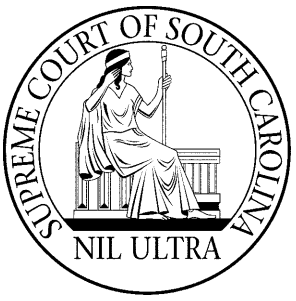

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 13
March 30, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Fred R. Rutland, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2014-000381

ON WRIT OF CERTIORARI

Appeal from Lexington County
L. Casey Manning, Post-Conviction Relief Judge

Opinion No. 27614
Submitted January 15, 2016 – Filed March 30, 2016

REVERSED

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Patrick Lowell Schmeckpeper, both of Columbia, for Respondent.

CHIEF JUSTICE PLEICONES: Petitioner was convicted of murder, possession of a firearm during the commission of a violent crime, and pointing a firearm. He was sentenced to life imprisonment without parole. This Court affirmed petitioner's convictions and sentences on direct appeal. *State v. Rutland*, Op. No. 95-MO-263 (S.C. Sup. Ct. filed Aug. 25, 1995).

Petitioner filed a post-conviction relief ("PCR") action,[1] and sought certiorari to review the PCR judge's order denying relief. We granted the petition for a writ of certiorari on two issues: (1) whether the PCR judge erred in finding trial counsel was not ineffective by failing to cross-examine the State's "key" witness regarding prior inconsistent statements;[2] and (2) whether the PCR judge erred in finding trial counsel was not ineffective by failing to preserve for appellate review the trial judge's refusal to charge the jury on the defense of others. Because we find the PCR judge erred as to the first issue, we reverse the PCR judge's decision.[3]

FACTS

Petitioner was romantically involved with the victim's estranged wife, Sally Peele ("Peele"), and both contend the victim was abusive and violent. On the morning of the victim's death, an altercation occurred at the Peele residence between petitioner, Peele, and the victim. Later that day, Peele and petitioner drove to Bow Wow Boutique ("Boutique"), a pet grooming business, to inquire about purchasing a vehicle from employee Kimberly Kestner ("Kestner"). The victim subsequently arrived at the Boutique, where he was shot and killed by petitioner. The only individuals in the Boutique at the time of the shooting, in addition to petitioner and the victim, were Peele and Kestner.

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[1] The State consented to petitioner filing his PCR application after the statute of limitations had run. *See* S.C. Code Ann. § 17-27-45(A) (2014).

[2] Prior inconsistent statements are admissible pursuant to Rule 613, SCRE.

[3] We decline to address petitioner's second argument as our holding on the first issue is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address remaining issues on appeal when the disposition of a prior issue is dispositive (citation omitted)).

Prior to trial, Kestner gave a written and signed statement to law enforcement to the effect that the victim was armed when he was shot inside the Boutique. In the signed statement, Kestner attested, "[The victim] came in. He reached behind him and pulled a gun. I heard two shots and [the victim] fell." Kestner gave a similar statement to a newspaper reporter, who later wrote a published article quoting Kestner as stating, "[the victim] said nothing. He pulled his gun out and was fixing to shoot, . . . It scared me to death. I couldn't understand why he was doing this."

At trial, Kestner testified she had a good view of the victim as he walked into the Boutique,[4] and the only thing she saw in the victim's hands was a pack of cigarettes, which he placed on the counter as soon as he walked in. Kestner testified that as the victim entered the Boutique, petitioner put his pack of cigarettes in his mouth and reached behind his back, at which point the victim also reached behind his back. Kestner testified she then heard two gunshots, and that she never saw the victim possess a gun, or utter a word during the quick exchange. Kestner testified that after the victim was shot, she witnessed petitioner holding a handgun, and saw a second handgun lying on the floor.[5]

On cross-examination, trial counsel failed to question Kestner as to her prior inconsistent statements made to law enforcement and to the newspaper reporter.

Peele testified the victim entered the Boutique, drew his 9mm handgun, chambered a round,[6] and pointed the handgun at Peele. Peele stated the victim had a "strange" look in his eyes she had seen before.[7] Peele described that as she started moving

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[4] The State presented testimony by Robin Hunt that the encounter at the Boutique was prearranged by Peele; however, that testimony was recanted in 1997 in a sworn affidavit.

[5] The 9mm handgun was recovered on the floor four to five feet from the victim with one bullet in the chamber and a full magazine. Peele later testified she moved the 9mm after the shooting in order to roll the victim over and administer CPR with petitioner's assistance.

[6] Specifically, Peele's testimony was, "He come through the front door fairly quick; stopped in front of the gate; put his hands behind him; pulled that nine out; shhh, shhh; loaded."

[7] Peele had previously testified as to the victim's demeanor when he was angry and

toward the victim, she heard petitioner beg him, "Please don't," repeatedly. Peele testified that, in shock, she turned to look at petitioner, who was holding a .25 caliber handgun pointed towards the floor. Peele testified that when the victim saw petitioner's handgun, he shifted his aim to petitioner, at which point Peele saw the victim pull the trigger of the 9mm handgun. Peele testified that at that moment, she heard gunshots, and the victim collapsed.

Petitioner's testimony largely corroborated Peele's version of events. However, petitioner added he had concealed the .25 caliber handgun and carried it into the Boutique due to threats made earlier that day by the victim to "blow [petitioner's] shit away, fuck [petitioner's] world up." Petitioner explained that as he saw the victim quickly approaching the front door of the Boutique, he tried to avoid a confrontation by exiting through the back of the building, but when petitioner could not find an escape route, he removed the .25 caliber handgun from his belt. Petitioner recalled that when he then encountered the victim, the victim reached behind his back, pulled out a handgun, cocked it, and aimed it at Peele from less than one foot away. Petitioner testified the victim appeared "wild," and was unresponsive to petitioner's verbal attempts to calm him down.

Petitioner stated the victim then aimed the 9mm handgun at petitioner and pulled the trigger. Petitioner explained seeing the victim pull the trigger prompted him to shoot the victim once, which did not faze the victim, and as petitioner saw the victim continue to pull the trigger, petitioner shot the victim three more times. Petitioner described that in the moment, he believed he himself had been shot.

At the PCR hearing, petitioner argued, *inter alia*, trial counsel was ineffective for failing to cross-examine Kestner as to her prior inconsistent statements that the victim was armed at the time of the shooting.

Trial counsel agreed Kestner's testimony at trial was important as she was the only disinterested, objective witness to the shooting. Trial counsel testified he was aware of Kestner's prior inconsistent statements, and acknowledged they could have been used to impeach her trial testimony, but explained he was unable to locate the newspaper article prior to trial, and admitted his failure to use the police report was due to his "oversight." Trial counsel further acknowledged that whether the victim was armed was an important issue at trial, and agreed the statement

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abusive, stating, "I've seen him angry plenty of times. You can see it in his -- you can see it in his eyes when he was angry."

given under oath to law enforcement could have been used not only to impeach Kestner, but also could have been entered into evidence if she had denied giving it.

The solicitor testified he was aware of Kestner's prior inconsistent statements, and agreed her trial testimony was essential as she was the only independent witness, and any inconsistencies in her statements could have negatively affected her credibility.

Although Kestner did not testify at the PCR hearing, petitioner produced the signed police statement wherein Kestner stated the victim was armed at the time of the shooting. Petitioner also produced affidavits by several individuals swearing that after the incident, Kestner stated to them the victim was armed when he was shot.

In his order denying relief, the PCR judge determined trial counsel was deficient for failing to impeach Kestner with her prior inconsistent statements; however, the PCR judge further found petitioner failed to prove he was prejudiced by trial counsel's deficient performance. We granted petitioner's petition for a writ of certiorari to review the PCR judge's decision.

ISSUE

> Did the PCR judge err in finding trial counsel was not ineffective by failing to cross-examine the State's "key" witness as to her prior inconsistent statements?

LAW/ANALYSIS

The PCR judge found that although trial counsel was deficient in failing to cross-examine Kestner as to her prior inconsistent statements, petitioner failed to meet his burden of proving trial counsel's deficiencies were prejudicial. We disagree.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 669 (1984). In a PCR proceeding, the burden is on the applicant to prove the allegations in his application. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citation omitted). This Court will uphold factual findings of the PCR court if there is any evidence of probative value to support them. *Webb v. State*, 281 S.C. 237, 238, 314 S.E.2d 839, 839 (1984) (citation omitted). However, this Court will not uphold the findings of a PCR court if no probative evidence supports those findings. *Holland v. State*, 322 S.C.

111, 113, 470 S.E.2d 378, 379 (1996) (citing *Cartrette v. State*, 323S.C. 15, 448 S.E.2d 553 (1994)).

In order to prove trial counsel was ineffective, the PCR applicant must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Ard*, 372 S.C. at 331, 642 S.E.2d at 596 (citing *Strickland*, 466 U.S. at 687; *Rhodes v. State*, 349 S.C. 25, 30–31, 561 S.E.2d 606, 609 (2002)).

Regarding the deficiency prong, the proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases. *McHam v. State*, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013) (quoting *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985)). Regarding the prejudice prong, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) (citing *Strickland*, 466 U.S. at 694). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694.

In denying petitioner's PCR application, the PCR judge relied on petitioner's failure to present Kestner as a witness at the PCR hearing and to produce extrinsic evidence as to her prior inconsistent statements.

We agree with the PCR judge's finding that there is substantial evidence trial counsel was deficient for failing to cross-examine Kestner as to her prior inconsistent statements. *See Strickland*, 466 U.S. at 688; Webb, 281 S.C. at 238, 314 S.E.2d at 839. However, we find the PCR judge's ruling as to the prejudice prong is not supported by the evidence in the record. *See Holland*, 322 S.C. at 113, 470 S.E.2d at 379 (stating the Court will not uphold findings of a PCR court if no probative evidence supports those findings). Principally, the PCR judge was incorrect in finding petitioner failed to produce extrinsic evidence of Kestner's statements at the PCR hearing. To the contrary, petitioner produced both the written copy of Kestner's statement to law enforcement, as well as affidavits from individuals attesting to have heard Kestner state the victim was armed at the time of the shooting. Accordingly, there is no evidence of probative value supporting the PCR judge's ruling that petitioner failed to present extrinsic evidence of Kestner's prior inconsistent statements. *See Holland*, 322 S.C. at 113, 470 S.E.2d at 379; *Webb*, 281 S.C. at 238; 314 S.E.2d at 839.

Further, had trial counsel discredited Kestner's testimony by raising the prior inconsistent statements on cross-examination, Kestner's credibility at trial would have suffered. Notably, petitioner admitted to shooting the victim, but maintained his actions were in self-defense; both petitioner and Peele testified at trial that the victim entered the Boutique and immediately brandished his 9mm handgun; and the only other witness to the shooting—and the only disinterested, objective witness—was Kestner. As a result, we find there is a reasonable probability the outcome of the trial would have been different had trial counsel impeached Kestner, as her prior inconsistent statements demonstrate all three witnesses to the incident attested at some juncture the victim was armed at the time of the shooting. *See Strickland*, 466 U.S. at 694; *see also, e.g., Thomas v. State*, 308 S.C. 123, 124, 417 S.E.2d 531, 532 (1992) (finding trial counsel's performance was deficient and prejudicial in failing to call as witnesses medical personnel who were the only individuals that could cast doubt on the victim's identification of the petitioner). Moreover, had Kestner denied making the statements during cross-examination, trial counsel could have introduced as evidence the police report or the newspaper article, which we find also would have damaged Kestner's credibility as to her version of events leading up to the shooting. *See* Rule 613(b), SCRE.

Any question as to whether petitioner was prejudiced may be answered by looking to the solicitor's reliance on Kestner's trial testimony, and the questions posed by the jury upon deliberation. During closing arguments, the solicitor emphasized Kestner was the only "independent witness," and relied upon her testimony to argue the victim was never armed, stating, "[The victim] never ever pulled that weapon. [Kestner] didn't see it. . . . Kim Kestner independent witness. Kim Kestner never ever saw [victim] with [a gun] ever." The solicitor further insinuated the victim never possessed the 9mm handgun, suggesting it could have been planted at the scene of the shooting. We find the solicitor's reliance on Kestner's uncontroverted trial testimony highlights trial counsel's deficient performance, and supports a finding the deficient performance undermines confidence in the outcome of the trial. *See Strickland*, 466 U.S. at 694 (establishing the prejudice prong is satisfied when there is a reasonable probability that but for counsel's errors, the result of the trial would have been different, which requires a probability sufficient to undermine confidence in the outcome of the trial).

Additionally, it is clear the jury was focusing on whether the victim was armed. Out of several questions asked by the jury, one of the initial questions was whose

fingerprints were on the 9mm handgun. We find this inquiry indicates the jury was considering the State's argument the victim was never armed, and was focusing "critical attention" on the sequence of events surrounding the shooting, which was undoubtedly impacted by Kestner's trial testimony, and would have been impacted by trial counsel's impeachment of those statements. *See State v. Blassingame*, 271 S.C. 44, 46–47, 244 S.E.2d 528, 530 (1978) (finding when a jury submits a question to the court following a jury charge, it is reasonable to assume the jury is focusing "critical attention" on the specific question asked). Moreover, although the jury was re-charged on the elements of murder, manslaughter, mutual combat, and self-defense at its request at least twice, the jury foreperson indicated she was unsure the jury could reach a unanimous verdict on any indictment except one.[8] The trial judge informed the foreperson he did not want to keep the jury from their families, but instructed the jury that it was important for them to work together to agree on a verdict, and asked that they continue to deliberate. Although the jury had been deliberating over six hours at that point, the jury returned a verdict on all indictments ten minutes later. Our finding that trial counsel's deficient performance undermines confidence in the outcome of petitioner's trial is supported by the jury's struggle to reach a unanimous verdict on all indictments in this case. *See Strickland*, 466 U.S. at 694.

CONCLUSION

For the reasons given above, we reverse the PCR judge's order denying petitioner PCR relief.

BEATTY, KITTREDGE and HEARN, JJ., concur. FEW, J., not participating.

[8] The foreperson did not disclose on which indictment she believed the jury could reach a unanimous verdict.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Travis A. Roddey, as the Personal Representative of the Estate of Alice Monique Beckham Hancock, deceased, Petitioner,

v.

Wal-Mart Stores East, LP, U.S. Security Associates, Inc., and Derrick L. Jones, Respondents.

Appellate Case No. 2012-213375

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lancaster County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 27615
Heard October 8, 2015 – Filed March 30, 2016

REVERSED AND REMANDED

John S. Nichols and Blake Alexander Hewitt, both of Bluestein Nichols Thompson & Delgado, LLC, of Columbia; S. Randall Hood and William Angus McKinnon, both of McGowan Hood & Felder, LLC, of Rock Hill; and Brent Paul Stewart, of Stewart Law Offices, LLC, of Rock Hill, for Petitioner.

W. Howard Boyd, Jr., and Stephanie G. Flynn, both of Gallivan, White & Boyd, PA, of Greenville, for Respondents.

ACTING JUSTICE TOAL: Petitioner appeals the court of appeals' decision affirming the trial court's grant of Wal-Mart's motion for a directed verdict on Petitioner's negligence claim. We reverse and remand for a new trial.

FACTUAL/PROCEDURAL BACKGROUND

The following facts are undisputed. On June 20, 2006, Alice Hancock waited in her vehicle in the parking lot of Wal-Mart while her sister, Donna Beckham, attempted to shoplift several articles of clothing.[1] Hope Rollings, a Wal-Mart customer service manager, noticed Beckham attempting to shoplift and alerted several other employees, including fellow manager Shawn Cox and the on-duty security guard Derrick Jones of U.S. Security Associates, Inc. (USSA), which provided security in the Wal-Mart parking lot pursuant to a contract with Wal-Mart.

Ultimately, Beckham exited Wal-Mart without the clothing. However, Jones approached her in the parking lot. Beckham ran towards Hancock's vehicle, and Jones followed her in his truck and blocked Hancock's vehicle with his truck. After Beckham entered Hancock's vehicle, Hancock turned the vehicle around and drove towards the parking lot's exit, with Jones following. Hancock exited the parking lot onto a highway, and Jones followed. Approximately two miles from Wal-Mart, Hancock's vehicle left the highway and crashed. Hancock died at the scene of the accident.

Travis Roddey, the personal representative of Hancock's estate (Petitioner), brought an action alleging negligence on the part of Wal-Mart, USSA, and Jones. At trial, there was varying witness testimony, especially with regard to the course of events that occurred between Jones and the two Wal-Mart customer service managers—Rollings and Cox—and between Jones and Beckham.

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[1] Beckham testified that Hancock was unaware of her intention to shoplift from Wal-Mart.

Beckham testified that when she exited Wal-Mart, she heard Jones yelling from his vehicle, "Hey, I need to talk to you." According to Beckham, Jones "zoomed in on [them]" and blocked Hancock's vehicle as she entered Hancock's backseat. Beckham testified that she remained crouched in the backseat as they drove, but looked up periodically to see Jones following behind them at a close distance with his emergency lights on and frequently flashing his high beam headlights. Beckham testified that about two miles from Wal-Mart, Hancock remarked that "he's still on our ass," Beckham observed Jones "on [their] bumper," and then Hancock's vehicle "shot off to the left" and crashed.

Rollings testified that when she saw Beckham attempting to shoplift, she radioed Cox,[2] and instructed the door greeters to stop Beckham and ask for a receipt if she exited the store. Rollings explained that she then walked to the parking lot and notified Jones of the suspected shoplifting. Rollings testified that she did not have authority or responsibility over Jones, and that she did not intend for Jones to approach, delay, or stop Beckham. Rollings acknowledged that Wal-Mart policy prohibited employees from pursuing shoplifters beyond the parking lot,[3] but testified that she could not radio Jones to tell him to stop pursuing

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[2] Cox testified that the night of the incident, the following employees had radios: Cox, Rollings, Jones, and assistant manager Chuck Campbell.

[3] Specifically, Wal-Mart's policy for investigating and detaining suspected shoplifters provides:

> NEVER pursue a fleeing Suspect more than approximately 10 feet beyond the point you are located when the Suspect begins to run to avoid detention. Ten feet is about three long steps. This limitation applies both inside and outside the facility.
>
> NEVER pursue a Suspect who is in a moving vehicle.
>
> NEVER pursue a Suspect off the Facility's property.
>
> NEVER use a moving vehicle to pursue a Suspect.
>
> TERMINATE the pursuit of a Suspect, if the Suspect begins to enter a vehicle.

Hancock's vehicle because only one person could speak into the radio at a time, and other employees were using the radio during the incident. Further, she remembered Cox telling Jones to "[j]ust get the tag number [from Hancock's vehicle,]" but was unsure whether Cox knew that Jones was pursuing Hancock's vehicle when Cox gave the instruction to Jones.

Cox testified that the night of the incident, Rollings notified her of Beckham's shoplifting. After Beckham abandoned the clothing and exited Wal-Mart, Cox walked outside and saw Jones driving down the aisle of the parking lot where Hancock's vehicle was parked. Cox testified that Hancock's vehicle struck a median in the parking lot and headed toward the exit, at which point Cox instructed: "Get her tag number." Cox testified that she did not intend for Jones to follow Hancock out of the parking lot and acknowledged that it was Wal-Mart policy not to pursue shoplifters, but stated that Jones was not a Wal-Mart employee. According to Cox, she observed Jones's truck two car lengths behind Hancock's vehicle as they exited the parking lot, but that Jones was less than two car lengths behind as she saw them driving away.

Jones testified that the night of the incident, he received a call on his radio informing him that Beckham shoplifted and that she was exiting Wal-Mart. According to Jones, he asked: "[W]hat do you want me to do because I'm a security officer; I'm not a police officer. I cannot detain, so what do you want me to do?" Jones testified that he was instructed to delay Beckham by talking to her. When he saw her exit the store, he attempted to engage her in conversation, at which point she ran to Hancock's vehicle. Jones testified that he then blocked Hancock's vehicle with his truck "because the whole time all [he was] hearing from [Wal-Mart] was, 'You've got to get that license plate tag. We need that license plate tag number.'" Jones testified that at the time, he was under the impression

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> LET THE SUSPECT GO, rather than continue a pursuit that is likely to injure or cause harm to someone.

Further, the Guidelines for Private Security Contractors provide that security contractors are prohibited from using their vehicles in an attempt to apprehend any suspects, and only allow their vehicles to leave Wal-Mart property for gas or maintenance of the vehicle. These guidelines also note that it is the responsibility of Wal-Mart management to enforce Wal-Mart policies and procedures.

that if he did not get the license plate tag number, he could be fired for not doing his job. According to Jones, both Rollings and Cox repeatedly instructed him to get the license plate tag number. After telling them that he could not see the tag number and that Hancock's vehicle was "about to leave the parking lot," Jones testified that through the radio, someone said, "Man, well, you got to do what you got to do. You need to get that license plate tag number."

Jones knew that he was not supposed to leave the parking lot, but stated that he felt pressure due to the instruction to "do what you got to do," which Jones interpreted to mean pursuing Hancock's vehicle beyond the parking lot. Jones testified that even after he told Wal-Mart employees over the radio that Hancock's vehicle was leaving the parking lot, Wal-Mart employees continued to instruct him to obtain the license plate tag number. Jones stated that he was in radio communication with Wal-Mart employees until a highway on-ramp, where he witnessed Hancock's vehicle almost cause an accident. He then lost sight of Hancock's vehicle until he later saw lights flashing on the side of the road, where he found Beckham screaming for help and Hancock severely injured.

Jeff Gross, Petitioner's expert witness in parking lot security, guard force, and loss prevention, testified that several of Wal-Mart's policies were violated "through tacit approval of [Wal-Mart]." Gross further testified that Wal-Mart "didn't do anything to stop [Jones] . . . . [T]hey told him to go out and get [the] license plate number, with that they didn't give any other instruction or guidance." Gross stated that "the very headwaters of this problem starts with [Wal-Mart employees] not following their own policies [and] asking [Jones] to do something that [Wal-Mart] specifically says they won't do themselves and they don't want their contractors to do." Finally, Gross testified that Cox witnessed the pursuit and had enough time to process the information, yet chose not to use the radio to instruct Jones to end the pursuit. Based on the testimony of the parties involved in the incident, Gross opined that there was sufficient range on the radios to communicate beyond the Wal-Mart parking lot.

Chip Tipton, a representative for Wal-Mart, testified that he saw no evidence that any Wal-Mart employee violated Wal-Mart policies, and found no fault in the employees' failure to instruct Jones to end the pursuit. Regardless, Tipton stated that he did not believe the radio's range would have enabled Wal-Mart employees to call Jones back because there were often issues with radio transmission inside Wal-Mart itself.

At the conclusion of Petitioner's case, Wal-Mart moved for a directed verdict on three grounds: (1) Petitioner presented no evidence that Wal-Mart breached its duty of care; (2) Wal-Mart's actions were not the proximate cause of Hancock's death as a matter of law; and (3) Hancock's fault in causing her own death was more than fifty percent as a matter of law. The trial court granted the motion on Wal-Mart's first two grounds, finding insufficient evidence that Wal-Mart was negligent, and that even if Wal-Mart was negligent, there was a lack of proximate cause because the events were not foreseeable. The trial court stated that at that point, it could not find Hancock more than fifty percent negligent as a matter of law. Upon the conclusion of trial, the jury found that Hancock was sixty-five percent at fault, and that USSA and Jones were collectively thirty-five percent at fault.

The court of appeals affirmed the trial court's decision to grant Wal-Mart's motion for a directed verdict in a split opinion. *See Roddey v. Wal-Mart Stores E., LP*, 400 S.C. 59, 732 S.E.2d 635 (Ct. App. 2012). Chief Judge Few found that the trial court should not have directed a verdict on the basis that there was insufficient evidence of Wal-Mart's negligence because evidence existed that Wal-Mart employees violated Wal-Mart policies. Chief Judge Few further found that the actions of Jones and Hancock were foreseeable. Nevertheless, Chief Judge Few determined that the trial court should have granted Wal-Mart's directed verdict motion on the following grounds: (1) the jury's factual determination of fault apportionment between Hancock, Jones, and USSA was binding on Petitioner even though Wal-Mart's actions were not included in the jury's analysis; and (2) Hancock was more than fifty percent at fault as a matter of law. Judge Short concurred in a separate opinion, finding that Wal-Mart was entitled to a directed verdict because it was not foreseeable that Jones would leave the parking lot and continue to aggressively pursue Hancock for several miles.

Judge Huff dissented, agreeing with Chief Judge Few that evidence existed from which a jury could find that Wal-Mart was negligent, and that negligence proximately caused the injuries that occurred. Judge Huff also stated that while a jury still could have found Hancock sixty-five percent negligent even after considering Wal-Mart's liability, it could also have conceivably found—after factoring in Wal-Mart's negligence—that Hancock was less than fifty percent at fault. Accordingly, Judge Huff opined that the trial court should have submitted the issues of negligence and proximate cause to the jury.

We granted Petitioner's petition for a writ of certiorari to review the court of appeals' decision pursuant to Rule 242, SCACR.

STANDARD OF REVIEW

When ruling on a motion for a directed verdict, the trial court must view all evidence and all reasonable inferences in the light most favorable to the nonmoving party, and if the evidence is susceptible of more than one reasonable inference, the trial court should submit the case to the jury. *Unlimited Servs., Inc., v. Macklen Enters., Inc.*, 303 S.C. 384, 386, 401 S.E.2d 153, 154 (1991). In a comparative negligence case, the trial court should grant a directed verdict motion if the sole reasonable inference from the evidence is the nonmoving party's negligence exceeded fifty percent. *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000). Comparing the negligence of two parties is ordinarily a question of fact for the jury. *Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997). This Court is "reticent to endorse directed verdicts in cases involving comparative negligence." *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002).

ANALYSIS

Viewing the evidence in the light most favorable to the nonmoving party—Petitioner—we find that there is evidence from which a jury could determine that Wal-Mart was negligent, and that its negligence proximately caused the injuries in this case. Accordingly, we hold that the trial court should have submitted to the jury the issues of Wal-Mart's negligence and proximate cause, and we remand for a new trial as to all of the defendants.

I. Evidence of Wal-Mart's Breach of its Duty of Care

To prove a cause of action for negligence, a plaintiff must show: (1) the defendant owes a duty of care to the plaintiff; (2) the defendant breached that duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages. *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006). In a given case, a court may establish and define the standard of care by looking to the common law, statutes, administrative

regulations, industry standards, or a defendant's own policies and guidelines. *Id.* at 140, 638 S.E.2d at 659. Evidence of a company's deviation from its own internal policies is relevant to show the company deviated from the standard of care, and is properly admitted to show the element of breach. *Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005); *see also Caldwell v. K-Mart Corp.*, 306 S.C. 27, 31, 410 S.E.2d 21, 24 (Ct. App. 1991) (holding that K-Mart's loss prevention manual was relevant on the material issue of the reasonableness of K-Mart's actions, and noting that in negligence cases, internal policies or self-imposed rules are often admissible as relevant on the issue of failure to exercise due care (citations omitted)).

There is evidence that Wal-Mart breached its duty of care, and therefore, the trial court erred in finding that the directed verdict was proper on that ground. While a jury could conclude from the evidence that Wal-Mart employees merely requested Jones to delay Beckham or obtain the license plate tag number of Hancock's vehicle in a manner that did not violate Wal-Mart's policies, there is also evidence that Wal-Mart employees violated Wal-Mart's policies by instructing Jones to engage in the pursuit that occurred. Specifically, there is evidence indicating that Wal-Mart employees directed Jones to obtain Hancock's license plate tag number *while* observing Jones following Hancock's vehicle in the parking lot and even after Jones stated that Hancock's vehicle was leaving the parking lot. Accordingly, there is evidence from which a jury could find that Wal-Mart employees either instructed Jones to act in violation of Wal-Mart's policies, or acquiesced in Jones's improper pursuit of Hancock and Beckham.

II. Proximate Cause

To show proximate cause, a plaintiff must show both causation in fact and legal cause. *Madison*, 371 S.C. at 146, 638 S.E.2d at 662 (citing *Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992)). A plaintiff proves causation in fact by establishing that the injury would not have occurred "but for" the defendant's negligence, and legal cause by establishing foreseeability. *Id.* (citing *Oliver*, 309 S.C. at 316, 422 S.E.2d at 130). "Foreseeability is determined by looking at the natural and probable consequences of the complained of act, although it is not necessary to prove that a particular event or injury was foreseeable." *Id.* (citations omitted). The defendant's

negligence does not have to be the sole proximate cause of the plaintiff's injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury. *Id.*

An intervening force may be a superseding cause that relieves an actor from liability, but for there to be relief from liability, the intervening cause must be one that could not have been reasonably foreseen or anticipated. *Rife v. Hitachi Const. Mach. Co.*, 363 S.C. 209, 217, 609 S.E.2d 565, 569 (Ct. App. 2005). In other words, the intervening negligence of a third party will not excuse the first wrongdoer if such intervention ought to have been foreseen in the exercise of due care. *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998). "In such case, the original negligence still remains active, and a contributing cause of the injury." *Id.* Accordingly, if the intervening acts are set into motion by the original wrongful act and are the foreseeable result of the original act, the "final result, as well as every intermediate cause, is considered in law to be the proximate result of the first wrongful cause." *Wallace v. Owens-Ill., Inc.*, 300 S.C. 518, 521, 389 S.E.2d 155, 157 (Ct. App. 1989).

As an initial matter, there is evidence that "but for" Wal-Mart employees instructing Jones to obtain Hancock's license plate tag number, the accident would not have occurred. Moreover, viewing the evidence in the light most favorable to Petitioner, the trial court erred in finding the directed verdict was proper as to foreseeability, because there is more than one reasonable inference as to whether the consequences of the Wal-Mart employees' actions were foreseeable. It is a natural and probable consequence that a contracted security guard would follow instructions from Wal-Mart employees telling him to "do what you got to do," including pursuing a suspect off-premises. Furthermore, Wal-Mart's own policies demonstrate that Wal-Mart recognized the danger of pursuing a shoplifting suspect, and it was reasonably foreseeable that instructing a contracted security guard to engage in such pursuit would be dangerous.

We find that there is sufficient testimony indicating that upon the Wal-Mart employees' instruction to obtain Hancock's license plate tag number, Jones's actions were *not* independent unforeseeable intervening acts. There was evidence presented that: Wal-Mart employees' instructions led Jones to drive through Wal-Mart's parking lot in pursuit of Beckham; Wal-Mart-employees directed Jones to obtain Hancock's license plate tag number while observing Jones pursue Beckham and Hancock in his patrol vehicle, with both vehicles being operated recklessly;

and Wal-Mart continued to instruct Jones to obtain the tag number even after Jones informed them that Hancock's vehicle was leaving the parking lot.

Accordingly, there is evidence that Jones's acts—which were the foreseeable results of Wal-Mart employees' actions—were set into motion by the original wrongful acts of Wal-Mart. We therefore reverse the court of appeals' decision to uphold trial court's grant of a directed verdict on the issue of proximate cause.

III. Apportionment of Fault

Unlike Chief Judge Few, we do not view Wal-Mart's liability as strictly derivative of Jones's or USSA's liability. In addition to Petitioner's claim that Jones was Wal-Mart's agent and thus, Wal-Mart is vicariously liable for his conduct, Petitioner also alleged that Wal-Mart was liable based on its failure to properly supervise Jones and Wal-Mart's improper advice or instruction to Jones to follow Hancock to obtain her license plate tag number. Considering Wal-Mart's potential liability, it is conceivable that a jury could find that the collective fault of the defendants was over fifty percent and that Hancock was less than fifty percent at fault.[4] In light of the reversal of the directed verdict as to Wal-Mart's liability, the only appropriate remedy in this situation is a new trial.

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[4] The dissent, by adopting Chief Judge Few's rationale, merely assumes the outcome of the jury's deliberations when it is impossible to know what would influence the jury's comparison if the jury was permitted to consider Wal-Mart's liability. Here, we cannot say that the sole reasonable inference to be drawn from the evidence was that Hancock was more than fifty percent negligent in light of the testimony that Wal-Mart employees instructed Jones to follow Hancock. *Bloom*, 339 S.C. at 422, 529 S.E.2d at 713 ("In a comparative negligence case, the trial court should only determine judgment as a matter of law if the *sole* reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent." (citation omitted) (emphasis added)). Therefore, it would be inappropriate for this Court to speculate. *See Thomasko*, 349 S.C. at 11, 561 S.E.2d at 599 ("Because the term is relative and dependant on the facts of a particular case, comparing the negligence of two parties is ordinarily a question of fact for the jury. For these reasons, this Court is reticent to endorse directed verdicts in cases involving comparative negligence." (internal citations omitted)).

CONCLUSION

Based on the foregoing, we reverse the court of appeals' decision and remand for a new trial as to all defendants.

REVERSED AND REMANDED.

BEATTY and HEARN, JJ., concur. PLEICONES, C.J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

CHIEF JUSTICE PLEICONES: I respectfully dissent and would affirm the decision of the Court of Appeals. I agree with Chief Judge Few:

> Even under [Petitioner's] theory of the case, Wal-Mart's conduct merely provides some explanation of what motivated Jones' actions. Wal-Mart's negligence could affect how much of the remaining 35% of fault is attributable to Jones, for if Jones was motivated by Wal-Mart's improper actions, arguably he would bear less of the fault for Hancock's death. However, Wal-Mart's actions can have no effect on Hancock's fault. Wal-Mart obviously did not advise or instruct Hancock to flee, nor did it enable her actions by failing to adequately supervise her. There is no evidence in the record that Hancock knew anything about what Wal-Mart told Jones. Therefore, Wal-Mart's alleged conduct could not have reduced Hancock's proportion of fault in the way it could have reduced that of Jones. Even if the jury had been permitted to consider Wal-Mart in its apportionment of fault, Wal-Mart's conduct could not have affected the jury's determination that Hancock was 65% at fault.
>
> Because Wal-Mart's conduct could not have reduced Hancock's fault, [Petitioner] is bound by the jury's finding that she was 65% at fault, and the trial court's decision to grant Wal-Mart a directed verdict could not have prejudiced [Petitioner]. Therefore, I believe we must affirm. *See O'Neal v. Carolina Farm Supply of Johnston, Inc.*, 279 S.C. 490, 497, 309 S.E.2d 776, 780 (Ct.App. 1983) (affirming directed verdict without deciding whether trial court erred because jury's verdict made error harmless).

Roddey v. Wal-Mart Stores E., LP, 400 S.C. 59, 68, 732 S.E.2d 635, 639-40 (Ct. App. 2012).

Moreover, I am not convinced that even if Petitioner were entitled to a new trial against Wal-Mart, it would be proper to require USSA and Jones to face the possibility of liability in a second trial having been absolved in the first. In arguing for a joint retrial, Petitioner relies on *Williams v. Slade*, 431 F.2d 605 (5th Cir. 1970). In *Williams*, the "innocent" passenger sued both the driver of the automobile in which she was riding and the driver of the other car involved in the

accident. The trial court directed a verdict in favor of one of the drivers, and the jury returned a verdict in favor of the other. In *Williams*, either of the defendants, or both, might have been liable to the plaintiff. Here, however, Wal-Mart could not be liable unless USSA and Jones were also responsible, and unlike the *Williams'* innocent plaintiff, a jury could (and did) find Hancock to be most at fault. I am unable to determine why the majority concludes, without discussion, that both USSA and Jones should again face a jury trial and the possibility of liability.

KITTREDGE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Charles E. Houston, Respondent.

Appellate Case No. 2015-001938

Opinion No. 27616
Heard January 14, 2016 – Filed March 30, 2016

DEFINITE SUSPENSION

Disciplinary Counsel Lesley M. Coggiola and Assistant Disciplinary Counsel Ericka M. Williams, both of Columbia, for Office of Disciplinary Counsel.

John E. Parker, of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Hampton, for Respondent.

PER CURIAM: Respondent Charles E. Houston, Jr. failed to perfect an appeal for a client and, in two separate matters, neglected to pay a videographer and court reporting service. Additionally he failed to cooperate with the disciplinary investigations into the ensuing complaints. We suspend Respondent for nine months, order him to pay the costs of the proceeding, and require him to complete the Legal Ethics and Practice Program Ethics School and Law Office Management School as a condition of reinstatement.

PROCEDURAL/FACTUAL BACKGROUND

Formal charges were filed against Respondent by Office of Disciplinary Counsel (ODC) on September 17, 2012. Respondent filed an answer on January 4, 2013. ODC and Respondent stipulated to the facts, which were adopted by the panel and are as follows:

Matter A

Respondent was hired to take over a pending appeal for a client. Accordingly, Respondent filed an amended notice of appeal and notified the court of appeals of his representation of the client. The deadline to file the initial brief and designation of matter passed and the court of appeals dismissed the matter. Respondent subsequently filed a motion to reinstate the appeal on the basis that he had difficulty obtaining the transcript. The court of appeals granted Respondent's motion and reinstated the appeal, noting that it would be necessary for Respondent to provide the court with a copy of the letter ordering the transcript within ten days.

Respondent missed the deadline to file the initial brief and designation of matter and the court of appeals advised him that the initial brief and designation of matter must be served and filed within thirty days because the transcript had been received. Respondent again failed to comply and the court of appeals dismissed the appeal. Respondent subsequently filed a motion to reinstate the appeal, which the court of appeals granted upon the condition that the initial brief and designation of matter be filed within thirty days. The court indicated that no further extension would be granted absent extraordinary circumstances.

One month after the deadline passed, Respondent filed a motion for extension of time and proceeded to file the initial brief and designation of matter three weeks later. The court of appeals dismissed the appeal for failing to timely file, denied Respondent's petition for reinstatement, and issued the remittitur.

Matter B

Respondent acquired the services of a videographer for a deposition. Following the deposition, Respondent received the video deposition and an invoice. After failing to receive payment for almost two years, the videographer emailed Respondent about the outstanding payment. Two months later, Respondent sent a check for the payment of the deposition and an additional $100.00 for the delay in payment and inconvenience.

Matter C

Respondent used the services of a court reporting service for two depositions. He was invoiced for both depositions at the time the transcripts were delivered. Several months later, the court reporting service requested payment of

the depositions and asked to be paid within the week. The next month, the court reporting service sent a certified letter requesting payment for both depositions. In response to the certified letter, Respondent made a partial payment towards the outstanding balance. One month later, the court reporting service sent a letter seeking the remainder of Respondent's balance. Eight months passed with no response and the court reporting service sent an email seeking payment. Respondent later issued a check for the payment of the outstanding invoice.

Cooperation with Disciplinary Authority's Investigation

Respondent failed to promptly respond to ODC regarding these disciplinary matters. As to Matter A, ODC sent a copy of the client's complaint and requested a response within thirty days by certified mail, which he failed to do. ODC subsequently issued a notice to appear and a subpoena requesting Respondent to bring his file in the client's case. Respondent failed to appear or produce his records. Instead, Respondent faxed a letter to ODC stating the client had previously filed a complaint and it had been dismissed by ODC. Three months later, ODC requested Respondent submit a written response to the complaint filed by the client. Respondent failed to timely respond and thereafter requested additional time to respond. The extension expired without a response from Respondent, although he eventually provided a written response to ODC.

As to Matters B and C, ODC sent a notice of investigation to Respondent, requesting a response within fifteen days. He did not respond. ODC subsequently sent Respondent a certified letter reminding him of his obligation to respond to the notice of investigation. Respondent did not file a response. As a result, ODC issued a notice to appear. On the day of the scheduled appearance, Respondent submitted his response to the notice of investigation. The appearance was rescheduled for the next day, which was then continued at Respondent's request.

LAW/ANALYSIS

This Court reserves the sole authority to discipline attorneys and determine appropriate sanctions. *In re Thompson*, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000). Although the Court may draw its own conclusions and make its own findings of fact, the unanimous findings and conclusions of the panel are entitled to significant respect and consideration. *Id.* at 11, 539 S.E.2d at 401.

We find, based on the foregoing facts, that Respondent has violated Rules 1.1 (competence), 1.3 (diligence) and 8.4(e) (conduct prejudicial to the

administration of justice) of the Rules of Professional Conduct (RPC), Rule 407, SCACR.

The panel recommended a definite suspension for nine months, the payment of costs, and completion of the Legal Ethics and Practice Program Ethics School and the Law Office Management School as a condition of reinstatement. We have found a definite suspension for nine months is an appropriate sanction in similar cases. *In re Smith*, 296 S.C. 86, 89, 370 S.E.2d 876, 878 (1988) (imposing a definite suspension of six months for an attorney who failed to perfect an appeal and failed to pay a court reporter); *See In re Conway*, 374 S.C. 75, 79, 647 S.E.2d 235, 237 (2007) (disciplining an attorney for a definite suspension of nine months where the attorney failed to pay a court reporter, failed to safeguard client files, and failed to respond to charges); *In re Jones*, 359 S.C. 156, 160, 597 S.E.2d 800, 803 (2004) (imposing a one-year suspension for the attorney's misconduct in failing to perfect a criminal defendant's direct appeal, failing to cooperate in disciplinary proceedings, as well as other misconduct). We also take into consideration Respondent's extensive prior disciplinary history involving a myriad of matters including Respondent's failure to pay a third party and his lack of compliance with civil orders from this Court.[1] *In re Braghirol*, 383 S.C. 379, 387, 680 S.E.2d 284, 288 (2009) (noting the attorney's pattern of prior disciplinary history in imposing a definite suspension for nine months). We therefore find the panel's recommendation is appropriate.

[1] *See In re Houston*, S.C.Sup.Ct. Order dated December 7, 2012 (finding Respondent in civil contempt for failing to enroll in the Legal Ethics and Practice Program Trust Account School, along with failing to submit statements from his CPA to the Commission as required by prior orders); *In re Houston*, 382 S.C. 164, 167–68, 675 S.E.2d 721, 723 (2009) (publicly reprimanding Respondent for non-compliance with RPC regarding recordkeeping and trust accounts); *In re Houston*, 314 S.C. 94, 98, 442 S.E.2d 175, 177 (1994) (disbarring Respondent for a "wide range of ethical violations" including improper fee splitting, lending money to a client without full disclosure, failing to pay an expert witness in several cases, and trust account matters); *In re Houston*, 271 S.C. 259, 259–60, 247 S.E.2d 315, 315 (1978) (publicly reprimanding Respondent for failing to promptly pay a client a settlement check received on the client's behalf).

CONCLUSION

We suspend Respondent for nine months and order that he pay the costs of the proceedings within thirty (30) days of the date of this opinion. We also order Respondent to complete the Legal Ethics and Practice Program Ethics School and Law Office Management School as a condition of discipline.

Within fifteen days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, Rules for Lawyer Disciplinary Enforcement, of Rule 413, SCACR.

PLEICONES, C.J., BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Alex Robinson, Respondent.

Appellate Case No. 2014-001545

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27617
Heard October 21, 2015 – Filed March 30, 2016

AFFIRMED AS MODIFIED

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia, for Petitioner.

Dayne C. Phillips, of Lexington, and Appellate Defender Laura Ruth Baer, of Columbia, for Respondent.

CHIEF JUSTICE PLEICONES: Respondent Robinson was convicted of one count of trafficking in cocaine in an amount between 100 and 200 grams. He was sentenced to twenty-five years imprisonment and ordered to pay a $50,000 fine. The Court of Appeals reversed Robinson's conviction holding that the search-warrant affidavit did not include any information to establish the reliability of the informant. *State v. Robinson*, 408 S.C. 268, 758 S.E.2d 725 (Ct. App. 2014). We granted the State's petition for a writ of certiorari and now affirm the Court of Appeals' decision as modified.

FACTS

An officer of the Horry County Police Department (Officer) sought a search warrant for a residence alleged to be Robinson's home (the Home). The search-warrant affidavit stated, in relevant part, that a confidential informant had purchased illegal drugs from the occupants of the Home on multiple occasions. Based solely on this affidavit, the Circuit Court[1] issued a search warrant for the Home. When the warrant was executed, officers found multiple people living in the Home. In one bedroom they found mail addressed to Robinson, and a bag containing 111 grams of cocaine located on top of a pile of men's clothing. In total, 375.88 grams of cocaine were found in the Home. Robinson was not present when the warrant was executed although a car registered to him was parked outside the Home.

At trial, Robinson challenged the veracity of the representations in the search-warrant affidavit under *Franks v. Delaware*, 438 U.S. 154 (1978), and sought to suppress the evidence obtained from the search. Robinson claimed that contrary to the assertions in the search-warrant affidavit, the purported confidential informant never personally made any drug purchases from the Home. The Trial Court conducted a *Franks* hearing where Officer testified that the confidential informant referenced in the affidavit never personally purchased drugs but that Oliver, a third party, made the purchases. The Trial Court found there were no false statements in the affidavit and denied Robinson's motion to suppress.

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[1] Officer testified that because there was a chance that this case would become a federal prosecution, he sought a search warrant from a circuit court judge instead of a magistrate.

On appeal, the Court of Appeals held the Trial Court erred in denying Robinson's motion to suppress because the search-warrant affidavit did not include any information to establish the reliability of the informant. It therefore reversed and remanded for a new trial. *See Robinson*, 408 S.C. at 278, 758 S.E.2d at 730. We granted the State's petition for a writ of certiorari to review the decision of the Court of Appeals.

ISSUES

I. Whether the Court of Appeals erred in finding the search warrant invalid because the search-warrant affidavit contained no information establishing informant reliability?
II. Whether the Court of Appeals erred in concluding there was intentionally false information in the search-warrant affidavit?
III. Whether the Court of Appeals erred in holding that the search-warrant affidavit could support probable cause even with the false information omitted?
IV. Whether the Court of Appeals erred in concluding that *Leon's*[2] good-faith exception to suppression did not apply?

ANALYSIS

A. Informant reliability information in the search-warrant affidavit

The State argues the Court of Appeals erred in finding there was no evidence to support the Trial Court's finding that the search-warrant affidavit contained information establishing informant reliability. Specifically, the State argues the information contained in the affidavit about the confidential informant's work with law enforcement and successful purchases of illegal drugs from the Home, was sufficient to support the Trial Court's determination. We agree.

The veracity and the basis of knowledge of persons supplying the information in a search-warrant affidavit are considerations in the determination of whether there is probable cause to issue a search warrant. *State v. Johnson*, 302 S.C. 243, 395 S.E.2d 167 (1990) (internal citation omitted). An appellate court gives great

[2] 468 U.S. 807 (1978).

deference to the issuing judge's probable cause determination. *State v. Dupree*, 354 S.C. 676, 583 S.E.2d 437 (Ct. App. 2003). An affidavit based solely on information provided by a confidential informant must contain information supporting the credibility of the informant and the basis of his knowledge. *See State v. Martin*, 347 S.C. 522, 527, 556 S.E.2d 706, 709 (2001) (citing *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 192, 525 S.E.2d 872, 881 (2000)).

The pertinent parts of this search-warrant affidavit include:

> REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES . . .
> A confidential and reliable informant working for the Horry County Police Department purchased a quantity of off white powder substance represented as being cocaine and field-testing positive for cocaine attributes from the occupants of the house identified as [the Home]. That the informant has been able to make recent continuous purchases of illegal drugs from this residence leads to the affiant's belief that there is the possibility there may be more illegal drugs located at this residence.

The contents of the affidavit were sufficient to provide the Circuit Court a substantial basis to believe that the: (1) Horry County Police Department; (2) had a confidential informant; (3) who bought a substance that tested positive for cocaine; (4) from the Home; and (5) the informant had made other recent purchases of illegal drugs from the Home. However, as explained below excepting that the confidential informant worked for the Horry County Police Department, none of these assertions were true. Looking at the four corners of the affidavit, there is information from which the Circuit Court could conclude the confidential informant was reliable. *See Dupree*, 354 S.C. at 685, 583 S.E.2d at 442. We agree with the State that the Court of Appeals erred in finding the affidavit, on its face, lacked sufficient information to establish the reliability of the confidential informant. Nevertheless, we affirm the result of the Court of Appeals as explained below.

B. Intentionally false statements in the search-warrant affidavit

Under the Fourth and Fourteenth Amendments to the United States Constitution, a defendant has the right to challenge false statements in a search-warrant affidavit. *See State v. Jones*, 342 S.C. 121, 126, 536 S.E.2d 675, 678 (2000) (citing *Franks v. Delaware*, 438 U.S 154 (1978)). In order to obtain relief, the defendant must prove the affiant knowingly and intentionally, or with reckless disregard for the truth, included false statements in the search-warrant affidavit. The burden is on the defendant to establish the falsity by a preponderance of the evidence. *See Franks*, 438 U.S. at 156.

At the *Franks* hearing, Officer testified that the Home became the target of his investigation when a confidential informant said she knew someone who could purchase drugs from within the Home. According to Officer's testimony, three purchases were made prior to the execution of the search-warrant affidavit. All three purchases happened in substantially the same way. The confidential informant picked up a third party, Oliver, and drove to a location close to the Home. Oliver was then dropped off a short distance away from the Home in order to avoid suspicion. The confidential informant stayed in the car and watched as Oliver walked into the Home. Oliver then returned to the car with drugs. The drugs were later tested and confirmed to be cocaine. The confidential informant was debriefed after the buys during which she informed Officer of what Oliver told her. When seeking the search warrant, Officer relied solely on his affidavit; he did not orally supplement the affidavit before the Circuit Court.

When Officer wrote the affidavit, he was aware that the confidential informant had not personally made the alleged drug purchases. After each of the three alleged transactions, Officer was informed that Oliver was the actual purchaser. Officer acknowledged, at the *Franks* hearing, he knew of Oliver's role, but offered no explanation why he did not include this information in the affidavit.

The State argues the Court of Appeals erred in holding clearly erroneous the Trial Court's finding that no false statements were contained in the search-warrant affidavit. Because the confidential informant drove Oliver close to the Home, gave Oliver "buy money," watched him enter the Home, and watched him exit the Home, the State argues that the confidential informant actually "purchased and obtained the drugs from [the Home]" herself. We disagree.

Applying a common-sense reading to the search-warrant affidavit, it states that this confidential informant personally made drug purchases out of the Home. There is nothing that reasonably suggests an alternative interpretation. *See State v. Thomas*, 275 S.C. 274, 276, 269 S.E.2d 768, 769 (1980) (stating that affidavits are to be given a "common-sense reading") *overruled in part on other grounds*, *State v. Mcknight*, 287 S.C. 167, 337 S.E.2d 208 (1985). Not only did this confidential informant not make the purchases, she did not witness Oliver's alleged purchases. At best, the informant could reliably state that: (1) Oliver left the car with the stated intention to buy drugs; (2) Oliver walked into the Home; and (3) Oliver returned to the car with drugs he claimed he had purchased from the occupants of the Home. The confidential informant could not provide any first-hand information about drug purchases from the Home.

We therefore agree with the Court of Appeals that the Trial Court erred in holding there were no false statements in the search-warrant affidavit. Officer's testimony makes clear that he knowingly and intentionally made false statements in the search-warrant affidavit. As a result, Robinson has met his initial burden under *Franks*. We hold that the false statements in the search-warrant affidavit were made knowingly and intentionally in violation of *Franks*. We next decide whether the search-warrant affidavit supported probable cause absent the false statements.

C. Probable cause absent false statements

The Court of Appeals reversed and remanded because it found that the search-warrant affidavit did not include any information establishing informant reliability. It also held that despite the *Franks* violation, the affidavit could support probable cause even if the false information were omitted. The State argues that the Court of Appeals correctly held that suppression was not required on this basis because even with Oliver's involvement included in the affidavit, probable cause would have still existed. We disagree.

Once it is established that the affiant has knowingly and intentionally or with reckless disregard for the truth made false statements, the search-warrant affidavit's remaining content must be reviewed to determine if probable cause exists. *See Franks*, 438 U.S. at 155-156. The remaining content must allow a reviewing judge to make a common sense decision whether, under the totality of the circumstances, including veracity and basis of knowledge of person(s) supplying information,

there is a fair probability that contraband or evidence of a crime will be found in the particular place to be searched. If the remaining content cannot support this determination, then the trial judge should suppress the evidence. *Id*.

With the false statements excised from this search-warrant affidavit, there no longer exists a substantial basis for a finding of probable cause. Contrary to the holding of the Court of Appeals and the argument of the State, the search-warrant affidavit supports probable cause only if **Oliver**, not the confidential informant, were telling the truth. Since the confidential informant stayed in the car, down the road from the Home, her knowledge hinges on the reliability of **Oliver,** whose credibility has not been established.[3] With the false information removed, nothing remains in the search-warrant affidavit to establish a substantial basis for a finding of probable cause.

D. *Leon's* good faith exception to suppression

Finally, the State argues the Court of Appeals erred in holding that the good faith exception to an otherwise invalid search warrant did not apply. We disagree. In *U.S. v. Leon*, the United States Supreme Court held that evidence should not be suppressed which resulted from a search where law enforcement reasonably relied on a search warrant, which was ultimately found to be invalid . *See* 468 U.S. 807, 920 (1978). The Court, however, held suppression remains the appropriate remedy when a reviewing judge is intentionally misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. *Leon*, 468 U.S. at 923.

The State argues that the Court of Appeals erred when it held that the good-faith exception to suppression does not apply because the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Robinson*, 408 S.C. at 277, 758 S.E.2d at 730. We agree with the Court of Appeals that *Leon* does not apply. We hold that the good faith exception is not available, where, as here, the warrant issued is based on a search-warrant

[3] Moreover, as Oliver was never searched prior to entering the Home, nothing in the record establishes that he did not possess the drugs prior to the alleged transactions.

affidavit of the officer which contained representations known to be false. *See Leon*, 468 U.S. at 923.

CONCLUSION

As explained in subsection A, *supra,* we hold that because the search-warrant affidavit**, on its face**, supports a finding of probable cause, an objective law enforcement officer's belief in it could be reasonable. Thus, the Court of Appeals erred in holding otherwise. However, because the information in the search-warrant affidavit concerning the informant/purported purchaser's reliability was intentionally false, *see* subsections B and C, *supra*, the credibility of the entire affidavit is compromised.

For the reasons given above, the decision of the Court of Appeals is

AFFIRMED AS MODIFIED.

BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice Jean H. Toal, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Howard B. Hammer, Respondent.

Appellate Case No. 2016-000452

Opinion No. 27618
Submitted March 10, 2016 – Filed March 30, 2016

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Julie K. Martino, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Thomas H. Pope, III, Esquire, of Pope & Hudgens, PA, of Newberry, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension not to exceed one year. Respondent requests that the suspension be made retroactive to the date of interim suspension.[1] In addition, respondent agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct in the investigation and prosecution of this matter within thirty days of the imposition of discipline and to complete the Legal Ethics and Practice Program Ethics School prior to reinstatement. We accept the Agreement and suspend respondent from the practice of law in this state for one

[1] Respondent was placed on interim suspension on June 22, 2012. *In re Hammer*, 398 S.C. 593, 730 S.E.2d 856 (2012).

year. The suspension shall not be retroactive to the date of interim suspension. The facts, as set forth in the Agreement, are as follows.

Facts

On June 25, 2012, respondent was charged with first degree assault and battery, malicious injury to personal property, hit and run or leaving the scene with property damage, and unlawful conduct towards a child. The charges resulted from an incident involving a process server who was attempting to serve documents on respondent in connection with a family court proceeding. During the incident, respondent, who was with his two sons, twice made contact with the process server's vehicle while backing his car out of a parking space. Respondent left the scene, but later returned.

On December 15, 2014, respondent pled guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) to leaving the scene with property damage. He was sentenced to 364 days in prison, suspended upon six months' probation. The remaining charges were dismissed.

Law

Respondent admits his conduct constitutes a violation of Rule 8.4(e) of the Rules of Professional Conduct, Rule 407, SCACR,[2] and Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.[3]

Conclusion

We accept the Agreement and suspend respondent from the practice of law for one year from the date of this opinion. Respondent shall, within thirty days of the date of this opinion, pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct. In addition, respondent shall complete the Legal Ethics and Practice Program Ethics School prior to

[2] It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. Rule 8.4(d), RLDE, Rule 413, SCACR.

[3] It shall be a ground for discipline for a lawyer to violate or attempt to violate the Rules of Professional Conduct, Rule 407, SCACR, or any other rules of this jurisdiction regarding professional conduct of lawyers. Rule 7(a)(1), RLDE, Rule 413, SCACR.

reinstatement. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

I would run the one year suspension retroactive to the date of respondent's interim suspension.

PLEICONES, C.J.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gary Kubic, in his official capacity as County Administrator for Beaufort County, South Carolina, and Dale L. Butts, in his official capacity as Register of Deeds for Beaufort County, South Carolina, Respondents,

v.

MERSCORP Holdings, Inc., Mortgage Electronic Registrations Systems, Inc., Bank of America, N.A., Deutsche Bank National Trust Company, JPMorgan Chase Bank, N.A., CitiMortgage, Inc., HSBC Bank USA, N.A., HSBC Mortgage Corporation (USA), HSBC Mortgage Services, Inc., South State Bank, Coastal Banking Company, Inc., and Tidelands Bank, Petitioners.

2013-CP-07-1340

Thessa G. Smith, in her official capacity as County Administrator for Allendale County, South Carolina, and Elaine Sabb, in her official capacity as Register of Deeds for Allendale County, South Carolina, Respondents,

v.

MERSCORP Holdings, Inc., Mortgage Electronic Registrations Systems, Inc., Bank of America, N.A., South State Bank, SunTrust Mortgage, Inc., Branch Banking and Trust Company, Citibank, N.A., Quicken Loans, Inc., Wells Fargo Bank, N.A., Regions Bank, and Green Tree Servicing, LLC, Petitioners.

2014-CP-03-00146

Andrew P. Fulghum, in his official capacity as County Administrator for Jasper County, South Carolina, and Patsye M. Greene, in her official capacity as Register of Deeds for Jasper County, South Carolina, Respondents,

v.

MERSCORP Holdings, Inc., Mortgage Electronic Registrations Systems, Inc., Bank of America, N.A., CitiMortgage, Inc., South State Bank, Nationstar Mortgage, LLC, Wells Fargo Bank, N.A., SunTrust Mortgage, Inc., Branch Banking and Trust Company, 1st Choice Mortgage/Equity Corporation of Lexington, Regions Bank, and Countrywide Home Loans, Inc., Petitioners.

2014-CP-27-00242

Sabrena P. Graham, in her official capacity as County Administrator for Hampton County, South Carolina, and Mylinda Nettles, in her official capacity as Register of Deeds for Hampton County, South Carolina, Respondents,

v.

MERSCORP Holdings, Inc., Mortgage Electronic Registrations Systems, Inc., Bank of America, N.A., South State Bank, Wells Fargo Bank, N.A., SunTrust Mortgage, Inc., Branch Banking and Trust Company, and Countrywide Home Loans, Inc., Petitioners.

2014-CP-25-00262

Kevin Griffin, in his official capacity as County Administrator for Colleton County, South Carolina, and Debbie Gusler, in her official capacity as Register of Deeds for Colleton County, South Carolina, Respondents,

v.

MERSCORP Holdings, Inc., Mortgage Electronic Registrations Systems, Inc., Bank of America, N.A., South State Bank, SunTrust Mortgage, Inc., Branch Banking and Trust Company, Countrywide Home Loans, Inc., Citibank, N.A., TD Bank, N.A., Quicken Loans, Inc., and Capital One, N.A., Petitioners.

2014-CP-15-00650

Appellate Case No. 2015-001366

Appeal from Beaufort County
The Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 27619
Heard February 10, 2016 – Filed March 30, 2016

REVERSED

J. Edward Bell, III, of Bell Legal Group, of Georgetown, for Petitioner Capital One, N.A.; Tobias G. Ward, Jr. and

J. Derrick Jackson, of Tobias G. Ward, Jr., PA, of Columbia, for Petitioner 1st Choice Mortgage/Equity Corporation of Lexington; B. Rush Smith, III, and Brian P. Crotty, of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Petitioners MERSCORP Holdings, Inc., et al., Bank of America, N.A., Countrywide Home Loans, Inc., Quicken Loans, Inc., Wells Fargo Bank, N.A., CitiMortgage, Inc. and Citibank, N.A., JPMorgan Chase Bank, N.A., Deutsche Bank National Trust; C. Pierce Campbell, of Turner Padget Graham & Laney, PA, of Florence, for Petitioner South State Bank; Michael C. Griffin, of Bradley Arant Boult Cummings, LLP, of Charlotte, NC, for Petitioner Nationstar Mortgage, LLC; William Grayson Lambert, of McGuireWoods, LLP, of Charlotte, NC, for Petitioner TD Bank, N.A.; Clay M. Carlton and Robert M. Brochin, of Miami, FL, for Petitioner MERSCORP Holdings, Inc., et al.; Brian A. Herman, of Morgan Lewis & Bockius LLP, of New York, NY, for Petitioner JPMorgan Chase Bank, N.A.; Lucia Nale and Thomas V. Panoff, of Mayer Brown LLP, of Chicago, IL, for Petitioners CitiMortgage, Inc. and Citibank, N.A.; Robert E Sumner, IV, of Moore & Van Allen, PLLC, of Charleston, for Petitioner Tidelands Bank; Joseph F. Yenouskas and Thomas F. Hefferon, of Goodwin Procter LLP, of Washington, DC, for Petitioners Bank of America, N.A., Countrywide Home Loans, Inc., Quicken Loans, Inc., and Wells Fargo Bank, N.A.; Elizabeth A. Frohlich, of Morgan Lewis & Bockius, of San Francisco, CA, for Petitioner Deutsche Bank National Trust.

James P. Scheider, Jr., Roberts Vaux, and Antonia T. Lucia, of Vaux Marscher Berglind, P.A., of Bluffton, for Respondents.

ACTING CHIEF JUSTICE HEARN: This case is a consolidation of five separate lawsuits instituted by county administrators and registers of deeds in

Allendale, Beaufort, Colleton, Hampton, and Jasper Counties (collectively, Respondents) against MERSCORP Holdings, Inc.; Mortgage Electronic Registrations Systems, Inc. (MERS); and numerous banking institutions (collectively, Petitioners). Respondents contend Petitioners have engaged in a practice of fraudulent recordings that have disrupted the integrity of the public index Respondents are statutorily required to maintain. Petitioners filed a motion to dismiss, which the trial court denied. Petitioners then filed a motion for a writ of certiorari pursuant to Rule 245, SCACR, which this Court granted. We now reverse the decision of the trial court and dismiss Respondents' suits.

FACTUAL/PROCEDURAL BACKGROUND

Because this appeal arises from the denial of a motion to dismiss, we accept the facts as alleged in the complaint for the purposes of our analysis. MERS is a subsidiary of MERSCORP and is a member-based organization made up of lenders and investors, including mortgage banks, title companies, and title insurance companies. When MERS member-lenders issue a mortgage and promissory note, MERS is listed as the mortgagee, specifically as "nominee" in place of the lender. The mortgage is then recorded in the county where the real property is located, and internally, the loan is registered in the MERS system. Accordingly, MERS becomes the grantee in the public index, despite the fact that MERS holds no security interest in the promissory note. This allows the lender to retain priority with MERS as the nominee without having to record each time there is an assignment of the mortgage when the promissory note is transferred. MERS essentially provides a convenient framework through which members can transfer notes amongst themselves without having to record each exchange. However, as a result of this system, the public index may not accurately reflect who has an interest in the real property, as the note has been severed from the mortgage.

Respondents filed lawsuits in their respective counties against Petitioners, alleging fraud and misrepresentation, unfair trade practices, conversion, and trespass to chattels. Additionally, Respondents sought a declaratory judgment stating Petitioners had caused damage to the public index in recording false documents. Furthermore, they requested injunctive relief enjoining Petitioners from recording any document indicating MERS has a lien on real property as well as requiring Respondents to correct the falsely filed documents. Respondents prayed for direct and consequential damages to remediate deficiencies in the index, as well as compensatory and punitive damages in the event the errors in the records

could not be ameliorated. Chief Justice Jean H. Toal signed an order consolidating the cases and assigning them to Business Court Judge R. Lawton McIntosh.

Petitioners then filed a joint motion to dismiss, arguing Respondents "lack contractual standing," the lawsuit was barred by section 30-9-30 of the South Carolina Code (2007), the parties may designate MERS as mortgagee, and the complaints fail to state a cognizable claim.

The trial court denied the motion to dismiss in a form order stating: "As this is a novel issue of law[,] motions to dismiss are inappropriate at this time under *Byrd v. Irmo [High School*, 321 S.C. 426, 468 S.E.2d 861 (1996)]. No formal order to follow." Petitioners filed a petition for a writ of certiorari, which this Court granted.[1]

ISSUE PRESENTED

Did the trial court err in failing to grant Petitioners' motion to dismiss because Respondents failed to state a cause of action?

LAW/ANALYSIS

Petitioners contend section 30-9-30(B) does not provide Respondents authority to bring this cause of action, and on this ground, the suit should be dismissed. Respondents argue this statute allows them to bring this suit by implication. We agree with Petitioners.[2]

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[1] The denial of a motion to dismiss is ordinarily not immediately appealable; however, in this matter the Court found a writ of certiorari was warranted. *See Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 471, 674 S.E.2d 154, 160 (2009) (explaining this Court may issue a writ of certiorari when exceptional circumstances exist despite an order not being directly appealable).

[2] The parties dispute the scope of the issue on appeal. Petitioners maintain the issue is whether the General Assembly created a right of action for Respondents to bring this suit. Respondents prefer to reframe the issue more broadly and contend it is one of standing. Whether a party has standing and whether a party has stated a cognizable cause of action are discrete inquiries. *See, e.g.*, *Georgetown Cnty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 358 n.4, 713 S.E.2d 287, 291 n.4 (2011) ("To have standing, an individual must generally have a personal stake in the litigation or qualify as a real party in interest. By contrast, the

At the outset, we find the trial court erred in declining to dismiss the suit on the ground this was a novel issue. Although our Court has held that "important questions of novel impression should not be decided on a motion to dismiss," this general rule does not apply when the determinative facts are not in dispute. *See Unisys Corp. v. S. Carolina Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001). Where, as here, the question is one of simple statutory construction, a trial court should not deny a meritorious motion merely because the question is one of first impression.

Our focus in statutory construction is ascertaining the intent of the legislature, and we turn first to the text of a statute as the best evidence of legislative will. *Horry Tel. Co-op., Inc. v. City of Georgetown*, 408 S.C. 348, 353, 759 S.E.2d 132, 134 (2014). Therefore, questions of whether the legislature intended to create a private cause of action should be resolved by the language of the statute. *16 Jade St., LLC v. R. Design Const. Co.*, 405 S.C. 384, 389, 747 S.E.2d 770, 773 (2013). "When a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party." *Doe v. Marion*, 373 S.C. 390, 397, 645 S.E.2d 245, 248 (2007). Generally, "a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing civil liability." *Whitworth v. Fast Fare Markets of S.C. Inc.*, 289 S.C. 418, 420 388, S.E.2d 155, 156 (1985) (quoting 73 Am. Jur. 2d, Statutes §432 (1974)).

Section 30-9-30(B)(1)-(2) provides:

> (1) If a person presents a conveyance, mortgage, judgment, lien, contract, or other document to the clerk of court or the register of deeds for filing or recording, *the clerk of court or the register of deeds may refuse to accept the document for filing if he reasonably believes that the document is materially false or fraudulent or is a sham legal process.* Within thirty days of a written notice of such refusal, the

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determination of whether a party has a private right of action under a particular statute is merely a matter of legislative intent.") (Hearn, J., concurring in part and dissenting in part) (internal citations omitted). Respondents cannot recast Petitioners' appeal as a question of standing, and we therefore address the challenge actually asserted by Petitioners—whether the statute invoked by Respondents permits them to bring this action.

> person presenting the document may commence a suit in a state court of competent jurisdiction requiring the clerk of court or the register of deeds to accept the document for filing.
>
> (2) *If the clerk of court or the register of deeds reasonably believes that a conveyance, mortgage, judgment, lien, contract, or other document is materially false or fraudulent, or is a sham legal process, the clerk of court or the register of deeds may remove the document from the public records* after giving thirty days' written notice to the person on whose behalf the document was filed at the return address provided in the document. Within thirty days written notice of the proposed removal, the person providing the notice[3] may commence a suit in a state court of competent jurisdiction preventing the clerk of court or the register of deeds from removing the document.

(emphasis added). Respondents suggest that because section 30-9-30 allows the register of deeds to reject and remove fraudulent documents, by implication, the statute provides Respondents "the power to commence litigation to remediate the record and ask guidance from this Court."

Although a statute need not *expressly* create a cause of action, we do not agree the language of section 30-9-30(B) can be expanded in the manner Respondents propose. Our rules of construction allow this Court to infer a cause of action "*only* if the legislation was enacted for the special benefit of a private party." *Doe v. Marion*, 373 S.C. at 397, 645 S.E.2d at 248 (emphasis added). Here, Respondents ask the Court to imply a right of action to *government officials* who are not expressly entitled to some special benefit under the statute; rather, the statute merely offers guidance as to how they should carry out their job duties. If anything, the language clearly acknowledges that it is incumbent on Respondents to accept and record appropriate filings and any dereliction in that duty is actionable by the party who filed the document.[4] Contrary to Respondents'

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[3] The parties agreed at oral argument that the use of the phrase "the person providing the notice"—which would be the clerk or register of deeds—is a typographical error and should be a reference to the person on whose behalf the document was filed.

[4] For this reason, we similarly reject Respondents' argument they are entitled to declaratory relief under the Uniform Declaratory Judgment Act, Section 15-53-10 to -140 (2005). The purpose behind the Act is to "provide for declaratory

assertion, it is the "person presenting the document" who is entitled to "commence a suit in a state court" to require the clerk of court or register of deeds to accept a document for filing or to prevent him or her from removing a document. S.C. Code Ann. § 30-9-30(B)(1)–(2). When the legislature delineated who would be able to bring a suit pursuant to section 30-9-30(B), it chose not to afford that right to government officials. We decline to imply language into a deliberate silence because to do so would be to rewrite the statute.

Additionally, the statute already provides a remedy to government officials by allowing them to remove or reject any fraudulent records; by its express language a judicial blessing or directive is not required (and thus, not permitted) in performance of this executive function. Nevertheless, Respondents complain "[t]he tools provided were not sufficient to preserve the integrity of the public record from fraudulent and pervasive effects of a shadow recording system which would go undetected until substantial harm had been done." However laudable the interest in protecting the public index may be, our limited role here is discerning legislative intent from the statutory text. If Respondents are dissatisfied with the powers the legislature has outlined for them, that should be taken up with the General Assembly. It is not the province of this Court to legislate or imply remedies not specified by the legislature.[5]

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judgments without awaiting a breach of existing rights." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004). Here, none of Respondents' legal rights are being or will be abridged.

[5] Respondents also argue that South Carolina Court Administration *recommended* filing a lawsuit as a means of ferreting out fraudulent documents, relying on a court administration memorandum that states "if a clerk of court or register of deeds is not clear as to whether the document is fraudulent, it should be accepted for filing and subject to review by the court." Memorandum from Rosalyn Frierson, Director of Court Administration to Clerks of Court, Registers of Deed and Masters-In-Equity (August 25, 2010). From this language, Respondents claim they are entitled to file this lawsuit. We disagree. This memorandum does not have the force of law. Moreover, while we do not agree with Respondents that it intimates this lawsuit is proper, to the extent it might be read that way, it conflicts with the clear language of the statute and is therefore not controlling.

CONCLUSION

Based on the foregoing, we find Respondents have failed to state a claim and therefore reverse the trial court's denial of Petitioners' motion to dismiss.

Acting Justices Aphrodite K. Konduros, John D. Geathers, William H. Seals and Tanya A. Gee, concur.

The Supreme Court of South Carolina

In the Matter of Lisabeth Kirk Rogers, Respondent.

Appellate Case No. 2016-000600

ORDER

The Office of Disciplinary Counsel petitions this Court to place respondent on interim suspension pursuant to Rule 17 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.

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

Within fifteen (15) days of this order, respondent shall serve and file the affidavit required by Rule 30, RLDE. Should respondent fail to timely file the required affidavit, respondent may be held in civil and/or criminal contempt of this Court as provided by Rule 30, RLDE.

s/ Costa M. Pleicones C.J.

Columbia, South Carolina

March 22, 2016

The Supreme Court of South Carolina

Richard Stogsdill, Petitioner,

v.

South Carolina Department of Health and Human Services, Respondent.

Appellate Case No. 2014-002513

ORDER

After granting a writ of certiorari to review the decision of the South Carolina Court of Appeals in this case, this Court issued an opinion on January 20, 2016, dismissing the writ as improvidently granted. That same day, the remittitur was sent to the Administrative Law Court.

Petitioner has now filed a motion requesting that this Court vacate its opinion pursuant to Rule 60(b)(3), SCRCP, and seeking leave to supplement the record in this matter pursuant to Rule 212(b), SCACR. Alternatively, Petitioner seeks a rehearing pursuant to Rule 221(a), SCACR.

Initially, to the extent Petitioner petitions the Court to vacate its opinion under Rule 60, SCRCP, we remind Petitioner that the South Carolina Rules of Civil Procedure are inapplicable in appellate proceedings. *See* Rule 73, SCRCP ("Procedure on appeal to the South Carolina Supreme Court or the South Carolina Court of Appeals shall be in accordance with the South Carolina Appellate Court Rules."); Rule 81, SCRCP (providing the SCRCP "shall apply to every *trial court* of civil jurisdiction within this state " (emphasis added)).

To the extent Petitioner's motion seeks a rehearing of this Court's decision, such a request is improper because petitions for rehearing are not entertained following this Court's dismissal of a writ of certiorari as improvidently granted. *See* Rule

221(a), SCACR ("No petition for rehearing shall be allowed from an order denying a petition for a writ of certiorari . . . ."); *Hollins v. Wal-Mart Stores, Inc.*, 392 S.C. 313, 313, 709 S.E.2d 625, 626 (2011) (finding that, for purposes of Rule 221(a), SCACR, a dismissal of a writ of certiorari as improvidently granted is equivalent to the denial of a petition for a writ of certiorari since both dispositions indicate this Court has determined there is no need to discuss or further review the merits of the case).

Further, since the opinion of this Court was not subject to any petition for rehearing, the remittitur was properly sent when the opinion was filed. The sending of the remittitur ended appellate jurisdiction over this case, and no further motions will be entertained after the remittitur is sent. *Wise v. S.C. Dep't of Corr.*, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007).

Therefore, Petitioner's motion is hereby stricken and dismissed.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Moore, A.J., not participating.

Columbia, South Carolina

March 24, 2016

The Supreme Court of South Carolina

In the Matter of Todd Anthony Strich, Petitioner.

Appellate Case Nos. 2014-002456 and -0002457

ORDER

By opinion dated November 21, 2005, the Court suspended petitioner from the practice of law for one year. *In the Matter of Strich*, 366 S.C. 373, 622 S.E.2d 543 (2005). Petitioner filed Petitions for Reinstatement pursuant to Rule 33 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR) and Rule 419, SCACR. After referral to the Committee on Character and Fitness (Committee), the Committee has filed a Report and Recommendation recommending the Court reinstate petitioner to the practice of law with certain conditions.

The Court grants the Petitions for Reinstatement subject to the following conditions: (1) petitioner shall complete the Legal Ethics and Practice Program, including the trust account management, law office management and advertising classes, no later than twelve months from the date of this order, and shall file proof of completion of the program with the Commission on Lawyer Conduct no later than ten days after the conclusion of the program; (2) petitioner shall remain current on his monthly payments to the Lawyers' Fund for Client Protection; (3) if petitioner decides to be a sole practitioner, he shall be mentored by a practitioner in good standing chosen by the Commission on Lawyer Conduct and approved by this Court, who will be in contact with petitioner on a weekly basis and will file quarterly reports with the Commission for the first year petitioner is in practice; and (4) if petitioner decides to be a sole practitioner, he shall provide quarterly trust account reports to the Commission for two years after he begins his solo practice.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina

March 24, 2016

The Supreme Court of South Carolina

Re: Amendments to Rule 416, South Carolina Appellate Court Rules

Appellate Case No. 2016-000248

ORDER

The South Carolina Bar requests that Rule 18 of Rule 416, SCACR, which controls appointment of a hearing panel in matters involving the Resolution of Fee Disputes Board, be amended to change how a hearing panel is selected in the event of a conflict of interest.

We adopt the Bar's proposed amendments to Rule 18, as set forth in the attachment, with minor changes to indicate that a co-chair may select the members of the hearing panel in the event the circuit chair is disqualified based on a conflict of interest. This amendment is effective immediately.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
March 30, 2016

Rule 18 of Rule 416, SCACR, is amended to provide:

RULE 18. CONFLICTS OF INTEREST

In case of a conflict of interest or disqualification of a circuit chair and any co-chair in a given case, the circuit chair shall request assistance from the chair in another circuit and transfer the case to that circuit.

In extraordinary cases where members of the circuit panel are disqualified for any reason, either voluntarily or involuntarily, in a specific dispute, and there do not remain enough members of the circuit panel to comprise the hearing panel, the chair of the Executive Council, or, in the event of the disqualification of the chair of the Executive Council, the President shall appoint the requisite number of members from the Board to the hearing panel.

Should any member of the circuit panel in a judicial circuit fail or refuse to discharge the duties of a member of the Board, the chair of the Executive Council shall appoint a substitute member from members of the Board.

The Supreme Court of South Carolina

Re: Amendment to Rule 608(i), South Carolina Appellate Court Rules

Appellate Case No. 2016-000438

ORDER

The Executive Director of the South Carolina Bar requests that Rule 608(i), SCACR, be amended to eliminate the requirement that clerks of court provide quarterly reports to the South Carolina Bar concerning the number and type of Rule 608 appointments. We grant the request and amend Rule 608(i) to provide as follows:

> **(i) Records.** Any records maintained by the South Carolina Bar, the circuit court, the family court, or a clerk of court relating to appointments under this rule shall be made available for review by any regular member upon written request of that member.

The amendment is effective immediately.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
March 30, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

George White, Appellant.

Appellate Case No. 2013-000638

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 5396
Heard October 13, 2015 – Filed March 30, 2016

AFFIRMED

Rachel Atkin Hedley, Nelson Mullins Riley & Scarborough, LLP, and Chief Appellate Defender Robert Michael Dudek, both of Columbia, for Appellant.

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

FEW, C.J.: George White appeals his convictions for lewd act upon a child[1] and criminal sexual conduct with a minor in the second degree, arguing (1) the trial court erred in admitting into evidence a video of a forensic interview with the victim and allowing the jurors to use a transcript of the interview while watching the video, (2) the trial court erred in finding the victim's statement in the interview provided particularized guarantees of trustworthiness, (3) the trial court erred in qualifying the forensic interviewer as an expert in the dynamics of child abuse, (4) the trial court erred in denying his motion for a directed verdict because the State failed to present evidence of sexual battery—one of the elements of criminal sexual conduct with a minor in the second degree, (5) the admission of the forensic interview deprived him of due process, (6) the trial court erred in allowing the forensic interviewer to offer her opinion on the victim's credibility, and (7) the trial court erred in allowing the forensic interviewer to offer improper character evidence. We affirm.

I. Admissibility of the Victim's Statement and Use of a Transcript

At trial, the State sought to admit into evidence a video of the victim's forensic interview, but the parties and the trial court were unable to clearly hear the audio of the interview. During a recess, a court reporter prepared a transcript of the audio for the jury to use while watching the video. The trial court found the forensic interview video admissible, explained the audio problems to the jurors, and allowed them to follow the transcript while watching the video. White argues that because the victim's statement in the video was not clearly audible, the trial court abused its discretion in admitting the video and allowing the jury to use the transcript.

Subsection 17-23-175(A) of the South Carolina Code (2014) provides that in a criminal proceeding, an out-of-court statement made by a child under the age of twelve is admissible if four requirements are met, including, "(2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means." The purposes of subsection 17-23-175(A)(2) include giving the

[1] White was convicted for crimes occurring in 2007 and 2008. At that time, the crime of lewd act upon a child was codified at section 16-15-140 of the South Carolina Code (2003) (repealed 2012). The same conduct is now classified as criminal sexual conduct with a minor in the third degree. S.C. Code Ann. § 16-3-655(C) (2015).

jurors direct access—audio and visual—to the victim's statements to enable the jurors to more accurately evaluate the victim's credibility. Under subsection 17-23-175(A), therefore, there is an important difference between using a transcript to assist the jury in listening to the statement and using a transcript to replace an inaudible statement. In this case, the video of the forensic interview contained some sound but was not clearly audible.

When faced with the problem of poor audio quality, the trial court must use its discretion in determining whether the admission of a forensic interview meets the requirement of and is consistent with the purposes of subsection 17-23-175(A)(2). The trial court in this case demonstrated it understood the purposes of subsection 17-23-175(A)(2) when it explained to the jurors they must "listen and watch" and "decide what was said and done on the video, not what th[e] transcript is." Because the trial court focused on the purposes of the statute and fashioned a solution to the audio problem consistent with those purposes, we hold the court did not abuse its discretion in allowing the jurors to use the transcript and in admitting the forensic interview.[2]

II. Remaining Issues

We affirm as to the remaining issues pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to White's argument that the trial court erred in finding the victim's statement provided particularized guarantees of trustworthiness, we find the trial court acted within its discretion. *See* S.C. Code Ann. § 17-23-175(B) (2014) (providing when determining whether a statement contains particularized guarantees of trustworthiness, the trial court may consider five factors: "(1) whether the statement was elicited by leading questions; (2) whether the interviewer has been trained in conducting investigative interviews of children; (3) whether the statement represents a detailed account of the alleged offense; (4) whether the statement has internal coherence; and (5) sworn testimony of any participant which may be determined as necessary by the court").

[2] Because we find the trial court acted within its discretion to admit the forensic interview under subsection 17-23-175(A), we need not address whether the interview was admissible under subsection 17-23-175(F) of the South Carolina Code (2014).

2. As to White's argument that the trial court erred in qualifying the forensic interviewer as an expert in the dynamics of child abuse, we find the trial court acted within its discretion. *See* Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."); *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (requiring as a foundation for the admission of expert testimony (1) the witness is qualified, (2) the testimony will assist the trier of fact, and (3) the method by which the witness reached the opinion is reliable); *State v. Brown*, 411 S.C. 332, 339-42, 768 S.E.2d 246, 250-51 (Ct. App. 2015) (affirming the admission of expert testimony on child sex abuse dynamics when the foundation was properly laid under *Watson*). *But see State v. Anderson*, 413 S.C. 212, 218-19, 776 S.E.2d 76, 79 (2015) (suggesting the "better practice" is not to have the forensic interviewer testify about child abuse assessment or dynamics).

3. As to White's argument that the trial court erred in denying his motion for a directed verdict, we find the State presented evidence of sexual battery. *See State v. Brannon*, 388 S.C. 498, 501, 697 S.E.2d 593, 595 (2010) ("'When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight.' A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. When reviewing a denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the nonmoving party." (citations omitted)); *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) ("[I]f there is any direct or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." (emphasis omitted)); S.C. Code Ann. § 16-3-655(B) (2015) ("A person is guilty of criminal sexual conduct with a minor in the second degree if: (1) the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age . . . ."); S.C. Code Ann. § 16-3-651(h) (2015) (defining "sexual battery" as "sexual intercourse . . . or any intrusion, *however slight*, of any part of a person's body or of any object into the genital or anal openings of another person's body" (emphasis added)); *State v. Mathis*, 287 S.C. 589, 593, 340 S.E.2d 538, 541 (1986) (holding a six-year-old's testimony that it "hurt" when the defendant touched her vaginal area with his penis

"is evidence of some 'intrusion, however slight,' as . . . required by § 16-3-651(h)" and thus the trial court "properly denied [the] motion for a directed verdict").

4. As to White's argument that the admission of the forensic interview deprived him of due process, we find no error. *See State v. Dukes*, 404 S.C. 553, 558, 745 S.E.2d 137, 140 (Ct. App. 2013) (providing due process requires only "adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review" (citation omitted)).

5. As to White's argument that the trial court erred in allowing the forensic interviewer to offer her opinion on the victim's credibility, we find the argument unpreserved. *See State v. Brown*, 402 S.C. 119, 125 n.2, 740 S.E.2d 493, 496 n.2 (2013) (stating an issue must be "raised to and ruled upon by the trial court" to be preserved for appellate review); *see also State v. Culbreath*, 377 S.C. 326, 333, 659 S.E.2d 268, 272 (Ct. App. 2008) ("[A] defendant may open the door to what would be otherwise improper evidence through his own introduction of evidence or witness examination. A party cannot complain of prejudice from evidence to which he opened the door." (citation omitted)).

6. As to White's argument that the trial court erred in allowing the forensic interviewer to offer improper character evidence, we find the forensic interviewer testified only in general terms and her testimony was not offered for the purpose of proving White acted in conformance with any character trait. *See* Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

AFFIRMED.

KONDUROS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nichols Holding, LLC and J. Wade Nichols,
Respondents-Appellants,

v.

Divine Capital Group, LLC, John S. Divine, IV, Nathan Anderson, and Divine Dining Group, Inc., Appellants-Respondents.

Appellate Case No. 2014-000662

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 5397
Submitted December 29, 2015 – Filed March 30, 2016

REVERSED AND REMANDED

Emma Ruth Brittain, Leah Montgomery Cromer, and J. Jackson Thomas, of Thomas & Brittain, P.A., of Myrtle Beach, for Appellants-Respondents.

Gene M. Connell Jr., of Kelaher, Connell & Connor, P.C., of Surfside Beach, for Respondents-Appellants.

GEATHERS, J.: In this breach of contract action, Appellants-Respondents, Divine Capital Group, LLC, John S. Divine, IV, Nathan Anderson, and Divine Dining Group, Inc. (collectively, Divine), and Respondents-Appellants, Nichols

Holding, LLC and J. Wade Nichols (collectively, Nichols), seek review of the circuit court's order. Divine appeals that part of the order requiring Divine to pay impact fees to Georgetown County Water and Sewer District (the District) on behalf of Nichols. Nichols challenges that part of the order requiring Nichols to pay Divine's outstanding trade debt.[1]

FACTS/PROCEDURAL HISTORY

In March 2011, Nichols filed this breach of contract action against Divine to recover capital contributions made to Divine for the purpose of opening certain restaurants at The Market Commons in Myrtle Beach. Nichols also sought an accounting and the appointment of a receiver to run all of Divine's restaurant businesses. At the time, two related actions involving the parties were pending in circuit court.[2] On May 25, 2012, the circuit court ordered the establishment of a receivership over Divine's restaurant businesses and appointed Arlene Jaskot, CPA, as the receiver.

Meanwhile, the District sent yearly notices to Divine concerning the District's imposition of a "Demand Charge," in addition to regular water and sewer charges, on the accounts of two restaurants located on Parsonage Creek in Murrells Inlet, i.e., Bovine's Wood Fired Specialties (Bovine's) and Divine Fish House (collectively, the Restaurants). At least one of these notices was signed by the District's "Finance/Administration Director," John F. Buck.[3] The notices stated, in pertinent part:

> In order to more equitably distribute costs associated with providing water and sewer service to commercial customers, the District put in place a "Demand Charge[."]

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

[2] One of the actions, *Bank of North Carolina v. Abaco Holdings, LLC, et al.*, No. 2010-CP-22-1541, was a mortgage foreclosure action. The other action, *J. Wade Nichols and J. Wade Nichols DMD, P.A. Profit Sharing Plan v. John S. Divine, IV*, No. 2010-CP-26-10474, involved a personal guaranty signed by John S. Divine, IV, in favor of both plaintiffs.

[3] The record does not include every District letter for each restaurant account; rather, Divine included in the record letters representing the nature of the District's correspondence for both accounts.

The "Demand Charge" is applicable only to those commercial customers [who] consistently *exceed* the water and sewer capacity assigned to them. The capacity assigned is determined by the number of water and/or sewer impact fees *previously paid for* at a specific service location. Impact fees are determined by the *expected* water and/or sewer demand required to service a particular commercial activity. The impact fees paid by our customers are used exclusively to pay for the expansion of the plant facilities, storage, and system improvements required [for] serving all users of the water and sewer system during peak demand periods. . . .

. . . .

The "Demand Charge" is intended to (a) encourage water/sewer conservation, (b) provide capital funds necessary to expand facility capacity associated with excess demand, and (c) ensure fair and equitable rates and charges to all District customers. . . .

. . . .

You have the *option* of purchasing the *additional capacity* by paying the associated *impact fees* and eliminating or reducing the monthly Demand Charge(s). . . .

Payment of the Demand Charges shall not be considered as a credit toward the purchase of additional impact fees. A user demand analysis shall be performed each year providing the customer the *opportunity to reduce consumption* and/or to lower or eliminate the Demand Charge for the following year.

The District encourages you to review your usage records and consider any justification or methods to *reduce the usage to the assigned capacities*. . . .

(emphases added). Divine did not opt to pay impact fees to purchase additional water and sewer capacity; instead, Divine paid the monthly demand charges.

By the spring of 2013, Nichols and Divine settled their litigation by executing (1) a Consent Order allowing for the entry of judgment in favor of Nichols against Divine in the amount of $8,642,370.70; (2) a "Settlement Agreement and Release in Full," in which Divine agreed to sell certain real estate and intellectual property to Nichols in exchange for Nichols' (a) assumption of certain debts of Divine, (b) execution of a satisfaction of judgment, and (c) request of the circuit court to terminate the receivership; and (3) an "Agreement of Purchase and Sale," covering Nichols' purchase of the real estate and intellectual property, which included Nichols' optional assumption of certain operating agreements for the Restaurants, and a marina adjacent to Divine Fish House. Specifically, the Agreement of Purchase and Sale required Nichols to pay Divine's "trade debt" that remained outstanding as of the date of the closing of the sale, which occurred on May 2–3, 2013. "Trade Debt" is defined in the Agreement of Purchase and Sale as follows:

> [A]ll amounts outstanding for and from the operation of the Restaurants and Bars [that] are normal operating expenses of the Restaurants and Bars, and [that] are reasonably consistent with past operating expenses of the Restaurants and Bars. The Trade Debt includes the fee for administrative services provided to the Restaurants and Bars by Divine Dining Group, Inc. ("DDG"); provided, however, that the administrative services fees of DDG shall not exceed DDG's actual cost and shall not exceed normal rates for fees of this kind in the greater Myrtle Beach, South Carolina market area. The Trade Debt shall not include, but specifically excludes, intercompany debt owed to Divine or companies owned by Divine other than the fees due to DDG for its administrative services for the Restaurants and Bars.

The closing of the sale occurred on May 2–3, 2013. At this time, Divine presented Nichols with documentation of the outstanding trade debt. Also, at this time, the Restaurants' water and sewer accounts with the District did not show any

past due charges; rather, the District had just issued a bill on May 2, 2013, the first day of the closing, and those charges were not due for payment until May 25, 2013.

After the closing, Nichols' new restaurant manager, Ernest Edwards, attempted to change the name on the Restaurants' water and sewer accounts from "John S. Divine" to "the Nichols Holdings companies" but was informed that to change the ownership of the accounts, Nichols would have to pay impact fees in the approximate amount of $53,000. The District's Engineering Director, Tommie Kennedy, then sent a letter, dated June 17, 2013, to Nichol's counsel, explaining the District's policy for changes in ownership of water and sewer accounts as well as the history of the Restaurants' accounts. Kennedy stated, in pertinent part:

> Before the request to transfer[, Divine] had received yearly notices that the account had gone over its allocated capacity of water and sewer. In the notice[, Divine had] the *option* of buying additional capacity or incurring a *penalty*. Every year that the usage was over its allowed capacity[, Divine] elected to pay the *penalty* in lieu of purchasing additional capacity.
>
> According to District policy, change in ownership triggers a review of the account and requires that all additional capacity needed for the commercial business be purchased as if it were a new business opening up for the first time. During this review[,] staff used historical data from the account to calculate the capacity required for the business. . . .

(emphases added).

Upon learning of the impact fees required to change ownership of the accounts, Nichols refused to pay Divine's outstanding trade debt. Hence, on June 5, 2013, Divine filed a motion to enforce the Settlement Agreement and the Agreement of Purchase and Sale (collectively, the Agreements), seeking an order compelling Nichols to pay the "trade creditor debt owed at the time of the closing" of the sale and to execute documents necessary to cancel Nichols' judgment against Divine. Several weeks later, Divine offered to allow Nichols to keep the

Restaurants' water and sewer accounts in Divine's name so that Nichols would not be required to pay the impact fees.

Divine then contacted Kennedy to inquire about the impact fees quoted to Edwards. Kennedy responded in a letter dated August 15, 2013, explaining the policy of reviewing accounts upon a change in ownership. In this letter, Kennedy also stated, "Any commercial account holder exceeding their purchased capacity should receive a letter every year notifying them of the overage. In the notice[,] the owner [sic] has the *option* of buying additional capacity or incurring a *penalty*." (emphases added). On September 12, 2013, Divine sent a letter to Kennedy, seeking information concerning the Restaurants' accounts and clarification of Kennedy's previous characterization of the demand charge as a "penalty."

In his response, Kennedy characterized the purchase of additional capacity as an option and admitted (1) there was nothing in the District's Rates and Charges Resolution characterizing a demand charge as a penalty, (2) the District had no records of ever placing a "lien" or making an "assessment" on the Restaurants or the underlying property, and (3) prior to May 2013, when Nichols purchased the Restaurants from Divine, the District had no records showing that the District's engineering department had reviewed the Restaurants' accounts and required Divine to pay additional impact fees. Kennedy also stated, "If the referenced account is not transferred and no other changes are made[,] such as remodeling or building a new building[,] then the account can continue to be billed as it is today with a demand charge instead of paying the impact fees."

On December 4, 2013, the circuit court conducted a hearing on Divine's motion to enforce the Agreements. At this time, one of Divine's attorneys testified he understood that Nichols was still using the Restaurants' water and sewer accounts in Divine's name. The circuit court later issued an order requiring Divine to pay to the District impact fees in the amount of $53,760.00 on Nichols' behalf and requiring Nichols to pay outstanding trade debt in the amount of $53,786.65. Nichols filed a "Motion for Reconsideration," and Devine filed a "Motion to Alter or Amend Order Pursuant to Rule 59(e)[, South Carolina Rules of Civil Procedure]." The circuit court denied both motions. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in requiring Divine to pay impact fees when Divine had no duty to disclose to Nichols prior to closing that Divine had not purchased additional water and sewer capacity?

2. Did the circuit court err in requiring Divine to pay impact fees when Nichols incurred no damages?

3. Did the circuit court err in relying on John Divine's affidavit in determining the amount of outstanding trade debt?

4. Did the circuit court err in offsetting the amount of trade debt Nichols must pay to reflect invoices paid by Nichols but not included in Divine's trade debt evidence?

STANDARD OF REVIEW

"An action to construe a contract is an action at law reviewable under an 'any evidence' standard." *Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). "In an action at law, tried, without a jury, the appellate court's standard of review extends only to the correction of errors of law." *Sherlock Holmes Pub, Inc. v. City of Columbia*, 389 S.C. 77, 81, 697 S.E.2d 619, 621 (Ct. App. 2010) (quoting *Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006)).

LAW/ANALYSIS

I. Duty to Disclose

Divine asserts the circuit court erred as a matter of law in requiring Divine to pay impact fees because (1) the Agreements did not impose on Divine a duty to advise Nichols that Divine had not purchased additional water and sewer capacity, and (2) paragraph 12(d) of the Agreement of Purchase and Sale required Nichols to make itself aware of the impact fees during the "Inspection Period" prior to closing. We agree.

"In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). Rather, interpretation of a contract "is governed by the objective manifestation of the parties' assent at the time the contract was made," rather than "the subjective, after the fact meaning one party assigns to it." *Bannon v. Knauss*, 282 S.C. 589, 593, 320 S.E.2d 470, 472 (Ct. App. 1984).

In other words, the court must ascertain and give effect to the intention of the parties, looking first to the language of the contract. *Wallace v. Day*, 390 S.C. 69, 74, 700 S.E.2d 446, 449 (Ct. App. 2010). "When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the court." *Id.* "The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed." *Pee Dee*, 381 S.C. at 241, 672 S.E.2d at 802.

Here, the circuit court relied on paragraphs 15(f) and 15(h) in concluding, "Divine had a duty under the terms of the contract to advise [Nichols] that he had not purchased additional water and sewer capacity prior to the sale." We will address the application of these provisions in turn.

Paragraph 15(f) of the Agreement of Purchase and Sale states:

> There are no service, maintenance, property management, leasing or other *contracts affecting the Property* [that] will be in existence *as of the Closing Date*, other than the Operating Agreements described on **Exhibit C** that [Nichols] elects to assume as provided in Paragraph 10(e), or for which notices of termination have been delivered as provided in Paragraph 10(e). [Divine has] fulfilled all of its duties and obligations in connection with the Operating Agreements, and [Divine is] not in default in any material respect under any of the terms and provisions of the Operating Agreements. To the best knowledge of [Divine], no other party is in

> default in any material respect under its Operating Agreement, and no event has occurred, [that], with the passage of time, would become a default under any Operating Agreement.

(first and second emphases added).

These terms did not require Divine to advise Nichols that Divine had not purchased additional water and sewer capacity. Even if the Restaurants' water and sewer accounts can be characterized as "contracts affecting the Property" that still existed at the time of closing, neither Nichols nor the circuit court charged Divine with failing to disclose the continued existence of the accounts. Further, even if the accounts should have been included as two of the "Operating Agreements" listed in Exhibit C to the Agreement of Purchase and Sale, there was no evidence that Divine was "in default in any material respect" concerning the accounts or failed to fulfill "all of its duties and obligations in connection with" the accounts. In fact, the District's "rates and regulations" for customer accounts, attached to the District's June 7, 2012 Resolution, make the purchase of additional capacity to eliminate demand charges an option rather than a requirement. This document also indicates customers may choose to reduce their water usage rather than paying a large sum of money for additional capacity they may not truly need. Thus, as a matter of law, Divine was not required to purchase additional capacity for the Restaurants' accounts with the District.

While the District's Engineering Director, Tommie Kennedy, initially characterized a demand charge as a "penalty" in his June 17 and August 15, 2013 correspondence, in his September 16, 2013 correspondence, Kennedy admitted (1) there is nothing in the District's Rates and Charges Resolution characterizing a demand charge as a penalty; (2) the District has no records of ever placing a "lien" or making an "assessment" on the Restaurants or the underlying property;[4] and (3)

[4] In its order, the circuit court implied that Divine misrepresented its payment of "all assessments against [Divine]" on a title insurance affidavit signed at closing. The circuit court quoted the following language from the affidavit: "[A]ll assessments against [Divine] or applicable to the real estate[,] including assessments for street lighting, water and sewer construction, sanitary assessments and other governmental services[,] have been paid in full . . . ." However, the

prior to May 2013, when Nichols purchased the Restaurants and became responsible for paying their utility bills, the District had no records showing that the District's engineering department had reviewed the Restaurants' accounts and required Divine to pay additional impact fees. Kennedy characterized the purchase of additional impact fees as an option and also stated, "If the referenced account is not transferred and no other changes are made[,] such as remodeling or building a new building[,] then the account can continue to be billed as it is today with a demand charge instead of paying the impact fees."

Moreover, the District's "Finance/Administration Director," John Buck, expressly characterized purchasing additional capacity as an option in his 2012 notice of the imposition of a demand charge: "You have the *option* of purchasing the additional capacity by paying the associated impact fees and eliminating or reducing the monthly Demand Charge(s)." (emphasis added). Buck also indicated this option is given to the District's customers so that they may choose to reduce their water usage rather than investing a large sum of money in additional capacity they may not truly need:

> The "Demand Charge" is intended to (a) *encourage water/sewer conservation*, (b) provide capital funds necessary to expand facility capacity associated with excess demand, and (c) ensure fair and equitable rates and charges to all District customers. . . .
>
> . . . .
>
> Payment of the Demand Charges shall not be considered as a credit toward the purchase of additional impact fees. A user demand analysis shall be performed each year providing the customer the *opportunity to reduce consumption* and/or to lower or eliminate the Demand Charge for the following year.

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evidence shows the District never imposed an assessment on the Restaurants' water and sewer accounts.

> The District encourages you to review your usage records and consider any justification or methods to *reduce the usage to the assigned capacities*.

(emphases added). In fact, Divine followed Buck's recommendation by reducing the peak water usage at Divine Fish House from sixty-six "Residential Equivalency Units" to fifty-seven such units over the course of a year.

Based on the foregoing, the evidence before the circuit court demonstrates Divine was not in default on its accounts with the District.

The circuit court also relied on paragraph 15(h) of the Agreement of Purchase and Sale in concluding Divine had a duty to advise Nichols that Divine had not purchased additional water and sewer capacity. Paragraph 15(h) states:

> [Divine has] received no notice of administrative agency *action, litigation, condemnation proceeding or proceeding of any kind* pending against [Divine that] relates to or affects the Property, including any requests for public dedication, nor [does Divine] know of any basis for any such action, other than collection actions relating to the Debts. [Divine has] no knowledge of any pending or contemplated public improvements in or about the Property [that] may in any manner increase the *taxes or assessments* levied against the Real Property. [Divine has] no knowledge of any proposal to change, limit or deny access to the Real Property from any adjacent publicly dedicated and maintained street(s).

(emphases added).

The Restaurants' water and sewer accounts do not fall within the scope of the legal proceedings referenced in paragraph 15(h). Additionally, Paragraph 12(d) of the Agreement of Purchase and Sale states, in pertinent part:

> [Nichols'] obligations under this Agreement shall be subject to the satisfaction, during the applicable time period set forth below, of the following conditions (any

> of which may be waived by [Nichols] by giving written notice of waiver to [Divine]:
>
> . . . .
>
> > (d) [Nichols], during the Inspection Period,[5] shall have satisfied itself, in its sole discretion, as to the physical condition of the Improvements, and as to the availability of and *capacity of water*, *sanitary sewer*, storm water management, electricity, natural gas, telephone, cable television and *other utilities* serving the Property.
> >
> > . . . .
>
> If any of the foregoing conditions have not been satisfied or waived by the end of the time[]frame set forth above, [Nichols] shall have the right, exercisable by delivery of written notice to [Divine] on or before that date, to terminate this Agreement, and upon such termination, this Agreement shall be deemed null and void. *If [Nichols] fails to deliver such written notice of termination during the Inspection Period, [Nichols] shall be deemed to have waived the conditions set forth in Section 2 and Paragraphs 12(a) through 12(d).*

(emphases added).

If Nichols had contacted the District during the Inspection Period to inquire about the Restaurants' accounts rather than waiting until after the closing to do so, Nichols would have learned of the requirement that the impact fees be paid as a

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[5] The term "Inspection Period" is defined in the Agreement of Purchase and Sale as "beginning on the Effective Date and ending on the latter of (i) the date ten (10) days after the Effective Date, or (ii) ten (10) business days after [Nichols] has received its survey, title exam, environmental assessment [that] it has commissioned and received [Divine's] Due Diligence documents." The "Effective Date" is defined as the date entered on the Agreement of Purchase and Sale.

prerequisite to changing the name on the accounts.[6] Nichols could have then opted to terminate the Agreements before the end of the Inspection Period. Because Nichols did not satisfy itself as to the capacity of the Restaurants' water and sewer accounts, Nichols waived this condition.

Based on the foregoing, Divine did not have a contractual duty to advise Nichols that Divine had not purchased additional water and sewer capacity. As previously stated, the purchase of additional capacity was merely an option for Divine to consider along with the equally acceptable alternative of paying the District's demand charges and attempting to reduce water usage. Therefore, the circuit court erred as a matter of law in concluding that the Agreements imposed on Divine a duty to advise Nichols that Divine had not purchased additional water and sewer capacity.[7]

II. Trade Debt

Nichols contends the circuit court erred in finding Nichols owed $53,786.65 to Divine's vendors for trade debt, rather than the amount of $42,877.59 indicated by the receiver,[8] because there was no evidence to support this finding. Specifically, Nichols challenges the circuit court's reliance on John Divine's affidavit in determining the amount of outstanding trade debt.

Initially, we note that Nichols' motion for reconsideration failed to challenge the circuit court's finding on the amount of outstanding trade debt on the ground

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[6] This requirement was also published in the attachments to the District's June 7, 2012 Resolution: "[The water impact fee] applies to anyone requesting new water service . . . ."

[7] In light of this holding, we need not address Divine's argument that Nichols incurred no damages. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address the remaining issues on appeal when resolution of a prior issue is dispositive).

[8] The receiver's October 23, 2013 affidavit indicated the amount of reasonable trade debt owed by Nichols was $45,673. However, at the motions hearing, the receiver testified that the amount of $2,795.41 should be subtracted from the amount stated in her affidavit to give Nichols credit for Divine's agreement to transfer certain funds held in trust to Nichols.

that there was no supporting evidence. Rather, the motion challenged the circuit court's trade debt figure on the ground that it did not credit Nichols for the water and sewer fees and demand charges it paid. Further, for the *first time* in his reply brief, Nichols challenges the competency of John Divine's affidavit, invoking Rule 43(a) of the South Carolina Rules of Civil Procedure and asserting Rule 43 "does not allow for the presentation of affidavits at trial." Therefore, these arguments are not preserved for our review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground."); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("In order to preserve for review an alleged error in admitting evidence[,] an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge."); *id.* ("[A] party may not argue one ground at trial and an alternate ground on appeal."); *Spivey ex rel. Spivey v. Carolina Crawler*, 367 S.C. 154, 161, 624 S.E.2d 435, 438 (Ct. App. 2005) (declining to consider issues raised for the first time in the appellants' reply brief).

Even if these arguments had been properly preserved, under Rule 43(e), SCRCP, the circuit court had the discretion to hear Divine's motion to enforce the Settlement Agreement on affidavits in lieu of oral testimony. *See* Rule 43(e), SCRCP ("When a *motion* is based on facts not appearing of record[,] the court *may hear the matter on affidavits presented by the respective parties*[] but *may* direct that the matter be heard wholly or partly on oral testimony or depositions." (emphases added)). Further, when Divine's counsel offered to substitute John Divine's affidavit for his own live testimony "in the interest of time," Nichols failed to request an opportunity to cross-examine Mr. Divine on his affidavit. Therefore, the circuit court properly considered Mr. Divine's affidavit in lieu of his testimony.

Nichols claims the circuit court "chose to discount and not consider Divine's [a]ffidavit because of his failure to testify in the trial." However, there is nothing in the record to support this claim. In fact, in announcing its ruling, the circuit court stated it considered

> the matters as filed by the parties in this case, all of their memorand[a], the affidavits of the parties, as well as today I've heard the testimony of the witnesses [who]

> have been presented. . . . I have relied upon the entirety of the record before me as reflected in the Clerk of Court's file and through the testimony here today.

Further, using the exact amount indicated in John Divine's affidavit, $62,809.08,[9] as a starting point in determining the amount of outstanding trade debt, the circuit court obviously considered Mr. Divine's affidavit without objection from Nichols. Therefore, we reject Nichols' challenge to the circuit court's reliance on Mr. Divine's affidavit in determining the amount of outstanding trade debt.

III. Offset

Divine contends the circuit court erred in offsetting the amount of outstanding trade debt by $9,022.43 for invoices paid by Nichols but not included in Divine's trade debt evidence. We agree.

During the motions hearing, the receiver, Arlene Jaskot, testified regarding her October 23, 2013 affidavit, which concluded that the reasonable trade debt *as of the date of the closing on May 2–3, 2013*, was $17,827.41 for Bovine's and $27,845.59 for Divine Fish House, or $45,673.00 for both restaurants.

In its written order, the circuit court indicated it was relying on John Divine's affidavit rather than Jaskot's affidavit in determining the outstanding trade debt:

> [T]he [c]ourt finds . . . that the Trade Debt [that] Nichols . . . owes Divine is $62,809.08[, the amount indicated in John Divine's affidavit,] and that all vendors shall be paid with one caveat. The [c]ourt heard the testimony of the receiver, Arlene Jaskot, and reviewed her affidavits . . . . The [a]ffidavits of Arlene Jaskot indicate that some of the Trade Debt has been paid by Nichols. The [c]ourt finds that Nichols has produced the following invoices for Trade Debt that he has paid, which

[9] We note Nichols has never challenged the circuit court's reliance on the amount of outstanding trade debt indicated in Mr. Divine's affidavit on the ground that this amount does not accurately reflect the total of the attached invoices.

> shall reduce the Trade Debt owed in the amount of $9,022.43.
>
> Those include the following:
>
> | | | |
> |---|---|---|
> | 1. | Roper | $ 1,751.27 |
> | 2. | Santee Cooper | $ 3,126.58 (Divine's) |
> | 3. | Santee Cooper | $ 3,129.66 (Bovines) |
> | 4. | Horry Telephone | $ 1,014.92 |
> | | Total | $ 9,022.43 |
>
> As a result of these checks (or paid invoices) being produced to the [c]ourt, the Trade Debt to be paid to the vendors is $53,786.65.

The circuit court's finding that these four items should be deducted from the amount indicated in John Divine's affidavit was likely based on one or both of the following assumptions: (1) Mr. Divine's affidavit, which was dated October 10, 2013, and the attached invoices demonstrated trade debt outstanding *as of the date of closing*, May 2–3, 2013, like Jaskot's affidavit did, and, (2) therefore, Mr. Divine's affidavit and attached invoices included the four items listed above as still outstanding. However, the invoices for these four items were not included in those invoices attached to Mr. Divine's affidavit and represented as unpaid. Hence, the amount of $62,809.08 set forth in Mr. Divine's affidavit as reflecting the invoices still outstanding *as of October 10, 2013* did not include the above amounts for Roper, Santee Cooper, and Horry Telephone precisely because by that time they had already been paid. Thus, Divine had already given Nichols credit for its payments to these creditors when Divine presented its evidence of outstanding trade debt to the circuit court. Therefore, the circuit court mistakenly doubled Nichols' credit for these payments when it deducted them from the $62,809.08 indicated in Mr. Divine's affidavit.

Based on the foregoing, there was no evidence to support the circuit court's finding that Nichols' payments to Roper, Santee Cooper, and Horry Telephone should be deducted from the amount of outstanding trade debt indicated in John Divine's affidavit.

CONCLUSION

Accordingly, the circuit court erred in requiring Divine to pay impact fees to the District. As to outstanding trade debt, the circuit court properly relied on John Divine's affidavit but erroneously deducted $9,022.43 from the $62,809.08 indicated in Mr. Divine's affidavit. Therefore, we reverse the circuit court and remand with instructions to require Nichols' payment of all vendor invoices attached to Mr. Divine's affidavit.

REVERSED and REMANDED.

SHORT and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Claude W. Graham, Respondent/Appellant,

v.

Town of Latta, South Carolina, Appellant/Respondent.

And

Vickie B. Graham, Respondent/Appellant,

v.

Town of Latta, South Carolina, Appellant/Respondent.

Appellate Case No. 2013-000752

Appeal From Dillon County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5398
Heard March 3, 2015 – Filed March 30, 2016

AFFIRMED

Andrew F. Lindemann, Michael B. Wren, and Daniel C. Plyler, of Davidson & Lindemann, P.A., of Columbia, for Appellants/Respondents.

Reynolds Williams, of Willcox, Buyck & Williams, P.A., of Florence, for Respondents/Appellants.

MCDONALD, J.: In this negligence action arising from a municipal sewer system overflow, the Town of Latta (the Town) appeals the circuit court's denial of its motions for directed verdict and judgment notwithstanding the verdict (JNOV). On cross-appeal, Claude Graham and Vickie Graham (collectively, the Grahams) argue the circuit court erred in (1) directing a verdict in favor of the Town on Vickie Graham's claims for inverse condemnation and trespass, and (2) ruling the Town has an easement by prescription for the sewer line located on their property. We affirm.

FACTS/PROCEDURAL BACKGROUND

On November 19, 2008, the Grahams filed companion civil actions[1] alleging that on September 5–6 and 13, 2008, the Town's municipal sewer system backed up, overflowed, and flooded their property at 220 East Rice Street in Latta.[2] Claude Graham asserted a negligence claim and Vickie Graham asserted claims for negligence, inverse condemnation, and trespass. In addition to their claims for damages to real and personal property, the Grahams alleged that they became physically ill as a result of the sewage backup events and their aftermath. The circuit court called the consolidated cases to trial on October 8, 2012.

At trial, Mr. Graham testified his wife purchased their home in 1989 for $60,000. The Grahams did not have the home inspected or the property surveyed before the purchase. Mrs. Graham testified that had she known there was a Town sewer line located under the property, she "would never have bought the house." Although the house was structurally sound when they purchased it, the Grahams spent a significant amount of time and money on renovations because the house was "in pretty bad shape." In addition to the money invested in the house during the initial remodel in 1989, the Grahams spent $40,000 during a 2007 remodel.

Shortly after moving into the house, the Grahams began experiencing trouble with several toilets. Their plumber traced the problem to a stopped up sewer line in the backyard. The Town's director of public works at that time, Melvin Jackson,

[1] These actions were later consolidated for discovery and trial.

[2] On the nights of September 5th and 6th, 2008, Tropical Storm Hanna dumped more than seven inches of rain in the area, resulting in severe flooding.

informed Mr. Graham that the main sewer line from another community runs across their property, under their house, and ties into the Town's main line on East Rice Street. At that time, the Town fixed the sewer line with a "repair strap" because it was leaking and causing a smell.

Following the sewage backup events of September 6, 2008, the Grahams spent a significant amount of time and money cleaning up their yard and crawl space, as well as replacing their heating and air conditioning (HVAC) system and ductwork. Mr. Graham consulted the Town's mayor and an official from the Town's sewer system. Mr. Graham testified that, according to the mayor, the Department of Health and Environmental Control (DHEC) had informed the Town that "the mixture of the water in the sewer system . . . was contaminated[,] and that [it] was the Town's responsibility." Mr. Graham declined the Town's offer to retain a service to "pump the stuff out from under the house," because he "[d]idn't see any need for the Town to pay for what [he] was already doing."

Following another sewer overflow on September 13, 2008, ten to twelve inches of sewage collected under the Grahams' home, but "no water came into the house." Despite the Grahams' efforts to clean up the yard and underneath the house, foul odors remained in the Grahams' home and in their cars. After the September 13th overflow, the Grahams did not re-replace their HVAC system or the ductwork. Mr. Graham again reported the problem to the Town. On multiple occasions thereafter, the sewer line leaked and overflowed onto the Grahams' property and under their house. Upon their physician's recommendation, the Grahams moved out of the East Rice Street home in November 2008. Mr. Graham has consistently returned to the house for the limited purpose of mowing the yard, but he sees no reason to undertake repairs until the Town corrects the underlying problem with the sewer line.

Following the September 2008 overflows, the Grahams and their dog "kept getting sick." They went "back and forth to the doctor and [took] the dog to the vet . . . . We were all on medication." Mrs. Graham was initially treated for respiratory problems and ultimately for pneumonia. After the Grahams moved out of the home, Mrs. Graham went back to the house occasionally to get some clothes and once in 2009 to use the copy machine. On that occasion, she had a respiratory reaction and was rushed to the emergency room. She has not since been back inside the house.

On cross-examination, Mrs. Graham testified she and her husband had not cleaned the pool or the storage room and the sewer line is still leaking under the house. Although Mrs. Graham had the water turned off two or three years ago, there is still sewage in the crawl space. Mrs. Graham suffered bouts of bronchitis and pneumonia prior to the sewage overflows, but she denied having any bronchitis issues once she stopped visiting the East Rice Street house in 2009.

Mrs. Graham explained that during this litigation, she received conflicting information as to whether the Town had an easement for the sewer line running beneath their property. The parties entered into evidence the following stipulation: "The parties stipulate that the Town of Latta is unable to produce a written instrument conveying an easement for a portion of the Town's sewer system which cross [sic] the property currently owned by Claude and Vickie Graham. 220 East Rice Street in Latta, South Carolina."

Dr. David Culpepper testified that the Grahams started coming to his practice in 2000. In the fall of 2008, he treated them "half a dozen" times each for "severe" respiratory tract symptoms and referred Mrs. Graham to "a specialist to check for allergies." When Dr. Culpepper learned about the sewage and mold in the Grahams' crawl space, he "encouraged them to seek other living quarters until the matter could be corrected." On cross-examination, Dr. Culpepper admitted the Grahams were treated for bronchitis prior to September 2008: Mrs. Graham was treated three times and Mr. Graham was treated five times. On re-direct, Dr. Culpepper opined as to whether the Grahams' health conditions between 2000 and 2007 were connected in any way to their health conditions between October 2008 and May 2009:

> [I]t's common for patients to come in with . . . occasional respiratory tract symptoms. . . . [T]here [is] a possibility there were leaks during that time period when there was rain and mold developing that they just weren't aware of[.] . . . The difference is the intensity of the [symptoms and the] frequency of visits that began in 2008 with both patients experiencing symptoms.

Danielle Watson—a DHEC compliance officer for wastewater, stormwater, industrial water, and emergency response—testified that prior to September 2008,

there were infiltration[3] problems with the Town's sewer system and several compliance issues regarding the Town's wastewater. Watson explained that following Tropical Storm Hanna, stormwater got into the sewer system, causing the lines to overflow. She observed debris from the sewer line located on the Grahams' property and either stormwater or wastewater under their house.

Watson testified it is the Town's responsibility to maintain, operate, and install the sewer line. She then testified that she informed the Town:

> A: [T]he area had to be cleaned up, and that usually when we clean up an area we add agricultural lime[,] which helps bring up the PH[,] which will help kill the bacteria and also cut down on the smell. All the solids had to be taken up and then lime the areas that were having overflows.
>
> . . . .
>
> Q: Okay. Did you discuss actions that could be taken to prevent such things from happening again in the future?
>
> A: Yes, sir. We actually had asked the Town to do some studies on the system to see where they were having problems with water getting into it.
>
> Q: And where [sic] those studies done to your knowledge?
>
> A: I know a smoke [testing] was done. Yes.
>
> Q: Have . . . the problems that were identified been corrected to your satisfaction?
>
> A: Some of them have, but not all of them that I know of.

On cross-examination, Watson agreed the Town has been responsive to DHEC's recommendations. She admitted that infiltration problems are "fairly common,"

[3] Infiltration occurs when groundwater gets into the sewage system. Conversely, exfiltration occurs when wastewater escapes from the sewage system.

and she has seen "quite a few" incidents where an overflow seeps under a house. Watson explained that DHEC maintains a list of contractors that pump water out from under houses as well as clean and sanitize such overflow. She also explained DHEC's "Recommendations for Sewer Clean-up in Residential Homes" form:

1. All furnishings, especially rugs, should be discarded. All non-porous surfaces which haven't been damaged by water should be washed down with a disinfectant solution.

2. For areas where water has fully penetrated the floors, the underlying floor insulation should be replaced. Even though the interior floor surface could be treated with a disinfection solution, the saturated insulation materials could pose a mold/mildew problem . . . [and] adversely affect an individual's health.

3. Prior to doing any work within crawl spaces, it is suggested that the soil be treated with a disinfectant to reduce the risk of disease transmission . . . . The nature and extent of this treatment will depend on the amount of wastewater . . . that could have entered the crawl space through the floor above.

4. Clean-up of the HVAC [depends] on the specific heating unit . . . . If wastewater intrusion has occurred, it is suggested that these ventilation ducts be removed and replaced . . . . [T]he entire duct system serving the first floor should be evaluated for evidence of wastewater[,] [and] [i]f necessary, they may need to be replaced. The coils under the home should also be checked to ensure that fecal matter has not gone down into this part of the heating unit. If found, the coils should be adequately disinfected.

Roger Davis, a mechanical engineer who has worked as a consulting engineer for the past thirteen years, was qualified without objection as an expert in mechanical engineering. The circuit court further qualified Davis as an "environmental engineer in the field of waste disposal" over the Town's objection. Davis testified about the localized flooding from the passing tropical storm:

> The flooding from the ditch adjacent to the Graham property. I think they call it the Main Town Ditch or something like that. It's kind of the main drainage channel for that area. Flooding from that ditch flooded the yard and surrounding streets around the Graham residence on that occasion.
>
> But they also experienced release of sewage from the sewage system or sewage collector lines which ran across their property and underneath their house releasing the contents of the sewer line into this flooded area. There was also a release of sewage from the manholes in the street that were bubbling up through the flooded street at that time.
>
> But there were also some other events which occurred both before and after that which involved the release of [sewage] from the collection system for the sewer in the Town of Latta. There was record [of] a number of complaints about those releases. There are some investigations that were done by the field investigator at D.H.E.C. documenting high levels of fecal chloroform bacteria in the ditches around the -- [abutting] the Graham property.

Based on his review of the Town's records, "[i]ncluding some engineering work done by consultants on behalf of the Town . . . to reroute that sewer line," Davis opined that the sewer line at issue passes under the Grahams' house. Davis explained that "it's very unusual to find a residence built over a sewer line" for two reasons: (1) any problem with the sewer line will affect the house; and (2) there is no good access for maintenance. The sewer line was likely constructed in 1924. Davis testified that sewer lines built during that time period were "most commonly" made out of terra cotta, which has a typical lifespan of fifty years.

Although he did not conduct any testing, based on his review of the Town's records, Davis determined there was a "significant amount" of infiltration and inflow. Unlike infiltration, which primarily involves ground water, inflow is

typically surface water[4] or stormwater that enters the sewer system. Davis testified that inflow is "very obvious" while infiltration is "a little more gradual." Due to the Town's maintenance records indicating that it frequently has to blow out the sewer lines using a high powered hose, Davis opined "the problems created by that sewer line were largely in part due to excessive infiltration and inflow." He testified that if a sewer line leaks under a residence, there is contamination under the residence, which can lead to health problems, and "[t]he wet conditions, of course, can lead to things like mold and damage to the structure itself." Davis explained that the gases generated by sewage as it decays, principally hydrogen sulfide, can lead to asphyxiation and even death. He then discussed various options to relocate, replace, or repair the sewer line.

On cross-examination, Davis testified the only portion of the sewer line he has "laid eyes on" is the portion that runs across the drainage ditch. He further testified that this portion of the sewer line is made out of iron because, "[y]ou don't put terra cotta pipes across creeks." Davis admitted he did not use geographic information system (GIS) technology or global positioning system (GPS) technology to determine the location of the sewer line, nor did he run a camera through the sewer line. He further admitted that he is not entirely certain exactly where the sewer line is located. Davis explained that a service line, which runs from a home to a municipal sewer line, is the responsibility of the homeowner. On re-direct, Davis testified he saw evidence of the sewer leak in the manhole on East Rice Street.

John Benton, a licensed general contractor for thirty-eight years before retiring in 2010,[5] testified that he worked for an architect after graduating from high school and then for Kyle Construction. Benton opened his own construction company in 1973 and has focused on light commercial construction and custom homes since that time. He has built homes in Florence, Marion, Myrtle Beach, Bennettsville, and Darlington. The Town objected to Benton's qualification as an expert in "estimating construction costs for custom homes in the Pee Dee," arguing his work in this case is not relevant as "[t]here has been no evidence . . . that the house in question needs to be replaced." However, the circuit court qualified Benton as an expert in "estimating residential home building."

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[4] Surface water is the accumulated water from precipitation or underground sources not contained within a body of water. F.P. HUBBARD & R.L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 229 (3rd ed. 2004).

[5] At the time of trial, Benton was employed by his brother's construction company.

To complete his estimate, Benton obtained a copy of the Grahams' floor plans and visited the East Rice Street house on four separate occasions. Benton obtained prices from two different building supply companies. He estimated it would cost $478,280.56 to rebuild the Grahams' home, excluding the price of the property, landscaping, pool, and irrigation system. On cross-examination, Benton admitted his estimate included ten percent for his fee and ten percent for the use of his equipment, totaling almost $80,000. He also admitted he did not get any quotes from suppliers located in Dillon County. Benton testified he would not build a house without first surveying the property. He further testified he did not test or inspect the Grahams' home to determine whether it needs to be completely replaced.

At the close of the Grahams' case, the Town moved for a directed verdict as to all claims. The circuit court directed a verdict in favor of the Town on Mrs. Graham's claims for trespass and inverse condemnation and denied the motion as to both negligence claims. The circuit court also directed a verdict in favor of the Town regarding any claims arising out of the events that occurred on September 5–6, 2008.

The Town called its assistant supervisor, Willie Hooks, as its first witness. Hooks, who oversees the Town's water, sewer, and streets, went to the Grahams' home on September 6, 2008, where he witnessed "[a] lot of water on the road[,] . . . water coming out of the ditch behind their home flooding their yard[,]" and "about [two]-inches of water" under their house. In order to determine the location of the sewer pipe, Hooks stood by the line that goes through the drainage ditch at the back of the Grahams' property while the Town's supervisor stood on the manhole on East Rice Street. "And by [their] assumptions of looking at each other from straight lines[,] it goes between [the Grahams'] pool and [their] home[,] [n]ot under [their] home." Hooks testified that between May and October 2010, the Town smoke tested all of its manholes and sewer pipes. According to Hooks, no smoke came out from under or near the Grahams' home or any other home on East Rice Street during the testing.

Mike Hanna, a civil engineer with B.P. Barber Company and the Town's engineer since 1997, was qualified without objection as an expert in "civil engineering with a focus on wastewater." After September 6, 2008, Hanna was informed that the sewer line under the Grahams' house was leaking and sewage was pouring into their crawl space. Hanna looked at options to relocate the sewer line as he knew he

could not replace a line underneath a house "but there were no good alternatives there."

In 2009, B.P. Barber performed a physical survey of all Town manholes to determine whether they were leaking. In 2010, B.P. Barber smoke tested the entire sewer system, paying particularly close attention to the area around the Grahams' house. The smoke testing did not reveal any problems or leaks in the vicinity of the Grahams' house. However, Hanna admitted that "[i]nfiltration is difficult to find using smoke testing. It's easier to find using camera surveys where you insert a camera in the line and go look for that drip." Because the results of the smoke test revealed there were "a number of problems," Hanna recommended that the Town "go to the next phase of testing[,] [which] is a camera survey."[6]

Based on the Federal Emergency Management Agency's (FEMA) map of Dillon County, Hanna opined that the Grahams' residence is located in a flood plain. Because maps of Dillon County created via aerial photos and GIS show every manhole as a green dot, Hanna explained that "[w]e can connect those dots to show the sewer system." He further explained that sewer lines are laid in straight lines. Red dots indicate where leaks were found in the sewer system, and red lines indicate the flood zones. Hanna identified the Grahams' residence and swimming pool and then testified "the sewer line goes right between the two." He later clarified that the sewer line is about three or four feet away from the house and "skirts the edge of the pool," opining that the sewer line does not go directly beneath the house.

On cross-examination, Hanna denied that camera tests were conducted on the sewer line at issue. Hanna admitted that the accuracy of the GPS devices used in creating the GIS maps is generally "within a foot [to] [eighteen] inches of the actual location." He also admitted he has a record indicating the Town searched for manholes it could not actually locate. However, he could not recall whether a manhole was missing from East Rice Street in front of the Grahams' driveway. Hanna also could not recall whether the missing manhole was covered up when East Rice Street was repaved.

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[6] At the time of trial, the Town was in the process of applying for funding to complete a camera survey, which would allow it to look at the sewer lines from the inside in order to identify cracked pipes, broken joints, and the like.

Q: If in fact there was a manhole cover . . . whose cover had been paved over at the end of the Grahams' driveway and . . . [y]ou stood there with the G.P.S. device[,] [y]ou would draw a straight line right through their house, would you not?

A: If I knew that to be the case.

. . . .

Q: Will you agree with me that if the service line from the Graham house connects with the main line right at their back door within 5 or 6 feet of the carport. You know what area I'm talking about?

A: Yes, sir.

Q: Where the back steps join the grass, if there is a main line connection to the service line at that point would you agree with me that you can't get to [East] Rice Street from that point without going under their house?

A: That would be true.

The Grahams subsequently recalled Mr. Graham and Watson (of DHEC) as rebuttal witnesses. Mr. Graham testified he watched as his plumber dug up their service line and followed it to where it ties into the sewer line. He further testified the sewer line ran towards and then went underneath the house towards East Rice Street and the swimming pool has never had any sewage related issues. He then recalled another conversation he had with former public works director Jackson, in which Jackson told him that a manhole located off the end of the Grahams' driveway had been covered up the last time East Rice Street was repaved.

Thereafter, Watson testified that after the flooding problems occurred—and after she became aware "of a line under a house"—she asked the Town to conduct a camera test on the sewer line at issue. The Town's supervisor reported to Watson that the Town had planned to come up behind the Grahams' house to get to the sewer line, but ran into an obstruction and could not get the camera to move over

or forward. On cross-examination, Watson admitted she had not seen any photographs or reports from the testing. She also admitted she had no idea whether the sewer line at issue was leaking or not.

At the close of all the evidence, the Grahams moved for reconsideration of the directed verdict rulings, which the circuit court denied. Additionally, the Town renewed its motion for directed verdict, which the circuit court again denied. On October 11, 2012, the jury returned a verdict in favor of Vickie Graham in the amount of $225,000, and a verdict in favor of Claude Graham in the amount of $100,000. Thereafter, the Town filed a motion for JNOV and a motion for a new trial absolute. The circuit court denied these motions by order filed March 8, 2013.

ISSUES ON APPEAL

The Town raises the following issues on appeal:

I. Did the circuit court err in denying the Town's motions for directed verdict and JNOV pursuant to the discretionary immunity exception to the South Carolina Tort Claims Act?

II. Did the circuit court err in denying the Town's motions for directed verdict and JNOV by allowing the Grahams to rely on the doctrine of res ipsa loquitur?

III. Did the circuit court err in denying the Town's motions for directed verdict and JNOV with respect to Vickie Graham's claim for damages to real property? In the alternative, is the Town entitled to a new trial absolute due to Benton's testimony as to the replacement cost of the house in the absence of evidence that the house could not be repaired?

IV. Did the circuit court err in denying the Town's motions for directed verdict and JNOV with respect to Claude Graham's claim for damages to certain personal property? In the alternative, is the Town entitled to a new trial absolute because the jury should not have been permitted to consider losses to the personal property in the storage room?

The Grahams raise these issues on cross-appeal:

I. Did the circuit court err in directing a verdict in favor of the Town on Vickie Graham's claims for inverse condemnation and trespass?

II. Did the circuit court err in ruling the Town has an easement by prescription for the sewer line on the Grahams' property?

LAW/ANALYSIS

"When ruling on motions for directed verdict and JNOV, the trial court and this [c]ourt must view the evidence and the inferences reasonably drawn therefrom in the light most favorable to the party opposing the motions." *Pike v. S.C. Dep't of Transp.*, 332 S.C. 605, 610, 506 S.E.2d 516, 518 (Ct. App. 1998) *aff'd as modified*, 343 S.C. 224, 540 S.E.2d 87 (2000); *see also Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429, 445 S.E.2d 439, 440 (1994) (affirming denial of SCDOT's directed verdict motion where evidence viewed in light most favorable to plaintiff demonstrated that SCDOT did not weigh competing considerations or use accepted professional standards). This court must affirm a trial judge's denial of a directed verdict motion when there is evidence to support the ruling below. *Id.* Accordingly, we must review the evidence to determine whether the trial court properly submitted the case to the jury.

The circuit court may grant a new trial absolute when a jury awards excessive or inadequate damages. *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996). "The jury's determination of damages, however, is entitled to substantial deference. The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives." *Id.* The grant or denial of new trial motions rests within the sound discretion of the trial judge and her decision will not be disturbed on appeal unless the findings "are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Id.* at 405, 477 S.E.2d at 723.

I. South Carolina Tort Claims Act—Discretionary Immunity

The Town contends the circuit court erred in denying its motions for directed verdict and JNOV based on the discretionary immunity exception to the South Carolina Tort Claims Act (Tort Claims Act). The Tort Claims Act "constitutes the exclusive remedy for any tort committed by an employee of a governmental

entity." S.C. Code Ann. § 15-78-70(a) (2005). "The Tort Claims Act waives immunity for torts committed by the State, its political subdivisions, and governmental employees acting within the scope of their official duties." *Pike*, 343 S.C. at 230, 540 S.E.2d at 90. "The provisions of the Act establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting [the] liability of the State." *Hawkins v. City of Greenville*, 358 S.C. 280, 292, 594 S.E.2d 557, 563 (Ct. App. 2004).

Section 15-78-60 of the South Carolina Code sets forth forty exceptions to this waiver of immunity, including the discretionary immunity exception. *See* S.C. Code Ann. §15-78-60 (2005 & Supp. 2015). Section 15-78-60(5) provides that a "governmental entity is not liable for a loss resulting from: (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." S.C. Code Ann. § 15-78-60(5) (2005). Our supreme court has repeatedly explained that "the burden of establishing a limitation on liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense." *Pike*, 343 S.C. at 230, 540 S.E.2d at 90.

"To establish discretionary immunity, the governmental entity must prove that the governmental employees, faced with alternatives, actually weighed competing considerations and made a conscious choice." *Id.* "Furthermore, 'the governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them. It is not enough to say the defect was noted and a decision was made not to repair it.'" *Id.* at 230, 540 S.E.2d at 90–91 (quoting *Foster v. S.C. Dep't of Highways & Pub. Transp.*, 306 S.C. 519, 525, 413 S.E.2d 31, 35 (1992)).

In denying the Town's motion for directed verdict, the circuit court explained that "in addition to the underlying dispute as to whether or not there is a leak[,]" there were four competing choices regarding the sewer line located on the Grahams' property: (1) reroute the line; (2) replace the line; (3) repair the line; and (4) do nothing.

The order denying the Town's motion for JNOV further elucidated the circuit court's reasoning:

> Testimony was given at trial that [the Town] was presented with several choices to remedy the drainage problem: move the pipe, add a sleeve to insulate the pipe, fix any crack or leak with concrete or glue, or do nothing. Testimony was also presented that [the Town] conducted smoke tests to determine whether there was a defect, . . . attempted to snake a camera through the line, then made a decision not to repair the pipe.

There was, however, no expert testimony indicating the Town actually weighed the competing considerations or that the Town utilized accepted professional standards in choosing to "do nothing." *See e.g.*, *Pike*, 343 S.C. at 232, 540 S.E.2d at 91 (explaining that "[i]t is not enough to say the defect was noted and a decision was made not to repair it"). Significantly, the Town's expert engineer Hanna, was unaware a camera test had even been attempted—and abandoned when the camera encountered an obstruction in or around the line.

With respect to the camera testing, Watson explained the testers "were going to come up behind the house to get to the line, and once they got so far they had obstruction in the line. They couldn't get the camera over [the obstruction] or to go any forward. So they couldn't get to that part to [l]ook at." When asked about the nature of the obstruction, Watson noted that the cameras can be stopped by a number of things. It "could be solids. It could have been a rock. It could have been a root." The obstruction could be inside the line or up against it, causing the line to be pushed up such that "the camera couldn't get over it." The record is unclear regarding whether the Town kept a record or log of the camera test; no such documentation was admitted into evidence.

The Town argues that in sending the case to the jury, the circuit court disregarded this court's opinion in *Hawkins v. City of Greenville*, which addressed a business owner's claims that his flood damages were caused by the City's neglect in designing and maintaining its stormwater drainage system. *Id.* at 285–86, 594 S.E.2d at 560. In *Hawkins*, this court held the Tort Claims Act barred plaintiff's claims because the design and maintenance of a municipal stormwater system is a discretionary governmental function requiring a city to exercise measured policy judgments. *Id.* at 292–94, 594 S.E.2d at 563–64. Accordingly, the City of Greenville was "immune from liability for [the] negligence claims arising out of the design and maintenance of the drainage system in the Laurel Creek Basin." *Id.* at 294, 594 S.E.2d at 564.

Hawkins, however, did not address the questions of whether the municipality actually weighed competing considerations or utilized accepted professional standards in designing and maintaining its stormwater drainage system. Instead, *Hawkins* focused, in pertinent part, upon the degree of discretion granted to the City to "exercise the measured policy judgments required to build and maintain an adequate municipal sewer and drainage system in Greenville." *Id.* at 294, 594 S.E.2d at 564. To the extent measured policy judgments are at issue, *Hawkins* would certainly control. The evidence presented at this trial, however, demonstrates this is not the situation in the case at bar.

The evidence in this case yields the reasonable inference that the Town failed to utilize accepted professional standards in addressing infiltration and inflow problems identified with respect to its sewer line. The Town continues to challenge whether or not the sewer line runs beneath the Grahams' house, relying upon a "straight line" vision test from the drainage ditch to a selected manhole and a GPS survey that may or may not be missing a cemented-over manhole at the end of the Grahams' driveway. Following the smoke testing, which engineer Hanna admitted is not the preferred method for locating infiltration, Hanna recommended "go[ing] to the next phase of testing and that is a camera survey." It appears that Hanna was unaware a camera survey had already been attempted but that the camera encountered some unidentified obstruction. Without having gathered the information necessary to even attempt to address the identified infiltration and inflow problems, it would be difficult to determine as a matter of law that the Town had weighed the competing considerations necessary to address them. Thus, we find the circuit court properly denied the motions for directed verdict and JNOV based upon section 15-78-60(5).

II. Res Ipsa Loquitur and Proximate Cause

Next, the Town argues the circuit court erred in denying its motions for directed verdict and JNOV by allowing the Grahams to rely on the doctrine of res ipsa loquitur to prove the sewer line located on their property was leaking or compromised in some fashion. We disagree.

To prevail in an action for negligence, a plaintiff must establish that: "(1) defendant owes a duty of care to the plaintiff, (2) defendant breached the duty by a negligent act or omission, (3) defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) plaintiff suffered an injury or damages." *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 387, 520

S.E.2d 142, 149 (1999). "The absence of any one of these elements renders the cause of action insufficient." *Washington v. Lexington Cty. Jail*, 337 S.C. 400, 405, 523 S.E.2d 204, 206 (Ct. App. 1999).

The Town correctly asserts that South Carolina does not recognize the doctrine of res ipsa loquitur. *See Crider v. Infinger Transp. Co.*, 248 S.C. 10, 16, 148 S.E.2d 732, 734–735 (1966) ("It is elementary that in order for a plaintiff to recover damages there must be proof, not only of injury, but also that it was caused by the actionable negligence of the defendant. It should be kept in mind that the doctrine of [r]es ipsa loquitur does not apply."). In an action for negligence, the plaintiff must prove by direct or circumstantial evidence that the defendant did not exercise reasonable care. *Snow v. City of Columbia*, 305 S.C. 544, 553–55, 409 S.E.2d 797, 803–04 (Ct. App. 1991). "Proximate cause is normally a question of fact for determination by the jury, and may be proved by direct or circumstantial evidence." *Player v. Thompson*, 259 S.C. 600, 606, 193 S.E.2d 531, 533 (1972). "The touchstone of proximate cause is foreseeability which is determined by looking to the natural and probable consequences of the defendant's conduct." *Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013).

While it is true that no party was able to pinpoint the precise location of the compromised line beneath the Grahams' home, the Grahams presented more than the mere fact of damage to their real and personal property in support of their negligence claims. *See Snow*, 305 S.C. at 555–556, 409 S.E.2d at 803–804 (reversing the trial court's grant of directed verdict for the defendant on negligence claim as competing inferences might reasonably be drawn as to the city's failure to exercise due care in installation and maintenance of water main). Specifically, Davis's testimony regarding his review of the Town records discussing the system's infiltration and inflow issues, the age of the terra cotta pipes, and his observations of the sewage "bubbling" from the manhole near the Grahams' yard provided evidence of more than "the mere fact of damage." More telling, perhaps, was Watson's testimony about the sewer system's infiltration problems and the unidentified obstruction encountered when a camera test was attempted on the line running beneath the Graham property. Finally, the Town's inability to precisely locate its own sewer line—much less reach it in order to properly maintain it—certainly supports the inference that the Town failed to exercise due care in the operation and maintenance of its system. This evidence, in addition to Mr. Graham's personal observations, supports the circuit court's denial of the Town's motions for directed verdict and JNOV.

III. Damages to Real Property

The Town argues the circuit court erred in denying its motions for directed verdict and JNOV with respect to Mrs. Graham's claim for damages to real property. In the alternative, the Town argues it is entitled to a new trial absolute because the jury should not have been permitted to consider Benton's testimony regarding the cost to rebuild or replace the house without evidence that the house was permanently and totally damaged.

"To recover damages [for negligence], the evidence must enable the jury to determine the amount of damages with reasonable certainty or accuracy." *Pope v. Heritage Cmtys. Inc.*, 395 S.C. 404, 434, 717 S.E.2d 765, 781 (Ct. App. 2011). "The existence, causation, and amount of damages cannot be left to conjecture, guess, or speculation." *Id*. "However, proof with mathematical certainty of the amount of loss or damage is not required." *Id.*; *see e.g.*, *May v. Hopkinson*, 289 S.C. 549, 559, 347 S.E.2d 508, 514 (Ct. App. 1986) (affirming the award of damages based on the contractor's repair estimate even though the exact repairs needed could not be determined because the removal of defective wood was expected to reveal additional problems). "The determination of damages may depend to some extent on the consideration of contingent events if a reasonable basis of computation is afforded, permitting a reasonably close estimate of the loss." *Pope*, 395 S.C. at 434, 717 S.E.2d at 781.

"The basic measure of actual damages is the amount needed to compensate the plaintiff for the losses proximately caused by the defendant's wrong so that the plaintiff will be in the same position he would have been in if there had been no wrongful injury." *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 312, 594 S.E.2d 867, 874 (Ct. App. 2004).

Our review of the record reveals the circuit court properly charged the jury, "[w]here real estate has been damaged[,] the measure of damages is the difference between the value of the entire premises before and after the injury." The circuit court further charged the jury as follows: "If repairing the building would put it in as good a condition as before the damage[,] then the measure of damages would be the cost of the repair plus any amount by which the building has been decreased due to the damages." *See e.g.*, *Babb v. Lee Cty. Landfill SC, LLC*, 405 S.C. 129, 142–43, 747 S.E.2d 468, 475 (2013) (explaining that "[t]he general rule is that in case of an injury of a permanent nature to real property, . . . the proper measure of damages is the diminution of the market value by reason of that injury") (quoting

Gray v. S. Facilities, Inc., 256 S.C. 558, 569, 183 S.E.2d 438, 443 (1971) (holding damage for permanent injury to real property caused by pollution of a stream is diminution in the market value of the property)).

At trial, Mrs. Graham testified she was advised by her family physician and at the emergency room not to return to the home until the sewage and mold issues were alleviated. Furthermore, she presented evidence regarding the value of the home before the damage, the loss of her home for a significant period of time, several hundred dollars in medical bills, and pain and suffering. The Grahams reasonably declined to repair the home until the Town addressed the sewage problem. Moreover, evidence was presented—through building inspector Thomas Robertson—that a significant quantity of mold was present in the home when he did air quality testing in 2010. Watson's testimony regarding DHEC's "Recommendations for Sewer Clean-up in Residential Homes" established that extensive cleaning, replacement, and repairs would be required before it would be safe for anyone to live in the home. Still, although Benton estimated it would cost $478,280.56 to rebuild the Grahams' home, excluding the price of the property, landscaping, pool, and irrigation system, the jury returned a verdict of less than half this figure—$225,000—for Mrs. Graham.

Therefore, we decline to find error, as the evidence presented at trial supports the jury's verdict. *See Camden v. Hilton*, 360 S.C. 164, 174, 600 S.E.2d 88, 93 (Ct. App. 2004) ("In South Carolina, an appellate court must uphold a jury verdict if it is possible to reconcile its various features."); *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592–93, 493 S.E.2d 875, 879 (Ct. App. 1997) ("The verdict will be upheld if there is *any evidence* to sustain the factual findings implicit in the jury's verdict.") (emphasis added); *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 334, 450 S.E.2d 66, 74 (Ct. App. 1994) ("It is the duty of the court to sustain a verdict when a logical reason for reconciling the verdict can be found.").

IV. Damages to Personal Property

The Town argues the circuit court erred in denying its motions for directed verdict and JNOV with respect to Mr. Graham's claim for damages to the personal property located in the storage room. In the alternative, the Town argues it is entitled to a new trial absolute because the jury should not have been permitted to consider the loss or damage to the personal property as an element of damages.

In his complaint, Claude Graham sought damages for the storage shed contents, two damaged automobiles, the impairment of his health and costs of medical treatment for such, the costs of the inconvenience of living temporarily on the second floor of the home, and the expenses of relocating. Because Mr. Graham testified that the damages to his Ford Taurus and Toyota Avalon occurred on September 5th and 6th, 2008, the circuit court disallowed recovery for the automobiles in light of the partial directed verdict in the Town's favor. In response to an inquiry during deliberations, the court charged the jury that "[p]ursuant to legal decisions by the Court, the cars are no longer [an] issue for consideration."

Mr. Graham testified as to the loss of tools, golf equipment, two lawnmowers, a refrigerator, and gardening supplies located in a storage room on the Grahams' property. He opined these items were valued in excess of $8,000. He further testified he paid $70,000 in rent for substitute housing from November 2008 through April 15, 2012. Finally, both Mr. Graham and Dr. Culpepper testified as to the medical issues that both of the Grahams suffered and the need for the Grahams to relocate due to the unhealthy conditions in the East Rice Street home.

The circuit court properly charged the jury that "any damages you would award for personal property would include the difference between the value of the property before the damage and the value of the property after the damage." The jury returned a verdict in favor of Mr. Graham in the amount of $100,000. We agree with the circuit court that the evidence presented at trial supports the jury's verdict. *See Camden*, 360 S.C. at 174, 600 S.E.2d at 93 ("In South Carolina, an appellate court must uphold a jury verdict if it is possible to reconcile its various features."); *Hawkins*, 328 S.C. at 592–93, 493 S.E.2d at 879 ("The verdict will be upheld if there is *any evidence* to sustain the factual findings implicit in the jury's verdict.") (emphasis added); *Orangeburg Sausage Co.*, 316 S.C. at 334, 450 S.E.2d at 74 ("It is the duty of the court to sustain a verdict when a logical reason for reconciling the verdict can be found.").

THE GRAHAMS' ISSUES ON APPEAL

The Grahams argue the circuit court erred in directing a verdict in favor of the Town regarding Mrs. Graham's claims for inverse condemnation and trespass. The Grahams further argue the circuit court erred in ruling the Town has an easement by prescription for a sewer line located on the Grahams' property.

I. Inverse Condemnation

The Grahams contend the circuit court erred in directing a verdict on Mrs. Graham's claim for inverse condemnation, arguing the Town's continued unauthorized use of the Grahams' property—not only for its main sewer line, but also as a dumping ground for raw sewage—constitutes an unconstitutional taking. We disagree.

"Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Hawkins*, 358 S.C. at 290, 594 S.E.2d at 562. "An inverse condemnation may result from the government's physical appropriation of private property, or it may result from government-imposed limitations on the use of private property." *Byrd v. City of Hartsville*, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005). "[A] plaintiff's right to recovery in an inverse condemnation case is premised upon the ability to show that he or she has suffered a taking." *Hardin v. S.C. Dep't of Transp.*, 371 S.C. 598, 604, 641 S.E.2d 437, 441 (2007). In *Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, our supreme court reiterated that an action for inverse condemnation requires: "(1) affirmative conduct of a government entity; (2) the conduct effects a taking; and (3) the taking is for a public use." 391 S.C. 429, 435, 706 S.E.2d 501, 504 (2011). "To prevail in such an action, a plaintiff must prove 'an affirmative, aggressive, and positive act' by the government entity that caused the alleged damage to the plaintiff's property." *Carolina Chloride, Inc. v. Richland Cty.*, 394 S.C. 154, 170, 714 S.E.2d 869, 877 (2011) (quoting *WRB Ltd. P'ship v. Cty. of Lexington*, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006)) .

In *Rolandi v. City of Spartanburg*, Rolandi alleged damage to real and personal property resulting from the backup of the City's sewer line. 294 S.C. 161, 163, 363 S.E.2d 385, 386 (Ct. App. 1987). This court affirmed the trial court's rejection of Rolandi's "unauthorized 'taking' claim," noting Rolandi "failed to allege the damage resulted from an affirmative, aggressive, positive act on the part of the City." *Id.* at 164–65, 363 S.E.2d at 387. In *Hawkins v. City of Greenville*, this court affirmed summary judgment for the City of Greenville on an inverse condemnation claim, emphasizing that "[a]llegations of mere failure to act are insufficient" to establish an "affirmative, positive, aggressive act" by the municipality. 358 S.C. at 291, 594 S.E.2d at 563.

Here, as in *Hawkins*, most of the acts averred to support the Grahams' inverse condemnation claim are more appropriately characterized as mere failures to act. *See Hawkins*, 358 S.C. at 291, 594 S.E.2d at 562. Based on the lack of any evidence demonstrating an "affirmative, positive, aggressive act" by the Town which would tend to prove the Town's actions caused or precipitated the sewage backups and flooding damages, we hold the circuit court properly directed a verdict in favor of the Town on the inverse condemnation claim.

II. Trespass

The Grahams contend the circuit court erred in directing a verdict in favor of the Town regarding Mrs. Graham's claim for trespass, arguing there was ample evidence of the Town's affirmative conduct to support a claim of trespass. We disagree and affirm.

Trespass to land is an interference with another's present right of possession. *See generally Prosser and Keeton on Torts* § 13. The historical requirements for recovery under the common law action of trespass include "an invasion (a) which interfered with the right of exclusive possession of the land, and (b) which was a direct result of some act committed by the defendant." *Id.* at 67. Trespass has been defined as "any intentional invasion of the plaintiff's interest in the exclusive possession of his property." *Hawkins*, 358 S.C. at 296, 594 S.E.2d at 565 (citations omitted). "To constitute actionable trespass, however, there must be an affirmative act, invasion of land must be intentional, and harm caused must be the direct result of that invasion." *Id.* at 296, 594 S.E.2d at 565–66 (quoting *Snow v. City of Columbia*, 305 S.C. 554, 553, 409 S.E.2d 797, 802 (Ct. App. 1991)). "The gist of trespass is the injury to possession, and generally either actual or constructive possession is sufficient to maintain an action for trespass." *Id.* at 296, 594 S.E.2d at 566.

In directing a verdict in favor of the Town on Mrs. Graham's trespass claim, the circuit court ruled, "I'm going to grant the directed verdict as to trespass on the same basis that there is not an affirmative act on the part of the [Town] for the same reasons as inverse condemnation." The Grahams argue the circuit court referred to the "affirmative, positive, aggressive act," which is required to prove inverse condemnation, but not required to prove trespass. However, our review of the record reveals the circuit court did no such thing. To the contrary, the circuit court explained:

> [T]here was no affirmative act with respect to the release of sewage on . . . September 5th and 6th, and that continued release of sewage [was] not an affirmative act as recognized by case law . . . . [A]s it relates to the September 5th and 6th incident there was not an intentional act. There was no intent for there to be any release of sewage or there was no intent that—on the part of the Town for any actions to occur on the property of the [Grahams]. And so for those reasons I find that the directed verdict should be granted as [to Mrs. Graham's claim for] trespass.

"Trespass does not lie for nonfeasance or failure to perform a duty." *Snow*, 305 S.C. at 553, 409 S.E.2d at 802. In *Snow*, this court found, "the immediate cause of the entry on the Snows' land was the discharge of water from the leaking pipe joint." 305 S.C. at 554, 409 S.E.2d 802. "[T]he City was not aware of the leak until Mr. Snow brought it to their attention. The Snows make no claim to the contrary." *Id.* Moreover, Mr. Snow conceded "the City did *not* intentionally allow the water to escape onto his property." *Id.* This court found that "[s]ince the event which constituted the entry was not a voluntary act of the City, an action for trespass will not lie." *Id.*

Here, Mrs. Graham argues the construction and operation of the municipal water system by the Town is sufficient evidence of trespass. However, Mrs. Graham presented no evidence that the Town intentionally released sewage onto the Grahams' property on September 5th or 6th, 2008, or that it continued to intentionally release sewage on subsequent dates thereafter. This court has previously rejected the notion that nonfeasance or failure to act may support a claim for trespass. Accordingly, we affirm the circuit court's granting of directed verdict on the trespass claim.

III. Easement by Prescription

Mrs. Graham asserts the circuit court erred in ruling *sua sponte* that the Town has an easement by prescription for the sewer line on the Graham property. We disagree. First, the issue of the prescriptive easement was raised and addressed by the Town at the directed verdict stage; there was no *sua sponte* ruling. Mrs. Graham never objected to the circuit court's consideration of the prescriptive easement issue, and she presented evidence addressing the elements of a

prescriptive easement in her case in chief. Moreover, Mrs. Graham never argued that the prescriptive easement issue was not properly raised or that the court's consideration of the question violated her due process rights. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."). Therefore, we find the question of the prescriptive easement is unpreserved for appellate review.

CONCLUSION

Accordingly, the decision of the circuit court is

AFFIRMED.

SHORT, J., concurs.

CURETON, A.J., concurring in a separate opinion.

CURETON, A.J.: I concur in the result reached by the majority. I write separately, however, to address Section III of the opinion on damages.

First, I find the Town is not entitled to a new trial because the circuit court allowed Benton to testify about an estimate to rebuild the Grahams' house. At trial, the Grahams presented evidence from which the jury could infer that the house was in an unlivable condition. Although Watson testified people can continue living in a house after a sewage overflow, there was evidence the sewage pipe ran underneath the Grahams' house. Specifically, Mr. Graham testified he was informed by the Town's director of public works that the sewer line ran across his property underneath his house. Additionally, although Davis did not specifically locate the pipe in his evaluation, he testified it ran underneath the Grahams' house. Davis opined the location of the line under the house hindered access for repairs and maintenance, and any problems with the sewer line would create wet conditions that could cause health problems or damage the structure of the house. Moreover, Dr. Culpepper testified he insisted the Grahams leave the house and saw an improvement in their respiratory symptoms after their move. Based on the evidence of the line running underneath the house and the medical testimony, the jury could infer the house could not be made safe for human habitation and was therefore a total loss. Accordingly, I find Benton's testimony about the reconstruction cost for the house was relevant. *See Roland v. Palmetto Hills*, 308

S.C. 283, 286, 417 S.E.2d 626, 628 (Ct. App. 1992) ("[T]he cost of repair or restoration is a valid measure of damages for injury to a building.").

Furthermore, viewing the evidence in the light most favorable to the Grahams, I find the circuit court did not abuse its discretion in denying the Town's motion for JNOV with respect to Mrs. Graham's claim for the amount of damages to the real property. *See Welch v. Epstein*, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000) ("When reviewing the denial of a motion for directed verdict or JNOV, this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party."). Benton, who was qualified as an expert in "estimating residential home building," estimated it would cost $478,280.56 to rebuild the Grahams' home. Benton's testimony was sufficient to create a factual question for the jury as to damages incurred to real property. *See Scott v. Fort Roofing & Sheet Metal Works, Inc.*, 299 S.C. 449, 451, 385 S.E.2d 826, 827 (1989) ("A competent estimate of the cost of repair to a building creates a factual issue regarding damages."). Moreover, the jury awarded a general verdict in favor of Mrs. Graham for actual damages. In addition to the evidence of damages to real property, Mrs. Graham presented evidence of medical bills, the loss of use of her home, and pain and suffering that further support the jury's damages award. Because there was evidence to support the damages award, I find the circuit court did not abuse its discretion. *See Austin*, 358 S.C. at 310, 594 S.E.2d at 873 ("Our task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award.").

For the foregoing reasons, I think the result reached by the majority is correct and would affirm the circuit court.