of the evidence." *Goldman v. RBC, Inc.*, 369 S.C. 462, 465, 632 S.E.2d 850, 851 (2006). "However, this broad scope of review does not require the appellate court to disregard the findings made below." *Id.*

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[9] The circuit court arrived at this figure by adding the $40,000 Fred's paid in the settlement with the Fountains and the $36,691.82 Fred's claimed in legal fees and costs in defending the Fountains' claims and in establishing its right to indemnity.

LAW/ANALYSIS

I. Special Relationship

Tippins-Polk argues the circuit court erred in finding it had a special relationship with Fred's to support a claim for equitable indemnification. We disagree.

"There are two forms of indemnity: contractual indemnity and indemnity implied in law or 'equitable indemnity.'" *Rock Hill Tel. Co. v. Globe Commc'ns., Inc.*, 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005). "Equitable indemnity . . . 'is based upon the specific relation of the indemnitee to the indemnitor in dealing with a third party.'" *Id.* (quoting James C. Gray, Jr. & Lisa D. Catt, *The Law of Indemnity in South Carolina*, 41 S.C. L. Rev. 603, 604 (1990)). Our courts "have allowed equitable indemnity in cases of imputed fault or where some special relationship exists between the first and second parties." *Inglese v. Beal*, 403 S.C. 290, 299, 742 S.E.2d 687, 691 (Ct. App. 2013) (quoting *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 57, 398 S.E.2d 500, 503 (Ct. App. 1990)).

In *Stuck v. Pioneer Logging Machinery, Inc.*, our supreme court discussed the existence of a special relationship stating, "a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other . . . ." 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). However, our courts have specified that "there must be some kind of relationship between the parties beyond the relationship established by virtue of one party alleging that he was sued because of another party's wrongdoing." *Rock Hill Tel.*, 363 S.C. at 390 n.3, 611 S.E.2d at 237 n.3. Our courts have found a special relationship existed for the purposes of equitable indemnification between a contractor and subcontractor;[10] a purchaser of a defective vehicle and a seller;[11] a landlord and a general contractor who damaged a tenant's property;[12] a home seller and an exterminator who were both sued by a

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[10] *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 443, 445 S.E.2d 446, 448 (1994).

[11] *Stuck*, 279 S.C. at 22, 24, 301 S.E.2d at 552–53.

[12] *Addy v. Bolton*, 257 S.C. 28, 31, 34, 183 S.E.2d 708, 708, 710 (1971).

home buyer for falsely representing that the purchased home was free of termites and moisture;[13] and two former property owners who were both sued by a subsequent property owner for damage to the property.[14] Conversely, in *Rock Hill Telephone*, our supreme court found the relationship between a utility company and a general contractor's distant subcontractor was too attenuated for the purposes of an equitable indemnification claim. 363 S.C. at 390, 611 S.E.2d at 237.

This case involves the relationship between Fred's, a retail tenant, and Tippins-Polk, a general contractor who constructed the leased commercial property, the Williston Fred's store. We find Fred's presented ample evidence of a special relationship with Tippins-Polk that extended beyond Fred's mere allegation that it was sued because of Tippins-Polk's wrongdoing. Although Barber, Wildevco's construction manager for the Fred's project, testified he had never done business with Tippins-Polk before the Fred's project, he stated Tippins-Polk was recommended to Wildevco for the Fred's project because Tippins-Polk had experience constructing other Fred's stores. The construction contract between Wildevco and Tippins-Polk provided it was an agreement for the construction of "one Fred's Store." Wildevco agreed in its lease with Fred's to "cause construction" of the store in accordance with conceptual plans Fred's provided as an attachment to the lease.

Further, Polk, the owner of Tippins-Polk, testified he knew his company was hired to build a Fred's store before construction began, and he stated his company had previously constructed ten to fifteen different Fred's stores. Polk asserted that representatives from Fred's often visited the site during construction and examined every aspect of the building. Polk also revealed that Tippins-Polk owned a Fred's location in a neighboring county. Based on these facts, we find the circuit court did not err in finding a special relationship existed between Fred's and Tippins-Polk for the purposes of equitable indemnification. Therefore, we affirm the circuit court's finding as to this issue.

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[13] *Griffin v. Van Norman*, 302 S.C. 520, 521, 527, 397 S.E.2d 378, 378–79, 382 (Ct. App. 1990).

[14] *McCoy v. Greenwave Enters., Inc.*, 408 S.C. 355, 357–58, 361, 759 S.E.2d 136, 137, 139 (2014).

II. Fault

Tippins-Polk argues the circuit court erred in finding Fred's and Wildevco were without fault in the underlying action. We disagree.

"Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999). "If the second party is also at fault, he comes to court without equity and has no right to indemnity." *Id.* Therefore,

> For [Fred's and Wildevco] to recover under a theory of equitable indemnification, three things must be proven: (1) [Tippins-Polk] was liable for causing the [Fountains'] damages; (2) [Fred's and Wildevco were] exonerated from any liability for those damages; and (3) [Fred's and Wildevco] suffered damages as a result of the [Fountains'] claims against [them] which were eventually proven to be the fault of [Tippins-Polk].

Id.

A. Potential Liability

First, Tippins-Polk argues Fred's and Wildevco failed to prove they were without fault in the underlying suit because the circuit court's order noted Fred's and Wildevco were required to prove they were potentially liable to the Fountains. Tippins-Polk contends Fred's and Wildevco failed to make this showing, and even if they did, their potential liability is equivalent to fault.

Because Fred's and Wildevco sought the recovery of settlement costs from Tippins-Polk, they were also required to make an additional showing that (1) the settlement with the Fountains was bona fide, with no fraud or collusion by the parties; (2) the decision to settle with the Fountains was a reasonable means of protecting Fred's and Wildevco's interests; and (3) the amount of the settlement was reasonable in light of the Fountains' estimated damages and the risk of Fred's and Wildevco's exposure if the case was tried. *See Griffin*, 302 S.C. at 523, 397

S.E.2d at 380; *see also Otis Elevator, Inc. v. Hardin Constr. Grp., Inc.*, 316 S.C. 292, 297, 450 S.E.2d 41, 44 (1994) ("Whe[n], as here, [Fred's and Wildevco] gave [Tippins-Polk] notice and an opportunity to participate in the litigation, [Fred's and Wildevco were] not 'required to prove the plaintiff's *actual* ability to recover the amount paid in settlement so long as [Fred's and Wildevco] prov[ed] that [they were] *potentially* liable to the [Fountains].'" (quoting 42 C.J.S. *Indemnity* § 24 (1991))).

The potential liability standard only requires the non-negligent party seeking indemnification to show that its settlement with the original plaintiffs was reasonable in means and amount in light of the original plaintiff's estimated damages and the non-negligent party's risk of loss and exposure should the case be tried. Courts that have adopted the potential liability standard have found that "[p]otential liability actually means nothing more than that the indemnitee acted reasonably in settling the underlying suit." *Trim v. Clark Equip. Co.*, 274 N.W.2d 33, 36 (Mich. Ct. App. 1978); *Pennant Serv. Co. v. True Oil Co.*, 249 P.3d 698, 706 (Wyo. 2011). Therefore, we find Fred's and Wildevco were only required to present proof of potential liability to establish the reasonableness of their settlement with the Fountains. Because Tippins-Polk did not challenge the reasonableness of the settlement between Fred's, Wildevco, and the Fountains on appeal, any finding by the circuit court related to the reasonableness of the settlement—including Wildevco and Fred's potential liability—is the law of the case.[15] *See In re Morrison*, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996) (noting an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal).[16]

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[15] We note that we are not aware of any requirement that the circuit court make a specific finding on potential liability. The circuit court made specific findings on the reasonableness of the settlement that we believe encompass the meaning of potential liability as defined above.

[16] Tippins-Polk also argues an alleged underlying inconsistency exists in requiring a party to prove both absence of fault, to establish a right to indemnity, and potential liability, to recover settlement costs. We disagree. As explained above, potential liability means nothing more than that the indemnitee acted reasonably in settling the underlying lawsuit. A potential liability showing is not associated with a finding of fault.

B. Latent Defect

Tippins-Polk argues the circuit court's finding that a "latent defect" caused Martha's injuries indicates the circuit court erred in not finding Fred's and Wildevco at fault. The circuit court found Fred's and Wildevco relied on Tippins-Polk to ensure the premises was built in accordance with the architectural drawings and site plans, free from latent defects. The circuit court also determined Tippins-Polk breached its contractual obligations and its duty of care to Wildevco and Fred's in failing to construct the premises free of latent defects. The circuit court found these defects were the sole proximate cause of Martha's injuries.

We find the circuit court only used the term "latent" for its literal definition of hidden, not to find that Fred's and Wildevco had knowledge of or should have had knowledge of the defect. *See Larimore v. Carolina Power & Light*, 340 S.C. 438, 445, 531 S.E.2d 535, 538 (Ct. App. 2000) ("The landowner has a duty to warn an invitee only of latent or hidden dangers of which the landowner has knowledge or should have knowledge."). An interpretation that the circuit court used the term "latent defect" to imply Fred's and Wildevco had knowledge or should have had knowledge of the defect in this case is inconsistent with the testimony presented and the circuit court's other findings. Hunt testified neither Fred's nor Wildevco had the specialized knowledge to discern the construction defect in the curb ramp, and the circuit court found in its order that neither Fred's nor Wildevco could have discovered the defect through inspection or maintenance. The circuit court also determined neither Fred's nor Wildevco breached any duty to the Fountains in regards to the construction, inspection, or maintenance of the premises. We agree with the circuit court that Fred's and Wildevco reasonably relied on Tippins-Polk, as general contractor, to construct the premises in accordance with the architectural drawings and site plans and, therefore, free from any latent defects. The construction defect in this case involved a specific issue with the dimensions and grading of a curb ramp, compliance with building codes, compliance with the Americans with Disabilities Act (ADA), and compliance with the prepared architectural drawings and site plans. A store owner or property manager could not have discerned the defects in the curb ramp without background or experience in construction. Therefore, based on the circuit court's findings as a whole as well as the testimony presented in this case, we find the circuit court used the term "latent" for its literal definition of hidden, not to imply that Fred's or Wildevco had knowledge of the defect. Accordingly, we find the circuit court did not make

inconsistent findings as to the nature of the defect and as to fault between the parties.

C. Breach of Standard of Care

Tippins-Polk argues Wildevco was at fault because it admitted that it breached a standard of care owed to the Fountains. Based on the following evidence and testimony, we find Wildevco did not breach a standard of care owed to the Fountains. Hunt stated owners and occupants of buildings have a duty to the public to do inspections and look for tripping hazards. The circuit court also recognized this safety standard. Hunt clarified that the defect in this case was a design defect that had not changed since its construction and that Wildevco relied upon Tippins-Polk to build the curb properly. The circuit court agreed with Hunt that this safety standard did not include "looking for latent defects which [were] not in [Fred's and Wildevco's] ordinary capacity to know about." Hunt testified Wildevco's representative did not have the specialized knowledge to be able to discern the construction defect in the ramp. Hunt also explained an "ordinary person at a store level" conducting an inspection would not be able to identify the curb ramp as a tripping hazard. Barber testified he conducted regular safety inspections of the exterior of the premises to observe, for example, the condition of the parking lot, and to check whether the lights were working.[17] Tippins-Polk did not present any testimony to establish that an owner's duty to inspect the premises included inspecting for hidden design and construction defects. The circuit court ultimately found neither Fred's nor Wildevco breached any duty to the Fountains through the construction, inspection, or maintenance of the Fred's store. Based on this evidence, we find Wildevco did not admit that it breached a standard of care owed to the Fountains.

D. Defective Plans

Tippins-Polk contends Wildevco was at fault for the Fountains' injuries because it provided defective plans. Based on the testimony and the circuit court's findings below, we find Wildevco did not provide defective plans to Tippins-Polk.

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[17] Barber also testified he did not conduct an inspection for tripping hazards at the Fred's store. However, the lease agreement between Fred's and Wildevco provided that Wildevco was only responsible for "keep[ing] and maintain[ing]" the exterior of the premises while Fred's was responsible for the interior of the store.

Wildevco hired an architect to create the architectural drawings for the premises and a civil engineer to create the site plans for the premises. Hilderbrand testified the site plans called for the building's front sidewalk to be one-tenth of a foot lower than the finished floor of the building. Hilderbrand asserted the site plans did not call for the construction of a handicap curb ramp and that the site plans, not the architectural drawings, governed the height of sidewalk curbs. Hilderbrand explained the site plans included a handicap ramp detail in the margins, but he testified this was a standard detail commonly put on site plans regardless of whether a ramp was actually constructed. He stated the inclusion of the handicap ramp detail in the margins did not indicate the site plans called for the construction of a handicap ramp. The site plans provided that the contractor should contact the engineer regarding any discrepancies discovered at the site or on the architectural drawings. Hilderbrand testified the contractor never contacted him to discuss any discrepancies or deviations from the site plans. Hunt testified a contractor would have the specialized knowledge and skill to read a site plan or architectural drawing and know what was called to be constructed.

Polk testified the site plans and architectural drawings clearly called for the construction of a handicap curb ramp based on the detail on the plans with notated elevations. Polk stated the "black lines" on the sidewalk in the site plans called for a handicap ramp because they "would not be there for any other purpose." He explained the constructed handicap ramp complied with both the site plans and the architectural drawings. However, Polk admitted on cross-examination that the architectural drawings called for handrails to be installed but Tippins-Polk never constructed handrails at the premises. Polk also admitted he never contacted Hilderbrand about any deviations or discrepancies from the site plans.

The circuit court found the testimony indicated possible confusion as a result of the discrepancies between the architectural drawings and the site plans. However, the circuit court noted it was the contractor's responsibility to contact the engineer for review if any discrepancies were discovered or to request clarification of the plans. Tippins-Polk also did not present any expert testimony to stand for the proposition that confusion in site plans or architectural drawings can render them defective. Based on this testimony and the circuit court's superior position to judge the witnesses' credibility, we find the plans Wildevco provided to Tippins-Polk were not defective. *See Goldman*, 369 S.C. at 465, 632 S.E.2d at 851 (explaining the appellate court is not required to disregard the circuit court's findings despite a

broad scope of review); *Gowdy v. Gibson*, 381 S.C. 225, 233, 672 S.E.2d 794, 798 (Ct. App. 2008) (noting a circuit court's better position to judge witness credibility because it saw and heard the witnesses).

Moreover, even if we assume the plans were defective, our courts have repeatedly held that when a party, such as an architect or engineer, "'furnishes specifications and plans for a contractor to follow in a construction job, [the architect or engineer] thereby impliedly warrants their sufficiency for the purpose in view.'" *See Hill v. Polar Pantries*, 219 S.C. 263, 271, 64 S.E.2d 885, 888 (1951) (quoting 17 C.J.S. *Contracts* § 329); *see also Beachwalk Villas Condo. Ass'n, Inc. v. Martin*, 305 S.C. 144, 146, 406 S.E.2d 372, 374 (1991). In this case, however, Tippins-Polk alleges the developer, Wildevco, was responsible for providing the allegedly defective plans even though the site plans and architectural drawings were prepared by the site engineer and architect, respectively, without any input from Wildevco. Accordingly, we find Wildevco did not provide Tippins-Polk with defective plans.

E. Barber's Qualifications

Tippins-Polk argues Wildevco was at fault because Wildevco negligently tasked Barber, who was unqualified, to oversee the construction of the Fred's store location. Tippins-Polk contends Wildevco failed to comply with the standard of care required from a developer by not hiring someone qualified to oversee the construction process.

We find Wildevco was not at fault because it appointed Barber to manage the construction of the Fred's store. Tippins-Polk has cited no authority to support its position that a property owner has a duty to hire a qualified construction overseer—in addition to the general contractor—to manage the construction of a property. To the contrary, our courts have generally held that a property owner is "not held answerable for the negligence of an independent contractor to whom he has committed the work [about such property], to be done without his control in its progress." *See Durkin v. Hansen*, 313 S.C. 343, 347, 437 S.E.2d 550, 552 (Ct. App. 1993) (quoting *Conlin v. City Council of Charleston*, 49 S.C.L. (15 Rich.) 201, 211 (1868)).

Indeed, our examination of the evidence in the record shows Tippins-Polk, as general contractor, had the duty to oversee and manage the construction of the premises, as opposed to Barber and Wildevco. Polk stated his company was

responsible for ensuring the premises was constructed in accordance with the site plans, architectural drawings, and building codes. Barber explained that Wildevco hired Tippins-Polk because of its expertise and specific knowledge from constructing other Fred's locations. The circuit court found Barber had no education or formal training in construction, engineering, or architecture. Barber testified his management of the premises' construction included hiring the architect, site engineer, and general contractor. He stated Wildevco did not take part in the preparation of the architectural drawings or site plans, nor did it have any input in how Tippins-Polk would construct the premises. Polk explained Tippins-Polk, as the construction manager and general contractor, would "go behind" the subcontractors to ensure the architectural drawings and site plans were followed. Polk stated the county building inspectors often came out during the construction process to inspect the premises, and Barber would visit the site during these inspections to "check for completion and verify pay requests." Barber testified Tippins-Polk requested the final inspection and certificate of occupancy from the county building inspector. Based on this evidence and testimony, we find Wildevco was not at fault for hiring Barber to manage the construction of the Fred's location because Wildevco had no duty to hire a qualified construction overseer in addition to a general contractor.

Based on the foregoing, we affirm the circuit court's finding that neither Fred's nor Wildevco were at fault in the underlying action.[18]

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[18] Tippins-Polk also argues the settlement agreement between Wildevco, Fred's, and the Fountains acknowledged that Fred's and Wildevco were liable for the Fountains' injuries. On November 29, 2017, this court issued an order striking the settlement agreement from the record on appeal in this case based on Rule 210(c), SCACR because the settlement agreement was never presented to the circuit court. Because the parties failed to present the settlement agreement to the circuit court and the settlement agreement is not part of the record on appeal, we find this argument is not preserved for this court's review. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the [circuit] court.").

III. Bound by Relief Sought in Pleadings

Tippins-Polk argues the circuit court erred in awarding Fred's and Wildevco relief not requested in their pleadings. We disagree.

Rule 8, SCRCP outlines the required contents for pleadings and states in subsection (f) that "[a]ll pleadings shall be so construed as to do substantial justice to all parties." In order to achieve substantial justice for all parties, our courts have determined that pleadings should be construed liberally. *See Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). This court has also explained that "[i]t is the substance of the requested relief that matters 'regardless of the form in which the request for relief was framed.'" *Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (quoting *Standard Fed. Sav. & Loan Ass'n v. Mungo*, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991)). Indeed, our supreme court has "repeatedly held that the plaintiff may obtain any relief appropriate to the case made by the pleadings and the evidence, without regard to the *form* of the prayer for relief . . . ." *Beaty v. Mass. Protective Ass'n*, 160 S.C. 205, 207, 158 S.E. 206, 207 (1931). "Especially is this true in an equity case." *Id.*

In this case, Fred's made the following prayer for relief in its third-party complaint against Tippins-Polk:

> judgment over and against [Tippins-Polk] for all or part of any verdict or judgment which may be recovered by the [Fountains] directly or indirectly against [Fred's], together with its costs and disbursements herein. Further in the alternative [Fred's] pray[s] that [Tippins-Polk] be ordered to contribute toward the satisfaction of any verdict or judgment obtained by the [Fountains] under their [c]omplaint, and for such other and further relief as the [c]ourt would deem just and proper.

Wildevco made the following prayer for relief in its third-party complaint against Tippins-Polk:

> judgment over and against [Tippins-Polk] for all or part of any verdict or judgment that may be recovered by the [Fountains] directly or indirectly against [Wildevco], together with costs and disbursements herein, as well as for all damages sustained by [Wildevco], including attorneys' fees and costs, and for such other and further relief as the [c]ourt would deem just and proper.

Tippins-Polk contends Fred's and Wildevco only sought an award of a "judgment or verdict" but not the settlement costs from their settlement with the Fountains. Tippins-Polk has failed to provide authority for its position that Fred's and Wildevco were required to explicitly request payment of settlement costs as part of their relief sought against Tippins-Polk.

Construing Fred's and Wildevco's pleadings liberally, we find the circuit court did not award relief to Fred's and Wildevco that fell outside the relief sought in their respective complaints. *See id.* ("[T]he plaintiff may obtain any relief appropriate to the case made by the pleadings and the evidence . . . ."). Fred's prayed for a judgment against Tippins-Polk for all or part of any verdict or judgment that may be recovered by the Fountains against Fred's. The circuit court issued a Form 4 order on March 21, 2016, granting Fred's and Wildevco's motion for a continuance that included the following statement of judgment: "The main case settled with [the Fountains]." We find this order can be liberally construed as a statement of judgment for the Fountains from which Fred's can recover against Tippins-Polk. Fred's stated in its complaint that it was entitled to full and complete indemnity from Tippins-Polk "including being indemnified for the costs and attorneys' fees associated with defending this civil action [brought by the Fountains]." We find "costs . . . associated with defending this civil action" included the costs of a potential settlement. Fred's also included the statement in its prayer for relief "and for such other and further relief as the [c]ourt would deem just and proper." We find a liberal construction of this sentence in Fred's prayer supports the circuit court's award. Similarly, Wildevco's prayer for relief included requests for "all damages sustained" and "for such other and further relief as the [c]ourt would deem just and proper." We find a liberal construction of these requests in Wildevco's prayer supports the circuit court's award. *See Griffin*, 302 S.C. at 521–22, 397 S.E.2d at 379 (awarding a non-negligent party settlement costs in an equitable indemnification action when the party requested in its prayer for relief that the at-fault party be held responsible for any damages suffered by the non-

negligent party); *Kaiser*, 351 S.C. at 94, 567 S.E.2d at 262 ("It is the substance of the requested relief that matters 'regardless of the form in which the request for relief was framed.'" (quoting *Mungo*, 306 S.C. at 26, 410 S.E.2d at 20)); *Russell*, 305 S.C. at 89, 406 S.E.2d at 339 (finding pleadings must be construed liberally to do substantial justice to all parties). Therefore, we affirm the circuit court's decision as to this issue.

IV. Attorney's Fees

Alternatively, Tippins-Polk argues the circuit court erred in awarding attorney's fees to Fred's and Wildevco. Specifically, Tippins-Polk asserts a difference exists between awarding attorney's fees to Fred's and Wildevco for fees incurred in defending the Fountains' underlying claim and fees incurred in establishing their right to equitable indemnification against Tippins-Polk. We agree.

In an equitable indemnification action, attorney's fees and costs proximately resulting from the at-fault party's breach of contract or negligence are treated as the legal consequences of the at-fault party's original wrongful act and may be recovered as damages. *See Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992); *Addy*, 257 S.C. at 33, 183 S.E.2d at 710.

> In order to recover attorneys' fees under this principle, [Fred's and Wildevco] must show: (1) that [Fred's and Wildevco became] involved in a legal dispute . . . because of [Tippins-Polk]'s tortious conduct; (2) that the dispute was with a third party—not with [Tippins-Polk]; and (3) that [Fred's and Wildevco] incurred attorneys' fees connected with that dispute.

Addy, 257 S.C. at 33, 183 S.E.2d at 709–10 (quoting 22 Am. Jur. (2d), *Damages*, § 166). Our courts have also determined that in equitable indemnification actions, attorney's fees that are "the natural and necessary consequence of the [at-fault party's] act" and attributable solely to the negligence of the at-fault party are only recoverable "when there is a sufficient relationship between the [at-fault party and the non-negligent party]." *Town of Winnsboro*, 307 S.C. at 132, 414 S.E.2d at 121. "A sufficient relationship exists when the at-fault party's negligence . . . is directed

at the non-[negligent] party and the non-[negligent] party incurs attorney fees and costs in defending itself against the [at-fault party]'s conduct." *Id.*

In this case, both Fred's and Wildevco presented attorney's fees and cost affidavits for the circuit court's review. Fred's presented an invoice requesting $36,691.82 in litigation fees, costs, and expenses but did not break down its bills to distinguish between actions undertaken in the defense of the Fountains' suit and actions undertaken to advance the third-party claim Fred's brought against Tippins-Polk. The circuit court awarded Fred's $76,691.82 as to its equitable indemnification claim, which included the $40,000 settlement it paid to the Fountains and the $36,691.82 it requested in attorney's fees. Conversely, Wildevco presented an invoice requesting $55,418.30 in litigation fees, costs, and expenses. Wildevco's invoice reflected that it omitted all fees that it incurred in pursuit of its third-party claim against Tippins-Polk. Wildevco also reduced the amount of fees and costs it incurred that involved both the defense of the Fountains' claims and the prosecution of its third-party action against Tippins-Polk by fifty percent. The circuit court awarded Wildevco $305,418.30 as to its equitable indemnification claim, which included the $250,000 settlement it paid to the Fountains and the $55,418.30 it requested in attorney's fees.

Initially, we note Tippins-Polk does not challenge Fred's and Wildevco's right to recover attorney's fees under the requirements in *Addy*; rather, Tippins-Polk solely asserts the circuit court erred in awarding Fred's and Wildevco fees incurred from both defending the Fountains' underlying lawsuit and from establishing Fred's and Wildevco's right to equitable indemnification against Tippins-Polk when only attorney's fees for defending an equitable indemnification claim were recoverable. Although our courts have not yet recognized this distinction in equitable indemnification claims, we do so here.

Our courts have repeatedly awarded attorney's fees as part of a non-negligent party's damages against an at-fault party in an equitable indemnification action. *See McCoy*, 408 S.C. at 361, 759 S.E.2d at 139 ("Appellants are entitled to equitable indemnification for the attorney's fees and costs that they incurred in defending the lawsuit brought by the [third party]."); *Town of Winnsboro*, 307 S.C. at 131, 414 S.E.2d at 120 (affirming the court of appeals decision allowing equitable indemnification for attorney's fees and costs expended in "defending the negligence of [the sub-contractor]"); *Addy*, 257 S.C. at 33, 183 S.E.2d at 710 (finding reasonable attorney's fees incurred in "resisting the claim indemnified

against" may be recovered as damages). In these cases, our courts have awarded attorney's fees as damages only when a non-negligent party incurred necessary expenses in *defending* its interests in a lawsuit brought by a third-party. *See Town of Winnsboro*, 307 S.C. at 131, 414 S.E.2d at 120.

The majority of jurisdictions around the country have adopted the rule that the right of indemnity includes the right to attorney's fees and litigation costs incurred in defending the underlying claim, but it does not extend to fees and costs incurred in establishing the right of indemnity.[19] In other words, a non-negligent party can recover as damages the fees and costs it incurred in defending against a plaintiff's claims, but it cannot recover the fees and costs it incurred in pursuing a third-party equitable indemnification claim against the at-fault party. Requiring an at-fault party to hold a non-negligent party harmless for the costs associated with defending a plaintiff's claims "gives effect to the very nature of indemnity, which is to make the party whole." *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Tex.*, 551 F.2d 1026, 1037 (5th Cir. 1977). However, the same reasoning does not support a party's recovery of the fees and costs incurred in establishing a right to indemnity because these fees and costs are not coupled with the claim indemnified against. Rather, these are fees and costs incurred as a result of a non-negligent party's decision to bring a separate claim to establish the right to indemnity. Therefore, we find the fees and costs incurred in establishing an indemnity obligation fall within the standard "American" rule, which requires a party to bear his own expenses of litigation. *See Layman v. State*, 376 S.C. 434, 451, 658 S.E.2d 320, 329 (2008). This court has defined "expenses" under the *Addy* rule as "any costs

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[19] *See Peter Fabrics, Inc. v. S.S. Hermes*, 765 F.2d 306, 315 (2nd Cir. 1985); *Simko v. C & C Marine Maint. Co.*, 594 F.2d 960, 969 (3rd Cir. 1979); *Am. Exp. Lines v. Norfolk Shipbuilding & Drydock Corp.*, 336 F.2d 525, 527 (4th Cir. 1964) (allowing a non-negligent party to be indemnified for the costs of defending the plaintiff's lawsuit but not the costs of defending the at-fault party's appeal); *Lusich v. Bloomfield S.S. Co.*, 355 F.2d 770, 776 (5th Cir. 1966); *Bagby v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 491 F.2d 192, 198 n.9 (8th Cir. 1974); *Vallejos v. C.E. Glass Co.*, 583 F.2d 507, 510 (10th Cir. 1978); *Ins. Co. of N. Am. v. M/V Ocean Lynx*, 901 F.2d 934, 941 (11th Cir. 1990) ("[T]he indemnitee can recover attorneys' fees from his indemnitor as part of the reasonable expenses of *defending* a claim." (emphasis added)); 42 C.J.S. *Indemnity* § 44 (2019); *but cf. Dillingham Shipyard v. Associated Insulation Co.*, 649 F.2d 1322, 1328 (9th Cir. 1981).

which are reasonably necessary to *defend* litigation or otherwise protect the innocent party's interest." *Griffin*, 302 S.C. at 523, 397 S.E.2d at 380 (emphasis added). We also find this rule is in accordance with South Carolina's rule that, with limited exceptions, "[a]ttorney's fees are not recoverable unless authorized by contract or statute." *Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). This rule also squares with our current equitable indemnification jurisprudence that has only permitted recovery for attorney's fees and costs incurred in "defending" or "resisting" the claim indemnified against. *See McCoy*, 408 S.C. at 361, 759 S.E.2d at 139; *Town of Winnsboro*, 307 S.C. at 131, 414 S.E.2d at 120; *Addy*, 257 S.C. at 33–34, 183 S.E.2d at 709–10. Therefore, we adopt the rule that the right of indemnity in *equitable indemnification cases* includes the right to attorney's fees and litigation costs incurred in defending the underlying claim, but it does not extend to fees and costs incurred in establishing the right of indemnity.

Therefore, we reverse the circuit court's decision to award attorney's fees to Fred's for both defending the Fountains' underlying claims and establishing its right to indemnity from Tippins-Polk. We remand this case to the circuit court to (1) order Fred's to reasonably apportion its invoice to only seek as damages those fees and costs associated with its defense of the Fountains' underlying claims and (2) award Fred's fees and costs that reflect this reasonable apportionment.

Because Wildevco only sought those fees and costs related to its defense of the Fountains' underlying claims, we affirm the circuit court's $55,418.30 award of fees and costs to Wildevco.

V. Evidence of Similar Incidents

Tippins-Polk argues the circuit court abused its discretion in failing to admit evidence of a prior similar accident that occurred at a Fred's store in a neighboring county. We disagree.

"A ruling on the admission of evidence is within the sound discretion of the [circuit court] and will not be disturbed absent an abuse of discretion and a showing of prejudice." *Oconee Roller Mills, Inc. v. Spitzer*, 300 S.C. 358, 360, 387 S.E.2d 718, 719 (Ct. App. 1990). "Evidence of similar accidents, transactions, or happenings is admissible in South Carolina whe[n] there is some special relation between them tending to prove or disprove some fact in dispute." *Whaley v. CSX*

Transp., Inc., 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005). "This rule is based on relevancy, logic, and common sense." *Watson v. Ford Motor Co.*, 389 S.C. 434, 453, 699 S.E.2d 169, 179 (2010). "Because evidence of other accidents may be highly prejudicial, '[a party] must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue.'" *Whaley*, 362 S.C. at 483, 609 S.E.2d at 300 (quoting *Buckman v. Bombardier Corp.*, 893 F. Supp. 547, 552 (E.D.N.C. 1995)).

In *Pope v. Heritage Communities, Inc.*, this court addressed whether the circuit court erred in admitting evidence of construction defects at a development company's other condominium properties similar to the defects at the condominium at issue in the lawsuit. 395 S.C. 404, 426–28, 717 S.E.2d 765, 777–78 (Ct. App. 2011). In *Pope*, the architect hired to develop the plans for the condominium at issue testified he used the same basic plans in the company's other developments that were experiencing defects. *Id.* at 427, 717 S.E.2d at 777. The development company's president testified the company's other properties were experiencing defects similar to the problems at the subject condominium. *Id.* The general contractor expert for the development company stated he had been involved in "four or five" cases involving the company's condominium properties. *Id.* at 428, 717 S.E.2d at 777–78. The engineering and construction defect expert for the subject condominium testified he prepared reports on the scope of work at the company's other condominium properties. *Id.* at 428, 717 S.E.2d at 778. Finally, the development company's expert witness stated he was hired to investigate the company's other properties and found similar defects. *Id.* at 428, 717 S.E.2d at 777. This court ultimately found the defects at the development company's other properties were substantially similar to the defects at the subject property and affirmed the circuit court's decision to admit the evidence. *Id.* at 428, 717 S.E.2d at 778.

Unlike the ample proof in *Pope*, we find the evidence in this case failed to show the other accident was substantially similar to Martha's accident. In this case, Tippins-Polk sought to show that Fred's had notice of the potential tripping hazard. Specifically, Tippins-Polk sought to admit evidence that the Fred's store in Varnville put up bollards, a warning sign, and painted the curb outside the store because of a similar accident that occurred approximately three months prior to Martha's fall. The only similarities Tippins-Polk presented between the accident at the Varnville store and the accident in this case are the manner of the fall—tripping on a curb—and the location of the fall—outside of a Fred's store. Tippins-Polk did

not attempt to admit or proffer any evidence about the construction of the curb ramp at the Varnville store, the type of curb ramp, or the ramp's measurements and slope. Although Tippins-Polk sought to admit that Fred's had prior knowledge of the curb defect, Tippins-Polk also never attempted to admit or proffer any evidence of who actually installed the additional safety features at the Varnville store or why they were installed. The lease agreement between Fred's and Wildevco also provided that Wildevco—not Fred's—would maintain the exterior of the premises, including the curbs. Therefore, even if Fred's was on notice of this potential hazard from the fall at the Varnville store, it had no obligation to repair what the parties delineated in the lease as Wildevco's responsibility. Most importantly, the Varnville store was constructed using a different architect with different architectural drawings and a different engineer with different site plans. Therefore, we find Tippins-Polk failed to present evidence of *substantial* similarity between the two accidents to overcome the highly prejudicial effect of admitting such evidence. *See Whaley*, 362 S.C. at 483, 609 S.E.2d at 300 ("Because evidence of other accidents may be highly prejudicial, '[a party] must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue.'" (quoting *Buckman*, 893 F. Supp. at 552)). Accordingly, we affirm the circuit court's decision on this issue. *See Spitzer*, 300 S.C. at 360, 387 S.E.2d at 719 ("A ruling on the admission of evidence is within the sound discretion of the [circuit court] and will not be disturbed absent an abuse of discretion and a showing of prejudice.").

CONCLUSION

Based on the foregoing, we **AFFIRM** the circuit court's order as to all issues except the award of attorney's fees and costs to Fred's. We **REVERSE** the circuit court's award of attorney's fees and costs to Fred's only and **REMAND** this case to the circuit court for further proceedings solely on the issue of Fred's award of attorney's fees and costs.

GEATHERS and HILL, JJ., concur.