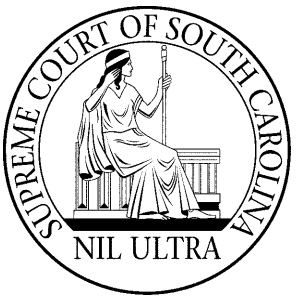

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 10
February 27, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS AND ORDERS

None

PETITIONS – UNITED STATES SUPREME COURT

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5077-Kirby Bishop v. City of Columbia	Denied 2/22/13
5078-In re: Estate ov Atn Buirns Livingston	Pending
2012-UP-399-Bowen v. S.C. Department of Motor Vehicles	Pending
2012-UP-520-Johnson v. Mew	Pending
2012-UP-526-State v. Christopher Ryan Whitehead	Pending
2012-UP-576-State v. Trevee J. Gethers	Denied 2/22/13
2012-UP-609-Coghlan v. Coghlan	Pending
2012-UP-614 - Charles Griggs v. Ashleytowne Development	Pending
2012-UP-623-L. Paul Trask v. S.C. Department of Public Safety et al.	Pending
2012-UP-626-Maurice Morant v. SCDC	Pending
2012-UP-627-Mack v. American Spiral Weld	Denied 2/22/13
2012-UP-628-State v. Norman Stoudenmire	Denied 2/22/13
2012-UP-632-State v. Stevie Lamont Aiken	Pending
2012-UP-670-Burgess v. Burgess	Pending
2012-UP-674-SCDSS v. Devin B, Brian G., and Sue G.	Pending
2012-UP-676-G. Gottschlich v. D. McNeil	Pending
2012-UP-678-State v. Darrin D. Holston	Pending
2012-UP-688-L. Brown v. Dick Smith Nissan	Pending
2013-UP-001-R. Coleman v. State	Pending
2013-UP-007-Hoang Berry v. Stokes Import Collision	Denied 02/21/13
2013-UP-010-N. Mitchell v. Juan P. Marruffo et al.	Pending

2013-UP-014-D. Keller v. ING Financial Partners et al.	Pending
2013-UP-015-Travelers Property Casualty Co. v. Senn Freight	Denied 2/22/13
2013-UP-020-State v. Jason Ray Franks	Denied 2/21/13
2013-UP-022-State v. Curtis T. Johnson	Denied 2/21/13
2013-UP-025-Curtis Johnson v. Deering Milliken	Denied 2/22/13
2013-UP-034-Clark D. Thomas v. Bolus & Bolus	Pending
2013-UP-056-William Lippincott v. S.C. Dept. of Employment	Pending
2013-UP-057-Progressive Home Builders v. Grace Hucks	Pending
2013-UP-058-State v. Bobby J. Barton	Pending
2013-UP-061-State v. Christopher M. Stephens	Pending
2013-UP-066-Carpenter v. Measter	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4670-SCDC v. B. Cartrette	Pending
4750-Cullen v. McNeal	Pending
4764-Walterboro Hospital v. Meacher	Pending
4779-AJG Holdings v. Dunn	Pending
4819-Columbia/CSA v. SC Medical	Pending
4832-Crystal Pines v. Phillips	Pending
4833-State v. L. Phillips	Pending
4851-Davis v. KB Home of S.C.	Pending
4859-State v. B. Garris	Pending
4862-5 Star v. Ford Motor Company	Pending

4863-White Oak v. Lexington Insurance	Pending
4865-Shatto v. McLeod Regional Medical	Pending
4867-State v. Jonathan Hill	Pending
4872-State v. Kenneth Morris	Pending
4873-MRI at Belfair v. SCDHEC	Pending
4879-Stephen Wise v. Richard Wise	Pending
4880-Gordon v. Busbee	Pending
4887-Rebecca West v. Todd Morehead	Pending
4888-Pope v. Heritage Communities	Pending
4890-Potter v. Spartanburg School	Pending
4892-Katie Green Buist v. Michael Scott Buist	Pending
4894-State v. Andre Jackson	Pending
4895-King v. International Knife	Pending
4898-Purser v. Owens	Pending
4902-Kimmer v. Wright	Pending
4905-Landry v. Carolinas Healthcare	Pending
4907-Newton v. Zoning Board	Pending
4909-North American Rescue v. Richardson	Pending
4914-Stevens v. Aughtry (City of Columbia) Stevens (Gary v. City of Columbia)	Pending
4918-Patricia Lewin v. Albert Lewin	Pending
4921-Roof v. Steele	Pending

4923-Price v. Peachtree Electrical	Pending
4924-State v. Bradley Senter	Pending
4926-Dinkins v. Lowe's Home Centers	Pending
4927-State v. John Porter Johnson	Pending
4932-Margie Black v. Lexington County Bd. Of Zoning	Pending
4933-Fettler v. Genter	Pending
4934-State v. Rodney Galimore	Pending
4936-Mullarkey v. Mullarkey	Pending
4940-York Cty. and Nazareth Church v. SCHEC et al	Pending
4941-State v. Bentley Collins	Pending
4947-Ferguson Fire and Fabrication v. Preferred Fire Protection	Pending
4949-Robert Crossland v. Shirley Crossland	Pending
4953-Carmax Auto Superstores v. S.C. Dep't of Revenue	Pending
4954-North Point Dev. Group v. SCDOT	Pending
4956-State v. Diamon D. Fripp	Pending
4960-Justin O'Toole Lucey et al. v. Amy Meyer	Pending
4964-State v. Alfred Adams	Pending
4973-Byrd v. Livingston	Pending
4975-Greeneagle Inc. v. SCDHEC	Pending
4979-Major v. City of Hartsville	Pending
4983-State v. James Ervin Ramsey	Pending

4989-Dennis N. Lambries v. Saluda County Council et al.	Pending
4992-Gregory Ford v. Beaufort County Assessor	Pending
4995-Keeter v. Alpine Towers International and Sexton	Pending
4997-Allegro v. Emmett J. Scully	Pending
5001-State v. Alonzo Craig Hawes	Pending
5003-Earl Phillips as personal representative v. Brigitte Quick	Pending
5006-J. Broach and M. Loomis v. E. Carter et al.	Pending
5010-S.C. Dep't of Transportation v. Janell P. Revels et al.	Pending
5011-SCDHEC v. Ann Dreher	Pending
5013-Geneva Watson v. Xtra Mile Driver Training	Pending
5017-State v. Christopher Manning	Pending
5019-John Christopher Johnson v. Reginald C. Lloyd et al.	Pending
5020-Ricky Rhame v. Charleston Cty. School District	Pending
5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual	Pending
5025-State v. Randy Vickery	Pending
5031-State v. Demetrius Price	Pending
5032-LeAndra Lewis v. L.B. Dynasty	Pending
5034-State v. Richard Bill Niles, Jr.	Pending
5035-David R. Martin and Patricia F. Martin v. Ann P. Bay et al.	Pending
5041-Carolina First Bank v. BADD	Pending
5044-State v. Gene Howard Vinson	Pending

5052-State v. Michael Donahue	Pending
2010-UP-356-State v. Darian K. Robinson	Pending
2011-UP-038-Dunson v, Alex Lee, Inc.	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-084-Greenwood Beach v. Charleston	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-127-State v. Beulah Butler	Pending
2011-UP-199-Amy Davidson v. City of Beaufort	Pending
2011-UP-328-Davison v. Scaffe	Pending
2011-UP-343-State v. Eric Dantzler	Pending
2011-UP-359-Price v. Investors Title Ins.	Pending
2011-UP-363-State v. Lloyd Wright	Pending
2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending
2011-UP-380-EAGLE v. SCDHEC and MRR	Pending
2011-UP-385-State v. Anthony Wilder	Pending
2011-UP-400-McKinnedy v. SCDC	Pending
2011-UP-447-Brad Johnson v. Lewis Hall	Pending
2011-UP-456-Thomas Heaton v. State	Pending
2011-UP-468-Patricia Johnson v. BMW Manuf.	Pending
2011-UP-471-State v. Terrell McCoy	Pending

2011-UP-475-State v. James Austin	Pending
2011-UP-495-State v. Arthur Rivers	Pending
2011-UP-496-State v. Coaxum	Pending
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2011-UP-516-Vaughn Smith v. SCDPPPS	Pending
2011-UP-517-N. M. McLean et al. v. James B. Drennan, III	Pending
2011-UP-519-Stevens & Wilkinson v. City of Columbia	Pending
2011-UP-522-State v. Michael D. Jackson	Pending
2011-UP-550-McCaskill v. Roth	Pending
2011-UP-558-State v. Tawanda Williams	Pending
2011-UP-562-State v. Tarus Henry	Pending
2011-UP-572-State v. Reico Welch	Pending
2011-UP-581-On Time Transp. v. SCWC Unins. Emp. Fund	Pending
2011-UP-583-State v. David Lee Coward	Pending
2011-UP-587-Trinity Inv. v. Marina Ventures	Pending
2011-UP-590-A. Leon Ravenell v. Nancy Meyer	Pending
2012-UP-010-State v. Norman Mitchell	Pending
2012-UP-014-State v. Andre Norris	Pending
2012-UP-018-State v. Robert Phipps	Pending
2012-UP-030-Babaee v. Moisture Warranty Corp.	Pending
2012-UP-037-Livingston v. Danube Valley	Pending

2012-UP-058-State v. Andra Byron Jamison	Pending
2012-UP-060-Austin v. Stone	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-089-State v. A. Williamson	Pending
2012-UP-091-State v. Mike Salley	Pending
2012-UP-152-State v. Kevin Shane Epting	Pending
2012-UP-153-McCall v. Sandvik, Inc.	Pending
2012-UP-203-State v. Dominic Leggette	Pending
2012-UP-217-Forest Beach Owners' Assoc. v. C. Bair	Pending
2012-UP-218-State v. Adrian Eaglin	Pending
2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club	Pending
2012-UP-267-State v. James Craig White	Pending
2012-UP-270-National Grange Ins. Co. v. Phoenix Contract Glass, LLC, et al.	Pending
2012-UP-274-Passaloukas v. Bensch	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-278-State v. Hazard Cameron	Pending
2012-UP-285-State v. Jacob M. Breda	Pending
2012-UP-286-Diane K. Rainwater v. Fred A. Rainwater	Pending
2012-UP-290-State v. Eddie Simmons	Pending
2012-UP-292-Demetrius Ladson v. Harvest Hope	Pending

2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-314-Grand Bees Development v. SCDHEC et al.	Pending
2012-UP-321-James Tinsley v. State	Pending
2012-UP-330-State v. Doyle Marion Garrett	Pending
2012-UP-348-State v. Jack Harrison, Jr.	Pending
2012-UP-351-State v. Kevin J. Gilliard	Pending
2012-UP-365-Patricia E. King and Robbie King Jones, as representatives of W.R. King and Ellen King v. Margie B. King and Robbie Ione King, individually and as co-representatives of the estate of Christopher G. King et al.	Pending
2012-UP-371-State v. Thomas Smart	Pending
2012-UP-404-McDonnell and Assoc v. First Citizens Bank	Pending
2012-UP-432-State v. Bryant Kinloch	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-460-Figueroa v. CBI/Columbia Place Mall et al.	Pending
2012-UP-462-J. Tennant v. Board of Zoning Appeals	Pending
2012-UP-471-SCDSS v. Kelcie C. et al.	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-504-Palmetto Bank v. Cardwell	Pending
2012-UP-552-Virginia A. Miles v. Waffle House	Pending

2012-UP-559-NAFH National Bank v. Israel Romero	Pending
2012-UP-569-Vennie Taylor Hudson v. Caregivers of SC	Pending
2012-UP-577-State v. Marcus Addison	Pending
2012-UP-579-Andrea Beth Campbell v. Ronnie A. Brockway	Pending
2012-UP-585-State v. Rushan Counts	Pending
2012-UP-603-Fidelity Bank v. Cox Investment Group et al.	Pending
2012-UP-608-SunTrust Mortgage v. Ostendorff	Pending
2012-UP-616-State v. Jamel Dwayne Good	Pending
2012-UP-658-Palmetto Citizens v. Butch Johnson	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Daryl J. Brown, on behalf of his minor children, Lindsey B. and Janise B.; Deanna J. Brown Thomas, on behalf of her minor child, Jason L.; Yamma N. Brown, on behalf of her minor children, Sydney L. and Carrington L.; Tonya B.; Vanisha Brown; Larry Brown; Tommie Rae Hynie Brown; and James B., through his Guardian ad Litem, Respondents,

v.

Albert H. Dallas, Alfred A. Bradley, and David G. Cannon, Individually and as (purported) Trustees of the James Brown 2000 Irrevocable Trust; Adele J. Pope and Robert L. Buchanan, Jr., Personal Representatives of The Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust; Terry Brown; Romunzo Brown; Forlando Brown; Cinnamon N. M. Paris; LaRhonda Petitt; Jeanette Mitchell; and Russell L. Bauknight, as Special Administrator and Special Trustee for The Estate of James Brown and The James Brown 2000 Irrevocable Trust, Defendants,

of whom Robert L. Buchanan, Jr. and Adele J. Pope, as Personal Representatives of The Estate of James Brown and Trustees of The James Brown 2000 Irrevocable Trust are, Appellants,

and Albert H. Dallas, Alfred A. Bradley, and David G. Cannon, Individually and as (purported) Trustees of The James Brown 2000 Irrevocable Trust; Terry Brown; Romunzo Brown; Forlando Brown; Cinnamon N. M. Paris; LaRhonda Petitt; Jeanette Mitchell; and Russell L. Bauknight, as Special Administrator and Special Trustee

for The Estate of James Brown and The James Brown 2000 Irrevocable Trust are, Respondents.
In re: The Estate of James Brown and The James Brown 2000 Irrevocable Trust u/a/d August 1, 2000.

Appellate Case No. 2009-142286

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

Opinion No. 27227
Heard November 1, 2011 – Filed February 27, 2013

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

James B. Richardson, Jr., of Columbia, and Tressa T. H. Hayes, of Asheville, NC, for Appellants.

Attorney General Alan Wilson, Senior Assistant Attorney General C. Havird Jones, Assistant Deputy Attorney General Robert D. Cook, Assistant Attorney General J.C. Nicholson, III, Assistant Attorney General Mary Frances Jowers, all of Columbia; Louis Levenson, of Atlanta; Matthew Day Bodman, of Columbia; Robert N. Rosen, of Charleston; David L. Michel, of Charleston; S. Alan Medlin, of Columbia; T. Heyward Carter, Jr., of Evans Carter Kunes & Bennett, of Charleston; William W. Wilkins, of Nexsen Pruet, of Greenville; and J. David Black and Fred L. Kingsmore, Jr., both of Nexsen Pruet, of Columbia, for Respondents.

Albert P. Shahid, Jr., of Charleston, for the Guardian ad Litem.

JUSTICE BEATTY: Robert L. Buchanan, Jr. and Adele J. Pope ("Appellants"), formerly personal representatives for The Estate of James Brown and trustees of The James Brown 2000 Irrevocable Trust, appeal from circuit court orders that (1) approved a settlement agreement pursuant to S.C. Code Ann. § 62-3-1102 (2009) of pending litigation concerning the estate; and (2) removed Appellants from their fiduciary positions and appointed Russell L. Bauknight as personal representative and trustee. We affirm in part, reverse in part, and remand.

I. FACTS

James Brown ("Brown"), a singer and entertainer known as "The Hardest-Working Man in Show Business" and "The Godfather of Soul," died in Atlanta, Georgia on December 25, 2006. Brown left an estate widely estimated to be worth anywhere from $5 million to over $100 million that is at the heart of this dispute among numerous parties.

By will dated August 1, 2000, Brown devised all of his personal and household effects to six adult named children: Deanna J. Brown Thomas, Yamma N. Brown, Vanisha Brown, Daryl J. Brown, Larry Brown, and Terry Brown. Brown left the remainder of his estate to The James Brown 2000 Irrevocable Trust via a pour-over provision in his will.

Brown created the 2000 Irrevocable Trust under a separate agreement, also dated August 1, 2000, as part of his estate plan to provide financial assistance for the education of his grandchildren and disadvantaged youths. The agreement creating the 2000 Irrevocable Trust includes Schedule A, which indicates Brown placed his long-time residence at Beech Island, Aiken County, and other assets in the trust as part of its initial funding, although the record contains some discrepancies as to the timing of the transfers.

Albert H. Dallas, Alfred[1] A. Bradley, and David G. Cannon were named as the co-personal representatives of Brown's estate and as the co-trustees of the 2000

[1] Bradley's first name also appears as "Alford" in various documents in the record, including Brown's will and trust. We further note variations exist in the record

Irrevocable Trust. In the trust document, Brown created an Advisory Board, initially to be comprised of three members, who were to confer with and advise the trustees in a manner consistent with Brown's objectives for the trust. There were also provisions regarding trustee succession, which required three trustees to serve at all times.

Upon Brown's death, the principal and income contained in the 2000 Irrevocable Trust, as augmented by Brown's general estate, was to be divided, by its terms, into two "shares" or subtrusts: (1) The Brown Family Education Trust ("Family Trust"), which was capped in the amount of $2 million for tax purposes and designated for the education of Brown's grandchildren; and (2) The James Brown "I Feel Good" Trust ("Charitable Trust"), which Brown declared "shall be used solely for the tuition, educational expenses, and financial assistance of . . . poor and financially needy children, youth, or young adults (Who are both qualified and deserving) who seek and have need of such assistance to obtain and further their education at the many educational entities and/or institutions available in the States of South Carolina and Georgia." Thus, Brown's estate planning documents indicate Brown intended the bulk of his wealth to be used to support the Charitable Trust.

Brown's will and trust each contained a no-contest clause, which provided that any beneficiary who challenged the will or the 2000 Irrevocable Trust "shall forfeit his or her entire interest thereunder." Brown noted in both documents that the persons described therein, i.e., the six named children and their legitimate issue, comprised "the entire class . . . acknowledge[d] to be [his] heirs and issue." Brown expressly disavowed any other potential beneficiaries, stating, "I have intentionally failed to provide for any other relatives or other persons, whether claiming, or to claim, to be an heir of mine or not." Brown stated any person not provided for in his will or trust "whether or not claiming to be a beneficiary, party in interest, or otherwise shall not have standing or be qualified to contest, claim an interest in or otherwise dispute the disposition of [his] estate as he herewith disclaims and disinherits any such person." Brown stated that any challenge by such persons to the disposition of his estate or the validity of the documents would "be considered an affront to [his] wishes," and "shall be vigorously challenged as

---

regarding the spelling of the names of Vanisha Brown (also "Venisha") and Tommie Rae Hynie Brown (also "Tomi Rae Hynie" and "Tommie Rae Hyne"). The names herein are as they appear in the case caption presented to this Court.

such by his fiduciaries." In the trust agreement, Brown declared that he was not then married and that he did not want the trust estate to ever go to a spouse: "It is the Grantor's [Brown's] intention that the trust estate be available only to the beneficiaries and not . . . the Grantor's past or future spouse. The Trustee(s) are directed to enforce this provision."

Thereafter, on November 27, 2001, Brown and Tommie Rae Hynie ("Tommie Rae") executed a Prenuptial Agreement in which Tommie Rae acknowledged that she was entering the agreement knowingly and voluntarily and that she had the opportunity to receive the advice of counsel of her own choosing. Tommie Rae waived any right to Brown's property or the receipt of alimony in the event of a separation or divorce from Brown, and she agreed to waive any claim for an interest in his estate in the event of his death, including the rights to a statutory share of Brown's estate or to any interest as an omitted spouse.

On December 14, 2001, Brown and Tommie Rae participated in a marriage ceremony in Aiken County. In 2004, Brown brought annulment proceedings against Tommie Rae after discovering that she had participated in a marriage ceremony in Texas in 1997 with another individual, Javed Ahmed. Brown attached documents to his pleadings showing Tommie Rae had not been granted an annulment of the prior marriage until April 15, 2004. Tommie Rae counterclaimed for a divorce from Brown on the ground of physical cruelty, and in his reply, Brown sought genetic testing of a son, respondent "James B.," born to Tommie Rae on June 11, 2001. The parties dismissed their respective suits in a consent order filed August 16, 2004, in which Tommie Rae agreed to "forever waive any claim of a common law marriage to [Brown], both now and in the future." The parties thereafter had an on-and-off-again relationship up until Brown's death on December 25, 2006.

In 2007, five of the six adult children Brown named in his will as well as Tommie Rae, all Respondents herein, brought actions to set aside Brown's will and the 2000 Irrevocable Trust based on undue influence. They alleged Brown's estate should, instead, pass by the laws of intestate succession. Tommie Rae claimed that she was entitled to an elective share or an omitted spouse's share of Brown's estate and that her son, James B. (via a guardian ad litem), was entitled to a share of the estate as an omitted child. The probate court transferred these claims and all filings thereafter to the circuit court.

Appellants were initially appointed by the circuit court in March 2007 as Special Administrators with limited duties to oversee the handling of Brown's estate after petitions were filed by some of Brown's family members seeking the removal of Dallas, Bradley, and Cannon as personal representatives. The court made the selection after the parties could not agree on who should be appointed. Ultimately, the three original fiduciaries either resigned or were removed from their positions as personal representatives and trustees.[2]

In November 2007, the circuit court appointed Appellants as the personal representatives for Brown's estate and as trustees of the 2000 Irrevocable Trust, with full authority as if they had been appointed in the original placement order. The South Carolina Attorney General ("AG"), who had recently intervened in the case on the ground the claims involved a charitable trust, unsuccessfully opposed the appointment of Appellants as fiduciaries.[3]

After ongoing negotiations directed by the AG, the parties entered into a compromise agreement at an informal mediation session on August 10, 2008. The settling parties named in the agreement were Tommie Rae, the children and grandchildren of Brown, and the AG. Appellants contend they did not participate in the discussions or in the agreement as they received no notice of them. The agreement was thereafter submitted to the circuit court for its approval pursuant to S.C. Code Ann. § 62-3-1102 (2009). Appellants were given notice of the agreement and participated in all proceedings related to the court's consideration of the compromise.

---

[2] The three left amid allegations that Cannon had misappropriated funds belonging to Brown. Bradley is now deceased. In 2011, Cannon entered a plea under *North Carolina v. Alford*, 400 U.S. 25 (1970) to charges of taking money from Brown, for which he was sentenced to house arrest. The prosecuting authority did not seek restitution from Cannon although Cannon reportedly retained a million-dollar mansion in Honduras as well as an interest in Brown's publishing companies.

[3] Although references herein are to the "AG" generally, the current AG's predecessor handled most of the filings in this matter, including the motion to intervene, which the circuit court granted, without objection, on October 11, 2007. The court also granted the Georgia AG's motion to intervene, but the Georgia AG is no longer participating in the action, as it was later determined South Carolina's AG was the appropriate and necessary party.

In January 2009, the circuit court appointed Russell L. Bauknight, a certified public accountant, as Special Administrator for Brown's estate and Special Trustee of the 2000 Irrevocable Trust. Bauknight was appointed, at the Respondents' suggestion, for the limited purpose of providing input and recommendations to the court regarding the compromise agreement. The circuit court ordered Appellants to continue in their fiduciary capacities at that time, except for the limited duties assigned to Bauknight.

A hearing was conducted over seven days from January to April 2009. At the first hearing date on January 30th, the parties advised the circuit court that Respondent Terry Brown, one of the six children Brown named in his will, had joined in the compromise, so that the agreement now included an addendum. In exchange for his participation, Terry Brown was given "an absolute and superior Right of First Refusal to purchase any and all of the James Brown Assets (whether on an asset or stock basis) to be sold in any Proposed Transfer" for a period of ten years.

The circuit court approved the compromise agreement by order of May 26, 2009, over the objections of Appellants.[4] The circuit court found the agreement was executed by all persons having beneficial interests that were affected by the compromise, the will and trust controversy was pursued in good faith, and the agreement was fair, equitable, and reasonable.

Under the terms of the agreement brokered by the AG, the parties would jointly seek the removal of Appellants as the personal representatives of Brown's estate and as trustees of the 2000 Irrevocable Trust. All challenges to the will were to be dismissed, and the settling parties agreed that such contests were brought in good faith and with probable cause. Tommie Rae was recognized as the surviving spouse of Brown, and all children and grandchildren who were parties to the agreement were acknowledged to be Brown's legitimate issue and heirs without the need for DNA testing to verify their status.

---

[4] The compromise agreement contained in the record is actually a series of documents signed by some of the parties at different times, rather than one agreement and an addendum signed by all parties.

The settling parties agreed to create a new trust called the James Brown Legacy Trust ("Settlement Entity"), which will "receive, hold, manage and be authorized to sell the James Brown Assets." The trustee and any successor trustee for the Settlement Entity was to be selected solely by the AG. The settling parties who had any intellectual property rights to Brown's music or persona created under federal copyright laws or laws for heirs agreed to surrender those rights to the Settlement Entity. Tommie Rae waived any spousal rights that she might have and the children waived any rights to Brown's assets that they might otherwise have beyond any share to be received in the compromise.

A (New) Charitable Trust, similar to the existing Charitable Trust formed from the 2000 Irrevocable Trust, was to be created by the AG with the advice and counsel of the parties. The AG was to have the sole authority to select the managing trustee as well as any successor trustee. An Advisory Board was to be established, whose members would "serve at the pleasure of and on such terms as the [AG] shall decide." The number of members on the Advisory Board was to be determined by the AG, but would include a member selected by Tommie Rae and one selected by each of Brown's adult children, and the roles of all members of the board were expressly stated to "be solely advisory." The (New) Charitable Trust would also have Honorary Family Trustees in a number to be decided by the AG and who would serve under the same terms and conditions as the Advisory Board. A trust similar to the Brown Family Education Trust was to be established for the education of the grandchildren and their issue, to be funded with $2 million.

The parties were to divide their distributional interest in the Settlement Entity as follows: a net 47.5% to the (New) Charitable Trust; a net 23.75% to Tommie Rae, which includes any share attributable to her son; and a net 4.79% to each of Brown's adult children who are settling parties. For voting purposes, however, the (New) Charitable Trust was to retain a 50% voting and control interest in the Settlement Entity, the named adult children were to retain a 25% voting and control interest, and Tommie Rae was to retain a 25% voting and control interest. The parties indicated in their agreement that they intended this to be a binding private agreement, but they also desired court approval of the agreement.

The circuit court approved the compromise agreement and directed Appellants to execute the agreement. At the request of the settling parties, the circuit court appointed Bauknight to have full authority as the personal

representative for Brown's estate and as trustee, and Appellants were removed from those positions.

Appellants appealed these rulings as well as additional, related orders, and the Court of Appeals consolidated the appeals. This Court granted a request for certification by the Court of Appeals pursuant to Rule 204(b), SCACR, and the case was transferred to the Supreme Court.

II. LAW/ANALYSIS

A. Standing

As an initial matter, Respondents assert Appellants do not have standing to pursue this appeal because they have no interest in the subject matter of the litigation, i.e., the will and trust; therefore, the appeal should be dismissed. Specifically, Respondents argue Appellants lack standing to appeal the circuit court's approval of the settlement agreement and the AG's involvement since they had no vote or veto power over the settlement at the trial level. Respondents further argue Appellants lack standing to appeal their removal as personal representatives and trustees because (1) their failure to adequately brief this point operates as a waiver of the issue; and (2) once the order was issued removing them as fiduciaries, its effect was immediate and their only interest in this matter became a peripheral one pertaining to their claim for fees for the time they acted as fiduciaries.

"Before any action can be maintained, there must exist a justiciable controversy." *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). Justiciability encompasses several doctrines, including ripeness, mootness, and standing. *Jackson v. State*, 331 S.C. 486, 491 n.2, 489 S.E.2d 915, 917 n.2 (1997) (citation omitted). "Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Michael P. v. Greenville County Dep't of Soc. Servs.*, 385 S.C. 407, 415, 684 S.E.2d 211, 215 (Ct. App. 2009). "Generally, to have standing, a litigant must have a personal stake in the subject matter of the litigation." *Id.* at 415-16, 684 S.E.2d at 215.

As noted by Appellants, there was no specific ruling discussing Appellants' standing in the circuit court's order of May 2009, and the matter was not raised in a Rule 59 motion. Although the circuit court did refer to standing, it was in the

context of discussing authority from another jurisdiction when the circuit court reviewed the facts of that case. This Court has previously declined to consider standing where the matter was not both raised to and ruled upon by the trial court, and it is questionable whether the issue was properly preserved here, although it was briefed. *See, e.g., James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732-33 (2010) (observing this Court has the inherent authority to consider justiciability, but when a party raises the issue, our courts have applied error preservation principles and have held the issue was not preserved where the trial court did not first rule on the issue).

Assuming, *arguendo*, that the circuit court impliedly ruled on the issue, we conclude Appellants have standing. Appellants were properly made parties to the action and were allowed to set forth specific challenges to the proposed compromise agreement for the circuit court's consideration under S.C. Code Ann. § 62-3-1102 (2009). We agree with Appellants that they have standing based on the explicit terms of the trust agreement, which conferred upon the trustees the authority to handle claims for or against the trust estate (including the authority to mediate or compromise claims), and based on their official fiduciary capacities pursuant to state law.[5] *See* S.C. Code Ann. § 62-7-405(c) (2009) ("The settlor of a charitable trust, the trustee, and the Attorney General, among others may maintain a proceeding to enforce the trust."); P.H. Vartanian, Annotation, *Right of Trustee of Express Trust to Appeal from Order or Decree Not Affecting His Own Personal Interest*, 6 A.L.R.2d 147, 152 (1949 & Later Case Service 1997) (stating where an order threatens the existence of a trust, prevents a trustee from performing his duties, or depletes the trust fund with unreasonable claims, the trustee may, in his fiduciary or representative capacity, appeal therefrom as an aggrieved party); *see also Columbia Union Nat'l Bank & Trust Co. v. Bundschu*, 641 S.W.2d 864, 879 n.10 (Mo. Ct. App. 1982) (stating "where a trustee is affected by a judgment in his official capacity, he is aggrieved and may appeal"); *In Re Estate of Birch*, 378 N.Y.S.2d 792, 797 (App. Div. 1976) (holding "that the Attorney General and the trustee had standing" because "[t]he trustee has a legal obligation to defend the trust . . . [and] [t]he Attorney General, likewise, has a duty to represent the beneficiaries where there are dispositions for religious and charitable purposes");

---

[5] We need not reach Appellants' alternative arguments that they have constitutional standing or standing under the public importance exception.

In re Crawford's Estate, 16 A.2d 521 (Pa. 1940) (involving an appeal from an order removing the appellant as a co-trustee).

B. Court's Approval of Compromise Agreement

In their appeal, Appellants contend the compromise agreement was not eligible for court consideration under section 62-3-1102 because the trust did not agree to it and the AG had no authority to speak for the trust. Appellants assert a compromise can be considered under the statute only if all holders of beneficial interests agree to it, and the 2000 Irrevocable Trust, which was entitled to the residue of Brown's estate, was the chief holder of a beneficial interest in the estate. The trust, however, was not represented in the settlement and did not agree to reducing its share of Brown's estate by half, so there was no compromise agreement for the circuit court to consider.

Appellants argue the AG's authority to enforce a charitable trust does not give him the authority to direct the settlement of an estate dispute, remove existing trustees, and administer a new trust with the AG at the helm. Appellants argue the AG effectively placed himself in control of most of Brown's assets by securing sole authority to select a managing trustee of the new entity, and then proceeded to give away over half of the estate to disinherited family members and purported family members, all in contravention of Brown's express wishes that the bulk of his wealth be used for the charitable purpose of educating disadvantaged youths.

Appellants further assert that, even if the agreement were eligible for court consideration, the agreement did not meet the statutory standard necessary to nullify Brown's estate plan because (1) it was not a compromise of a bona fide (good faith) challenge to Brown's will, and (2) it was unjust and unreasonable.

Upon appeal, "[t]he question [for an appellate court] is did the [ruling] court abuse its discretion in approving the compromise?" *In re Estate of Horton*, 90 Cal. Rptr. 66, 68-69 (Ct. App. 1970). An abuse of discretion occurs when a court's order is controlled by an error of law or there is no evidentiary support for the court's factual conclusions. *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 727 S.E.2d 407 (2012); *see also Univ. of S. Cal. v. Moran*, 365 S.C. 270, 617 S.E.2d 135 (Ct. App. 2005) (stating the interpretation of a statute approving a compromise agreement presents a question of law); *Perreault v. The Free Lance-Star*, 666

S.E.2d 352 (Va. 2008) (same). For the reasons to be discussed, we hold the circuit court erred in approving the compromise agreement in the current matter.

(1) Eligibility for Court Consideration

We first consider Appellants' contention that the proposed compromise agreement was ineligible for court consideration.

"A compromise agreement is void unless executed in compliance with the governing statute." *In re Estate of Riley*, 266 P.3d 1078, 1080 (Ariz. Ct. App. 2011). Section 62-3-1102 of the South Carolina Code establishes the following procedure for securing court approval of a compromise agreement resolving an estate controversy:

> (1) The terms of the compromise shall be set forth in an agreement in writing which *shall be executed by all competent persons* and parents acting for any minor child *having beneficial interests or having claims which will or may be affected by the compromise*. . . .
>
> (2) *Any interested person*, including the personal representative or a trustee, then may submit the agreement to the court for its approval *and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives*.
>
> (3) *After notice to all interested persons or their representatives,* including the personal representative of the estate and all affected trustees of trusts, *the court,* if it finds that the contest or controversy is *in good faith* and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is *just and reasonable, shall make an order approving the agreement and directing all fiduciaries subject to its jurisdiction to execute the agreement.*

S.C. Code Ann. § 62-3-1102 (2009) (emphasis added).[6] "Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement." *Id.* § 62-3-1102(3).[7]

Citing *University of Southern California v. Moran*, 365 S.C. 270, 617 S.E.2d 135 (Ct. App. 2005), Appellants contend "where a trust is beneficiary of a devise, it is the trust, acting through its trustee, which alone has statutory authority to participate in a Section 1102 settlement agreement."[8] Appellants contend the circuit court could not approve the compromise agreement without their consent as trustees. Appellants assert they were not given notice of the parties' negotiations, so the beneficiaries were unrepresented. They also contend the circuit court erred in finding the AG has the authority to direct or enter into a compromise on behalf of the charitable beneficiaries.

---

[6] The first sentence of subsection (3) was amended in 2010, but the change does not impact this appeal. Act No. 244, 2010 S.C. Acts 1764.

[7] *See Columbia Union Nat'l Bank & Trust Co.*, 641 S.W.2d at 874 (stating once a compromise agreement is approved, the property devolves under the terms of the agreement, not the testamentary instrument, so the judgment on appeal adjudicates a contract, not a will contest, and the efficacy of the agreement depends only on the written agreement among all persons with a beneficial interest or claim affected by the compromise and the determination of the ruling court that the controversy is in good faith and that the agreement affects fairly the interests of persons represented by fiduciaries or their representatives).

[8] In *Moran*, the Court of Appeals held that a trust, created by a pour-over provision in the decedent's will, was the entity with a "beneficial interest" in the decedent's *estate*, whereas the appellant University, which was a beneficiary of the *trust*, was merely an "interested person" in the estate. 365 S.C. at 282-83, 617 S.E.2d at 141-42. Therefore, the trustee had the authority to compromise a claim on behalf of the trust and the trustee was required to execute a compromise agreement to settle a dispute over the estate. *Id.* The court held the University was entitled to notice and to an opportunity to voice its objection to the compromise, but its signature was not required for court approval of the agreement. *Id.* The *Moran* case did not involve the AG's representation of charitable beneficiaries, however, so there is no discussion in this regard.

Respondents, in contrast, contend Appellants are improperly attempting to broaden *Moran* to give a trustee absolute and sole control over settlements, and this is antithetical to the purpose of section 62-3-1102. They state that under Appellants' theory, the beneficiaries of a trust could *never* reach a compromise because a trustee could always single-handedly veto the process.

Respondents argue that under the statutory framework, the important question is whether all beneficial interests were represented *at the hearing* in this matter. The AG asserts he represents the beneficial interests of a charitable trust, but even if he does not, the charitable beneficiaries would have been represented by Appellants at the hearing, since they contended they represented the "trust" and were present to voice their objections to the proposed compromise. Consequently, the charitable beneficiaries were represented at the hearing, either by the AG or by Appellants as trustees. Moreover, trustees do not have a statutory right to unilaterally prevent a compromise.

Under the statute, any "interested person"[9] may submit the proposed agreement to the court after notice has been given to all interested persons and their representatives, and the agreement must be executed by all persons having "beneficial interests" in the estate[10] as well as fiduciaries. Thus, Appellants

---

[9] An "interested person" under our Probate Code "includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons." S.C. Code Ann. § 62-1-201(20) (2009).

[10] The Reporter's Comments to section 62-3-1102 state, "The agreement must be signed by all persons having a beneficial interest in or claim against *the estate*, whose interest or claim is affected by the agreement." Reporter's Comments to S.C. Code Ann. § 62-3-1102 (2009) (emphasis added). What constitutes a "beneficial interest in an estate" is not specifically defined in the Probate Code. *See Milner v. Milner*, 361 S.W.3d 615, 620 (Tex. 2012) (defining a "beneficial interest" as "[a] right or expectancy in something (such as a trust or an estate), as opposed to legal title to that thing" (alteration in original) (quoting *Black's Law Dictionary* 885 (9th ed. 2009)); *accord In re Estate of Sullivan*, 724 N.W.2d 532

unquestionably were entitled to notice (and a corresponding opportunity to be heard) and they were necessary signatories based on the express terms of the statute. Appellants dispute, however, whether they were properly noticed and whether their signatures could be compelled by the court, and they contend the agreement was not eligible for the court's consideration.

Although Appellants were not given notice of the *negotiations* engaged in by the other parties *prior* to reaching the settlement, Appellants admittedly were given notice of the proposed compromise ultimately reached, and they fully participated in the extensive hearings held over a four-month period in the circuit court, at which time they were given the opportunity to voice their objections. It is notice of the proposed compromise and any hearings that is statutorily required, as it is the final proposal that is subject to the court's scrutiny under section 62-3-1102. The method by which the proposal was reached, including how many of the parties actively participated in any preliminary discussions, is not a determinative factor in whether the agreement is *eligible* to be presented to the circuit court for consideration.[11]

In addition, section 62-3-1102(3) specifically states that if the court "finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, [it] *shall make an order approving the agreement and directing all fiduciaries subject to its jurisdiction to execute the agreement*." S.C. Code Ann. § 62-3-1102(3). Thus, while Appellants were necessary signatories to the compromise, it is clear from the plain language of the statute that the circuit court had the authority to direct their execution of the document if it found the two preceding conditions for approval were met.

(Minn. Ct. App. 2006) (also applying the definition in *Black's Law Dictionary*). The Probate Code does define a "beneficiary" in S.C. Code Ann. § 62-1-201(2), but only as it relates to trusts.

[11] Any alleged overreaching by the AG in the actual terms of the settlement and any resulting unfairness in the compromise ultimately reached are more appropriately considered in evaluating if the compromise was just and reasonable.

The Reporter's Comments to section 62-3-1102 reiterate that a personal representative or testamentary trustee may be *directed* by the court to sign the agreement:

> Subsection (2) requires submission of the agreement to the probate court for approval. The application for approval may be made by an interested party or by the personal representative. The application would request approval of the agreement and would request an order *directing or permitting* the personal representative and the trustee of an affected testamentary trust to execute the agreement.

Reporter's Comments to S.C. Code Ann. § 62-3-1102 (2009) (emphasis added).

The official Comment to section 3-1102 of the Uniform Probate Code, on which our South Carolina statute is based, states the provision for obtaining court approval of compromise agreements was specifically intended to *prevent* executors and testamentary trustees from single-handedly vetoing such agreements:

> The thrust of the procedure [for approving settlement agreements] is to put the authority for initiating settlement proposals with the persons who have beneficial interests in the estate, *and to prevent executors and testamentary trustees from vetoing any such proposal*. . . . Because executors and trustees may have an interest in fees and commissions which they might earn through efforts to carry out the testator's intention, *the judgment of the court is substituted for that of such fiduciaries* in appropriate cases.[12]

Unif. Probate Code, Comment to § 3-1102 (amended 1993), 8 U.L.A. 305 (1998) (emphasis added).

As the Comment to section 3-1102 of the Uniform Act unequivocally states, the purpose of this provision is to prevent trustees from unilaterally vetoing settlement agreements based on a desire to earn fees or based on some other

[12] The AG argues Appellants have sought $5 million in fees for their service, so this case would be an appropriate one for the court to substitute its judgment for that of the fiduciaries.

motive. *See In re Estate of Riley*, 266 P.3d 1078, 1083 (Ariz. Ct. App. 2011) (observing the purpose of the statute regarding compromise agreements, which is based on the Uniform Probate Code, is to keep the power to make compromises involving the estate in the hands of the estate's beneficiaries and to prevent executors and testamentary trustees from vetoing such proposals); *In re Estate of Smith*, 355 N.Y.S.2d 994, 995 (App. Div. 1974) (stating "Appellant, as executor and trustee under the will, does not have such an interest as would prevent any compromise made among all the parties beneficially interested in the estate"; "the interests sought to be protected under a compromise agreement are those of named and unnamed beneficiaries"); *In re Estate of Smith*, 349 N.Y.S.2d 281 (Surrog. Ct. 1973) (holding the objections of the preliminary executor and nominated executor and trustee to the proposed settlement should be overruled and that the attorney general has the right and power to enter into a compromise on behalf of the ultimate, unspecified, and indefinite charitable beneficiaries mentioned in the decedent's will); *see also In re Will of Seabrook*, 218 A.2d 648, 652 (N.J. Super. Ct. Ch. Div. 1966) (holding the beneficiaries of a will could compromise a challenge to a will without the consent of the executors and trustee named in the will and codicil and noting the interests of the charitable beneficiaries were represented by the attorney general; the court stated, "'In a proper case the court has power to compel a trustee to execute a compromise agreement.'" (citation omitted)); Mary F. Radford, George Gleason Bogert, & George Taylor Bogert, *The Law of Trusts & Trustees* § 1009, at 450 n.3 (3d ed. 2006) ("Under UPC §§ 3-1101 and 3-1102 a compromise of a will contest will bind a testamentary trustee.").

In general, we agree with Appellants that, as the trustees of the 2000 Irrevocable Trust, they were conferred the authority under the trust documents and under South Carolina law to compromise claims involving the trust. However, where the trust involves charitable entities, the trustee has a duty to defend the trust, and the AG has the duty to represent the unspecified charitable beneficiaries. *See In Re Estate of Birch*, 378 N.Y.S.2d 792, 797 (App. Div. 1976) (stating "[t]he trustee has a legal obligation to defend the trust . . . [and] [t]he Attorney General, likewise, has a duty to represent the beneficiaries where there are dispositions for religious and charitable purposes"); *see also* S.C. Code Ann. § 1-7-130 (2005) (providing the AG shall enforce the due application of funds given or appropriated to public charities within the state); S.C. Code Ann. § 62-7-405(c) (2009) ("The settlor of a charitable trust, the trustee, and the Attorney General, among others may maintain a proceeding to enforce the trust."); *Epworth Children's Home v. Beasley*, 365 S.C. 157, 616 S.E.2d 710 (2005) (stating the AG is the proper party to

protect the interests of the public at large in administering or enforcing charitable trusts). The AG was allowed to intervene in this action, without objection, and there is no challenge on appeal as to the propriety of the intervention.[13]

Contrary to Appellants' assertion, it was the circuit court, not the AG, which gave final approval to the compromise agreement submitted by the parties, and the circuit court repeatedly noted its duty was to review the compromise to determine if it satisfied the two statutory factors (a good faith controversy, a fair and just effect), and it set forth its findings in this regard. In contrast, the requirements to seek court approval of an agreement under section 62-3-1102 are distinguishable, i.e., the agreement must be in writing and executed by all parties with beneficial interests in the estate, it must be submitted to the court by an interested party, notice must be given to all interested parties, and there must be an opportunity to be heard. We find these requirements were met and the compromise was eligible for the court's consideration.

(2) Section 62-3-1102's Two-Part Test for Court Approval

Having found the circuit court may approve a compromise agreement after notice to, but over the objection of, Appellants, our next consideration is the propriety of the circuit court's approval of the agreement itself. In this regard, a two-part test is employed under section 62-3-1102: (1) whether the compromise settles a good-faith controversy between the parties, and (2) whether the compromise is just and reasonable.

In this case, actions were brought by some of Brown's adult children and Tommie Rae to set aside Brown's will and the 2000 Irrevocable Trust on the ground of undue influence. Tommie Rae also claimed she was entitled to an elective share or an omitted spouse's share of Brown's estate as his surviving legal spouse, and that her child, James B., was entitled to a share of the estate as an omitted child. In approving the compromise, the circuit court found the settling parties had initiated their contests to Brown's will and trust in good faith, and that the settlement was just and reasonable. We question whether the parties

[13] The order authorized the AG "to intervene in this matter to represent and protect the interests of the beneficiaries of any charitable trust created by [Brown's 2000 will] and the [2000 Irrevocable Trust] or any other assets of the Estate of James Brown that may be impressed with a charitable trust . . . ."

established the existence of a good faith controversy, but conclude the compromise was not just and reasonable, in any event.

(a) Requirement of a Good Faith Controversy

The first part of the two-part statutory mandate of section 62-3-1101(3) requires that the court "finds that the contest or controversy is in good faith[.]"

The circuit court found that there was a good faith basis for each of the claims asserted by Respondents. As to the claim of undue influence, the circuit court found the credibility of the four principal witnesses to the validity of the will and the 2000 Irrevocable Trust was questionable because the attorney who drafted the will, H. Dewain Herring, is now in jail for a crime of violence, and the testimony of the three original trustees, Dallas, Bradley, and Cannon, who had been removed from their fiduciary positions, was suspect and contradictory in prior proceedings. For example, the court noted Dallas had testified that he had knowingly allowed his attorney to agree to a stipulation containing false information because he did not want to lose his position as a fiduciary. The court found the questionable credibility of these four individuals supported the good faith basis of the contestants' claims. Further, the circuit court found there were several examples of undue influence in the record, including the fact that the trust authorized the trustees to spend up to 50% of gross income for management purposes, and there was a blank deed signed by James Brown and witnessed in Herring's client file. The court also noted there was a controversy regarding what assets were actually transferred to the trust during Brown's lifetime.

The circuit court further found a good faith controversy existed regarding the assertion of Tommie Rae for either an elective share[14] or an omitted spouse's share[15] of the estate. The court stated that, although Tommie Rae had undergone a

---

[14] A "surviving spouse has a right of election to take an elective share of one-third of the decedent's probate estate." S.C. Code Ann. 62-2-201(a) (2009). "[P]robate estate means the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy, reduced by funeral and administration expenses and enforceable claims." *Id.* § 62-2-202. The right of election of a surviving spouse and the rights of the surviving spouse to a homestead allowance and exempt property can be waived by a written agreement. *Id.* § 62-2-204.

purported marriage ceremony in 1997 with another man before she had a marriage ceremony with Brown in 2001, Tommie Rae had obtained an annulment of her marriage to Ahmed on April 15, 2004 on the basis Ahmed did not have the capacity to marry. Thus, there was no impediment to her marriage to Brown.[16] The circuit court also found that an agreement that Tommie Rae had executed in which she agreed never to assert a common law marriage with Brown had no bearing on Tommie Rae's claim as a surviving legal spouse. Moreover, after that agreement was executed, Brown published an autobiography in which he referred to Tommie Rae as his "wife" and to James B. as his "son," so the circuit court found Tommie Rae's legal status was muddled by the actions of the parties.

Even if Tommie Rae did not prevail on a claim for a spousal share, the circuit court found significant arguments existed to warrant recognizing a claim for

---

[15] The omitted spouse statute provides that, "[i]f a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse, upon compliance with the provisions of subsection (c), shall receive the same share of the estate [s]he would have received if the decedent left no will unless: (1) it appears from the will that the omission was intentional; or (2) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence." *Id.* § 62-2-301(a).

[16] Tommie Rae had claimed her marriage to Ahmed had been procured by fraud because she had discovered that Ahmed already had three or more wives in Pakistan and was merely seeking U.S. citizenship, and that he had refused to live with her as husband and wife. Tommie Rae's request for an annulment from Ahmed was hastily granted by the family court in Charleston County during the pendency of Brown's separate annulment action against her. The circuit court noted the decision of the Court of Appeals in *Lukich v. Lukich*, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006), in which the Court of Appeals held that an annulment declaring a spouse's first marriage void could not retroactively validate the spouse's second marriage. The circuit court distinguished Brown's situation, opining that the rule in *Lukich* did not apply where the first marriage was never valid because one of the parties was already married. This Court has since affirmed *Lukich*, in *Lukich v. Lukich*, 379 S.C. 589, 666 S.E.2d 906 (2008). We express no opinion, however, on the circuit court's interpretation here.

an omitted child's share for James B. under S.C. Code Ann. § 62-2-302 (2009), which would allow the child an intestate share of the probate estate. The court did note that such a claim is not conclusive, however, because if Brown had made transfers to the child that were in lieu of a provision by will, then those transfers could be deemed to satisfy the child's share.[17] The circuit court stated it was not only the presence of each of these individual, primary claims, but also their cumulative effect, that supported its finding of a good faith controversy between the parties.

In general, a threat to contest a will must be made in good faith in order for the surrender of the right to constitute consideration for a family settlement, and if it is made in bad faith to extort a settlement, or if the claim is known to be frivolous and without foundation, then it is not in good faith. M.L. Cross, Annotation, *Family Settlement of Testator's Estate*, 29 A.L.R.3d 8, at § 27 (1970 & Supp. 2011).

The "good faith" requirement has been variously interpreted, with jurisdictions applying definitions that can be categorized along a continuum from a subjective to an objective standard,[18] and they have afforded the claims a level of

---

[17] The statute provides, "If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child, upon compliance with subsection (d), receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless: (1) it appears from the will that the omission was intentional; or (2) when the will was executed the testator had one or more children and devised substantially all of his estate to his spouse; or (3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown . . . ." S.C. Code Ann. § 62-2-302(a) (2009).

[18] *Compare* 80 Am. Jur. 2d *Wills* § 982 (2002) (stating "it need not appear that a ground of opposition in fact would have defeated the will; rather, it is enough if the parties consider it so far doubtful as to be the subject of a compromise" (footnote omitted)), *with Holt v. Holt*, 282 S.E.2d 784, 787 (N.C. 1981) ("The mere relinquishment of a right to contest a will is not sufficient consideration to support a reciprocal promise to modify the will unless there is a *bona fide* dispute as to the will's validity."), *and id.* at 789 ("Whether there is a *bona fide* dispute depends, furthermore, not on what any particular party to the alleged compromise may

scrutiny that is less than that given to ordinary contracts, up to what has been described as "close scrutiny."[19]

However, it is universally acknowledged that full proof of the asserted claims is not required because the *raison d'etre* for the statute is to dispense with the necessity of litigating the merits of the claims. The circuit court's duty was not to decide the ultimate question of the merits of the undue influence and other claims; rather, the statutory standard is whether the proposed compromise agreement resolves a good faith controversy and whether the agreement is just and reasonable. *See generally* M.L. Cross, *supra*, 29 A.L.R.3d 8 (family settlements)*; see also Warner v. Warner*, 1 A.2d 911, 914-15 (Conn. 1938) (stating forbearance in pursuing a claim known to be frivolous or without foundation is not in good faith; however, the question is not whether there was in fact undue influence, but whether the parties could in good faith reasonably believe so, and the test is not whether the claim would have succeeded in the litigation, as that would involve a trial of the issue that was compromised, and the purpose of the law in encouraging compromises would thus be defeated; a compromise does not import finality as to the sufficiency of the grounds for opposition to a will, as the compromise in effect includes a discontinuance of the investigation of the claim); *In re Estate of Yeley*, 959 N.E.2d 888, 893 (Ind. Ct. App. 2011) ("A court order approving a settlement

---

subjectively believe about it, but whether the *bona fides* of the disagreement may, under all the facts and circumstances of the case, be reasonably found to exist by the trier of fact. This principle inheres in our decisions; and cases from other jurisdictions with near uniformity hold that absent any basis in fact and law upon which to challenge the validity of a will, a compromise promise to distribute the property differently from the manner contemplated by the will is unenforceable due to lack of consideration if the reciprocal promise is merely not to contest the will.").

[19] *Compare Skaggs v. Cullipher*, 941 S.W.2d 443, 447 (Ark. Ct. App. 1997) (stating family agreements resolving estate and will matters "are afforded a legal status distinct from typical contracts, and will be enforced without closely scrutinizing the consideration of the transaction or the strict legal rights of the parties"), *with Fleisch v. First Am. Bank*, 710 N.E.2d 1281, 1283-84 (Ill. App. Ct. 1999) (stating "family settlements are subjected to close scrutiny to determine whether the disputes they purport to resolve are genuine or simply ill-conceived threats concocted to subvert the settlor's intent" (citation omitted)).

agreement is not an adjudication of the issues of the litigation, but rather is an avoidance of adjudication.").

That being said, we have substantial concerns about the circuit court's findings in this regard. Although proof of a claim is not required, we believe something more than a subjective belief or a mere allegation is necessary to avoid the potential for collusion among disinherited or disgruntled family members who wish to dispose of the testator's estate plan and substitute it with one more to their liking.

As to the claim of undue influence, it has been frequently stated that, "[i]n order to void a will on the ground of undue influence, the undue influence must destroy free agency and prevent the maker's exercise of judgment and free choice." *In re Estate of Cumbee*, 333 S.C. 664, 671, 511 S.E.2d 390, 393 (Ct. App. 1999). The influence necessary to void a will must amount to force and coercion. *Id.* "A mere showing of opportunity or motive does not create an issue of fact regarding undue influence." *Id.* "In cases where allegations of undue influence have been successful, there has been evidence of threats, force, restricted visitation, or an existing fiduciary relationship at the time of or before the will's execution." *Id.* at 671-72, 511 S.E.2d at 394 (citation omitted). Although there is a presumption of undue influence in the making of a will involving fiduciaries, the ultimate burden always remains with the proponent. *Gordon v. Busbee*, 397 S.C. 119, 723 S.E.2d 822 (Ct. App. 2012). "[T]he circumstances must point unmistakenly and convincingly to the fact that the mind of the testator was subject to that of some other person so the will is that of the latter and not of the former." *Byrd v. Byrd*, 279 S.C. 425, 427, 308 S.E.2d 788, 789 (1983). In addition, "even if a contestant does establish an inference of undue influence, the unhampered opportunity of the testator to change the will after the operation of undue influence destroys this conclusion." *Hembree v. Estate of Hembree*, 311 S.C. 192, 196-97, 428 S.E.2d 3, 5 (Ct. App. 1993).

The circuit court's scant references to alleged improprieties in the handling of Brown's will, while troubling, do not bear directly on the issue of whether Brown's desires for the disposition of his estate were overborne to such an extent that the resulting distribution was not the product of his own free will. In particular, although the circuit court focused on the later imprisonment of the attorney who drafted the will, the imprisonment was for a crime totally unrelated to his services as an estate planner. This fact has no bearing on the execution of

Brown's testamentary documents and sheds no light on whether Brown's will was somehow overcome at the time he signed the documents finalizing his estate plan. *See Russell v. Wachovia Bank*, 353 S.C. 208, 219, 578 S.E.2d 329, 335 (2003) ("In order for the will to be void due to undue influence, '[a] contestant must show that the influence was brought directly to bear *upon the testamentary act*." (alteration in original) (emphasis added) (quoting *Mock v. Dowling*, 266 S.C. 274, 277, 222 S.E.2d 773, 774 (1976)).

Similarly, the fact that one provision regarding management fees in the trust could be deemed "generous" would support at most reformation of the document, but would not justify the complete destruction of Brown's estate plan.[20] *See generally In re Estate of Schroeder*, 441 N.W.2d 527 (Minn. Ct. App. 1989) (stating to constitute a good faith will contest, the objections must have legal merit; the appellate court found that even if the testimony were true, at most it would have supported reformation of the will, not the overthrow of the decedent's entire testamentary plan); *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (stating "a showing of general influence is not tantamount to undue influence" and "a contestant must show that the undue influence was brought directly to bear upon the" challenged transaction such that it prevented the grantor's exercise of judgment and free choice).

All indications in the record are that Brown was of sound mind and strong physical constitution until the time of his death, as he had only recently returned from touring and was making preparations for future performances when he suddenly became ill and passed away. *Cf. Russell*, 353 S.C. at 219, 578 S.E.2d at 335 (finding no undue influence where it was "undisputed that [the] [t]estator was independent, and physically mobile until a few days before his death," and that the "[t]estator, while elderly, was not infirm, mentally or physically, and was not prevented from seeing relatives, friends or business associates").

It appears Brown painstakingly developed his estate plan over the course of several years, and in various drafts, including the will in dispute here, Brown made it clear that he intended the bulk of his estate to be used for the education of

[20] Both Brown's will and trust contained severability clauses that stated if any part thereof should be found invalid, illegal, or inoperative for any reason, it was his intention that the remaining parts be fully effective as far as possible and reasonable.

disadvantaged youths, as he had provided for his family members during his lifetime. His estate documents explicitly state that he had named all of those he wished to be the beneficiaries of his estate, and that any further claimants, including future spouses or those purporting to be heirs, were purposefully excluded. Another strong indicator of Brown's intent is his inclusion of no-contest clauses in both his will and trust.

The record contains numerous references to the fact that Brown repeatedly made his intentions known during his lifetime to his family, friends, and business associates, and he had even met with family members not too long before his unexpected death and had reaffirmed his intentions in this regard. Brown had a reputation as a strong-willed individual who did not take orders from others, and he made his desires abundantly clear during his lifetime. We find there is no reasonable basis for the undue influence claim asserted here other than as a means to dismantle Brown's estate plan. The result is to enable those who were disinherited to obtain Brown's assets to the detriment of the charitable entity that Brown so fervently desired. Because he knew that it would be a source of dispute, Brown went to remarkable lengths to protect his right to designate the appropriate legacy for his life's work, including having numerous provisions in his estate documents and informing family members of his intentions in advance. We see no reasonable or substantial basis to support a good faith finding here.[21] *See Anderson v. Anderson*, 44 N.E.2d 43, 47 (Ill. 1942) ("[T]here must be some reasonable or substantial basis for the claims advanced by the parties which are surrendered by the agreement."); *Russell*, 353 S.C. at 220, 578 S.E.2d at 335 (finding evidence of the testator's "unhampered opportunity" to change his will negated any undue influence that the appellants put forth); *cf., e.g., Estate of Cumbee*, 333 S.C. at 672-73, 511 S.E.2d at 394-95 (holding the determination that the testator's will was the product of undue influence was supported by the evidence, which showed the testator's conversations were overheard using a baby monitor, the testator developed hand signals to communicate with her visitors, the beneficiary had the testator's power of attorney and managed all of her finances, and that same beneficiary controlled the execution of the will).

[21] Knowing of the potential for an attack on his estate plan after his death, Brown had admonished all potential challengers to his will and trust that such actions would "be considered an affront to [his] wishes."

The AG acknowledged during oral arguments in this matter that it undertook no inquiry into the undue influence claims of the Respondents and the circumstances surrounding Brown's execution of his will. While we do not believe a full-blown, formal investigation is required before a compromise may be reached, we believe something more than a mere accusation and the subjective opinion of the Respondents is necessary to justify court approval of a compromise that seeks to vitiate the decedent's entire estate plan on the basis of a vague allegation of undue influence. *Cf. Russell*, 353 S.C. at 220, 578 S.E.2d at 335 (noting "the circumstances surrounding the execution of the Will . . . is the critical issue when evaluating an undue influence case"); *In re Last Will and Testament of Smoak*, 286 S.C. 419, 427, 334 S.E.2d 806, 810-11 (1985) (stating a witness's testimony that the will was the result of undue influence was a conclusion "obviously drawn out of thin air" as the witness "knew absolutely nothing about the circumstances under which the Will was executed"; the court noted "one of the basic rights known to our civilization is the privilege of disposing of property by Will as one elects").

As to the spousal claims, even if Tommie Rae were able to establish a claim as Brown's surviving spouse, she executed a prenuptial agreement, in which she indicated that she had the opportunity to consult with counsel of her own choosing and waived all rights to Brown's property or any statutory claims against his estate. A valid prenuptial agreement would normally preclude any right to an elective share. *See* S.C. Code Ann. § 62-2-204 (2009) ("The right of election of a surviving spouse . . . may be waived . . . by a written contract . . . signed by the party waiving after fair disclosure."). She also executed an agreement waiving any claim to status as a common-law spouse.[22] Although the circuit court correctly noted the agreement to waive any claim as a common-law spouse would not be dispositive of Tommie Rae's claim that she was a surviving spouse, the circuit court did not acknowledge the sizeable bar posed by a prenuptial agreement.

Beyond this, Brown's testamentary documents state that he was specifically omitting any other beneficiaries or potential beneficiaries, including a future spouse or heirs, based on his desire to leave most of his estate to charity after

[22] Tommie Rae's waiver of any claim for status as a common-law wife begs the question of the necessity to do so if she was, in fact, the legal spouse of Brown. Moreover, the timing of the waiver raises additional questions because it arose from Brown's filing of an annulment action.

providing for the education of his grandchildren. *See* S.C. Code Ann. § 62-2-301(a) (2009) (providing an omitted spouse is not entitled to a statutory share where "(1) it appears from the will that the omission was intentional; or (2) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence").

As for the claim of the pretermitted child, we note it was not supported by a properly-authenticated DNA test, even though one had been offered to Tommie Rae for her child, and Brown himself had previously requested a DNA test during his relationship with Tommie Rae.[23] The child was not born of the marriage, which is certainly not required for a pretermission claim, but this fact does mean that he does not enjoy a presumptive status as Brown's child, which would have been a significant factor supporting the finding of a good faith claim.

Moreover, as recognized by the circuit court, an omitted child is not entitled to a statutory share if "it appears from the will that the omission was intentional" or "the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown . . . ." S.C. Code Ann. § 62-2-302(a)(1), (3) (2009). In light of the strong language in Brown's will that his failure to provide for any other person "claiming, *or to claim*, to be an heir" was "intentional and not occasioned by accident of mistake," we think this claim has some weakness, although it presents a closer question. (Emphasis added.) We do not believe, however, that this claim involving only one party can single-handedly validate the tenuous and unrelated claims of all of the remaining parties so as to justify the finding of a good faith controversy.

In sum, we question whether the claims were asserted in good faith since the primary claim asserted by the parties as a basis for discarding Brown's testamentary documents, undue influence, was of dubious validity. There was also a major impediment to Tommie Rae's spousal claim that undermines confidence in

---

[23] There was a test performed, but the testing lab stated in its report that it could not verify the accuracy of the results because the samples were not submitted in accordance with established protocol ("The samples were not collected according to AABB guidelines and the laboratory cannot verify the origin of the DNA samples.").

the court's finding of a good faith controversy. We further find the circuit court's statement that the totality of the claims supported a good faith finding is unpersuasive, as it is based on the assumption that each claim met some threshold level of viability. To the contrary, we do not believe the cobbling together of tenuous claims can be the basis for a good faith finding that would justify the drastic results sanctioned here. *See* 80 Am. Jur. 2d *Wills* § 982 (2002) (stating "a court may decline to approve or enforce a settlement agreement which does not settle a 'good faith contest or controversy,' as where an agreement seeks only to set aside an otherwise valid will. In other words, a family settlement agreement may fail for lack of adequate consideration when there is lack of a reasonable or substantial basis for any claims surrendered by it." (footnotes omitted)).

(b) Requirement of a Just and Reasonable Agreement

Appellants further argue that, even if the compromise was of a bona fide challenge to the will, it was not just and reasonable, which would preclude court approval under the statutory standard.

In addition to the presence of a good faith controversy between the parties, the ruling court must find "the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable[.]" S.C. Code Ann. § 62-3-1102(3). Both parts of the two-part test must be satisfied to warrant approval of a compromise agreement. *In re Estate of Schroeder*, 441 N.W.2d 527 (Minn. Ct. App. 1989); *see also In re Estate of Birch*, 378 N.Y.S.2d 792, 797 (App. Div. 1976) (stating where a necessary requirement for a compromise agreement is lacking, the agreement may not be approved). Even assuming a good faith controversy existed among the parties, we agree that the compromise should not have been approved because the second element of the two-part test has not been met.

Our state statute does not explicitly provide a standard for determining whether a compromise is "just and reasonable," nor does the Uniform Probate Code. A similar observation was made by the Minnesota Court of Appeals, which ultimately "conclude[d] that to be just and reasonable, an estate plan in a settlement agreement must defer to the testator's intent unless a departure from that intent is reasonably necessary to protect the interests of the beneficiaries." *Schroeder*, 441 N.W.2d at 533 (citing Fratcher, IV *Scott on Trust*s § 337.6 (4th ed. 1989)). The Minnesota court noted this is consistent with the statutory scheme and it is also

implied by a comment to the Uniform Probate Code, which states, "The only reason for approving a scheme of devolution which differs from that named by the testator or the statutes governing intestacy is to prevent dissipation of the estate in wasteful litigation." *Id.* (quoting Comment, Uniform Probate Code, 8 U.L.A. § 3-1102 (1983)). The court observed an estate plan in a settlement agreement may affect a trust; "[h]owever, an estate plan which differs from the testator's intent can be approved only in limited circumstances." *Id.* [24]

In *Schroeder*, the court found the decedent had clearly expressed her intent in a will executed with the requisite formalities and that the respondents had brought a frivolous will contest in a collusive move to destroy a trust created by the decedent. *Id.* at 534 (citing Bogert, *Trusts* § 152 (6th ed. 1987)). The appellate court found "[t]o approve such a settlement agreement threatens to unravel two fundamental principles of probate law: (1) the paramount importance of carrying out the intention of the testator, and (2) the requirement that a testator express his intention with the requisite formalities." *Id.*

In determining that the settlement in the current appeal was just and reasonable, the circuit court observed there could be a potential beneficial effect if a marital deduction was obtained and further stated that, in addition to dropping their claims, the settling parties had, as part of the compromise, signed over their federal copyright termination rights. The circuit court found these rights could be a significant benefit for the charitable beneficiaries because they might form a substantial portion of the future value of the estate. There was, however, no evidence presented as to the potential value of these rights that could be compared to the potential value the Respondents would obtain by having Brown's testamentary plan voided. The court also opined that the settlement was necessary to protect the charitable trust from the threat of litigation.

In our view, the evidence does not support the finding that the compromise was just and reasonable. The compromise orchestrated by the AG in this case destroys the estate plan Brown had established in favor of an arrangement overseen virtually exclusively by the AG. The result is to take a large portion of Brown's estate that Brown had designated for charity and to turn over these amounts to the

[24] A compromise approved by the court "is binding even though it may affect a trust or an inalienable interest." S.C. Code Ann. § 62-3-1101 (2009).

family members and purported family members who were, under the plain terms of Brown's will, given either limited devises or excluded.

Even if a good faith controversy had existed, the remedy more appropriately would have been the reformation of the documents to provide for any monies payable, not the total dismemberment of Brown's carefully-crafted estate plan and its resurrection in a form that grossly distorts his intent. We find the compromise proposed here is fundamentally flawed because the entire proposal is based on an unprecedented misdirection of the AG's authority in estate cases. We also believe that a departure from the testator's intent is not reasonably necessary to protect the beneficiaries' interests because any alleged advantage to them occasioned by the avoidance of further litigation, as propounded by the settling parties, is illusory at best.

"A will is an expression of a testator's intent to dispose of the testator's property after death." *In re Estate of Pallister*, 363 S.C. 437, 448, 611 S.E.2d 250, 256 (2005). The right to make a will directing the ultimate disposition of one's property is one of the basic rights known to our civilization, and it encompasses the right to make it according to the testator's pleasure and in his absolute discretion, whether judiciously or capriciously, justly or unjustly, subject only to the restraints upon the power of disposition that the law has imposed. *In re Last Will and Testament of Smoak*, 286 S.C. 419, 427, 334 S.E.2d 806, 811 (1985) (citation omitted); *see also Mock v. Dowling*, 266 S.C. 274, 278, 222 S.E.2d 773, 775 (1976) ("It is elementary that the statutory right of a competent person to dispose of [his] property as [he] wishes may not be thwarted by disappointed relatives or by one who thinks the [testator] used bad judgment or was misled.").

The law generally favors an agreement of compromise among family members to avoid a will contest or to promote the settlement and distribution of an estate. *Duncan v. Alewine*, 273 S.C. 275, 255 S.E.2d 841 (1979); *Dibble v. Dibble*, 248 S.C. 165, 149 S.E.2d 355 (1966); *see also In re Estate of Yeley*, 959 N.E.2d 888, 894 (Ind. Ct. App. 2011) ("[T]he settlement agreement is a contractual agreement to transfer and distribute property among the parties so as to avoid litigation."). However, "[a] settlement agreement must defer to the testator's intent unless departing from his intent is reasonably necessary to protect the beneficiaries' interests." *In re Estate of Sullivan*, 724 N.W.2d 532, 535 (Minn. Ct. App. 2006).

In granting the AG's Motion to Intervene, to which no objections were interposed, the circuit court ruled the AG was authorized to intervene pursuant to his *parens patriae*, statutory, and common law authority. The AG undoubtedly has the authority to intervene to protect the public interest of a charitable trust. However, the AG has no authority to become completely entrenched in an action that began here as one to set aside a will and for statutory shares, direct the settlement negotiations, and then fashion a settlement that discards Brown's will and his 2000 Irrevocable Trust and replaces them with new trusts, only to give himself sole authority to select the managing trustee. By so doing, the AG has effectively obtained control over the bulk of Brown's assets and has given his office unprecedented authority to oversee the affairs of the parties that has not heretofor been recognized in our jurisprudence.

"The role of the Attorney General is as an overseer of charities representing the public, the ultimate beneficiary of the charitable trust." *In re Estate of Horton*, 90 Cal. Rptr. 66, 68 (Ct. App. 1970) (citation omitted). "His duty is to remedy abuses in trust management." *Id.* (citation omitted). However, the AG is not "in the position of a super administrator of charities with control over, or right to participate in, the contractual undertakings of the charities." *Id.*

In discussing the duties of the attorney general as the protector, supervisor, and enforcer of charitable trusts, one treatise observes: "As an adjunct to his enforcement powers, the Attorney General is frequently granted powers of supervision and investigation regarding the administration of charities. However, . . . in the absence of a statute, this power does not extend to the continuous oversight of a charity's administration when the settlor's intent is clear and there is no allegation of actual or threatened breach [of trust by a charitable trustee]." Ronald Chester, George Gleason Bogert, George Taylor Bogert, *The Law of Trusts and Trustees* § 411, at 25-26 (3d ed. 2005).

"[I]t is axiomatic that a trustee is always under the direction and guidance of the court . . . ." *Kingdom v. Saxbe*, 161 N.E.2d 461, 466 (Ohio, Ashtabula County Prob. Ct. 1958). Although the AG certainly has duties in regards to charitable trusts, if he believed Appellants, as trustees, were not good stewards, the remedy would be to seek their removal and replacement. Brown's 2000 Irrevocable Trust contained a detailed procedure for the succession of trustees that was gutted and replaced with provisions allowing the AG the sole authority to select the managing

trustee and to serve at his pleasure.[25] *Cf. In re Estate of Ward*, 23 P.3d 108, 112 (Ariz. Ct. App. 2001) ("The remedy for bona fide problems with the trustee is not rewriting a will or trust but replacing the trustee with a new trustee . . . .").

Although the stated justification for the compromise was to avoid the potential of a substantial threat to the charitable beneficiaries occasioned by Respondents' claims, the compromise condoned by the AG here results in an outright gift of half of the estate to the family members and purported family members who challenged Brown's will and trust based on tenuous claims. As the enforcer of charitable trusts, we believe the AG's efforts would have been better served in attempting to make a cursory evaluation of the claims rather than directing a compromise which ultimately resulted in the AG obtaining virtual control over Brown's estate. Based on all the circumstances, we do not believe the effect of the compromise is just and reasonable, and we cannot condone its approval.

C. Removal of Appellants as Personal Representatives and Trustees

Appellants next argue the circuit court erred in removing them from their fiduciary positions.[26]

Appellants assert the circuit court removed them without complying with the procedures outlined in sections 62-3-611 (removal of personal representative), 62-3-614 (appointment of special administrator), or 62-3-616 (powers and duties of special administrator) of the South Carolina Code, and no statutory ground was

---

[25] Brown's trust agreement provided that, upon notice a trustee would no longer serve, the remaining trustees were to select a successor, and if they did not timely do so, the obligation fell to the advisory board. If that also failed, then the selection was to be made by the court with jurisdiction over the trust.

[26] Appellants further argue the circuit court erred in ordering them to sign the compromise agreement, since their removal was effective "immediately." Appellants' argument in this regard is now moot based on our holding the circuit court erred in approving the compromise agreement in the first instance, as their signatures are effectively nullified by our ruling. As a general matter, however, we find no error in a court directing fiduciaries to sign a compromise while ordering their removal, as it is understood the acts are to proceed in logical sequence.

claimed or found justifying the removal of Appellants as trustees as required by section 62-7-706 (removal of trustees).

Section 62-3-611 governs removal of a personal representative. Subsection (a) provides "[a] person interested in the estate may petition for removal of a personal representative for cause at any time" and requires a hearing to be held after notice. S.C. Code Ann. § 62-3-611(a) (2009).[27] Subsection (b) provides "[c]ause for removal exists when removal would be in the best interests of the estate . . . ." *Id.* § 62-3-611(b).

Respondents contend the circuit court took up the issues related to Appellants' removal at the hearing to consider whether it should approve the settlement agreement; thus, a hearing and the opportunity to be heard was afforded to Appellants. Further, all of the settling parties petitioned the circuit court for Appellants' removal well in advance of the hearing, thus providing adequate notice. In addition, the circuit court found an irreconcilable conflict existed between Appellants and the settling parties because Appellants had expressed continuing opposition to their actions. Thus, the circuit court had cause to remove them and replace them with a professional fiduciary.

We find the circuit court did not violate the statutory provisions regarding the removal of personal representatives. Notice and a hearing were provided, and the court had cause to remove them as it was in the best interests of the estate. Moreover, it was within the circuit court's implied authority under section 62-3-1102, as Appellants had a continuing and irreconcilable conflict with the settling parties. While we ultimately agree with Appellants in the specific conflict over the compromise agreement, we note the parties remained at odds over the handling of Brown's estate matters.

We are also aware that Appellants have sought $5 million in fees for their services as fiduciaries for a relatively short interval of time. In addition, Appellants sought and obtained permission from the circuit court to sell iconic assets from Brown's estate in order to raise funds, and a large portion of the amount raised went first to pay Appellants' own attorneys' fees. Appellants also

---

[27] Section 62-3-611(a) was subsequently amended, but the change is not relevant to these proceedings. Act No. 244, 2010 S.C. Acts 1764.

unsuccessfully attempted to sell Brown's GRAMMY award at auction; the process was halted only because officials from the National Academy of Recording Arts and Sciences reclaimed the award after informing Appellants that it was a long-standing policy that the award could not be sold by recipients or anyone acting on their behalf. These actions and the extreme discord between the parties convince us that Appellants' continued service as fiduciaries is not in the best interests of the estate.

As to section 62-7-706, regarding the removal of trustees, this provision is cited once by Appellants, but it is not otherwise discussed. *See* S.C. Code Ann. § 62-7-706 (2009). Thus, Appellants have set forth no issue in this regard for the Court's consideration. *See Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 620 S.E.2d 326 (2005) (observing an argument is effectively abandoned if the appellant's brief treats it in a conclusory manner). The other provisions cited by Appellants concerning the appointment and duties of a special administrator likewise afford no basis for relief here. *See* S.C. Code Ann. §§ 62-3-614, -616 (2009).

We hold Appellants have shown no error in the circuit court's ruling removing them from their fiduciary positions. However, in light of our decision invalidating the compromise agreement and our order of remand, we believe the circuit court should, upon proper application, appoint new, neutral fiduciaries to oversee these matters. Bauknight's appointment came at the urging of the AG,[28] whose influence over Brown's estate has exceeded the statutory authority allowed in such matters, and Bauknight's continued association with the estate and trust presents a significant conflict in determining the appropriate course for their future administration.[29]

---

[28] Bauknight was appointed on the recommendation of the AG's predecessor in office and the settling parties, and he currently serves at the AG's pleasure under the terms of the compromise agreement.

[29] Although Brown's music rights have been widely reported as being worth up to $100 million or more at his death, Bauknight filed documents with the Internal Revenue Service indicating the value of Brown's music empire was only a net of $4.7 million. The $4.7 million valuation has been questioned based on the fact that it came at a time when one of Brown's sons, Terry Brown, had joined the compromise upon being given the first right of refusal to purchase the estate assets.

III. CONCLUSION

The circuit court did a commendable job in attempting to sort out this difficult situation, but after considering the record and evaluating the positions of the numerous parties who seek a share of Brown's estate, we conclude the settlement reached in this case was not a fair and just resolution of a good faith controversy and that court approval is not appropriate.

The agreement served to transfer a large portion of the estate assets to persons who had been specifically excluded from Brown's will, in contravention of his stated desires. Throughout the record, it is clear that Brown's oft-repeated intent was to leave the bulk of his estate to charity for the education of needy children, as well as to provide up to $2 million for the education of his own family members. The settlement plan subverts that stated desire. The settlement provisions allowing the AG to select the trustee, and his continued influence over the trust overreaches his statutory authority, as there is no provision allowing an AG to become involved in the day-to-day operations of a trust. Moreover, the AG's primary job is the enforcement of charitable trusts, and in this case, the compromise dismantles the existing charitable trusts, to great ill effect on Brown's estate plan, rather than enforces it. These facts all demonstrate that the agreement should not be condoned by this Court, and we reverse the circuit court's finding to the contrary.

We affirm the circuit court's removal of Appellants from their fiduciary positions, but, in light of our decision invalidating the circuit court's approval of

---

Further, the AG, with Bauknight's knowledge and cooperation, allegedly entered into contingency-fee agreements with outside counsel, Kenneth Wingate, for Wingate to sue Appellant Pope on behalf of the State, Bauknight, and others while also representing private plaintiffs in the suit. The suit sought damages to Brown's estate allegedly arising during Pope's appointment. Despite FOIA requests, the AG has refused to publicly release all of the documents pertaining to this purported arrangement. These matters should be considered by the circuit court in the first instance and any fees found to be inappropriately incurred should be disgorged and returned to the trust in light of our finding that the compromise is void and the AG has exceeded his authority by, among other things, effectively controlling the charitable trust through the appointment of Bauknight, who serves at the AG's pleasure.

the compromise agreement, we direct the circuit court, upon proper application, to appoint new, neutral fiduciaries to oversee these matters.

Based on the foregoing, the order of the circuit court is affirmed in part and reversed in part, and the matter is remanded to the circuit court for further proceedings in accordance with this decision.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KITTREDGE, J., AND Acting Justice James E. Moore, concur. HEARN, J., concurs in result. TOAL, C.J., concurring in part in a separate opinion.

CHIEF JUSTICE TOAL: I concur in nearly all of the majority's excellently researched and learned opinion, with the exception of the finding regarding the removal of the court-appointed fiduciaries. I also write separately to comment on what I view as the government's unprecedented encroachment into estate administration, which had we accepted it, would be the end of estate administration as we know it in this State.

As an initial note, I concur wholeheartedly in the portions of the majority opinion finding that the contestants had no good faith basis upon which to bring their claims against the estate and that the terms of the settlement were not just and reasonable. The effect of the circuit court's order is to allow a group of "beneficiaries" with highly questionable or completely invalid claims to agree with each other to receive benefits the testator chose to deny them without even having to take any steps toward substantiating the validity of their claims or verifying the testator's incapacity. Had any steps been taken to verify their claims, I am of the opinion that the circuit court would have found all completely lacking in merit, which in turn would have lead to the disinheritance of every contestant of the will under the no-contest clauses contained in the estate documents. *See Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 633 S.E.2d 722 (finding no-contest clause was valid and enforceable where claims of undue influence lacked probable cause in that they did not represent a bona fide inquiry into the testators carefully drafted estate plans).

While I agree with the majority that the purpose of a settlement agreement is not to litigate the merits of the claims against the estate, accusations in a complaint and inferences made from other fragmented facts in the Record cannot form the basis of a good faith controversy to invalidate an otherwise carefully drafted estate plan. Instead, courts must require the settling parties to put forward some "forecast of evidence indicating that at trial [they] would be able to show that a *bona fide* dispute existed as to the validity of the [estate provisions] in question." *Holt v. Holt*, 282 S.E.2d 784, 785 (N.C. 1981); *see also O'Neil v. O'Neil*, 155 S.E.2d 495, 501 (N.C. 1967) ("The record discloses no information as to the circumstances under which the 'Will' was drafted. Nor does the record indicate what inquiries, if any, have been made to determine what testimony the draftsman and the witnesses would give relevant to what occurred prior to and at the time of the execution of the 'Will.'"). Otherwise, it is impossible to say to that the claims were brought in good faith. Further inquiry is especially important, where, as here, it appears the contestants' chance of success on the merits was highly unlikely. Furthermore, any

agreement sanctioning a windfall to these contestants which also simultaneously defeats Brown's express desire that one hundred percent of that money go to fund the educational pursuits of needy children cannot be just or reasonable.

The fact that the AG has agreed to the settlement is of no consequence, as the court is the ultimate arbiter of the merits of any settlement agreement devolving from a testator's express intent.

The AG has taken unprecedented action in this case. After effecting a total takeover of James Brown's estate by excluding its trustees and banding together with parties who stand only to gain from the invalidation of the testator's devise, the AG disposed of the court-appointed trustees, created a new settlement entity, and inserted himself into the day-to-day operations of a newly created charitable trust, the Legacy Trust. Along the way, a seemingly carefully executed testamentary devise was completely disregarded without any sworn testimony that the document, itself, is somehow defective. In asking this Court to give our imprimatur to the settlement agreement, Respondents effectively asked us to dispense with the cardinal rule of trusts and estates law that the intent of the testator must prevail wherever possible. *See Johnson v. Thornton*, 264 S.C. 252, 257, 214 S.E.2d 124, 127 (1975) ("In determining this question we are guided by the rule that in construing the provisions of a will the intention of the testator is the primary inquiry of the court."); *Limehouse v. Limehouse*, 256 S.C. 255, 257, 182 S.E.2d 58, 59 (1971) ("The court's aim in construing a Will is to discover and effectuate the expressed intention of the testator."). Were we to accept the new estate plan, we would undermine any confidence citizens may have in their ability to do with their personal assets as they wish, leading to a chilling effect on future testators in South Carolina wishing to make charitable testamentary devises, as the result sought by the AG would permit him to become the effective "super member" of the boards of directors or trustees of these future testators' foundations whenever he chose to intervene in the administration of their estates. Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 Ind. L. J. 937, 1034 (2004).

As outlined by the majority, four months after intervening in the action,[30] the

[30] Everyone agrees that the AG's initial intervention was proper amidst allegations of fraud and misappropriations of the trust funds by the original trustees, Bradley,

AG convened a mediation in Augusta, Georgia, and intentionally excluded Appellants, the court-appointed fiduciaries of Brown's estate. During the ensuing negotiations, the AG purported to "settle" the claims against the estate by creating a new estate plan, under which nearly fifty percent of the residuary estate, which Brown left entirely to the Charitable Trust for the education of needy children, was now divided between some of Brown's adult children and his purported spouse. In settlement of these parties' claims against the estate, the AG and these family members created a new charitable trust, the Legacy Trust. The AG gave himself sole authority to select, remove, and replace the managing trustee of the Legacy Trust.[31] Furthermore, the disinherited children and putative wife of Brown were authorized to select a trustee from whom the managing trustee would seek input and advice when managing the Legacy Trust.

In approving the settlement agreement, the circuit court observed:

> When the [AG] does appear in litigation involving a charitable trust either by motion for intervention or being brought in by an amendment to the pleadings, he has a right to take charge and control that portion of the litigation which relates to the charitable trust . . . This authority that allows the [AG] to control the litigation also provides that the [AG] has exclusive authority, in order to protect the public interest, to settle or compromise litigation . . . .
>
> Therefore, it is for the [AG], as the officer charged with the duty of protecting charitable beneficiaries, to exercise his discretion as to the appropriateness of a settlement. It is the responsibility of this Court in reviewing the record to determine if the [AG] acted in good faith [in] entering in this compromise agreement.

(citations omitted).

Dallas, and Cannon.

[31] In fact, the settling parties represented to the circuit court that under the settlement agreement, "there will be a replacement of the currently serving personal representatives and trustees with a managing trustee who will be controlled completely by the attorney general of South Carolina" and that "the [AG] under the documents has full power to remove and replace any trustee serving . . . as trustee of the . . . Legacy Trust."

This is a gross misstatement of AG's authority. While the circuit court ultimately approved the settlement, in my view, this erroneous statement of law suggests that the circuit court did not engage in meaningful independent review of the settlement because the court wrongly assumed that the AG had discretion to settle the estate, with the court merely required to "rubber-stamp" any agreement presented to it by the AG.

It goes almost without saying that the AG, like the attorneys general of most states, has common law and statutory authority to enforce trusts domiciled in the State of South Carolina. *See* S.C. Code Ann. § 1-7-130 (Supp. 2011).[32] The precedents relied upon by the circuit court and cited by Respondents are in line with this position and stand for the proposition that the attorney general is the appropriate party to "protect the interests of the public at large in the matter of administering and enforcing charitable trusts." *Epworth Children's Home v. Beasley*, 365 S.C. 157, 163 n.3, 616 S.E.2d 710, 713 n.3 (2005) (citing *Furman Univ. v. McLeod*, 238 S.C. 475, 482, 120 S.E.2d 865, 868 (1961)).

Epworth and *Furman* are foundational in that they define the role of an attorney general in our state jurisprudence; however, these cases cannot be read as broadly as Respondents urge. In my view, these cases illustrate the traditional role of the AG's enforcement and oversight role in charitable trust administration, but do not grant the AG a "blank check" authorizing the AG to do what he will when it comes to charitable enforcement. Under the traditional model, the role of an attorney general in overseeing charitable entities is "limited . . . to ascertaining that trustee actions are permitted by, and not inconsistent with, the underlying trust instrument, and safeguarding against fraud." Mark Sidel, *The Struggle for Hershey: Community Accountability and the Law in Modern American Philanthropy*, 65 U. Pitt. L. R. 1, 2 (2002); *cf.* 1 S.C. Jur. Attorney General § 14 ("The Attorney General is charged with responsibility for enforcement of the due application of funds given or appropriated to public charities within the State of South Carolina. He is responsible for the prevention of breaches of trust in the administration of public charities. His duty is to protect the interests of the public

---

[32] I note that this power to enforce the trust is not *exclusive*. *See* S.C. Code Ann. § 62-7-405(c) ("The settlor of a charitable trust, *the trustee*, and the Attorney General, among others may maintain a proceeding to enforce the trust." (emphasis added)).

at large rather than those who may have an immediate or peculiar interest in a charitable trust." (footnotes omitted)). This traditional oversight role, contrary to the AG's view, "does not include . . . a right to direct either the day-to-day affairs of the charity or the action of the court." *Id.* at 32 (citation omitted).[33]

This viewpoint is very much in line with other state court and scholarly opinions. For example, in *Midkiff v. Kobayashi*, 507 P.2d 724, 745 (Haw. 1973), the Hawaii Supreme Court aptly described an attorney general's role in charitable trust administration as follows:

> The function of the attorney general, as *parens patriae* of charitable trusts, is to oversee the activities of the trustees to the end that the trust is performed and maintained in accordance with the provisions of the trust document, and to bring any abuse or deviation on the part of the trustees to the attention of the court for correction. The authority of the attorney general over charitable trusts does not extend beyond the performance of that function.

(internal citations omitted).[34]

---

[33] The facts of both *Epworth* and *McLeod* exemplify the valid exercise of attorney general enforcement power. In *Epworth*, 365 S.C. 157, 616 S.E.2d 710, the trustees wished to terminate the trust in a manner that was violative of the settlor's intent, and the attorney general intervened to protect the charitable trust from destruction. In *McLeod*, 238 S.C. 475, 120 S.E.2d 865, the attorney general was made a party to protect the public interest when trustees sought to deviate from the technical terms of the trust.

[34] Importantly, the Hawaii Supreme Court found that the attorney general did not have the authority to sanction trustee deviation from the provisions of the trust. *Id.* Instead, that court stated, "If a deviation from any trust provision is necessary in the interest of the trust, the power to authorize the deviation rests solely with the court." *Id.* Our facts are slightly different, but I think the import of this statement rings true in the present controversy, as the circuit court, in approving the AG's settlement agreement, wrongly assumed that the AG had total control over the litigation, and thus the court's approval was a foregone conclusion. The

Of course, this view of the AG's supervisory powers, embodied in reporting requirements and other oversight and investigative tactics, does not mean that the AG has *no* role to play when a charitable trust is involved. In *Estate of Horton*, 90 Cal. Rptr. 66, 68 (Ct. App. 1970), the California court was presented with the question of how much involvement the attorney general should have in settlement negotiations involving several charitable entities and other beneficiaries of a testamentary trust. In approving the settlement agreement, the court defined the role of the attorney general as follows:

> The role of the Attorney General is as an overseer of charities representing the public, the ultimate beneficiary of the charitable trust . . . . His duty is to remedy abuses in trust management . . . . He is a necessary party to proceedings affecting the disposition of the assets of a charitable trust . . . . It is his right and duty to participate in proceedings to protect charitable gifts . . . .

Id. (internal citations omitted). While the court found the attorney general "has undoubted standing to seek redress in the courts of contracts entered into by charities which are collusive, tainted by fraud or which demonstrate any abuse of trust management," the court also found that the attorney general could not assume "the position of a super administrator of charities with control over, or right to participate in, the contractual undertakings of the charities." *Id.*; *cf.* Mary Grace Blasko, Curt S. Crossley, David Lloyd, *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. Rev. 37, 47 (1993) ("The attorney general does *not* . . . have a right to regulate the actions of a charity or to direct its day-to-day affairs. Courts have denied the attorney general authority to intervene in suits contesting wills

---

Respondents repeatedly proclaimed to the court that they sought court approval of the agreement not out of legal necessity, but as a matter of course, because court approval of a private settlement agreement was not essential to its validity. In my view, in any instance where any party desires to deviate from the express terms of a testamentary trust, meaningful court review is required. *See, e.g.*, *Brown v. Ryan*, 788 N.E.2d 1183, 1191 (Ill. App. Ct. 2003) (citations omitted) (holding while "the community has an interest in enforcing the trust and the Attorney General represents the community in seeing that the trust is properly construed and that the funds are applied to their intended charitable uses[,]" the state could not "compel the court to terminate the trust and end the relationship between the Trustees and the Trust *corpus*.").

involving charities, to enforce obligations owing to charities, to intervene or appear for the establishment of an invalid charitable trust, or to authorize deviations from trust provisions." (emphasis in original) (footnotes omitted)).

While no one disputes the propriety of the AG's initial intervention amidst allegations of fraud by the original trustees, once the court appointed Pope and Buchanan as fiduciaries, the AG's involvement was no longer necessary to stave off maladministration of the Charitable Trust. At that point, the AG should have assumed a more passive role. Carl Schramm, *Law Outside the Market: The Social Utility of the Private Foundation*, 30 Harv. J. L. & Pub. Pol'y 355, 372–73 (2006) ("In general . . . government oversight is premised on a view of nonintervention in the substantive decision-making and operations of foundations . . . . 'With few exceptions, the law neither attempts to control the decisions of managers, made in good faith, as to how the purposes will be achieved, nor how their organizations will be administered.' Generally, a state attorney general can pursue legal action against foundations in cases where charitable assets are in jeopardy (thus possibly violating donor intent), and in cases involving illegal actions." (quoting Waldemar A. Nielsen, *The Golden Donors: A New Anatomy of the Great Foundations* 13, 110 (1985))).

Instead, the AG took it upon himself to discontinue the court-appointed trustees' administration of the trust in accordance with their fiduciary responsibilities by settling the claims against the estate, and then proceeded to create an entirely new estate plan in which he has a direct role in the management and day-to-day operation of the Charitable Trust through the appointment, at will, of the managing trustee. Thus, the AG impermissibly crossed "the line between oversight and management" in this case. Brody, *supra*, at 974. Absent any claims of fraud or mismanagement, the trustees should have been permitted to probate the will in accordance with its terms or engaged in any settlement negotiations they deemed necessary to protect the assets of the estate. *Cf. Murphey v. Dalton*, 314 S.W.2d 726, 730–31 (Mo. 1958) ("And trustees of a public charitable trust, like trustees of a private trust, may bring actions against third persons to recover or preserve or protect the trust assets and may bring suits for instructions, and it should follow that they may take any reasonable action (including the defense of a will contest suit) necessary to uphold the validity of the trust established by a will and thereby protect and preserve the trust assets . . ."). When the AG hijacked the proceedings here, the case was nothing more than a run-of-the-mill will contest

(aside from the size of the estate).[35] The AG had no authority to act as the lawyer for the trust or the trustees by entering into this settlement agreement at the exclusion of the rightful fiduciaries. *See Murphey*, 314 S.W.2d at 730–31 (finding the trustee was empowered to hire outside counsel to defend a will contest and stating "the attorney general as the attorney for the public is not the attorney for the trustee of a public charitable trust who was appointed by the settlor, and that when and under what circumstances the attorney general is a necessary or proper party to a will contest or to any other suit involving a public charitable trust or when and under what circumstances he should or must bring such action, has nothing to do with the right of a trustee to be represented by counsel of his own choosing." (internal citations omitted)).

Furthermore, as noted by the majority, the testamentary documents, which are the guiding indicator of a testator's intent, absent a *court* finding otherwise, conferred upon the trust, acting through its trustees, and upon the estate, acting through the personal representatives, the power to compromise claims. Trust, Art. X(19); Will, ITEM VI; *see also Bob Jones Univ. v. Strandell*, 344 S.C. 224, 230, 543 S.E.2d 251, 254 (Ct. App. 2001) (citation omitted) ("In construing a will, a court's first reference is always to the will's language itself."); *Limehouse v.*

---

[35] Indeed, I question whether the AG has any role to play in a will contest. *See Com. ex rel. Ferguson v. Gardner*, 327 S.W.2d 947, 949 (Ky. 1959) ("The contention that the Attorney General should be permitted to intervene and participate as a party in the present type of will contest does not appeal to this court as being independently sound in principle. The object of the contest is to determine one issue, i. e. [sic], whether the papers probated are the last will and testament of Ed Gardner. If not, nothing was thereby devised, bequeathed, or created to go to charity, and there will be no administration to be supervised."); *Spang v. Cleveland Trust Co.*, 134 N.E.2d 586, 591 (Ohio Com. Pl. 1956) ("The object of this will contest proceeding is to determine one simple issue: Whether the paper writing is the last will and testament of the testatrix. If it is found not to be, then it never was the last will and testament; and nothing was bequeathed or devised by it, and nothing was created by it. The object of the proceeding is not primarily, if at all, to terminate a charitable trust. The will contest proceeding may result in the *nonexistence* of a *purported* trust created by a paper writing, having no recognition in law as a conveyancing, assigning, transferring, bequeathing or devising instrument." (emphasis in original)).

Limehouse, 256 S.C. 255, 257, 182 S.E.2d 58, 59 (1971) ("The court's aim in construing a Will is to discover and effectuate the expressed intention of the testator. In searching for intention, however, we may not conjecture how the testator might have chosen to express himself had his mind adverted to the particular contingency. Circumstances known to the testator at the execution of his Will are an admissible aid in construing doubtful provisions, but the main recourse must be to the language used. We may not redraft the Will, nor may we doctor a crucial part." (internal citations omitted)). There has not been a finding by any court concerning the validity of the will or the trust instruments. Therefore, the plain language of the testamentary documents only reinforces Appellants' claim that the AG overstepped his authority in this case.

In sum, the Court has rightly decided that the AG simply does not possess the sweeping and unprecedented authority he assumed in this case, perhaps best illustrated by the dearth of case law supporting the AG's position in our own jurisprudence. The AG orchestrated the fabrication of an entirely new estate plan under the auspices of his power to intervene in the litigation when settlement negotiations in this case should have been undertaken (or not) by the trustees as the rightful fiduciaries of the charitable trust, and not the AG. The AG, absent claims of fraud or mismanagement, has no right to interfere in the operation of a validly created testamentary trust based solely on his statutory authority to enforce a charitable trust.

> Where discretion is conferred on a charity's board, proper state enforcement action over fiduciary decision making reduces to a single rule: The role of the attorney general and courts is to guard against charity fiduciaries' wrongdoing, and not to interfere in decision making carried out in good faith . . . . To this end, an attorney general is vested with the authority to seek to correct breaches of fiduciary duty that have not otherwise been remedied by the board. However, the attorney general is not a "super" member of the board.

Brody, *supra*, at 1034.

Because the circuit court labored under the erroneous assumption that the AG had the right to control this litigation, failed to review the *bona fides* of the claims against the estate, and approved a settlement that was entirely unjust and

unreasonable based on the dubious claims of the contestants, I would further find that the circuit court erred in removing Appellants as fiduciaries of the estate based on the recommendation of the settling parties.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Andrew Lee Harrison, Appellant.

Appellate Case No. 2010-178686

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

Opinion No. 27228
Heard October 30, 2012 – Filed February 27, 2013

AFFIRMED

Janna A. Nelson of Greenwood, and Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General William M. Blitch, Jr., all of Columbia and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

CHIEF JUSTICE TOAL: Andrew Lee Harrison (Appellant) contends that the trial court erred in refusing to find that the penalty portion of section 56-5-1210 of the South Carolina Code offends the Eighth Amendment to the United States Constitution. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On the morning of September 27, 2009, Appellant picked up a 2003 Ford F-350 truck from Wilson's Auto Sales for detailing. Appellant drove the truck a short distance in Greenwood County on U.S. Route 25 (Highway 25), a highway comprised of two northbound and southbound lanes. Appellant travelled to Parson's Used Cars to perform the detailing work. At approximately 3:00 p.m., Appellant completed the detailing work and exited Parson's by making a right turn onto the southbound lane of Highway 25.

Gary Tims (the Victim) and Daniel Gantt were travelling on Highway 25 in the same direction as Appellant, and in the left lane. The Victim and Gantt were both riding motorcycles. Gantt rode approximately one "bike length" behind the Victim. Appellant entered Highway 25, but instead of utilizing the right lane, pulled his vehicle into the left lane. The Victim lost temporary control of his motorcycle and shifted to the right lane to avoid Appellant's vehicle. However, Appellant simultaneously switched to the right lane and the Victim struck the rear of Appellant's truck. The Victim's motorcycle "flipped over," and the Victim landed in the highway. Appellant did not stop, but continued driving on Highway 25. Gantt followed Appellant until Appellant pulled over approximately one-half mile from the accident. Gantt informed Appellant that the Victim was "laying [sic] down in the highway," and that Gantt did not know whether the Victim was "dead or alive." Appellant inspected the damage to the truck and stated that he did not possess a valid driver's license, because his driver's license had been suspended. Appellant agreed to return to the scene of the accident. However, once Gantt departed to return to the scene, Appellant travelled in the opposite direction. It is undisputed that Appellant never returned to the scene of the accident. Law enforcement officers later located Appellant hiding in the closet of a vacant house and placed him in custody.

The Greenwood County Grand Jury indicted Appellant for driving under suspension, in violation of section 56-1-0460 of the South Carolina Code and leaving the scene with death, in violation of section 56-5-1210 of the South Carolina Code. A jury convicted Appellant of both charges. The trial court sentenced Appellant to twenty years' imprisonment for leaving the scene with

death, and a concurrent sentence of six months' imprisonment for driving under suspension. Appellant argues that section 56-5-1210 is unconstitutional, and appealed his conviction pursuant to Rule 203(d), SCACR.

ISSUE PRESENTED

Whether the trial court erred in finding that the penalty portion of section 56-5-1210 of the South Carolina Code does not offend the Eighth Amendment's prohibition against cruel and unusual punishment.

STANDARD OF REVIEW

This Court has a very limited scope of review in cases involving a constitutional challenge to a statute. *Joytime Distrib. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 651 (1999). All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. *Davis v. Cnty. of Greenville*, 332 S.C. 73, 77, 470 S.E.2d 94, 96 (1996). A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt. *Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 62, 467 S.E.2d 739, 741 (1995).

LAW/ANALYSIS

Appellant argues that the trial court erred in refusing to find that the penalty provision of section 56-5-1210 of the South Carolina Code, and his sentence pursuant to that provision, violates the Eighth Amendment. We disagree.

The Eighth Amendment to the United States Constitution, which applies against the States by virtue of the Fourteenth Amendment, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Eighth Amendment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime. *Solem v. United States*, 463 U.S. 277, 284 (1983).

A. The Proportionality Principle

The United States Supreme Court first recognized a constitutional principle of proportionality in *Weems v. United States*, 217 U.S. 349 (1910). In that case the defendant had been convicted of falsifying a public document and sentenced to fifteen years of "cadena temporal," a type of imprisonment including hard labor in

chains, and permanent civil disabilities. *Id.* at 367. The Supreme Court held the punishment cruel and unusual because it was not graduated and proportioned to offense, and therefore violated the Eighth Amendment. *Id.* In *Robinson v. California*, 370 U.S. 660 (1962), the Supreme Court held a 90-day sentence for the crime of "addicted to the use of narcotics," excessive despite the fact that such a short sentence is not, in the abstract, cruel or unusual. *Id.* at 667. However, the Supreme Court looked at the actual nature of the crime in finding, "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[1] *Id.*

In *Solem v. Helm*, 463 U.S. 277 (1983), the Supreme Court applied the proportionality principle to a felony prison term. In that case, the defendant pled guilty to check fraud. *Id.* at 281. At the time of his conviction, South Dakota law provided for a maximum punishment of five years' imprisonment and a $5,000 fine. *Id.* However, the defendant was sentenced pursuant to the state's recidivist statute due to his six previous non-felony convictions. *Id.* (citing S.D. Codified Laws § 32-23-4 (1976)). The recidivist statute mandated that a defendant convicted of three prior felonies, in addition to the principal felony, receive life imprisonment. *Id.* at 281–82 ("The maximum penalty for a 'Class 1 felony' was life imprisonment in the state penitentiary and a $25,000 fine."). Following exhaustion of his state appeals, the defendant sought habeas relief. *Id.* at 283–84. The United States Court of Appeals for the Eighth Circuit held the defendant's sentence "grossly disproportionate to the nature of the offense," and ordered the District Court to issue the writ unless the State resentenced the defendant. *Id.* at 284. The Supreme Court affirmed, and provided "objective factors" to guide courts in reviewing the proportionality of sentences under the Eighth Amendment.

First, courts should look to the gravity of the offense and the harshness of the penalty. *Id.* at 290–91. Second, it may be helpful to compare the sentence to sentences imposed on other criminals in the same jurisdiction. *Id.* at 291. If more serious crimes carry the same penalty, or less serious penalties, then that is some indication that the punishment at issue may be excessive. *Id.* Third, courts may also compare the sentences imposed for the commission of the same crime in other

---

[1] Later, the Supreme Court applied the proportionality principle to hold capital punishment excessive in certain circumstances. *See Enmund v. Florida*, 458 U.S. 782, 798–801 (1982) (finding the death penalty an excessive punishment for felony murder when defendant did not take life, attempt to take life, or intend that life be taken or that lethal force be used); *Coker v. Ga.*, 433 U.S. 584, 592 (1977) (holding the death penalty excessive punishment for the crime of rape).

jurisdictions. *Id.* at 291–92 ("In *Enmund* [*v. Florida*, 458 U.S. 782 (1982)], the Court conducted an extensive review of capital punishment statutes and determined that 'only about a third of American jurisdictions would ever permit a defendant [such as Enmund] to be sentenced to die.'" (alterations in original)). The Court applied these objective criteria to the defendant's crime and found that he received the "penultimate sentence for relatively minor criminal conduct." *Id.* at 303 ("He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single state. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment.").

Solem appeared to stand for a continued, if not strengthened, Eighth Amendment prohibition against disproportional sentences. However, in *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Supreme Court narrowed, significantly at points, its proportionality guidance.

In *Harmelin*, the petitioner was convicted of possessing more than 650 grams of cocaine and sentenced to a mandatory term of life imprisonment without the possibility of parole. 501 U.S. at 961. The petitioner claimed that his sentence violated the Eighth Amendment because it was "significantly disproportionate" to the crime he committed, and because the sentencing court was statutorily required to impose the term of imprisonment without taking into account the particularized circumstances of the crime and of the criminal. *Id.* at 961–62.

Justice Scalia delivered the Court's decision in a four part opinion, and concluded that the Eighth Amendment contains no proportionality review. *Id.* at 965 ("We have addressed anew, and in greater detail, the question whether the Eighth Amendment contains a proportionality guarantee—with particular attention to the background of the Eighth Amendment (which *Solem* discussed in only two pages.)").

In Parts I and II of the opinion, Justice Scalia rejected the notion that the framers of the Federal Constitution intended the Eighth Amendment to prohibit disproportionate punishments. Justice Scalia noted specifically that state constitutions at the time contained such provisions, but the framers of the Federal Constitution specifically chose not to include such a guarantee. *Id.* 978–85 ("Both the New Hampshire Constitution, adopted 8 years before ratification of the Eighth Amendment, and the Ohio Constitution, adopted 12 years after, contain, in separate provisions, a prohibition of 'cruel and unusual punishments' . . . *and* a requirement

that 'all penalties ought to be proportioned to the nature of the offence.'" (emphasis in original)). In Part III of the opinion, Justice Scalia expressed his disapproval that 20th century Supreme Court jurisprudence did not directly reflect the idea that the Eighth Amendment does not contain a proportionality requirement. *Id.* at 990. Justice Scalia's point of view on this issue can be succinctly summarized: A sentence within statutory limits is not cruel and unusual punishment, but to the extent the Court applied a proportionality review to capital punishment, "death is different," and courts should "leave it there," and not extend it further. *Id.* at 992–93. In Part IV of the opinion, Justice Scalia analyzed the petitioner's claim that imposition of a severe punishment without consideration of mitigating factors, such as lack of prior felony convictions, constituted cruel and unusual punishment. *Id.* at 994. The Supreme Court had previously held that a capital sentence is cruel and unusual if it is imposed without an individualized determination that the punishment is "appropriate." *Id.* at 995. However, according to Justice Scalia, even a severe sentence, such as life without the possibility of parole, cannot compare with the finality and irrevocability of death. *Id.* at 995–96. Thus, the Supreme Court declined to extend the individualized sentencing analysis outside the capital context. *Id.*

Chief Justice Rehnquist joined Justice Scalia in Parts I–IV of the opinion. Justices Kennedy, O'Connor, and Souter joined Justice Scalia in Part IV of the opinion. Justice Kennedy wrote separately, concurring in part and concurring in the judgment. *Id.* at 996. Justice O'Connor and Justice Souter joined Justice Kennedy's concurrence. *Id.* Justices White, Marshall, Stevens, and Blackmun dissented. *Id.* at 1009–29.

Justice Kennedy's concurrence adhered to a narrow proportionality principle:

> All of these principles—the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors—inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.

Id. at 998, 1001 (citation omitted).

Justice Kennedy wrote that *Solem* did not announce a rigid three-part test, but instead considered comparative factors after analyzing the gravity of the offense and the harshness of the penalty.

> *Solem* is best understood as holding that comparative analysis within and between jurisdictions is not always relevant to proportionality review. The [*Solem*] Court stated that "it *may* be helpful to compare sentences imposed on other criminals in the same jurisdiction," and that "courts *may* find it useful to compare sentences imposed for commission of the same crime in other jurisdictions." It did not mandate such inquires.

Id. at 1004 ("In fact, *Solem* stated that in determining unconstitutional disproportionality, 'no one factor will be dispositive in a given case.'") (citation omitted). Thus, Justice Kennedy concluded:

> A better reading of our cases leads to the conclusion that intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.

Id. at 1005.

This Court has yet to definitively reconcile the *Solem* factors with *Harmelin*. In *State v. Jones*, 344 S.C. 48, 543 S.E.2d 541 (2001), the defendant challenged section 17-25-45 of the South Carolina Code. *See* S.C. Code Ann. § 17-25-45 (Supp. 2011) ("Life sentence for person convicted of certain crimes"). The defendant asserted, *inter alia*, that the statute constituted cruel and unusual punishment. *Id.* at 56, 543 S.E.2d at 544–45. We analyzed the defendant's claim pursuant to *Solem*, but acknowledged that this exercise may not have been necessary due to *Harmelin*:

> It is questionable, in light of the United States Supreme Court's opinion in *Harmelin v. Michigan*, whether the stringent three-factor *Solem* inquiry remains mandated in "cruel and unusual punishment" cases. However, we need not decide the matter here since, in our view, even the more stringent test of *Solem* is met in this case.

Id. at 56 n.11, 543 S.E.2d at 545 n.11 (citation omitted); *see State v. McKnight*, 352 S.C. 635, 652 n.7, 576 S.E.2d 168, 177 n.7 (2003) ("It is questionable, in light of the United States Supreme Court's opinion in *Harmelin v. Michigan*, whether the stringent three-factor *Solem* inquiry remains mandated in 'cruel and unusual punishment' cases." (citing *State v. Brannon*, 341 S.C. 271, 533 S.E.2d 345 Ct. App. 2000)).

However, we now hold that Justice Kennedy's concurrence is the controlling law of *Harmelin*, and represents a significant constraint on the *Solem* test. *See Hawkins v. Haggert*, 200 F.3d 1279, 1282 n.1 (10th Cir. 1999) ("The controlling position is the one 'taken by those Members who concurred in the judgments on the narrowest grounds.'") (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). The decisions of federal circuit courts addressing the proportionality principle reflect this view. *United States v. MacEwan*, 445 F.3d 237, 248 (3d Cir. 2006) ("Consequently, in assessing such a challenge, the first proportionality factor acts as a gateway or threshold. If the defendant fails to show a gross imbalance between the crime and the sentence, our analysis is at an end."); *McGruder v. Puckett*, 954 F.2d 313, 314 (5th Cir. 1992); *McCullough v. Singletary*, 967 F.2d 530, 535 (11th Cir. 1992) ("The Fifth Circuit held that if a determination was made that a sentence was grossly disproportionate after comparing the sentence to the offense, only then would the remaining *Solem* factors be considered. We agree with the *McGruder* analysis.") (citation omitted); *United States v. Bland*, 961 F.2d 123, 129 (9th Cir. 1992) ("We conclude that Justice Kennedy's view that the eighth amendment 'forbids only extreme sentences that are grossly disproportionate to the crime' is the rule of *Harmelin*."); *United States v. Hooper*, 941 F.2d 419, 422 (6th Cir. 1991) ("Hooper's ten-month jail term easily survives the 'narrow proportionality principle' applied by the *Harmelin* plurality, the opinion that is, we believe, binding upon us."); *United States v. Johnson*, 944 F.2d 396, 409 (8th Cir. 1991) (declining to find gross disproportionality and "in light of *Harmelin*," finding a proportionality review unnecessary); *see also Clark v. State*, 981 A.2d 710, 712 (Md. 2009) ("The submission invokes a two-step analysis. First, we must 'determine whether the sentence appears to be grossly disproportionate.' If so, then we should 'engage in a more detailed *Solem* [*v. Helm*, 463 U.S. 277 (1983)] type analysis.'") (citations omitted); *Dunaway v. Commonwealth of Virginia*, 663 S.E.2d 117, 132 (Va. 2008) ("Thus, we examine the sentence at issue in relation to the crime only for "gross disproportionality. Only if we find such gross disparity will we proceed further with the analysis.")[2]

[2] We note that the United States Court of Appeals for the Fourth Circuit appears to continue to apply the full *Solem* test:

We find that the foregoing authority demonstrates the proper articulation of proportionality review as discussed in *Harmelin* and *Somelin*. Thus, in analyzing proportionality under the Eight Amendment outside the capital context, South Carolina courts shall first determine whether a comparison between the sentence and the crime committed gives rise to an inference of gross disproportionality. If no such inference is present, the analysis ends. In the rare instance that this threshold comparison gives rise to such an inference, intrajurisdictional and interjurisdictional analysis is appropriate. Courts may then look to whether more serious crimes carry the same penalty, or more serious penalties, and the sentences imposed for commission of the same crime in other jurisdictions. Courts should use this comparative analysis to confirm the gross disproportionality inference, and not to develop an inference when one did not initially exist. *See Harmelin*, 501 U.S. at 1005 ("The proper role for comparative analysis of sentences, then, is to validate an initial judgment that a sentence is grossly disproportionate to a crime. This conclusion neither 'eviscerates' *Solem*, nor 'abandons its second and third factors.'"). Having articulated the proper framework for Eighth Amendment proportionality review, we turn to the facts of Appellant's case.

> It may be somewhat unclear, in light of the Supreme Court's decision in *Harmelin*, whether *Solem*'s three-part proportionality test is still relevant in noncapital cases. Indeed as noted above, the *Harmelin* Court issued three separate, and somewhat conflicting, opinions discussing the scope of the Eighth Amendment's proportionality guarantee, which ranged from a virtual repudiation of *Solem* . . . to a recognition of a "narrow" proportionality doctrine . . . to an explicit approval of *Solem* . . . . Despite the Court's conflicting opinions on the issue, however, the continuing applicability of the *Solem* test is indicated by the fact that a majority of the *Harmelin* Court either declined expressly to overrule *Solem* or explicitly approved of *Solem*.

United States v. Kratsas, 45 F.3d 63, 67 (4th Cir. 1995) (rejecting the defendant's claim that a sentence of life without parole for conspiracy to distribute and possession with intent to distribute five kilograms or more of cocaine is disproportionate punishment under the Eighth Amendment). However, Justice Kennedy's concurrence explicitly narrowed *Solem*. Thus we decline to follow the Fourth Circuit's precedent regarding *Solem* and *Harmelin*.

B. Proportionality of Section 56-5-1210

Under section 56-5-1210 of the South Carolina Code, the driver of a vehicle involved in an accident resulting in injury or death must immediately stop their vehicle at the scene of the accident or as close to the accident as possible. S.C. Code Ann. § 56-5-210(A) (2006). In the event that death occurs from the accident, a person who fails to stop or comply with the requirements of section 56-5-1210 is guilty of a felony. *Id.* § 56-5-1210(A)(3). Upon conviction, the defendant must be imprisoned for at least one year, but not more than twenty-five years, and fined between $10,000 and $25,000 dollars. *Id.*

Appellant argues that the gravity of the offense in this case is not proportionate to the severity of the punishment. According to Appellant, "the unlawful conduct is the same whether leaving the accident scene results in property damage to an unattended vehicle or death of another party involved in the accident." Additionally, Appellant avers that the statute does not require a defendant to have caused the accident to be charged with leaving the scene, "and the penalty adjusts based on the result rather than on the underlying conduct of leaving." Appellant may raise valid points demonstrating the statutes possible weaknesses. However, the proper inquiry is not whether the General Assembly crafted the most *correct* or *just* scheme to address the covered conduct, but instead whether the General Assembly could rationally conclude that the conduct poses a risk substantial enough to support the penalty portion of the statute.

In 1996, the General Assembly amended section 56-5-1210 to provide for the current penalties for leaving the scene of the accident where death occurs. The alarming facts regarding South Carolina road and vehicle safety support the General Assembly's decision to allow a possibly severe penalty in the event an individual decides to leave the scene of an accident in which death results. In 1995, South Carolina had over 125,000 automobile collisions, and 882 of those collisions resulted in death. SOUTH CAROLINA BUDGET AND CONTROL BOARD, South Carolina Statistical Abstract, South Carolina Traffic Collisions, Fatalities, Non-Fatal Injuries, Mileage Death Rate and Vehicle Miles of Travel (1970-2005), *available at* http://abstract.sc.gov/chapter16/transport6.php. The next year, there were over 120,000 collisions, and 930 deaths related to those collisions. *Id.* Over the next ten years, the number of collisions per year fell below 100,000 only once, and the number of fatalities remained constant at over 900 per year. *Id.*

More recent statistics demonstrate an equally troubling picture. In 2006, South Carolina tied for fifth worst in the nation in terms of traffic fatalities per 100

million vehicle miles. UNITED STATES CENSUS BUREAU, http://www.census.gov/statab/ranks/rank39.html (last visited Oct. 24, 2012). According to the South Carolina Department of Public Safety, approximately 106,864 automobile accidents occurred in South Carolina in 2009, and of those, 48,303 resulted in non-fatal injury and 894 resulted in death. SOUTH CAROLINA TRAFFIC COLLISION FACT BOOK (2009), *available at* http://www.scdps.gov/ohs/2009TrafficCollisionFactBook.pdf. In 2009, forty-two percent of all traffic deaths in South Carolina resulted from driving under the influence of alcohol. *Id.* at 76. Only two states in the nation reported higher totals. *Id.* This limited summary alone supports the General Assembly's decision to create a statute that deters individuals from leaving the scene of a vehicular accident.

The structure of the statute itself addresses Appellant's argument. Section 56-5-1210 gives the trial court broad discretion to account for the unique facts and circumstances of individual cases. If an individual leaves the scene of the accident, the conduct is technically the same, whether property damage or death results. However, the statute does not provide the same *penalty* for that conduct. *See* S.C. Code Ann. § 56-5-1210(A)(1)–(3) (2006). Depending on the circumstances of the particular accident, the trial court may choose to sentence a defendant to as little as one year in jail, even if death occurs. *Id.* § 56-5-1210(A)(3).

However, Appellant's actions appear to be just the type the General Assembly intended to punish when enacting section 56-5-1210. Appellant operated a motor vehicle without a driver's license. He negligently placed that vehicle in front of the Victim so that he was unable to avoid a collision. Subsequently, Appellant did not stop to consider the accident at all until a third party followed him some distance down the road. Appellant expressed more concern regarding possible damage to his vehicle than to the Victim, and refused to return to the scene of the crime. In sum, Appellant caused an accident, left the scene of that accident, and when confronted with the possibility that the other party to the accident had been severely injured or killed, refused to return to the scene of the accident. Despite Appellant's reprehensible behavior, the trial court did not sentence him to the maximum punishment under the statute.

The trial court balanced Appellant's behavior, prior criminal history, and absence of intent:

> I understand that there was no intent to cause this accident, I understand that you did not set out on this particular day to injure [the Victim] or anyone else, for that matter. The inescapable fact, though .

> . . is that in reality you caused this accident by being present where you had no business to be and that you were driving a car, sir . . . . I also have to consider your criminal history. I count [twenty-seven] offenses. A lot of these, I agree with your attorney, they happened when you were young and I understand . . . how young people can make mistakes . . . I just can't disregard it . . . because you have demonstrated over and over again a pattern of being unable to not only obey the law but to stay out from behind the wheel of a car . . . . It is my job to take all of this into consideration and work out some sort of calculation, and I'm not all unsympathetic to the arguments of counsel that you are being punished far in excess.

The trial court's statements at sentencing are the very embodiment of proportionality, and the court performed the analysis envisioned by the statute's broad penalty provision and in sentencing Appellant based on the facts and circumstances of the case. It is inexplicable that a statute's provisions which give a trial court the discretion to sentence the defendant in proportion to the circumstances of the case, could be found to give rise to an inference of gross disproportionality.

The United States Supreme Court has explicitly recognized that the legislature has the power to define criminal punishments without giving the courts any sentencing discretion. *See, e.g.*, *Chapman v. United States*, 500 U.S. 453, 467 (1991); *see also Harmelin*, 501 U.S. at 1006 ("To set aside petitioner's mandatory sentence would require rejection not of the judgment of a single jurist, as in *Solem*, but rather the collective wisdom of the Michigan Legislature, and, as a consequence, the Michigan citizenry. We have never invalidated a penalty by a legislature based only on the length of a sentence . . . we should do so only in the most extreme circumstances."). Courts do not have to accept the wisdom of a legislature's sentencing scheme, but merely accept the fact that arguments for or against a particular sentencing scheme are for the legislature to resolve. *See Harmelin*, 501 U.S. at 1007–08 (questioning the actual deterrent effect of the law's mandatory scheme, but refusing to find that it had no chance of success).

Based on the foregoing analysis, we find that the General Assembly could rationally conclude that leaving the scene of an accident where death results poses a risk substantial enough to support the penalty portion of the statute. Thus, we hold that the penalty provision of section 56-5-1210 is not grossly disproportionate to the offense, and no further review is necessary. *See Futch v. McAllister Towing of Georgetown*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate

court need not review remaining issues when its determination of a prior issue is dispositive of the appeal). However, we continue our discussion to provide guidance on this previously unfamiliar analysis for the benefit of the bench and bar. *See, e.g.*, *Harris v. Anderson Cnty. Sheriff's Office*, 381 S.C. 357, 364, 673 S.E.2d 423, 427 (2009) ("We broach this subject for the benefit of the bench and bar, as some adhere to the belief that section 47–3–110 liability against a dog owner incorporates negligence principles.").

i. Intrajurisdictional Comparisons

Appellant argues that the penalty imposed under section 56-5-1210 is greater than the penalty that can be imposed for more serious crimes under South Carolina law. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. *Solem*, 463 U.S. at 291.

In *Solem*, where the defendant had been sentenced to a life sentence without parole for habitual nonviolent offenses, the Supreme Court considered the sentences that could be imposed on other criminals within the same jurisdiction. *Id.* at 298. The Court found that:

> In sum, there were a handful of crimes that were necessarily punished by life imprisonment: murder, and, on a second or third offense, treason, first degree manslaughter, first degree arson, and kidnapping. There was a larger group for which life imprisonment was authorized in the discretion of the sentencing judge. Finally, there was a large group of very serious offenses for which life imprisonment was not authorized, including a third offense of heroin dealing or aggravated assault.

Id. at 298–99. Based on this review, the Court found that the defendant had been treated "in the same manner as, or more severely than," criminals who committed far more serious crimes. *Id.* at 299.

Review of analogous provisions under the South Carolina Code tends to support the notion that section 56-5-1210 provides a penalty substantially similar to more serious offenses. For example, section 56-5-2910 of the South Carolina Code covers reckless vehicular homicide. That statute provides in pertinent part:

> When the death of a person ensues within three years as a proximate result of injury received by the driving of a vehicle in reckless disregard of the safety of others, the person operating the vehicle is guilty of reckless vehicular homicide. A person who is convicted of, pleads guilty to, or pleads nolo contendere to reckless vehicular homicide is guilty of a felony, and *must be fined not less than one thousand dollars nor more than five thousand dollars or imprisoned not more than ten years or both.*

S.C. Code Ann. § 56-5-2910 (Supp. 2012) (emphasis added).

Section 56-5-2945 of the South Carolina Code mirrors section 56-5-1210's penalty provision, but for what is arguably a much more serious crime. Section 56-5-2945 covers the offense of felony driving under the influence, and provides in pertinent part:

> (A) A person who, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, drives a motor vehicle and when driving a motor vehicle does any act forbidden by law or neglects any duty imposed by law in the driving of the motor vehicle, which act or neglect proximately causes great bodily injury or death to a person other than himself, is guilty of the offense of felony driving under the influence and, upon conviction, must be punished:
>
> (1) by a mandatory fine of not less than five thousand one hundred dollars or more than ten thousand one hundred dollars and mandatory imprisonment for *not less than thirty days nor more than fifteen years when great bodily injury results*;
>
> (2) by a mandatory fine of not less than ten thousand one hundred dollars nor more than twenty-five thousand one hundred dollars and mandatory imprisonment for *not less than one year nor more than twenty-five years when death results*.

S.C. Code Ann. § 56-5-2945 (Supp. 2011) (emphasis added). Thus, an individual who causes the death of another either through reckless driving or driving while intoxicated may face the same or similar punishment as someone who leaves the

scene of an accident where death results. However, a person convicted of involuntary manslaughter, a crime requiring a showing of criminal negligence, may be imprisoned for no more than five years.[3] At first glance, this appears to be the very type of constitutionally impermissible disproportionality observed in *Solem*. Essentially, one could argue that an individual who leaves the scene of a deadly accident for which they are technically not "at fault," could receive a harsher penalty than someone who acts with reckless intent and a proven careless disregard for the safety of others.

Harmelin cautions against drawing such conclusions based on bare comparisons. According to Justice Kennedy, one of the key limits on proportionality review is that the fixing of prison terms for specific crimes involves a substantial penological judgment, a judgment not best exercised by the courts. *Harmelin*, 501 U.S. at 998. In addition, the efficacy of any sentencing system cannot be assessed absent agreement about the purposes and objectives of the penal system. *Id.* at 998–1000. The responsibility for making these fundamental choices and implementing them lies with the legislature. *Id.* at 999–1000. The General Assembly's sentencing scheme reflects the complexity of circumstances arising from dangerous traffic offenses, and allows the entity in the best position to assess the evidence, the trial court, discretion in determining the appropriate punishment. It is not irrational to conceive of a scenario in which leaving the scene of an accident resulting in death might call for a greater punishment than causing a death due to felony driving under the influence. Thus, we refuse to conclude that the General Assembly must ignore valid factual and policy considerations in favor of abstract notions of proportionality.[4]

Moreover, offenders sentenced under section 56-5-1210 are not necessarily subject to a harsher punishment than criminals convicted of more serious crimes. The sentencing scheme merely allows the trial court discretion in balancing the many factors at play in cases where operation of a motor vehicle results in death. Our analysis does not stand for the proposition that this Court cannot properly draw a line between certain penalties, and decide that one penalty violates the Eighth Amendment while another does not. *See Solem*, 463 U.S. at 294

---

[3] *See* S.C. Code Ann. § 16-3-60 (2003).

[4] The General Assembly may have concluded, for example, that an individual, who acted negligently, perhaps in the involuntary manslaughter context, deserves a lighter sentence than someone in Appellant's case who caused a death by purposeful conduct, and then refused to even acknowledge the resulting chaos.

("Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts."). However, in the instant case, the question before the Court is not one of fixed penalties. Instead, this Court is asked to draw a line which says that the General Assembly should give trial courts sentencing discretion with regard to some crimes and not others. This type of determination, and the conflicting interests and disagreements of discretion and sentencing, are strictly questions of legislative policy. *See Harmelin*, 501 U.S. at 998–99 ("Thus 'reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.'"). An intrajurisdictional comparison in this case could not support an inference of gross disproportionality.

ii. Interjurisdictional Comparisons

Courts conducting a proportionality review may find it useful to compare the sentences imposed for commission of the crime in other jurisdictions. In *Enmund v. Florida*, 458 U.S. 782, 801 (1983), the Supreme Court held that the death penalty was excessive for felony murder when the defendant did not take life, attempt to take life, or intend that life be taken or that lethal force be used. In that case, the Court conducted an extensive review of capital punishment statutes and determined that "only about a third of American jurisdictions would ever permit a defendant [such as the defendant] to be sentenced to die." *Id.* at 792. Here, Appellant argues that other states impose less severe penalties for the leaving the scene of an accident where death results, and the majority of the country believes that a penalty of ten years or less is appropriate for the offense in question. However, a review of those penalties merely demonstrates constitutionally permissible differences in the way different states choose to approach similar issues.

For example, Appellant cites section 40-6-270 of the Georgia Code which addresses the duty of a driver in accidents involving personal injury or death. That statute provides in pertinent part:

> (a) The driver of any vehicle involved in an accident resulting in injury to or the death of any person or in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of the accident or shall stop as close thereto as possible and forthwith return to the scene of the accident . . . .

> (b) If such accident is the proximate cause of death or a serious injury, any person knowingly failing to stop and comply with the requirements of subsection (a) of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years.

Ga. Code Ann. § 40-6-270 (2011). However, depending on the circumstances of the offense the penalty can rise to between three and fifteen years' imprisonment pursuant to section 40-6-393 of the Georgia Code:

> (b) Any driver of a motor vehicle who, without malice aforethought, causes an accident which causes the death of another person and leaves the scene of the accident in violation of subsection (b) of Code Section 40-6-270 commits the offense of homicide by vehicle in the first degree and, upon conviction thereof, shall be punished by imprisonment for not less than three years nor more than 15 years.

Id. § 40-6-393 (2011). The sentencing range of section 56-5-1210 is not substantially different than the penalty provided for by statute in neighboring Georgia.

Sentences for offenses similar to Appellant's vary from jurisdiction to jurisdiction. Some states provide a lesser penalty than South Carolina. For example, Delaware and Kentucky provide for a maximum five year sentence for the offense. *See* Del. Code Ann. Title 21, §§ 4202–05 (2005 & Supp. 2010); Ky. Rev. Stat. Ann. §§ 189.580, 189.990 (Lexis-Nexis 2009 & Supp. 2012), 532.020 (Lexis-Nexis 2008). Offenders convicted in Maryland or Virginia may receive no more than ten years' imprisonment. *See* Md. Code Ann., Transportation, § 20–102; 27–113(c) (Lexis-Nexis 2009); Va. Code Ann. § 46.2-894 (2010), 18.2–10 (2009). In Michigan and Nevada, an offender may receive up to fifteen years' imprisonment. *See* Mich. Comp. Laws Ann. § 257.617 (West 2005); Nev. Rev. Stat. Ann. § 484E.010 (Lexis-Nexis 2010). However, Nebraska provides a maximum sentence of twenty years' imprisonment, and the Wisconsin statute provides the same twenty-five year maximum as section 56-5-1210 of the South Carolina Code. *See* Neb. Rev. Stat. §§ 60-697, 60-698 (Supp. 2011), 28-105 (2008); Wash. Rev. Code Ann. §§ 346.67 (West 1998), 346.74 (West Supp. 2012), 939.50 (West 2003). These varying sentencing schemes are indicative of different legislative determinations and policy choices, but certainly not disproportionality.

The Eighth Amendment does not mandate adoption of a national penological theory. *Harmelin*, 501 U.S. at 999. Different governments will inevitably attach differing weights to the traditional penological goals of retribution, deterrence, incapacitation, and rehabilitation. *See id.* (citing *Mistretta v. United States*, 488 U.S. 361, 363–66 (1989); *Williams v. N.Y.*, 337 U.S. 241, 248 (1949)). Diverse attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes. *Id.* (citing *Rummel v. Estelle*, 445 U.S. 263, 274 (1980)). The simple fact that a state may have the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate. *Id.* We find Justice Scalia's observation in *Harmelin* instructive:

> That a State is entitled to treat with stern disapproval an act that other States punish with the mildest of sanctions follows *a fortiori* from the undoubted fact that a State may criminalize an act that other States do not criminalize at all. Indeed, a State may criminalize an act that other States choose to reward—punishing, for example, the killing of endangered wild animals for which other States are offering a bounty. What greater disproportion could there be than that? "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." Diversity not only in policy, but in the means of implementing policy, is the very raison d'être of our federal system.

Id. at 989–90 (emphasis in original) (citations omitted). In preserving the narrow proportionality principle in *Harmelin*, the Supreme Court adhered to the notion expressed in previous cases that severity alone does not render a sentence grossly disproportionate:

> By contrast, *Rummel* and *Davis*, decisions in which the Court upheld sentences against proportionality attacks, did not credit such comparative analyses. In rejecting this form of argument, *Rummel* noted that "even were we to assume that the statute employed against *Rummel* was the most stringent found in the 50 states, that severity hardly would render *Rummel*'s punishment "grossly disproportionate" to his offenses. *Id.* at 1005 (holding that intra-jurisdictional and inter-jurisdictional analyses are appropriate only in the rare cases in which

a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality).

Appellant fails to demonstrate that section 56-5-1210's penalty provision is the harshest in the United States. But, even if he could, that fact alone would not render his punishment grossly disproportionate. Thus, an interjurisdictional analysis does not demonstrate that section 56-5-1210 provides a penalty that is significantly harsher than other states, or that is unsupported by reasonable and rationally related policy objectives.

Appellant requests this Court to draw new and impermissible lines, (1) instructing the General Assembly how and when to allow trial court discretion in sentencing and (2) directing the General Assembly adopt a sentencing structure in uniformity and harmony with an undefined number of states. This runs counter to the well-accepted principle that, in analyzing proportionality, reviewing courts must grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes. *See Solem*, 463 U.S. at 290.

CONCLUSION

When the proportionality principle jurisprudence is applied to section 56-5-1210 it is not evident that its repugnance to the constitution is clear beyond a reasonable doubt. *See Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 62, 467 S.E.2d 739, 741 (1995). Thus, we affirm the trial court's conclusion that section 56-5-1210 of the South Carolina Code is constitutional.

AFFIRMED.

BEATTY, KITTREDGE, AND HEARN, JJ., concur. PLEICONES, J., concurring in result only.

The Supreme Court of South Carolina

In the Matter of William J. McMillian, III, Respondent.

Appellate Case No. 2013-000346

ORDER

On January 29, 2013, respondent was charged with breach of trust with fraudulent intent involving $2,000 or less. As a result, the Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(a) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

s/ Costa M. Pleicones J.

Columbia, South Carolina

February 22, 2013

The Supreme Court of South Carolina

In the Matter of William Joseph Cutchin, Respondent.

Appellate Case No. 2013-000324

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

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

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Giampiero P. Diminich, Esquire, has been duly appointed

by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Diminich's office.

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

s/ Costa M. Pleicones J.

Columbia, South Carolina

February 22, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Diane Bass and Otis Bass, Individually and as Parents and Guardians of Alex B., a minor under the age of ten (10) years, and Hanna B., a minor under the age of ten (10) years, Respondents,

v.

South Carolina Department of Social Services, Appellant.

Appellate Case No. 2011-195866

Appeal From Fairfield County
R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 5093
Heard January 9, 2013 – Filed February 27, 2013

REVERSED

Patrick J. Frawley, of Davis, Frawley, Anderson, McCauley, Ayer, Fisher & Smith, LLC, of Lexington, for Appellant.

Lee Deer Cope, of Peters, Murdaugh, Parker, Eltzroth & Detrick, PA, of Hampton, and John K. Koon and Jamie L. Walters of Koon & Cook, P.A., of Columbia, for Respondents.

THOMAS, J.: This tort case involves the placement of Otis and Diane Bass's minor children by the South Carolina Department of Social Services (DSS) after the children became ill. The Basses alleged DSS failed to conduct a thorough investigation before deciding to remove the children from their custody. DSS admitted the investigation was not thorough, but argued its involvement with the family showed at least slight care. In a general verdict, the jury found for the Basses on both their gross negligence and intentional infliction of emotional distress causes of action. DSS appeals the denial of its motion for JNOV, arguing the trial court erred in holding jury questions existed as to whether: (1) DSS was grossly negligent in investigating the family; (2) the Basses voluntarily participated in the children's relative placement; and (3) DSS was liable under an intentional infliction of emotional distress theory. We reverse.

FACTS AND PROCEDURAL HISTORY

On April 30, 2008, Diane Bass refilled her children's prescription at Long's Drugs. Unbeknownst to anyone at the time, the pharmacist mixed the prescription at a concentration of over one thousand times the prescribed strength. When the Basses administered the medication to their children on May 15, 2008, two children became sick, resulting in their hospitalization. DSS responded to the hospital after receiving a report of a potential parental poisoning. Within twenty-four hours, the Basses signed a document entitled "Safety Plan," in which the Basses agreed their children would reside with a relative, Linda Sims. On June 17, 2008, an insurance representative contacted DSS and indicated the children's prescription may have been filled at too strong a dose. As a result, DSS returned the children to the Basses on June 25, 2008.

The Basses filed a complaint against DSS, Long's Drugs, and the pharmacist who filled the prescriptions. After settling with Long's Drugs and the pharmacist, the Basses filed an amended complaint solely against DSS. The amended complaint raised three causes of action: (1) defamation; (2) gross negligence; and (3) intentional infliction of emotional distress. The gross negligence and intentional infliction of emotional distress claims alleged DSS was grossly negligent and reckless, respectively, in placing the children in DSS custody without properly investigating the claims against the Basses.

DSS answered and denied the Basses' claims. Specifically, DSS affirmatively alleged DSS took appropriate steps to secure the safety of the children and the

Basses voluntarily signed the Safety Plan to place the children with a relative. DSS also raised as an affirmative defense that the harm caused to the Basses was caused by Long's Drugs's intervening negligence as a third party.

Monique Parish, the DSS caseworker assigned to the Basses, testified by deposition at trial. According to Parish, she responded to the hospital forty-five minutes after receiving the initial complaint against the Basses. Parish further testified she retrieved the children's lab results when she arrived at the hospital, but they were inconclusive as to poisoning. Parish, however, did admit she never talked to a doctor about the poisoning during her initial investigation. Parish also explained she met with the Basses when she responded to the hospital, gave them a brochure explaining the investigation, and had them sign releases concerning the children's medical information. The Basses' expert in child protection services, Michael Corey, opined during trial that Parish did not exercise slight care in conducting her investigation.

After the Basses rested their case, DSS moved for directed verdicts on all causes of action. DSS argued the Basses failed to present any evidence of gross negligence and all of the evidence presented showed DSS exercised slight care. The Basses further asserted they were entitled to a directed verdict on the intentional infliction of emotional distress claim because the South Carolina Tort Claims Act (the Act) excludes "intentional infliction of emotional harm" from the definition of a recoverable loss. The trial court denied the motions. DSS renewed its motion at the close of its case, which the trial court denied.[1]

The jury returned a verdict against DSS, finding DSS liable to the Basses in the amount of $4,000,000. DSS made various post-trial motions. DSS first moved for a JNOV on the same grounds set forth in its directed verdict motion during trial. DSS also moved for a JNOV because the Basses voluntarily agreed to the placement of their children with relatives after having been advised of their legal rights. DSS further asked the trial court to reduce the verdict to $140,000 due to a lack of evidence indicating either the parents or children were damaged in any appreciable way by the placement. In the alternative, DSS sought to have the verdict reduced to $600,000 as provided by the Act's statutory cap.

[1] The Basses withdrew their defamation claim at this time.

The trial court granted DSS's motion to reduce the verdict to $600,000, but denied the JNOV motions. First, the trial court found evidence in the record existed from which a jury could decide DSS did not exercise slight care before removing the children. Second, the trial court found the Act does not preclude recovery for intentional infliction of emotional distress claims so long as the conduct underlying the claim constitutes recklessness. Additionally, the trial court found the lack of any investigation by DSS before the removal and "the unique circumstances of the family and the hospitalization of the children," could support a finding that DSS recklessly inflicted emotional distress on the Basses. This appeal followed.

ISSUES ON APPEAL

I. Did the trial court err in denying DSS's JNOV motion on the gross negligence cause of action?

II. Did the trial court err in denying DSS's JNOV motion because the record does not support a finding that the children's placement was involuntary?

III. Did the trial court err in denying DSS's JNOV motion on the intentional infliction of emotional distress cause of action?

STANDARD OF REVIEW

"In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). "The trial court can only be reversed by this [c]ourt when there is no evidence to support the ruling below." *Jinks v. Richland Cnty.*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003).

ANALYSIS

I. Gross Negligence

DSS argues the trial court erred in denying its JNOV motion on the gross negligence cause of action because no evidence in the record showed DSS was grossly negligent in placing the children. We agree.

"The governmental entity is not liable for a loss resulting from . . . responsibility or duty . . . except when the responsibility or duty is exercised in a grossly negligent manner." S.C. Code Ann. § 15-78-60(25) (2005). Gross negligence is proved by demonstrating the "intentional conscious failure to do something which is incumbent upon one to do or the doing of a thing intentionally that one ought not to do," or "the failure of slight care." *Jinks*, 355 S.C. at 345, 585 S.E.2d at 283. It has also been defined as the absence of care that is necessary under the circumstances. *Id.* Whether a defendant's actions are grossly negligent is ordinarily a mixed question of law and fact. *Id.*

Within twenty-four hours of receiving a report of suspected child abuse or neglect, "[DSS] must begin an appropriate and thorough investigation to determine whether a report of suspected child abuse or neglect is 'indicated' or 'unfounded.'" S.C. Code Ann. § 63-7-920(A)(1) (2010); *see also Jensen v. S.C. Dep't of Soc. Servs.*, 297 S.C. 323, 331-32, 377 S.E.2d 102, 106-07 (Ct. App. 1988) (holding the sections mandating DSS investigate and intervene to remove an endangered child from the home create a special duty).

Based on the evidence in the record, we hold the trial court erred in denying DSS's motion for a JNOV on the Basses' gross negligence cause of action. Initially, the record indicates Parish responded to the hospital within forty-five minutes of the reported parental poisoning. Parish testified the children were classified as a medium danger rating, allowing Parish merely twenty-four hours to conduct her investigation, pursuant to DSS policy. We find this time constraint, which has been specifically recognized by our supreme court, to be particularly important in our determination. *See Spartanburg Cnty. Dep't of Soc. Servs. v. Little*, 309 S.C. 122, 125, 420 S.E.2d 499, 501 (1992) (declining to award attorney's fees against DSS in a child abuse and neglect case because "DSS often must act quickly and without thorough investigation to remove children who may have been abused or neglected from potentially dangerous situations"). In that time, Parish interviewed family members and learned the children became sick after Mrs. Bass administered their medicine. Parish also obtained the Basses' consent to have the children's medical information released to DSS. Although it was ultimately inconclusive, Parish further obtained the children's toxicology report. While far from perfect, there is no evidence in the record indicating DSS failed to exercise slight care.

The Basses contend Michael Corey's expert opinion that DSS failed to exercise slight care is sufficient to defeat DSS's motion for JNOV. During his testimony,

Corey opined DSS failed to exercise slight care and prefaced his opinion on DSS's duty to investigate the allegations of abuse and neglect. The record, however, is devoid of any indication that Corey in any way took into account the expediency with which DSS must investigate claims of abuse and neglect. Consequently, Corey failed to establish his opinion was based upon a proper statement of DSS's duty; therefore, it could not, without more, defeat DSS's motion for JNOV. *Cf. Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 289, 701 S.E.2d 742, 749 (2010) (finding an expert's testimony insufficient to defeat a motion for summary judgment when the expert failed to predicate his testimony on the correct standard of care). Accordingly, we hold the trial court erred in denying DSS's motion for a JNOV as to the gross negligence cause of action.

II. Voluntary Placement

DSS argues the trial court erred in denying its JNOV motion because the Basses voluntarily participated in the placement of the children. Only grounds raised in a directed verdict motion, however, can be properly reasserted in a motion for a JNOV. *In re McCracken*, 346 S.C. 87, 93, 551 S.E.2d 235, 238 (2001); *see also RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 171 (2012) ("A motion for a JNOV is merely a renewal of the directed verdict motion."). DSS never argued it was entitled to a directed verdict based on the Basses' voluntary placement of the children; therefore, DSS cannot properly raise this issue. Even if properly raised, this issue would still not be preserved for review because the trial court never made any sort of ruling with respect to the Basses' voluntariness in its order denying DSS's JNOV motion. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 643 (2011) (noting an issue must be raised to and ruled upon by the trial court to be preserved for appellate review). Thus, we decline to address this issue because it is not preserved for our review.

III. Intentional Infliction of Emotional Distress

DSS argues the trial court erred in denying its JNOV motion on the Basses' intentional infliction of emotional distress claim. We agree.

To recover under an intentional infliction of emotional distress theory, a plaintiff must establish

(1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct;

(2) the conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;"

(3) the actions of the defendant caused plaintiff's emotional distress; and

(4) the emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could expect to endure it."

Argoe v. Three Rivers Behavioral Health, L.L.C., 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011) (quoting *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 356, 650 S.E.2d 68, 70 (2007)). During trial and in their complaint, the Basses asserted their intentional infliction of emotional distress claim was based on DSS's reckless rather than intentional conduct. South Carolina courts have long recognized that an individual's negligent conduct can be so gross as to amount to recklessness. *See Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011); *Jeffers v. Hardemann*, 231 S.C. 578, 582, 99 S.E.2d 402, 404 (1957). The juxtaposition of this principle mandates an individual's conduct cannot be reckless where it was not at least grossly negligent. *See also* 18 S.C. Jur. Negligence § 9 (2012) ("Recklessness is a higher degree of negligence than gross negligence."). Thus, based on our prior determination that DSS was not grossly negligent in investigating the Basses' case, DSS's conduct was not reckless as a matter of law. Accordingly, the trial court erred in denying DSS's motion for a JNOV.

CONCLUSION

Based on the foregoing, we reverse the trial court's denial of DSS's motions for JNOV on the Basses' gross negligence and intentional infliction of emotional distress causes of action.

REVERSED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Neeltec Enterprises, Inc. d/b/a Fireworks Supermarket, Appellant,

v.

Willard Long d/b/a Foxy's Fireworks, and d/b/a Fireworks Superstore, Respondent.

Appellate Case No. 2008-101646

Appeal From Colleton County
A. Victor Rawl, Special Referee

Opinion No. 5094
Heard December 10, 2012 – Filed February 27, 2013

REVERSED AND REMANDED

Robert J. Thomas and Robert P. Wood, both of Rogers Townsend & Thomas, PC, of Columbia, for Appellant.

Bert Glenn Utsey, III, of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Walterboro, for Respondent.

KONDUROS, J.: Neeltec Enterprises, Inc., d/b/a Fireworks Supermarket, filed a complaint alleging violation of the South Carolina Unfair Trade Practices Act (SCUTPA) against Willard Long, d/b/a Foxy's Fireworks and d/b/a Fireworks Superstore. After hearing Long's motion for summary judgment or, in the alternative, a substitution of parties, the special referee filed an order directing two

corporations be substituted as defendants instead of Long. Neeltec appeals arguing the special referee erred in substituting the corporations because Long was responsible for his employees' actions. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

Neeltec owns and operates a fireworks store called Fireworks Supermarket off of I-95 in Walterboro. According to Neeltec, it advertises heavily with billboards along northbound I-95. Neeltec asserted Long opened and operated a competing fireworks store next to Fireworks Supermarket and closer to the interstate exit. Neeltec averred Long changed his store's sign to read "Fireworks Superstore" in early 2006 to capitalize on Neeltec's advertising. After Neeltec repainted its outside wall facing I-95 with an advertising display, Neeltec contended Long placed a forty-five-feet-long, nine-feet-tall storage container on the front of Long's property, substantially blocking the view of Neeltec's store.

In June of 2006, Neeltec filed a complaint against "Willard Long, d/b/a Foxy's Fireworks, and d/b/a Fireworks Superstore," alleging Long violated the SCUTPA by employing unfair and deceptive acts or practices and unfair methods of competition. Neeltec claimed Long's acts "have damaged, threaten to damage, and continue to damage" Neeltec's business by reducing sales. Neeltec requested actual, punitive, and statutory treble damages as well as attorney's fees and costs.

Long's answer stated a South Carolina corporation named Hobo Joe's, Inc. originally opened a store, named it "Foxy's Fireworks," and later changed the sign on the store to "Fireworks Super Store." Long admitted Hobo Joe's, Inc. placed a storage container in front of its store. Long stated Neeltec had sued the wrong party, and he consented to the substitution of the proper defendant. By way of a counterclaim, Long argued Neeltec's actions constituted a public nuisance.

Neeltec served and filed a motion to amend the complaint and motion for a temporary injunction. The motion to amend was granted. In June of 2007, the case was referred to a special referee, who declined to issue the injunction. In August of 2007, Long served and filed a motion for summary judgment or, in the alternative, a substitution of parties.

Long's motion asserted (1) Long did not individually own the Fireworks Superstore; (2) Hobo Joe's, Inc. owned the store when the action began; (3) Fox's

Fireworks Superstore, Inc. now owned the store; (4) Neeltec did not assert a claim for piercing the corporate veil nor was such a claim supported by the facts; and (5) Neeltec sued the wrong party. Long requested he be dropped as a defendant and Hobo Joe's, Inc. and Fox's Fireworks Superstore, Inc. be added.

In June of 2008, the special referee met with the parties to hear Long's motion.[1] At the hearing, Long admitted the store was always owned by his corporations and, while he is the sole shareholder, he has never operated the store as a sole proprietorship.

The special referee filed an order in August of 2008, denying summary judgment. The order found (1) Neeltec's claims were against the business Fireworks Superstore, which is a corporation; (2) the complaint did not allege conspiracy between Long and the corporation; (3) the complaint did not allege failure to follow corporate formalities or any other basis for piercing the corporate veil; and (4) Long was not the proper defendant for the claims presented. The special referee held the action should proceed against the two corporations that have owned and operated Fireworks Superstore, Hobo Joe's, Inc. and Fox's Fireworks Superstore, Inc.[2] The order concluded:

> [T]o the extent [Neeltec] wishes to articulate a conspiracy claim against . . . Long, individually, along with the subject corporations, [Neeltec] shall submit . . . no later than thirty (30) days from the date of this Order, a proposed Amended Complaint setting forth any such claims as well as a short Memorandum of Law . . . .

The Record does not indicate an amended complaint was ever filed. Neeltec appealed to this court, which dismissed the appeal because it was not immediately appealable. *See Neeltec Enterps., Inc. v. Long*, 391 S.C. 177, 705 S.E.2d 57 (Ct. App. 2011). Neeltec petitioned the South Carolina Supreme Court for certiorari, which the supreme court granted. On appeal, the supreme court reversed this court and found: "The order requiring petitioner to discontinue its SCUTPA suit against respondent Long affects petitioner's substantial right to name its defendant. This

[1] No court reporter was present at the hearing, and thus, there is no transcript.
[2] The order states the name of the corporation as Foxy's Firework Superstore, Inc., but the correct name is Fox's Fireworks Superstore, Inc.

interlocutory order is immediately appealable under § 14-3-330(2)(a)[of the South Carolina Code]." *Neeltec Enterps., Inc. v. Long*, 397 S.C. 563, 567, 725 S.E.2d 926, 929 (2012) (citing *Watts v. Copeland*, 170 S.C. 449, 456-57, 170 S.E. 780, 783 (1933)). The supreme court also noted the special referee's contention that Neeltec could amend its complaint to assert a conspiracy theory was irrelevant to the appealability of the order. *Id.* at 567 & n.3, 725 S.E.2d at 929 & n.3 (citing *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 565, 626 S.E.2d 884, 887 (2006) ("[A] corporation cannot conspire with itself."). The supreme court remanded the appeal to this court to consider the merits. *Id.* at 567-68, 725 S.E.2d at 929.

LAW/ANALYSIS

Neeltec argues the special referee erred in substituting the corporations for Long. Neeltec argues Long should be personally liable for commanding or inducing the corporation to commit a harmful act.[3] We agree.

"[I]n private actions under the [SC]UTPA, directors and officers are not liable for the corporation's unfair trade practices unless they personally commit, participate in, direct, or authorize the commission of a violation of the [SC]UTPA." *Plowman v. Bagnal*, 316 S.C. 283, 286, 450 S.E.2d 36, 38 (1994) (citing *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602 (3rd. Cir. 1978) (holding corporate officer is individually liable for unfair competition in which he participates); *E. Star, Inc. v. Union Bldg. Materials Corp.*, 712 P.2d 1148 (Haw. Ct. App. 1985) (finding corporate officer or director who participates in unfair or deceptive acts is jointly and severally liable with corporation); *Moy v. Schreiber Deed Sec. Co.*, 535 A.2d 1168 (Pa. Super. Ct. 1988) (deciding corporate president could be held individually liable under participation theory for acts of unfair competition he personally committed); *Great Am. Homebuilders, Inc. v. Gerhart*, 708 S.W.2d 8 (Tex. Ct. App. 1986) (determining corporate officer who knowingly participates in deceptive trade practice may be held individually liable); *Grayson v. Nordic Constr. Co.*, 599 P.2d 1271 (Wash. 1979) (en banc) (finding if corporate officer participates in violation of Consumer Protection Act, officer is liable for penalties)).

[3] Neeltec cites the doctrine of *qui facit per alium facit per se*, "He who acts through another, acts himself."

In *Green v. Mastodon Ventures, Inc.*, the complaint alleged the defendant was a controlling shareholder in a corporation "and engaged in wrongful non-corporate actions and participated in [the corporation's] wrongful actions." C.A. No. 6:07-3805-HMH, 2008 WL 697150, at *2 (D.S.C. Mar. 12, 2008). The district court found the complaint stated causes of action against the defendant including violation of the SCUTPA and denied the defendant's motion to dismiss. *Id.*

Although Neeltec's action is for the violation of the SCUTPA, the supreme court has found in tort cases:

> An officer, director, or controlling person in a corporation is not, merely as a result of his or her status as such, personally liable for the torts of the corporation. To incur liability, the officer, director, or controlling person must ordinarily be shown to have in some way participated in or directed the tortious act.

Rowe v. Hyatt, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996) (citing *Plowman*, 316 S.C. at 286, 450 S.E.2d at 38; *Hunt v. Rabon*, 275 S.C. 475, 272 S.E.2d 643 (1980)). Further, "a plaintiff has the sole right to determine which co-tortfeasor(s) she will sue." *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 345, 698 S.E.2d 559, 560 (2010); *see also Neeltec Enters., Inc. v. Long*, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012) (noting this principle in remanding this case to our court).

Neeltec's cause of action against Long was for the violation of the SCUTPA. Because an officer or controlling person in a corporation may be individually liable, Neeltec is allowed to assert a claim against Long individually. Neeltec has the right to decide which party it wishes to sue for certain acts. Accordingly, the special referee erred in substituting the two corporations for Long. Therefore, the special referee's order is

REVERSED AND REMANDED.

SHORT and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charleston County Assessor, Appellant,

v.

LMP Properties, Inc., Respondent.

Appellate Case No. 2011-203547

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

Opinion No. 5086
Heard November 1, 2012 – Filed February 27, 2013

REVERSED AND REMANDED

County Attorney Joseph Dawson, III, Deputy County Attorney Bernard E. Ferrara, Jr., Assistant County Attorney Austin A. Bruner, and Assistant County Attorney Bradley A. Mitchell, all of North Charleston, for Appellant.

Stanley C. Rodgers, of Charleston, for Respondent.

WILLIAMS, J.: The Charleston County Assessor (Assessor) appeals the administrative law court's (ALC) order valuing a piece of property containing one hundred twenty-one individual units and owned by LMP Properties, Inc. (LMP) at $8,565,000. The Assessor argues the ALC erred in determining the units' highest and best use on the valuation date of December 31, 2003, the operative date for the

last countywide reassessment in Charleston County, instead of December 31, 2007, for the tax year 2008. We reverse and remand.

FACTS

The subject property, named The Legends, is located in Mount Pleasant and consists of thirteen two-story buildings. LMP's predecessor in title to the property is Keystone Legends I, L.P. ("Keystone"). Keystone mortgaged the property in 1999 for $15,891,900 to build the complex, which was originally composed of two hundred apartment units. In April 2006, LMP purchased The Legends for $5.00 and assumed the mortgage. Just prior to conveying the property to LMP, Keystone legally converted the units to condominiums by establishing a horizontal property regime pursuant to section 27-31-10 *et seq.* of the South Carolina Code (2007 & Supp. 2012). At the time of the hearing before the ALC, LMP had sold fifty-eight of the two hundred units and placed twenty-one units aside for further marketing and sale. The remaining one hundred twenty-one units, which are the subject of this appeal, have continued to be owned and leased to third parties by LMP although they are titled as condominiums.

Following the title conversion of the apartments into condominiums, the Assessor changed its records to reflect the property as two hundred separate units and assigned each unit a separate tax identification number. The Assessor also reviewed the units' valuation for ad valorem taxation purposes, and, by assessing each unit individually as a condominium, determined that the fair market value of the units for the tax year 2008 was $16,454,000. LMP disagreed with the Assessor's valuation and submitted a timely request for review to the Assessor. The Assessor declined to alter its original valuation, and LMP sought review of the valuation with the Charleston County Board of Assessment Appeals (Board). Following a hearing on November 4, 2009, the Board set a value of $10,090,500 for the tax year 2008.

The Assessor filed a request for a contested case hearing with the ALC, seeking review of the Board's decision, and the ALC held a hearing on the matter on August 24, 2010. At the hearing, the parties agreed that the date for valuing the properties was December 31, 2003, because 2004 was the year of the countywide reassessment. However, the parties disagreed as to when the highest and best use of the units was to be determined for purposes of valuing the property. The Assessor argued that the highest and best use of the units was to be determined as of December 31, 2007. Accordingly, the Assessor contended the highest and best

use of the units was as condominiums because the units were titled as condominiums on December 31, 2007. In contrast, LMP countered that the proper date for determining the highest and best use was December 31, 2003. Based on this date, LMP contended that the highest and best use of the units was as apartments because the mortgage on the property in 2003 required that the units be used as apartments. Specifically, the loan used to finance the construction of the units was procured from the United States Department of Housing and Urban Development and prohibited 1) the prepayment of the indebtedness until March 1, 2006, and 2) the use of the units for any other purpose other than that intended at the time the mortgage was executed. In the alternative, LMP argued that the units should be valued as apartments because 1) due to the decline in the economy, apartments were the highest and best use of the property in 2007 and 2) pursuant to the supreme court's holding in *Lindsey v. South Carolina Tax Commision*, 302 S.C. 504, 397 S.E.2d 95 (1990), the units should be valued based on their use, as apartments, rather than how they are titled, as condominiums.

In its order, the ALC agreed with LMP and found that section 12-43-215 of the South Carolina Code (Supp. 2012) required that the highest and best use of the units be determined on the valuation date, which the parties agreed was December 31, 2003. Specifically, the ALC found that because "the assessment process is so intertwined with the valuation process . . . the legislative intent is clear [and t]he property's fair market value must be based on the property's highest and best use on the valuation date . . . ." Accordingly, the ALC found that the highest and best use of the units was as apartments because the mortgage on the units in 2003 prohibited them from being used as condominiums. In making this determination, the ALC relied upon the methodology endorsed by the Appraisal Institute, which provides that a property's highest and best use must be "physically possible, legally permissible, financially feasible, and maximally profitable . . . ."[1] Because the ALC agreed with LMP's argument that the highest and best use of the units should be determined as of December 31, 2003, the ALC declined to address LMP's remaining arguments. Based on its valuation of the units as apartments, the ALC adopted the valuation of the Assessor's witness Gary James, who valued the property at $8,565,000. This appeal followed.

STANDARD OF REVIEW

[1] The parties do not appeal the ALC's reliance on this method of determining the highest and best use of the units.

"Tax appeals to the ALC are subject to the Administrative Procedures Act (APA)." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 73, 716 S.E.2d 877, 880 (2011). "Accordingly, we review the decision of the ALC for errors of law." *Id.* at 74, 716 S.E.2d at 881. "Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." *Id.*

LAW/ANALYSIS

I. Highest and Best Use

The Assessor argues that the ALC erred in determining the highest and best use of the units as of December 31, 2003, the date of valuation used for the last countywide reassessment in 2004. We agree.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Id.* In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459. Further, "the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). Accordingly, we "read the statute as a whole" and "should not concentrate on isolated phrases within the statute." *CFRE, LLC*, 395 S.C. at 74, 716 S.E.2d at 881.

Section 12-37-930 of the South Carolina Code (Supp. 2012) provides that

> [a]ll property must be for taxation at its true value in money which in all cases is the price which the property would bring following reasonable exposure to the market, where both the seller and the buyer are willing, are not acting under compulsion, and are reasonably well informed of the uses and purposes for which it is adapted and for which it is capable of being used.

"Fair market value is the measure of value for taxation purposes under this statute." *Lindsey v. S.C. Tax Comm'n*, 302 S.C. 504, 507, 397 S.E.2d 95, 97 (1990).

Ordinarily, "[t]he pertinent date to determine the value of property for a given tax year is December 31st of the preceding year." *Lindsey v. S.C. Tax Comm'n*, 302 S.C. 274, 275 n.1, 395 S.E.2d 184, 185 n.1 (1990); *see also* S.C. Code Ann. § 12-37-900 (Supp. 2012). However, section 12-43-215, which the parties and the ALC agreed controls in the instant case,[2] provides as follows:

> When owner-occupied residential property assessed pursuant to Section 12-43-220(c) is valued for purposes of ad valorem taxation, the value of the land must be determined on the basis that its highest and best use is for residential purposes. When a property owner or an agent for a property owner appeals the value of a property assessment, the assessor shall consider the appeal and make any adjustments, if warranted, *based on the market values of real property as they existed in the year that the equalization and reassessment program was conducted and on which the assessment is based*. (emphasis added).

The parties and the ALC agreed that in order to calculate the property's fair market value, the property's highest and best use must first be determined, but disagree as to the date on which the highest and best use must be determined. LMP contends that section 12-43-215 requires that the highest and best use be determined as of December 31, 2003, the date used for the last countywide reassessment program in Charleston County. However, we agree with the Assessor that the appropriate date for determining the units' highest and best use is December 31, 2007.

Section 12-43-215 states merely that any adjustments to a property's value must be "based on the market values of real property as they existed in the year that the

---

[2] Because section 12-43-215 applies to "owner-occupied residential property" and the units at issue in the instant case are not owner-occupied, we question whether it applies in the instant case; nevertheless, because no party appealed the ALC's ruling that section 12-43-215 applies, this ruling is the law of the case. *See Carolina Chloride, Inc. v. Richland Cnty.*, 394 S.C. 154, 172, 714 S.E.2d 869, 878 (2011) (noting "an unchallenged ruling, right or wrong, becomes the law of the case").

equalization and reassessment program was conducted . . . ." The statute is silent on the date to be used for determining the highest and best use of the property. Accordingly, it cannot be read to mandate a diversion from the general rule that the use of the property is to be determined as of December 31st of the preceding year. Such a finding would result in potentially unreasonable and illogical valuations in instances when the use of a property changes, potentially dramatically, from the time of the last countywide reassessment. Further, we find that the purpose of the statute, which provides some stabilization to the property taxes owed on a piece of property, is less viable in circumstances in which the property owner intentionally and willingly changes the use of a property. Therefore, we reverse the ALC's order to the extent it determined the highest and best use of the units based on a date of December 31, 2003.

II. *Lindsey* Case

The Assessor also argues that because LMP failed to appeal the ALC's ruling that *Lindsey v. South Carolina Tax Commission*, 302 S.C. 504, 397 S.E.2d 95 (1990), does not apply to the facts of the instant case, that ruling is the law of the case. This argument is without merit.

First, the ALC did not rule that the holding in *Lindsey* does not apply to the facts of this case, but rather declined to address the issue because it agreed with LMP's argument that the highest and best use was to be determined as of December 31, 2003, and was, therefore, as apartments. Accordingly, the law of the case doctrine does not apply because there was no ruling on the issue of whether *Lindsey* applied for LMP to appeal. *See Carolina Chloride, Inc.*, 394 S.C. at 172, 714 S.E.2d at 878 (noting "an unchallenged ruling, right or wrong, becomes the law of the case"). Therefore, this argument is both factually and legally without merit.

CONCLUSION

Based on the foregoing, we reverse the ALC's order to the extent it determined the highest and best use of the units based on a date of December 31, 2003, and we remand so that the ALC may address the parties' remaining arguments regarding valuation of the units.

Accordingly, the ALC's order is

REVERSED AND REMANDED.

FEW, C.J., concurs in a separate opinion.

PIEPER, J., dissents in a separate opinion.

FEW, C.J., concurring: I agree with Judge Williams that December 31, 2007, is the correct date for determining the highest and best use of the property. I disagree, however, that we must consider section 12-43-215 of the South Carolina Code (Supp. 2012) under the law of the case doctrine. *See* note 2, *supra*. The ALC's reliance on the section is part of its analysis; it is not the court's ruling. The law of the case doctrine applies to unappealed "rulings." *Carolina Chloride, Inc.*, *supra*; *Charleston Lumber Co., Inc. v. Miller Hous. Corp.*, 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) ("unappealed ruling is law of the case" (citing *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997))). The ALC's ruling is that the proper date is December 31, 2003. The assessor appealed that ruling.

The parties appear to agree with the ALC that section 12-43-215 applies. However, the plain language of the section restricts its application to "owner-occupied residential property." Because the units whose values are in dispute here are not owner-occupied, the section does not apply. The fact that all parties and even the lower court mistakenly believe a statute applies does not require this court to interpret the statute when we find it to be inapplicable. The law of the case doctrine does not preclude this court from disagreeing with the basis of the lower court's analysis even when that basis is not challenged on appeal.

PIEPER, J., dissenting: I respectfully dissent and would affirm the ALC's determination that the property's fair market value must be based on the property's highest and best use on the valuation date, which is December 31, 2003.

Initially, the parties agreed to apply section 12-43-215 of the South Carolina Code (Supp. 2012). Additionally, neither party appealed the ALC's application of section 12-43-215. Therefore, the ALC's application of section 12-43-215, while incorrect, is the law of the case because South Carolina does not utilize a plain error rule of appellate procedure. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("South Carolina appellate courts do not recognize the 'plain error rule,' under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party."); *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case.").

Construing the statute in favor of the taxpayer, I would find a plain reading of section 12-43-215 provides that December 31, 2003, is the correct date to determine the highest and best use of the property. *See Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 321, 731 S.E.2d 869, 873 (2012) (holding an ambiguity in a tax statute must be construed in the taxpayer's favor); *S.C. Nat'l Bank v. S.C. Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989) ("In the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt."). According to section 12-43-215, the highest and best use of the property determines the value of the land and the market value of the land is to be determined by the last countywide reassessment year. *See* S.C. Code Ann. § 12-43-215 (Supp. 2012) ("When owner-occupied residential property assessed pursuant to Section 12-43-220(c) is valued for purposes of ad valorem taxation, the *value of the land must be determined on the basis that its highest and best use* is for residential purposes. When a property owner or an agent for a property owner appeals the value of a property assessment, the assessor shall consider the appeal and make any adjustments, if warranted, based on the *market values of real property as they existed in the year that the equalization and reassessment program was conducted* and on which the assessment is based." (emphases added)). Because the highest and best use determines the value of the property, and the last countywide reassessment was in 2004, the proper date to utilize in determining the property's highest and best use pursuant to the statute is December 31, 2003. For the foregoing reasons, I would affirm the order of the ALC.