The Supreme Court of South Carolina

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AMENDED
N O T I C E

In the Matter of Tamara Tucker

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 419 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on April 25, 2018, beginning at 4:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

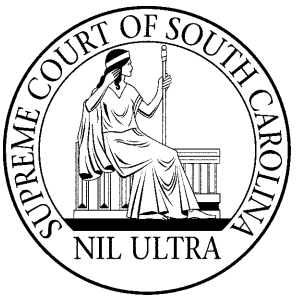
Any individual may appear before the Committee in support of, or in opposition to, the petition.

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

Columbia, South Carolina

March 19, 2018

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



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 13
March 28, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Joel F. Geer, Respondent.

Appellate Case No. 2017-000273

Opinion No. 27787
Heard March 5, 2018 – Filed March 28, 2018

DEFINITE SUSPENSION

Disciplinary Counsel John S. Nichols and Senior Assistant Disciplinary Counsel Ericka M. Williams, for the Office of Disciplinary Counsel.

Joel F. Geer, Respondent, *pro se*, of Greenville.

Lance S. Boozer, Guardian Ad Litem, *pro se*.

PER CURIAM: In this attorney disciplinary matter, a hearing panel of the Commission on Lawyer Conduct (Panel) issued a report recommending that Respondent Joel F. Geer be disbarred; that he be ordered to pay the costs of the disciplinary proceedings; and that he be ordered to pay restitution. Neither the Office of Disciplinary Counsel (ODC) nor Respondent took exception to the Panel's report. For the reasons that follow, we find the appropriate sanction is a three-year definite suspension and the payment of costs of the disciplinary proceedings. We further order Respondent to pay $31,794.92 in restitution.

I.

On April 10, 2015, the Court placed Respondent on interim suspension and appointed a receiver to protect the interests of Respondent's clients. *In re Geer*, 412 S.C. 124, 771 S.E.2d 345 (2015). Formal Charges were filed against Respondent in July 2015, and Supplemental Formal Charges were filed against

him in August 2016. As a result of Respondent's failure to answer either set of charges, the following allegations against him were deemed admitted pursuant to Rule 24(a), RLDE, Rule 413, SCACR.

Matter I

In 2013, Respondent represented a limited liability company (LLC) in collecting money owed by a customer, and Respondent obtained a confession of judgment in favor of the LLC in the amount of $31,794.92. Before the judgment was satisfied, the customer filed bankruptcy. Respondent prepared a Proof of Claim but failed to file it with the bankruptcy court. The bankruptcy estate had sufficient assets to pay the debt owed to the LLC, but by the time the LLC secured alternate counsel, its claim was time-barred.

Matter II

Respondent was administratively suspended from the practice of law on March 14, 2014, for failing to pay his annual license fees as required by Rule 401, SCACR; Respondent was reinstated on March 26, 2014. Prior to being reinstated, however, Respondent engaged in the unauthorized practice of law when he filed pleadings in circuit court on behalf of a shareholder client on March 17, 2014. Subsequently, the circuit court ordered that all corporate funds in the possession of Respondent's client be deposited with a court-appointed receiver and denied Respondent's request to receive attorney's fees from those funds. In disregard of the circuit court's order, attorney's fees were withheld prior to the funds being turned over to the receiver. Ultimately, Respondent's law firm remitted the withheld funds but only after the circuit court issued a Rule to Show Cause why Respondent should not be held in contempt. Throughout the pendency of the matter in circuit court, Respondent failed to respond to telephone calls and emails from court staff, failed to appear at multiple hearings, and failed to timely comply with court orders and sanctions imposed by the circuit court.

Matter III

In June 2014, Respondent accepted a fee of $250 to represent a client in connection with a car loan issue. Several months later, Respondent cancelled several meetings with the client, then stopped communicating with the client altogether. Eventually, the client's emails to Respondent were returned with a message that Respondent's

email domain name was no longer valid. The client retained new counsel to assist him with his case.[1]

Failure to Comply with Rule 30, RLDE, Following Suspension

The following year, Respondent was again administratively suspended, not only for failing to pay his annual license fees but also for failing to meet continuing legal education requirements. Further, on April 10, 2015, Respondent was placed on Interim Suspension and this Court appointed a receiver to protect Respondent's clients' interests. *In re Geer*, 412 S.C. 124, 771 S.E.2d 345 (2015). In addition to appointing the Receiver, this Court also ordered Respondent to cooperate with the Receiver, respond to the Receiver's requests for information and documents, and comply with the requirements of Rule 30, RLDE, Rule 413, SCACR.

Respondent failed to comply with Rule 30 and failed to cooperate with the Receiver or turn over his client files, bank records, and mail. Accordingly, the Court issued a Rule to Show Cause why Respondent should not be held in civil and criminal contempt of Court. Following a hearing in November 2015, this Court held Respondent in civil contempt for failing to comply with our directives, but we suspended any period of incarceration upon Respondent's compliance with certain stated conditions and held in abeyance any finding regarding Respondent's criminal contempt. Thereafter, Respondent met with the Receiver and turned over client files and his bank records, thus purging himself from civil contempt. We therefore declined to hold Respondent in criminal contempt.

Failure to Cooperate

Additionally, Respondent failed to communicate with ODC or cooperate with the ODC investigation. Although Respondent submitted a written response to the first notice of investigation in August 2014, Respondent thereafter failed to respond to subsequent notices of investigation, follow-up letters pursuant to *In re Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982), the Formal Charges, or the Supplemental Formal Charges. Respondent also failed to appear when subpoenaed by ODC or when ordered to do so by the Panel.

[1] In separate documents submitted to this Court, ODC indicated that its review of Respondent's client file in this matter revealed Respondent did perform some work on behalf of the client and that the $250 fee paid by the client was reasonable and earned. We modify the Panel report accordingly.

Failure to Update Contact Information

Throughout these disciplinary proceedings, Respondent failed to communicate with this Court and failed to maintain current and accurate contact information in the Attorney Information System (AIS) despite the requirements of Rule 410(g), SCACR, and direct orders from this Court. As a result, ODC, the Panel, and this Court have had to resort to the extraordinary method of personally serving Respondent with notice and other documents through the South Carolina Law Enforcement Division (SLED).

II.

In addition to the above misconduct, which is deemed admitted, the Panel considered two aggravating circumstances—namely, Respondent's pattern of misconduct and his continuing and persistent failure to cooperate with the investigation or appear when ordered to do so. Accordingly, the Panel recommended that Respondent be disbarred; that he be ordered to pay the costs of the disciplinary proceedings; and that he be ordered to pay restitution. No exceptions were taken.

This matter was initially scheduled for oral argument before this Court on September 6, 2017; however, the Court became concerned about Respondent's mental health. We therefore continued the hearing and appointed Lance S. Boozer as guardian ad litem to represent Respondent's interests.[2]

The hearing was reconvened on March 5, 2018. At the outset of the hearing, the guardian ad litem explained to the Court that since being appointed, he had made fourteen separate attempts to contact Respondent via multiple methods of communication; however, Respondent never answered or responded to any of these attempts. Nevertheless, Respondent unexpectedly appeared at the hearing mere seconds before it began; therefore, the guardian ad litem requested, and we permitted, a brief recess for Respondent and the guardian ad litem to confer. Thereafter, the Members of the Court questioned Respondent extensively. During this colloquy, Respondent indicated that he continued to hold stable employment, supported himself, and took medication to assist him in his daily life. After this careful examination, we concluded Respondent was competent to participate in the proceeding.

[2] We commend Mr. Boozer for his professionalism and diligent service as guardian ad litem.

In addressing the Court, Respondent acknowledged his persistent failure to respond to disciplinary counsel, the guardian ad litem, and this Court, as well as his failure to participate or cooperate in the disciplinary process. Although acknowledging these failures, Respondent contended they were not willful, attributing them to his numerous documented mental health issues.

III.

This Court "may accept, reject, or modify in whole or in part the findings, conclusions, and recommendations of the Commission [on Lawyer Conduct]." Rule 27(e)(2), RLDE, Rule 413, SCACR. "Because Respondent has been found in default and, thus, is deemed to have admitted all of the factual allegations, the sole question before the Court is whether to accept the Panel's recommended sanction." *In re Jacobsen*, 386 S.C. 598, 606, 690 S.E.2d 560, 564 (2010).

We find Respondent committed misconduct in violation of the following Rules of Professional Conduct, Rule 407, SCACR: 1.1 (competence); 1.2 (consult with client); 1.3 (diligence); 1.4 (communication); 1.15(g) (use of entrusted property); 1.16(c) (terminating representation); 1.16(d) (protect clients' interests upon termination of representation); 3.4(c) (knowingly disobey obligation under rules of tribunal); 5.5 (unauthorized practice of law); 8.1(b) (failure to respond); 8.4(d) (conduct involving dishonesty, fraud, deceit, or misrepresentation); and 8.4(e) (conduct prejudicial to the administration of justice). We also find there is clear and convincing evidence Respondent violated Rule 410(g), SCACR (duty to verify and update AIS), and Rules 30 (duties following suspension) and 31 (receivership), RLDE, Rule 413, SCACR.

We therefore conclude Respondent is subject to discipline pursuant to the following subsections of Rule 7, RLDE, Rule 413, SCACR: (a)(1) (violating the Rules of Professional Conduct); (a)(3) (willfully violating an order of the Court or the Panel or knowingly failing to respond to lawful demands from ODC); (a)(5) (engaging in conduct tending to pollute the administration of justice); and (a)(7) (willfully violating a valid court order).

Although we are sympathetic to Respondent's substantial, well-documented mental health issues, "we must weigh this sympathy against our duty to protect the public from lawyers who may lack the present ability to adequately represent their clients in the courts of this State." *In re Longtin*, 393 S.C. 368, 380, 713 S.E.2d 297, 303 (2011). Therefore, in light of the seriousness and extent of Respondent's

misconduct, we find the appropriate sanction is definite suspension for a period of three years from the date of this opinion. *See Longtin*, 393 S.C. at 380–81, 713 S.E.2d at 303–04 (imposing, in light of attorney's mental health diagnosis, a nine-month definite suspension for misconduct including the failure to obey orders of a judge; failure to respond to clients and ODC investigation; practice of law while on interim suspension; failure to timely pay case-related expenses; and failure to file a deed for a client); *In re Bonecutter*, 375 S.C. 414, 416–17, 653 S.E.2d 269, 270–71 (2007) (imposing two-year definite suspension for attorney's misconduct in failing to respond to notice of disciplinary investigation and failing to comply with Rule 30, RLDE, while on interim suspension); *In re Davis*, 366 S.C. 344, 347–52, 622 S.E.2d 529, 530–33 (2005) (imposing two-year definite suspension for attorney's failure to comply with Rule 30, RLDE; failure to pay case-related expenses and refund unearned fees; and failure to respond to notice of investigation or turn over client files); *In re Drayton*, 359 S.C. 138, 140–41, 597 S.E.2d 791, 792–93 (2004) (imposing indefinite suspension for attorney's failure to perform work and filing pleadings with a court while on interim suspension); *cf. In re Lorenz*, 408 S.C. 324, 325–28, 759 S.E.2d 721, 722–24 (2014) (disbarring attorney for failure to pay off mortgage, record deed, and remit title insurance premiums in connection with a real estate closing; failing to respond to ODC or cooperate with the attorney appointed to protect her clients' interests; and failing to maintain current contact information in AIS).

In addition to imposing a three-year definite suspension, we also order Respondent to pay the costs of the disciplinary proceedings and $31,794.92 in restitution. We further order Respondent to contact ODC within thirty (30) days of this opinion becoming final and enter into an agreement for the payment of restitution. Should Respondent fail to comply, upon affidavit to that effect by ODC, this Court reserves the right to issue a bench warrant for Respondent's arrest. Moreover, within fifteen (15) days of the date of this opinion becoming final, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

The Supreme Court of South Carolina

In the Matter of Melisa White Gay, Respondent.

Appellate Case No. 2018-000237

ORDER

The Office of Disciplinary Counsel asks this Court to place Respondent on interim suspension pursuant to Rule 17(a) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

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

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre Thomas Lumpkin, Esquire, Receiver, has been duly

appointed by this Court and has the authority to receive Respondent's mail and the authority to direct that Respondent's mail be delivered to Mr. Lumpkin's office.

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

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

s/Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina

March 21, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William Huck and Dianne Huck, Respondents,

v.

Oakland Wings, LLC d/b/a Wild Wing Café, Civil Site Environmental, Inc., Oakland Properties, LLC, Chandler Construction Services, Inc., Avtex Commercial Properties, Inc., Defendants,

Of Whom Avtex Commercial Properties, Inc. is the Appellant.

Appellate Case No. 2015-002025

Appeal From Charleston County
Brian M. Gibbons, Circuit Court Judge

Opinion No. 5500
Heard May 2, 2017 – Filed July 19, 2017
Withdrawn, Substituted and Refiled March 28, 2018

REVERSED AND REMANDED

Kenneth Michael Barfield and Diane Summers Clarke, II, both of Barnwell Whaley Patterson & Helms, LLC, of Charleston, for Appellant.

Edward K. Pritchard, III, and Elizabeth Fraysure Fulton, both of Pritchard Law Group, LLC, of Charleston, for Respondents.

LEE, A.J.: In this appeal arising from a premises liability lawsuit, Avtex Commercial Properties, Inc. (Avtex) argues the trial court erred in denying its motion to disclose settlement and motion for setoff. We reverse and remand.

FACTS

William Huck slipped and fell while walking into Wild Wing Café in Mount Pleasant. Huck and his wife, Dianne Huck, filed a complaint against Wild Wing Café and Avtex, as the building's owner, among other parties. Huck alleged he suffered bodily injury, causing him to have surgery and incur medical costs. Huck asserted causes of action for negligence and loss of consortium. Dianne also asserted a cause of action for loss of consortium. Prior to trial, a settlement was entered into with defendants Civil Site Environmental, Inc. and Chandler Construction Services, Inc. The terms of the settlement, including the amounts, were not disclosed to the trial court. At the close of the Hucks' case, the court granted the remaining defendants' motions for directed verdict on Dianne's loss of consortium claim.

The jury returned a verdict in favor of Huck against Avtex only in the amount of $97,640, but the jury found Huck was fifty percent negligent in bringing about his own injuries. Accordingly, the court reduced the verdict by fifty percent to $48,820 and entered judgment against Avtex in that amount. Avtex filed a motion for judgment notwithstanding the verdict pursuant to Rule 50(b), SCRCP. It also filed a motion for disclosure of settlement and setoff, or in the alternative, to determine if the settlement was made in good faith. The trial court denied both motions. Avtex made a motion to alter or amend judgment pursuant to Rule 59(e), SCRCP, which the trial court denied. This appeal followed.

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). "[A] factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Id.*

LAW/ANALYSIS

I. Motion to Disclose Settlement

Avtex argues the trial court erred in denying its motion to disclose settlement. We agree.

"In interpreting the language of a court rule, we apply the same rules of construction used in interpreting statutes." *Green ex rel. Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). "In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *City of Camden v. Brassell*, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997). "When the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning." *Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503, 508, 602 S.E.2d 99, 102 (Ct. App. 2004).

Rule 8 of the South Carolina Alternative Dispute Resolution Rules provides:

> Communications *during a mediation settlement conference* shall be confidential. Additionally, the parties, their attorneys and any other person present must execute an Agreement to Mediate that protects the confidentiality of the process. To that end, the parties and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications *having occurred in a mediation proceeding* . . . .

Rule 8(a), SCADR (emphases added).

This court must give the words of Rule 8 their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule. *See Green*, 314

S.C. at 304, 443 S.E.2d at 907; *Stark Truss Co.*, 360 S.C. at 508, 602 S.E.2d at 102.

Avtex argues the trial court erred in concluding the South Carolina rules governing alternative dispute resolution prevented it from compelling disclosure of the terms of the settlements between the Hucks and Civil Site Environmental, Inc. and Chandler Construction Services, Inc. The Hucks argue the settlement agreement is protected because it was a part of the mediation process.[1]

We find the trial court erred in denying Avtex's motion to disclose settlement. The documents referred to in Rule 8 are designed to protect any documents prepared for use by the mediator and the parties to the mediation itself. Once the parties reach a settlement, documents prepared in conjunction with the settlement and release are not for the purpose of, or in the course of, mediation. Rather, they are documents prepared in connection with the litigation and to bring the litigation to a close. Rule 8 is designed to protect the communications made during the mediation itself and to protect the process. The parties' mediation agreement reinforces the rule and simply incorporates the same language. The request for production of the settlement documents does not disclose confidential information from the mediation (i.e., it does not disclose or discuss information the parties utilized to reach the settlement). Further, any confidential matters the parties do not want disclosed can be protected through court proceedings including confidentiality provisions. Accordingly, we reverse the trial court on this issue.

II. Motion for Setoff

Avtex argues the trial court erred in denying its motion for setoff. We agree.

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[1] The Hucks argue Avtex failed to properly raise this issue to the trial court. They assert the SCRCP provides an adequate mechanism for discovering the terms of the settlement agreement—a Rule 34(a), SCRCP, request for production, and they claim this was the proper motion to make instead of waiting until after the verdict and making a motion to disclose settlement. However, Avtex had no reason to request the settlement agreement prior to the verdict against it. Once the verdict was rendered, setoff became an issue and disclosure of the settlement agreement was relevant.

"A nonsettling defendant is entitled to credit for the amount paid by another defendant who settles." *Welch v. Epstein*, 342 S.C. 279, 312, 536 S.E.2d 408, 425 (Ct. App. 2000) (citing *Powers v. Temple*, 250 S.C. 149, 155, 156 S.E.2d 759, 761 (1967) ("[T]he rule is almost universally followed that one [tortfeasor] is entitled to credit for the amount paid by another [tortfeasor] for a covenant not to sue.")). "The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him." *Truesdale v. S.C. Highway Dep't*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), *overruled on other grounds by McCall ex rel. Andrews*, 285 S.C. 243, 329 S.E.2d 741 (1985), *superseded by statute*. "In other words, there can be only one satisfaction for an injury or wrong." *Welch*, 342 S.C. at 312, 536 S.E.2d at 425. "However, the reduction in the judgment must be from a settlement for the same cause of action." *Id.*

Section 15-38-50 of the South Carolina Code (2005) provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

"Section 15-38-50 grants the court no discretion in determining the equities involved in applying a [setoff] once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors." *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 210, 662 S.E.2d 444, 451 (Ct. App. 2008) (quoting *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999)). When the settlement is for the same injury as a matter of law, "the right to setoff arises as

an operation of law, and the circuit court must award a setoff." *Smith v. Widener*, 397 S.C. 468, 474, 724 S.E.2d 188, 191 (Ct. App. 2012).

Avtex argues it is entitled to a setoff to account for the amounts Civil Site Environmental, Inc. and Chandler Construction Services, Inc. each paid the Hucks to settle the claims against them. Avtex asserts the Hucks allocated a substantial percentage of the settlement with Civil Site Environmental, Inc. and Chandler Construction Services, Inc. to Dianne's loss of consortium claim in an effort to deprive Avtex of a setoff. Therefore, Avtex argues the trial court erred in finding it "has no jurisdiction to evaluate the 'fairness' or 'reasonableness' of such settlement agreements or to reallocate the settlements, assuming there is anything to reallocate," and "[n]othing in the law or at equity permits this court to conduct such an inquiry." The Hucks argue the trial court did not have any authority to reapportion the settlement proceeds.

Pursuant to section 15-38-50, we agree Avtex is entitled to a setoff. There is no right to setoff until there is a verdict against a defendant. Once there is a verdict against a defendant, it becomes the trial court's function to determine whether the defendant is entitled to a setoff and the amount of the setoff, if any. *See Smith*, 397 S.C. at 471-72, 724 S.E.2d at 190 ("[B]efore entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury."); *id.* at 472, 724 S.E.2d at 190 ("When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law."); *id.* ("Under this circumstance, '[s]ection 15-38-50 grants the court no discretion . . . in applying a set-off.'" (quoting *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272)); *id.* at 474, 724 S.E.2d at 191 ("[T]he right to setoff arises as an operation of law, and the circuit court must award a setoff."). To determine if the nonsettling tortfeasor is entitled to a setoff as a preliminary matter, the documents must be reviewed to determine if their terms shield the settling tortfeasor from the requirements of section 15-38-50(2). Therefore, the court must review the documents to determine the amount of the settlement and its terms. Under section 15-38-50, the court also must determine if the release or covenant was "given in good faith." Because the trial court did not conduct such a review, we remand the case for the trial court to look at the settlement agreement and determine if Avtex is entitled to a setoff.

CONCLUSION

Accordingly, the trial court's order is

REVERSED AND REMANDED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Justin Jermaine Johnson, Appellant.

Appellate Case No. 2014-001219

Appeal From Clarendon County
W. Jeffrey Young, Circuit Court Judge

Opinion No. 5533
Submitted September 7, 2017 – Filed January 30, 2018
Withdrawn, Substituted and Refiled March 28, 2018

AFFIRMED

Appellate Defender Laura Ruth Baer, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia; and Solicitor Ernest Adolphus Finney, III, of Sumter, for Respondent.

KONDUROS, J.: Justin Jermaine Johnson appeals his convictions for two counts of murder, kidnapping, burglary in the first degree, and possession of a firearm during the commission of a violent crime. He maintains the circuit court erred in

(1) admitting predeath photographs of the victims, (2) permitting a witness to testify via Skype, (3) admitting his confession to police when it was not voluntarily given, (4) denying his motion for mistrial when he was brought shackled and guarded into a holding room adjacent to the jury pool's location, (5) denying his motion for mistrial when two witnesses involved in the case discussed the merits of the case in the hallway outside the courtroom and within earshot of prospective jurors, and (6) sentencing him to five years for possession of a weapon during the commission of a violent crime when a statute prohibits such punishment. We affirm.

FACTS

Johnson had two minor children with Kaisha Caraway, a nine-month-old son (Son) and a two-year-old daughter (Daughter). Kaisha and the children lived with her grandparents, John and Maxine Caraway. Son and Maxine Caraway were shot and killed on April 6, 2011. Johnson was arrested and indicted for the crimes.

At Johnson's trial, Kaisha testified that prior to the morning of the murders, she and Johnson had not been romantically involved for nine months. However, the two stayed in contact, and Johnson had his G.I. Bill check deposited into her bank account, on which he was a secondary cardholder, to help support the children. Kaisha and Johnson argued the night before the murders regarding Kaisha's having changed the personal identification number (PIN) on this account.

According to Kaisha, Johnson arrived at the Caraway residence on the morning of April 6, 2011, to take Son and Daughter to a doctor's appointment. Although he and Kaisha had discussed this, Kaisha was not expecting Johnson as he had last indicated he would not take the children. The two argued about the PIN over their cell phones for approximately twenty minutes until Johnson's phone battery died. He then left with Son and Daughter to go to the doctor. Kaisha testified that after Johnson had been gone about thirty minutes, she remembered something she needed to tell the doctor and phoned the doctor's office. According to the office, Johnson never arrived. Johnson returned to the Caraway residence with the children. He took Daughter out of her carseat and she walked into the house. Johnson brought Son onto the porch or into the house in his carseat. Kaisha and Johnson continued arguing. According to Kaisha, Johnson got in his car to leave but as she was shutting the door to the house, he got out of the car, ran back to the house, pushed through the front door, and began punching her. Son was sitting in

his high chair at this point, and Daughter was sitting in a chair in the same room. Maxine came out to see what was going on, and Johnson attacked her. When Kaisha went to get her phone, Johnson "came behind [her] and began dragging [her] out of the house."

According to Kaisha, Maxine had scratches and an injured nose and ran past Kaisha and Johnson who were now on the front porch. As she did, Johnson loosened his grip on Kaisha enough for her to slip out of her shirt and away from him into the house. Daughter was also outside the house.

Kaisha testified she located Maxine's cell phone and ran toward the hall when she realized Son was still in his high chair. Johnson entered the house with a shotgun in his hand and pointed it at her saying "you made me do this." She closed her eyes and heard a gunshot. She then realized Son had been shot. Kaisha ran down the hallway, locked herself in the bathroom, and pushed a cabinet in front of the door. She called 911 using the cell phone, and then Johnson shot through the door. Kaisha told Johnson emergency services were on the way.

Kaisha testified she left the bathroom and she and Johnson moved into the living room. When 911 called back, Johnson told Kaisha to tell the operator the call was a mistake, to pretend to be her grandmother, and to give them the name "Robert." After a few minutes, she heard Daughter crying and Johnson went to get her. As Kaisha went to the door, she saw that Maxine had been shot. Kaisha, Johnson, and Daughter got into his car to go to the police station. Though Johnson had the shotgun with him at first, he removed the remaining shells and left the gun in the yard at Kaisha's suggestion.

According to Kaisha, as they were driving to the police station, she and Johnson discussed the details of the story they would tell the police. Before they arrived, they encountered a police officer and led the officer back to the Caraway residence. Other police officers eventually arrived, and once Kaisha was separated from Johnson, she wrote "he did it" on a piece of paper, referring to Johnson.

Johnson's statement to police was initially in sharp contrast to Kaisha's testimony. After being read his *Miranda*[1] rights, he told police he arrived at the Caraway residence to find Kaisha and her boyfriend "Robert" arguing and the only shot he

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

fired was at Robert in defense of himself and the others present at the house. However, after a lengthy interrogation, Johnson admitted Robert did not exist and he had fired the gun—although the gun "just went off" and it was an accident.

Prior to the selection of the jury, Johnson moved for a mistrial based on having been brought into the courthouse handcuffed and accompanied by jail personnel. He argued jurors may have seen him and been prejudiced by the indicia of guilt. The circuit court denied the motion.

Johnson made an additional mistrial motion based on his attorney having overheard two witnesses for the State discussing evidence in the case within proximity of potential jurors in the courthouse hallway. The circuit court asked the jury pool whether they had heard anything that would influence their ability to be impartial and followed that with the question whether they had heard anything "today." All jurors responded in the negative. The circuit court denied the mistrial motion.

Also prior to trial, the circuit court held a *Jackson v. Denno*[2] hearing to determine the voluntariness of Johnson's statement to police. Investigator Mason Moore, testifying via Skype,[3] and Investigator Kippton Coker stated they advised Johnson of his *Miranda* rights and they did not threaten Johnson in order to coerce a confession from him. Investigator Moore further testified Johnson requested to speak with him again the following day and he was again read his *Miranda* rights. Moore stated Johnson did not recant his testimony or reassert his claim that the crimes were committed by a third party. After viewing the video recording that captured the majority of the interrogation, the circuit court found the statement was voluntary.

> [T]he statement made by Mr. Johnson was given freely, voluntarily, knowingly, and intelligently. Although it was over an eleven-hour period, he was --he was Mirandized twice during that. He was very talkative.

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[2] *Jackson v. Denno,* 378 U.S. 368 (1964).

[3] Skype is a telecommunications software that supports two-way video chat.

> He was offered ample times to take breaks. He was offered food. He was offered drink. He certainly did not appear to be under excessive I guess oppression in the giving of the confession, and I am going to allow the confession to come into evidence.

Although Johnson had not objected to Investigator Moore, who had moved to Montana, testifying via Skype for the *Jackson v. Denno* hearing, Johnson did object to the video testimony at trial. In anticipation of such an objection, the court made a preliminary ruling to admit the video testimony because the witness was 2,500 miles away, was an "ancillary" witness, "everything that was going on with him is available on videotape," and another officer was in the room for the majority of the interrogation.

Johnson argued the Skype testimony violated the Confrontation Clause of the Sixth Amendment and mere convenience of the witness should not trump the defendant's right to face-to-face confrontation. The State countered by reiterating the statements of the court and adding "a compelling or a substantial need exists to avoid costs, to avoid inconvenience to the witness, and to pretty much put on the record something that is not substantive but is a matter of tying the chain together." The circuit court concluded the Skype testimony was admissible.

The circuit court also held a preliminary hearing to address the admission of photographs at trial. Johnson objected to the admission of a predeath photograph of Maxine, arguing it was irrelevant and served only to arouse the sympathy of the jury. He further argued the photograph was more prejudicial than probative. Additionally, Johnson objected to the admission of a predeath picture of Son. The circuit court admitted the photographs saying, "I think who the person was is a part of this case." Johnson renewed his objections when the photographs were introduced, and the circuit court denied the objections.

The jury convicted Johnson for two counts of murder, kidnapping, burglary in the first degree, and possession of a firearm during the commission of a violent crime. The circuit court sentenced him to life in prison without parole plus five years for the possession of a weapon during the commission of a violent crime. This appeal followed.

LAW/ANALYSIS

I. Admission of Predeath Photographs

Johnson argues the circuit court erred in admitting predeath photographs of Maxine and Son. We agree, but we conclude the admission of the photographs constitutes harmless error in this case.

"The relevancy, materiality, and admissibility of photographs as evidence are matters left to the sound discretion of the trial court." *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2000). "However, photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or unnecessary to the issues at trial." *Id*. "Yet, there is no abuse of discretion if the offered photograph serves to corroborate testimony." *Id*.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Even if the evidence was not relevant and thus wrongly admitted by the trial judge, its admission may constitute harmless error if the irrelevant evidence did not affect the outcome of the trial." *State v. Langley*, 334 S.C. 643, 647, 515 S.E.2d 98, 100 (1999).

In *Langley*, our supreme court reversed the circuit court's admission of a photograph of the victim in his high school band uniform because it was not relevant to proving the guilt of the defendant. *Id*. at 648, 515 S.E.2d at 100. The court concluded the identity of the victim was not at issue and the only possible purpose of the photograph was to distance the victim from the drug dealing involved in the case. *Id.* at 648 n.3, 515 S.E.2d at 100 n.3.

As in *Langley*, the identification of the victims was not at issue in this case and nothing in the photographs served to make any fact in issue more or less likely. Neither the State nor the circuit court offered any rationale for how the predeath photographs were relevant to establishing Johnson's guilt. Consequently, we conclude admitting the photographs was error.

Nevertheless, we find the error was harmless based on the overwhelming evidence of guilt in the case and the nature of the error. Johnson's statement and Kaisha's

testimony indicate Johnson was the shooter. The physical evidence in the case corroborated Kaisha's testimony. Additionally, the jury knew the victims were a nine-month-old child and his great-grandmother, so feelings of sympathy were already on the side of the victims based on their status. Overall, we conclude the introduction of the photographs could not have reasonably affected the outcome of the trial. *See State v. Chavis*, 412 S.C. 101, 115, 771 S.E.2d 336, 343 (2015) ("Error is harmless when it could not reasonably have affected the result of the trial.").

II. Skype Testimony

Johnson next maintains the circuit court erred in permitting Investigator Moore to testify via Skype in violation of the Confrontation Clause of the Sixth Amendment. We agree. However, we again conclude this constituted harmless error under the facts of this case.

"A trial court's decision to allow videotaped or closed-circuit testimony is reversible 'only if it is shown that the trial judge abused his discretion in making such a decision. . . .'" *State v. Bray*, 342 S.C. 23, 27, 535 S.E.2d 636, 639 (2000) (quoting *State v. Murrell*, 302 S.C. 77, 82, 393 S.E.2d 919, 922 (1990)). "Where there is evidence to support a trial court's ruling, it will not be overturned for an abuse of discretion." *Bray*, 342 S.C. at 27, 535 S.E.2d at 639.

The majority of courts that have addressed two-way closed circuit testimony have adopted the same test set forth in *Maryland v. Craig*, 497 U.S. 836 (1990), which addressed the use of one-way video testimony in the context of a child sexual assault case.[4] In *Craig*, the United States Supreme Court recognized the right to

[4] See *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005) ("'Confrontation' through a two-way closed-circuit television is not different enough from 'confrontation' via a one-way closed-circuit television to justify different treatment under *Craig*."); *Horn v. Quarterman*, 508 F.3d 306, 319-20 (5th Cir. 2007) (relying on *Craig* and its progeny in examining whether the admission of a terminally ill witness's testimony via two-way video was contrary to clearly established federal law); *United States v. Abu Ali*, 528 F.3d 210, 240 (4th Cir. 2008) (discussed *infra*); *United States v. Yates*, 438 F.3d 1307, 1312-14 (11th Cir. 2006) (*en banc*) (discussed *infra*).

face-to-face confrontation under the Sixth Amendment is not absolute, but that it may only be modified "where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id*. at 850.

The Second Circuit Court of Appeals has adopted a less stringent standard for permitting two-way closed circuit testimony. In *United States v. Gigante*, 166 F.3d 75, 78 (2d Cir. 1999), the Second Circuit affirmed the use of two-way video testimony when the witness was in the Federal Witness Protection Program and suffering from terminal cancer. *Id*. at 79. The court did not adopt the *Craig* test, emphasizing that in two-way testimony the witness must view the defendant—a closer approximation to face-to-face confrontation. *Id*. at 80-81. Instead, the court determined two-way video should be permitted in the same circumstances warranting a deposition under Rule 15 of the Federal Rules of Criminal Procedure. The court held that "[u]pon a finding of exceptional circumstances, . . . a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice." *Id*. at 81. The court concluded the witness's situation coupled with Gigante's own poor health, which limited his ability to travel for a deposition, constituted exceptional circumstances. *Id*. Even having adopted a less stringent test than that set forth in *Craig*, the court opined "[c]losed-circuit television should not be considered a commonplace substitute for in-court testimony by a witness." *Id*. [5]

In *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006), the Eleventh Circuit held witnesses' trial testimony via two-way video conference violated the defendant's Sixth Amendment rights. *Id*. at 1312. Two essential witnesses were in Australia beyond the subpoena power of the United States government but willing to testify remotely. *Id*. at 1310. On appeal, the State argued two-way video conferencing provided all the same Sixth Amendment protections as face-to-face confrontation and two-way video conferencing was a better protection of rights than depositions when the witness was unavailable for trial. *Id*. at 1312. The appellate court determined *Craig* presented the proper test for its analysis, and the video

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[5] The Sixth Circuit appears to have approved of the *Gigante* rationale although it has not specifically adopted the *Gigante* test for analyzing this issue. *See United States v. Benson*, 79 F. App'x 813, 820-21 (6th Cir. 2003) (citing to *Gigante* and affirming the admission of testimony via two-way closed circuit television of an 85-year-old, out-of-state witness with numerous health issues).

conference testimony violated Yates' Sixth Amendment rights because it did not further an important public policy. *Id*. at 1313, 1316.

> The district court made no case-specific findings of fact that would support a conclusion that this case is different from any other criminal prosecution in which the Government would find it convenient to present testimony by two-way video conference. All criminal prosecutions include at least some evidence crucial to the Government's case, and there is no doubt that many criminal cases could be more expeditiously resolved were it unnecessary for witnesses to appear at trial. If we were to approve introduction of testimony in this manner, on this record, every prosecutor wishing to present testimony from a witness overseas would argue that providing crucial prosecution evidence and resolving the case expeditiously are important public policies that support the admission of testimony by two-way video conference.

Id. at 1316.

The Fourth Circuit has likewise acknowledged the *Craig* test is the measure for considering whether two-way closed circuit testimony is permissible under the Confrontation Clause. *United States v. Abu Ali*, 528 F.3d 210, 240 (4th Cir. 2008). In *Abu Ali*, the court affirmed the admission of testimony of Saudi Arabian officials beyond the reach of American courts in prosecution of a terrorism suspect. *Id*. at 240-41. The court found the interest of national security and protecting Americans from unprovoked terrorist attacks satisfied the first prong of *Craig*. *Id*. However, the court clarified:

> This is not to suggest that a generalized interest in law enforcement is sufficient to satisfy the first prong of *Craig*. *Craig* plainly requires a public interest more substantial than convicting someone of a criminal offense. The prosecution of those bent on inflicting mass civilian casualties or assassinating high public officials

> is, however, just the kind of important public interest contemplated by the *Craig* decision.

Id. at 241.

The court further determined the trial court had taken steps necessary to ensure the reliability of the testimony so that no Sixth Amendment violation occurred. *Id*. at 241-42.

Additionally, in 2002, the United States Supreme Court declined to adopt a proposed Federal Rule of Evidence that mirrored the *Gigante* approach. The proposed amendment stated:

> In the interest of justice, the court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if:
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> (1) the requesting party establishes exceptional circumstances for such transmission;
>
> (2) appropriate safeguards for the transmission are used; and
>
> (3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5)

Hadley Perry, *Virtually Face-to-Face: The Confrontation Clause and the Use of Two-Way Video Testimony*, 13 Roger Williams U. L. Rev. 565, 566-67 (2008).

South Carolina has not specifically addressed the tension between two-way video testimony and a defendant's rights under the Confrontation Clause. However, South Carolina has recognized modifications to the traditional presentation of testimony may be appropriate in certain situations involving vulnerable witnesses. *See* S.C. Code Ann. § 16-3-1550(E) (2015) ("The circuit or family court must treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate."). Our state has adopted the *Craig* test in cases of one-way closed-circuit testimony and the

testimony of children in sexual assault cases. *See State v. Lewis*, 324 S.C. 539, 544-45, 478 S.E.2d 861, 864 (Ct. App. 1996) (citing the *Craig* test for analyzing whether a witness's testimony via one-way closed circuit television violated the defendant's Sixth Amendment rights). While our courts have generally noted the protection of children is an important public policy concern, the appellate courts have not adopted a generalized policy of permitting child victims to present testimony via video recording. Rather, the courts require a specific case-by-case finding that a child witness will be traumatized by testifying in front of the defendant. *See Lewis*, 324 S.C. at 547-49, 478 S.E.2d at 865-67 (finding a Confrontation Clause violation when trial court permitted video testimony of a particular child without specific evidentiary support the child would be traumatized by testifying in the defendant's presence); *State v. Murrell*, 302 S.C. 77, 80, 393 S.E.2d 919, 921 (1990) (holding a trial judge must make a case-specific determination of the need for videotaped testimony in a child sexual assault case). This approach underscores the reluctance of the court to use methods other than live testimony except under extreme circumstances.

After examining federal and state jurisprudence, we conclude the circuit court erred in permitting the State to present Investigator Moore's testimony via Skype. The Fourth Circuit has indicated the generalized conviction of criminal offenses is not sufficient to dispense with in-court confrontation and other courts have generally permitted such testimony only in cases in which the witness's health prevents him or her from traveling or possibly when a witness is beyond the subpoena power of the court. We recognize the advancements in technology permit two-way closed circuit testimony to more closely approximate face-to-face confrontation. However, in the absence of an important public policy or at least an exceptional circumstance, modifying a defendant's truest exercise of the Sixth Amendment right via in-person confrontation is inappropriate.[6]

Nevertheless, we find the circuit court's error in allowing the testimony was harmless. "[V]iolation of a defendant's Sixth Amendment right to confront the

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[6] We decline to adopt a specific test for the admission of two-way closed circuit testimony in this case, as convenience and expediency alone do not rise to the level of an exceptional circumstance, as set forth in *Gigante*, or implicate an important public policy consideration as required by *Craig*. Additionally, this ruling does not prohibit parties from consenting to use two-way video testimony.

witness is not *per se* reversible error; instead, this Court must determine whether the error was harmless beyond a reasonable doubt." *State v. Davis*, 371 S.C. 170, 181, 638 S.E.2d 57, 63 (2006). "[W]hether an error is harmless depends on the particular circumstances of the case." *Id*. Error is harmless if it could not have reasonably affected the result of the trial. *Id*. at 181-82, 638 S.E.2d at 63.

We are cognizant that Johnson's confession was an important piece of evidence in this case. Likewise, we recognize the admission of his confession turned on a finding of voluntariness that must be proven by the State through its witnesses and evidence. In this case, Investigator Coker's testimony plus the recordings of Johnson's interrogation met this burden. Investigator Moore's testimony was only relevant to events *not* presented by the videos or covered by Investigator Coker. Johnson does not allege wrongdoing by Investigator Moore other than through conduct contained in the videos.[7] Consequently, Investigator Moore's testimony was largely cumulative to what was already before the jury. *See State v. Haselden*, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003) (recognizing admission of improper evidence is harmless where the evidence is merely cumulative to other evidence). Accordingly, because the circuit court's erroneous decision to permit Investigator Moore to testify via Skype was harmless, we affirm the admission of that testimony.

III. Voluntariness of Confession

Next, Johnson argues the circuit court erred in finding his confession was voluntary because police misrepresented the evidence to him, threatened him with the death penalty, and repeatedly referenced Daughter and what she would think of her father's actions.[8] We disagree.

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[7] Johnson's allegations as to the voluntariness of his confession are discussed more specifically in Section III of this opinion.

[8] Johnson does not directly argue the length of his interrogation rendered his confession involuntary. Physical evidence was collected from Johnson for approximately three hours before an additional seven to eight hours of questioning by police. The interrogation began approximately mid-morning and continued through the afternoon and evening. Johnson does not appear to have been sleep deprived or otherwise physically distressed at the time of the interrogation. He

"The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence. If admitted, the jury must then determine whether the statement was given freely and voluntarily beyond a reasonable doubt." *State v. Parker*, 381 S.C. 68, 74, 671 S.E.2d 619, 622 (Ct. App. 2008) (citations omitted). "When reviewing a trial court's ruling concerning voluntariness, this [c]ourt does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001). "The trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." *Id*.

"A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession." *State v. Pittman*, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007). This due process analysis is evaluated based on examining the totality of the circumstances. *In re Tracy B.*, 391 S.C. 51, 66, 704 S.E.2d 71, 78-79 (Ct. App. 2010). Relevant circumstances for the trial judge to consider include the defendant's youth, the defendant's lack of education, the failure to Mirandize, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. *Pittman*, 373 S.C. at 566, 647 S.E.2d at 164. "If a suspect's will is overborne and his capacity for self-determination critically impaired, use of the resulting confession offends due process." *Saltz*, 346 S.C. at 136, 551 S.E.2d at 252.

A. Misrepresentation of Evidence

"Misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible." *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009). "Both this [c]ourt and the United States Supreme Court have recognized that misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible . . . . The pertinent inquiry is, as always, whether the defendant's will

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was offered food, drink, and bathroom breaks and spoke with police only after having been read his *Miranda* rights twice.

was 'overborne.'" *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996). S*ee also State v. Myers*, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004) (holding defendant's confession voluntary and admissible after police told him his hair was found clutched in victim's hand because "[e]ven if the information were untrue, it is not, alone, enough to render the confession involuntary"); *State v. Register*, 323 S.C. 471, 478, 476 S.E.2d 153, 158 (1996) (confession voluntary and admissible despite police misrepresentation that appellant had been seen with victim, tire and shoe impressions at the murder scene were a match, and DNA evidence established guilt); *Von Dohlen* at 242, 471 S.E.2d at 694 (holding defendant's will was not overborne and confession was voluntary when interrogators manufactured a composite sketch of suspect by looking at defendant through a one-way mirror and showed defendant shell casings not actually recovered from the crime scene).

Investigators Coker and Moore told Johnson the trunk of his car was analyzed and only his fingerprints were found, his shoe matched a footprint left from kicking in the door, his ring matched a wound left on Kaisha, and one could hear him in the background of the 911 calls. The primary evidence repeatedly referenced by the Investigators related to the 911 calls, which they claimed made Johnson's story impossible to believe. While this information was either unconfirmed or inaccurate, courts have routinely held the misrepresentation of evidence does not render a confession involuntary unless it is demonstrated the free will of the defendant was overborne.

B. Statements Regarding the Death Penalty

A "confession may not be 'extracted by any sort of threats or violence, [o]r obtained by any direct or implied promises, however slight, [o]r by the exertion of improper influence.'" *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (alterations in original) (quoting *Hutto v. Ross*, 429 U.S. 28, 30 (1979)). "'Isolated incidents of police deception . . . and discussions of realistic penalties for cooperative and non-cooperative [defendants] . . . are normally insufficient to preclude free choice.'" *State v. Parker*, 381 S.C. 68, 91, 671 S.E.2d 619, 630-31 (Ct. App. 2008) (alterations in original) (quoting *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1475 (11th Cir. 1992)). In *State v. Childs*, 299 S.C. 471, 474, 385 S.E.2d 839, 841 (1989), the court found Childs's statement to police voluntary even though Childs argued his confession was coerced because investigating officers threatened him with the electric chair.

In this case, Johnson only cites to one instance of investigators mentioning the death penalty. However, this instance was not really a "discussion" of possible penalties but a statement that keeping up this "bullshit story" was going to land him in prison for life if not the death penalty. Nevertheless, this comment was isolated, and the death penalty was a possible sentence for the crimes at issue. Johnson did not recant his "Robert" story until well after the death penalty was mentioned, and it does not appear to have overborne his will.

C. Statements Regarding Daughter

In *State v. Corns*, 310 S.C. 546, 552, 426 S.E.2d 324, 327 (Ct. App. 1992), the court found an officer's statements that Corns's wife could be arrested because she could be "involved in the marijuana" and their children could be taken from them amounted to an exertion of improper influence rendering his confession involuntary. Other cases in which statements were found to be involuntary involved the threat of specific tangible consequences to the defendant. *See State v. Osborne*, 301 S.C. 363, 366-67, 392 S.E.2d 178, 179-80 (1990) (holding defendant's statement inadmissible when over a period of months involving multiple interrogations, defendant was told she would be charged with the additional crime of withholding evidence if she remained silent); *State v. Hook*, 348 S.C. 401, 413-14, 559 S.E.2d 856, 862 (Ct. App. 2001) (holding defendant's statement to his probation officer was inadmissible because circumstances of interrogation indicated defendant's probation would be revoked if he did not cooperate).

> Few criminals feel impelled to confess to the police purely of their own accord without any questioning at all. . . . Thus, it can almost always be said that the interrogation caused the confession. . . . It is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect. . . .
>
> These ploys may play a part in the suspect's decision to confess, but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary.

Von Dohlen, 322 S.C. at 244, 471 S.E.2d at 695 (quoting *Miller v. Fenton*, 796 F.2d 598, 604-05 (3d Cir. 1986)).

Johnson argues statements that Daughter would think he was a cold-blooded killer who only survived because her father ran out of bullets was unduly coercive. However, these statements are not the type of tangible threat related to children or family members generally considered to render a confession involuntary. Such statements are more akin to a psychological tactic than actual coercion.

Overall, we conclude the circuit court did not abuse its discretion in admitting Johnson's statement as the evidence supports a finding his will was not overborne by the various tactics employed during his interrogation.

IV. Remaining Arguments

A. Shackles

The circuit court did not err in denying Johnson's motion for mistrial based on his being brought into the courthouse in handcuffs and surrounded by police personnel as the record fails to demonstrate any juror observed this activity or that any juror was prejudiced. *See State v. Wiley*, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010) ("The decision to grant or deny a mistrial is within the sound discretion of the trial court."); *id*. ("The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law."); *State v. Moore*, 257 S.C. 147, 152-53, 184 S.E.2d 546, 549 (1971) ("We think that when a jury or members thereof see an accused outside the courtroom in chains or handcuffs the situation is psychologically different and less likely to create prejudice in the minds of the jurors." (quoting *State v. Cassel*, 180 N.W.2d 607, 611 (1970))); *id*. at 153, 184 S.E.2d at 549 (affirming the denial of defendant's motion for mistrial noting defendant presented no proof the incident prejudiced the minds of the jurors—only the allegation that it did).

B. Witness Discussion/Comments

Likewise, the circuit court did not err in denying Johnson's motion for mistrial based on his attorney having overheard two witnesses discussing the weight of the evidence when the record fails to demonstrate a juror overheard the comments or was prejudiced by them. *See State v. Rowlands*, 343 S.C. 454, 457-58, 539 S.E.2d

717, 719 (Ct. App. 2000) ("Whether a mistrial is manifestly necessary is a fact specific inquiry."); *id*. ("It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." (quoting *Gilliam v. Foster*, 75 F.3d 881, 895 (4th Cir. 1996))); *State v. Bantan*, 387 S.C. 412, 417, 692 S.E.2d 201, 203-04 (Ct. App. 2010) ("The trial court should exhaust other methods to cure possible prejudice before aborting a trial.").

C. Sentencing

Finally, we find Johnson's argument as to any error in his sentencing is unpreserved for appellate review. *See State v. Bonner*, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012) ("It is well settled that issues not raised and ruled on in the trial court will not be considered on appeal."); *id*. ("Thus, 'a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review.'" (quoting *State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999))). While preservation concerns may be superseded by the interest of judicial economy under certain circumstances, we do not believe such circumstances are implicated in this case as the State does not concede the circuit court erred in sentencing Johnson to five years for possession of a weapon during the commission of a violent crime. *See Johnston*, 333 S.C. at 463, 510 S.E.2d at 425 (vacating defendant's sentence in case which "present[ed] the exceptional circumstance in which the State has conceded in its briefs and oral argument that the trial court committed error by imposing an excessive sentence"); *Bonner*, 400 S.C. at 567, 735 S.C. at 528 (vacating defendant's sentence when both parties fully briefed the issue, acknowledged defendant could raise the issue in an application for post-conviction relief, and because the State "concede[d] in its brief that the trial court committed error by imposing an improper sentence.").

CONCLUSION

We find the circuit court erred in admitting predeath photographs of the victims and in permitting Investigator Moore to testify via Skype at trial over Johnson's objection. However, we conclude both of these errors were harmless under the facts of this case. Furthermore, we conclude the circuit court did not abuse its discretion in admitting Johnson's confession or in denying his motions for mistrial. Last, the sentencing issue is not preserved for our review. Therefore, Johnson's conviction is

AFFIRMED.[9]

GEATHERS, J., concurs.

SHORT, J., concurring in a separate opinion.

I agree with the majority's opinion with the exception of the last issue. Johnson argues the trial judge erred in sentencing him for possession of a firearm in the commission of a violent crime because section 16-23-490(A) (2015) of the South Carolina Code of Laws prohibits such a sentence where life imprisonment without parole is imposed. I agree.

Section 16-23-490(A) states:

> If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.

Section 16-23-490(A) expressly provides the mandatory five-year sentence for possession of a firearm during the commission of a violent crime shall not be imposed when the defendant is sentenced to death or to life without parole for the violent crime. Appellant was sentenced to life without parole. Although this argument was not raised to or ruled upon by the trial court, I would address the issue in the interest of judicial economy. *See State v. Bonner*, 400 S.C. 561, 565-67, 735 S.E.2d 525, 527-28 (Ct. App. 2012) (addressing an unpreserved sentencing issue in the interest of judicial economy); *State v. Vick*, 384 S.C. 189, 202, 682 S.E.2d 275, 282 (Ct. App. 2009) (noting the appellate courts have "summarily vacated" sentences for kidnapping when the defendant received a concurrent sentence under the murder statute and addressing the unpreserved

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

sentencing issue in the interest of judicial economy). Accordingly, I would vacate Johnson's five-year sentence for possession of a firearm during the commission of a violent crime.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

A&P Enterprises, LLC, Appellant,

v.

SP Grocery of Lynchburg, LLC and Suresh "Sam" Patel, Respondents.

Appellate Case No. 2015-000498

Appeal From Lee County
Walter Graham Newman, Special Referee

Opinion No. 5545
Heard November 9, 2017 – Filed March 28, 2018

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

S. Jahue Moore and John Calvin Bradley, Jr., of Moore Taylor Law Firm, PA, of West Columbia, for Appellant.

William W. Wheeler, III, of Jennings & Jennings, PA, of Bishopville, for Respondents.

MCDONALD, J.: In this action seeking ejectment and monetary damages, A&P Enterprises, LLC (A&P) argues the special referee erred in finding SP Grocery of Lynchburg, LLC and Suresh "Sam" Patel (collectively, Respondents) hold an equitable interest in the real property on which Sam operates a liquor store and

convenience store (Tommy's Grill). We affirm in part, reverse in part, and remand for any eviction proceedings that may be necessary.

Facts and Procedural History

Kamlesh "Kim" Patel is the sole member of A&P. Payel Suresh Patel, daughter of Sam Patel, is the sole member of SP Grocery. Sam and Kim are brothers.

Sam immigrated to the United States from India in 1979. By the early 1980s, Sam's extended family lived in Chicago with Sam and his wife. In 1989, Sam purchased a store on Willow Grove Road in Lynchburg, South Carolina. Sam's family, along with his parents and his younger brother, Kim, then moved to South Carolina, where the family worked in and lived on the premises of the Lynchburg store. The business grew and eventually the brothers acquired a store in Sumter. Although there is some dispute as to the circumstances, by 1992, Kim was operating the Sumter store as his own. From this point forward, Sam and Kim conducted their own respective businesses and both eventually came to have other stores and investments.

By 2010, Sam owned three parcels of improved real estate in Lynchburg (the Property). On two of these parcels, Sam ran a liquor store and Tommy's Grill. On the third parcel, Sam operated a British Petroleum station (the Gas Station); however, the Gas Station was no longer open at the time of the proceeding before the special referee. On February 16, 2010, First Citizens Bank and Trust Co., Inc., initiated foreclosure proceedings against Sam, demanding judgment in relation to the Property. Thereafter, Sam approached Kim about purchasing the Property; A&P later bought it for $350,001 at a May 9, 2011 foreclosure sale.[1]

After A&P bought the Property, Sam continued to operate Tommy's Grill; however, no rental agreement or writing of any kind exists to confirm the nature of Sam's occupancy. Due to financial difficulties, Sam placed Tommy's Grill in the name of SP Grocery during the summer of 2011. SP Grocery obtained all of the operating, lottery, and alcohol licenses for Tommy's Grill and the liquor store.

[1] A&P also bought other property owned by Respondents; that property is not at issue in this appeal.

After Kim's purchase of the Property at the foreclosure sale, Sam failed to pay rent and other expenses necessary for the continued operation of the liquor store and Tommy's Grill; thus, A&P sued for ejectment and monetary damages. Respondents timely answered and counterclaimed, alleging A&P promised Respondents title to the Property and "that in due reliance upon this promise, [Respondents] expended considerable sums of money and [a] large amount of labor in making numerous improvements to the [Property]." A&P denies the existence of any such promise.

At the hearing before the special referee, Sam and Kim gave conflicting accounts regarding Kim's purchase of the Property and the circumstances of Sam's occupancy. According to Kim, when A&P purchased the Property, Kim told Sam he could continue to operate the liquor store and Tommy's Grill rent-free for six or seven months so that Sam could get back on his feet. Kim testified that he asked and expected Respondents to begin paying monthly rent of $3,750 in May 2012. Kim explained that Respondents were also responsible for taxes, insurance, maintenance, and upkeep. On direct examination, Kim testified he sent several lease agreements to Sam, who refused to sign any of them. On cross-examination, Kim admitted he neither prepared nor presented Sam with a written lease agreement prior to July 10, 2013.

Kim denied buying the Property solely to help his brother and testified that he expected a twelve to fifteen percent return on his investment. However, Kim admitted he and Sam had no agreement regarding the sale of the Property or rent payments. According to Kim, the families have had a poor relationship since 1992, and the only time he ever heard from Sam was when Sam needed money.

Kim further claimed A&P paid $3,700 in outstanding property taxes on the Property despite Sam's agreement to pay the taxes. Additionally, on two separate occasions, Sam asked Kim to purchase gasoline for Sam to sell at the Gas Station. Initially, A&P purchased gas for Respondents from Turner Oil. Although Respondents agreed to reimburse A&P $17,415 for this purchase, they had not yet done so at the time of the hearing before the special referee. A&P subsequently incurred approximately $20,000 in costs for gasoline purchased from Southern Gas and Fuel. Kim testified, and the special referee agreed, Respondents still owe A&P approximately $17,000 for this purchase.

Sam's story differs. Sam contends Kim purchased the Property in order to convey it back to Sam, not to rent it to him. Although Kim offered to buy the Property for Sam and title it in Sam's name, Sam insisted on paying Kim back over three to five years. Sam claimed he told Kim not to put the Property in his name until he could repay him. Sam further testified that Kim promised Sam he would be able to buy back the Property and, in reliance on this promise, Respondents made significant property improvements.

Sam testified he never received a written lease agreement from Kim until July 2013. He did not object to making monthly payments but believed Kim should credit any payments toward his purchase of the Property as opposed to classifying them as rent. Further, Sam described a supportive family relationship and testified Kim's purchase of the Property was an example of one family member helping another.

Terrence Wilson, who was acquainted with Kim and Sam for many years, both personally and in a business capacity, explained that he owed fairly substantial sums to both Sam and Kim. Wilson understood that Tommy's Grill was to belong to Sam, and Sam was to reimburse Kim for the purchase of the Property. Wilson testified there was never any discussion of rent payments until Sam and Kim's wives argued over an unrelated matter in early 2013.

Payal Patel[2] testified that although the families did not see each other every week after Kim and his family moved to Sumter, they still visited, ate meals together, attended parties together, and participated in family weddings. She further testified that it was her father's intent to repurchase the Property from Kim and that he would not have made expenditures for improvements to the Property if he did not think he would be able to buy it back.

In an April 17, 2014 order, the special referee granted judgment as follows:

> It is ordered, that [Sam] Patel owns an equitable interest in the [the Property], that he cannot be evicted at this time, and that he has the right to purchase the property from A&P Enterprises, LLC according to the terms set forth above, and that he owes the annual real property

[2] Payel Patel was dismissed from this matter by consent.

> taxes as an incident of ownership of the equitable interest in this property.
>
> It is further ordered, that A&P Enterprises, LLC is granted judgment against [Sam] Patel in the amount of $17,415, plus prejudgment interest on this sum from May 1, 2012, plus judgment for [the] sum of $17,000, plus prejudgment interest on this sum from the date of January 1, 2014; plus the sum of $7,570.90, without prejudgment interest, for a total monetary judgment of $41,985.90 plus prejudgment interest to be computed as indicated.

The special referee denied A&P's motion to reconsider.

Standard of Review

"[C]haracterization of [an] action as equitable or legal depends on the appellant's main purpose in bringing the action . . . ." *Ins. Fin. Servs., Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978). "The main purpose of the action should generally be ascertained from the body of the complaint. However, if necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." *Id.* (citation omitted). "In an action at law, the appellate court will correct any error of law, but it must affirm the special referee's factual findings unless there is no evidence that reasonably supports those findings." *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010). "In actions in equity referred to a special referee with finality, the appellate court may view the evidence to determine the facts in accordance with its own view of the preponderance of the evidence, though it is not required to disregard the findings of the special referee." *Florence Cty. Sch. Dist. No. 2 v. Interkal, Inc.*, 348 S.C. 446, 450, 559 S.E.2d 866, 868 (Ct. App. 2002). However, when legal and equitable actions are maintained in one suit,[3] "the court is presented with a divided scope of review, and each action retains its own identity as legal or equitable for purposes of review on appeal." *Wright v. Craft*, 372 S.C. 1, 17, 640 S.E.2d 486, 495 (Ct. App. 2006).

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[3] A&P's amended complaint includes claims for ejectment, breach of contract, and quantum meruit; Respondents' counterclaim relies on a promissory estoppel theory.

Law and Analysis

I. Promissory Estoppel

A&P argues the special referee erred in finding Respondents own an equitable interest in the Property because Respondents failed to prove the first two elements of promissory estoppel. We agree.[4]

"Promissory estoppel is a quasi-contract remedy." *N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 379, 769 S.E.2d 237, 241 (2015). Our courts recognize a remedy in equity if the claimant can prove (1) a promise unambiguous in its terms; (2) reasonable reliance upon the promise; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise. *Satcher v. Satcher*, 351 S.C. 477, 483–84, 570 S.E.2d 535, 538 (Ct. App. 2002). "Unlike a contract which requires a meeting of the minds and consideration, promissory estoppel looks at a promise, its subsequent effect on the promisee, and in certain cases bars the promisor from making an inconsistent disposition of the property." *Id.* at 484, 570 S.E.2d at 538–39.

In *Barnes v. Johnson*, this court explained that "[a]lthough promissory estoppel is a flexible doctrine that aims to achieve equitable results, it, like all creatures of equity, has limitations." 402 S.C. 458, 469, 742 S.E.2d 6, 11 (Ct. App. 2013); *see Rushing v. McKinney*, 370 S.C. 280, 295, 633 S.E.2d 917, 925 (Ct. App. 2006) (holding absence of clearly articulated terms between the parties precludes recovery in promissory estoppel). "Specifically, the doctrine's elements represent a balancing between affording a remedy where contract law cannot, and ensuring the doctrine's application is not, itself, an inequity against the party estopped." *Barnes*, 402 S.C. at 469, 742 S.E.2d at 11. "To this end, and particularly because promissory estoppel applies without a contract, the promise to be enforced must be unambiguous with clearly articulated, definite terms, while the sustained injury must result from an inconsistent disposition by the promisor." *Id.* at 470, 742

[4] Because we reverse the special referee's promissory estoppel finding, we must also reverse the property tax finding and remand this question to the special referee for further proceedings.

S.E.2d at 11. "Therefore, the presence of either an ambiguous promise or an injury not arising out of the inconsistent disposition precludes promissory estoppel's application, though perceived inequities may exist." *Id.* at 470, 742 S.E.2d at 12. "Thus, promissory estoppel has broad applicability to prevent injustice, but where a promise is unclear or the alleged harms are unconnected to the inconsistent disposition, the doctrine does not risk imposing its own inequity against the party sought to be estopped." *Id.*

A. Unambiguous Promise

Sam testified, and the special referee found, that Kim made an unambiguous promise to Sam that Sam could repurchase the Property for $355,001. The special referee further found that Kim and Sam contemplated monthly payments (of no less than $3,750) over a period of five years.

Our review of the record reveals that Respondents failed to present *any* terms as part of an alleged agreement or contract for sale of the Property. *See Rushing*, 370 S.C. at 295, 633 S.E.2d at 925 (holding absence of clearly articulated terms between parties precludes recovery in promissory estoppel). In fact, the special referee specifically found there was no meeting of the minds as far as the terms or conditions of the alleged contract were concerned. Because there was no meeting of the minds nor any actual terms of an agreement, we are unable to find a promise unambiguous in its terms. *See Satcher*, 351 S.C. at 483–84, 570 S.E.2d at 538 (explaining the elements of promissory estoppel). Moreover, the special referee erred in finding "an implied promise of up to five years for the payments to be made," because promissory estoppel does not rest on an implied contract. *See Higgins*, 276 S.C. at 665, 281 S.E.2d at 470 (clarifying that an estoppel may arise from the making of a promise). Accordingly, we find the Respondents failed to establish anything other than a vague promise on the part of A&P to at some point sell the Property to Respondents. *See Barnes*, 402 S.C. at 470, 742 S.E.2d at 11 ("[B]ecause promissory estoppel applies without a contract, the promise to be enforced must be unambiguous with clearly articulated, definite terms . . . ."). Thus, we find the evidence insufficient to support a promissory estoppel claim.

B. Reasonable Reliance

Additionally, the special referee found Sam relied on Kim's alleged promise and that his reliance was reasonable. Sam testified he incurred significant expenditures

totaling $68,804.30 on the Property in reliance on Kim's promise. In addition to paying for general repairs to the Property, Sam purchased a new HVAC system as well as new gas pumps and walk-in coolers for the convenience store. Payal Patel testified her father intended to repurchase the Property from Kim and would not have made these expenditures had he not thought he would be able to buy it back. However, Kim testified that in addition to rent, Respondents were to be responsible for taxes, insurance, maintenance, and upkeep.

We find Sam's reliance on any alleged promise by Kim was unreasonable in light the ambiguities of the alleged promise. *See Rushing*, 370 S.C. at 295, 633 S.E.2d at 925 (explaining that appellant's reliance on the alleged promise of the respondents "is unreasonable in light of the tension between the parties and the ambiguities of the alleged promise"); *contra Satcher*, 351 S.C. at 483–84, 570 S.E.2d at 538–39 (reasoning that even absent a meeting of the minds and exchanged consideration, sufficient proof for enforcement still exists if there is an unambiguous promise, reasonable reliance, foreseeability, and related injury). As set forth above, the alleged promise here was ambiguous—it was devoid of any terms, conditions, timelines, or performance requirements. Therefore, Respondents failed to meet their burden of establishing the reliance element of promissory estoppel, and we reverse the special referee's finding that Respondents could recover under a promissory estoppel theory.

II. Eviction

A&P argues the special referee erred in denying A&P's request for an order evicting Respondents from the Property. We agree.

Under section 27-37-10(A) of the South Carolina Code (2007), "[t]he tenant may be ejected upon application of the landlord or his agent when (1) the tenant fails or refuses to pay the rent when due or when demanded, (2) the term of tenancy or occupancy has ended, or (3) the terms or conditions of the lease have been violated."

Here, Kim testified that in addition to taxes, insurance, maintenance, and upkeep, he expected Respondents to begin making monthly rent payments of $3,750 in May 2012. Although Kim and Sam did not discuss a monthly rental amount when Kim purchased the Property, they both testified that Kim prepared and presented a written lease agreement to Sam on July 10, 2013. However, Sam refused to sign

the lease agreement. Sam claimed that while he did not object to making monthly payments toward the amount Kim paid for the Property, he believed the payments should apply towards his purchase of the Property and not be classified as rent. As of the date of oral argument, no payments had been made.

As Sam has not established that Kim ever made an unambiguous promise to sell the Property back to him, and Sam has never paid any rent to Kim for the use of the Property, the special referee erred in denying A&P's request for an order evicting Respondents. Thus, we reverse and remand for the special referee to conduct any eviction proceeding that may be necessary.

III. Unpaid Rent

A&P argues the special referee erred in failing to award it unpaid back rent and prejudgment interest on this unpaid rent. We agree.

"An action based on a theory of quantum meruit sounds in equity." *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 616, 703 S.E.2d 221, 225 (2010). "Absent an express contract, recovery under quantum meruit is based on quasi-contract." *Id.* "The elements of a quantum meruit claim are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value." *Id.* at 616–17, 703 S.E.2d at 225.

Kim moved to the United States and lived with his older brother, Sam, who eventually helped Kim begin his own business. Over the years, Sam has helped Kim financially. During Sam's own financial difficulties, he approached Kim, who subsequently purchased the Property at the foreclosure sale. Despite the absence of a rental agreement or writing of any kind to confirm the nature of Sam's occupancy and use of the Property, Sam continued operating Tommy's Grill. Kim testified that he asked and expected Respondents to begin making monthly rent payments of $3,750 in May 2012. However, Kim neither prepared nor presented a written lease agreement to Sam until July 10, 2013.

For some period of time, Respondents have realized the benefit of rent-free use of the Property, and, absent payment, their retention of this benefit has been unjust. *See Earthscapes*, 390 S.C. at 616–17, 703 S.E.2d at 225 (setting out the elements

of a quantum meruit claim). Thus, we reverse the denial of A&P's quantum meruit claim for unpaid rent and remand for the special referee to calculate an unpaid rent award from the time Kim first presented Sam the proposed lease on July 10, 2013. Likewise, we remand the question of Respondents' counterclaim for expenditures made in maintaining and improving the subject property; A&P's award for unpaid rent should be offset by any award to Respondents for these expenditures. The special referee should further determine whether prejudgment interest on the unpaid rent award is appropriate.

Conclusion

We find the special referee erred in determining Respondents own an equitable interest in the Property and reverse the finding of promissory estoppel. Therefore, we also reverse the special referee's finding and judgment against Sam regarding the property taxes for the Property. Additionally, we reverse and remand for the special referee to conduct such further proceedings as may be necessary to address the question of Respondents' eviction, the unpaid rent award, and any offset to which Respondents may be entitled for their maintenance and improvement expenditures. As for the two gasoline purchases, we affirm the special referee's awards of judgment and prejudgment interest.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Paul Boehm, Respondent,

v.

Town of Sullivan's Island Board of Zoning Appeals and Town of Sullivan's Island, Appellants.

Appellate Case No. 2015-001230

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5546
Heard April 11, 2017 – Filed March 28, 2018

AFFIRMED

George Trenholm Walker and John Phillips Linton, Jr., both of Walker Gressette Freeman & Linton, LLC, of Charleston, for Appellants.

Alice F. Paylor, of Rosen Rosen & Hagood, LLC, of Charleston, for Respondent.

KONDUROS, J.: The Town of Sullivan's Island (the Town) and the Town of Sullivan's Island Board of Zoning Appeals (BZA) (collectively, Appellants) appeal the circuit court's order reversing the BZA's decision to affirm the zoning administrator's denial and limitation of permits requested by Paul Boehm to make certain alterations to his building and nearby structures. Appellants contend the

circuit court erred in determining (1) Boehm's building was a second principal building, rather than an accessory structure and (2) Boehm could expand the building. We affirm.

THE TOWN'S ZONING ORDINANCES

The application of the Town's zoning ordinances to Boehm's property is a tortured one involving multiple requests for alterations, building inspectors, and zoning reviews. To aid in application to the facts, we provide the relevant portions of those ordinances before discussing the facts.

> (1) Principal Building Coverage Area. The Lot Area covered by the Principal Building measured vertically downward from the Principal Building's exterior walls to the ground (also known as the building footprint area), but excludes areas covered only by:
> (a) accessory structures not readily useable as living space;
> (b) exterior porches and decks; and,
> (c) exterior stairs.
>
> (2) Principal Building. A building or buildings in which the principal use of the lot is conducted. The term also specifically applies to multiple dwellings located on the same lot, including an historic structure used as an accessory dwelling unit.

Town of Sullivan's Island, S.C., Zoning Ordinance (T.Z.O.) § 21-25(A) (2007). "No Principal Building shall be erected, altered or moved so as to exceed thirty-eight (38) feet in overall height." T.Z.O. § 21-54(A)

"Accessory structures shall . . . . [n]ot exceed 15 feet in height, except that the height may be extended to 18 feet where the pitch of the accessory structure[']s roof is not less than seven on twelve (7/12) . . . ." T.Z.O. § 21-138(A)(3)(a). The Zoning Ordinances provide an accessory structure cannot have a separate electric meter or be connected to the sewer system. T.Z.O. § 21-138(A)(7).

> *In the event that two or more Principal Buildings occupy a single lot, said occupancy shall constitute a non-conforming use.* One structure shall be designated conforming and the other(s) shall be non-conforming under the following procedure:
>
> (1) If a request to improve the property is received, the Zoning Administrator shall designate the Principal Building with the greatest livable square footage, including porches, as a conforming use and the other Principal Buildings as non-conforming.
>
> (2) The designation of conforming and non-conforming Principal Buildings shall be recorded on the Certificate of Occupancy that is on file in the Town Hall.
>
> (3) A Building Permit for improvements to the designated conforming Principal Building may be considered favorably, provided all other requirements of the Town Ordinances are met. The non-conforming structure(s) shall be regulated in accordance with Subsections A-E.

T.Z.O. § 21-150(F) (emphasis added).

"A Nonconforming Use is a land use that was legally established but that is no longer allowed by the use regulations of the Zoning District in which it is located. . . . *A Nonconforming Use shall not be expanded except to eliminate or reduce the nonconforming aspects*." T.Z.O. § 21-150(A), (B) (emphasis added). "A Nonconforming Structure is any building or structure that was legally established but no longer complies with the density, lot coverage, floor area, height and dimensional standards of this Zoning Ordinance. Nonconforming Structures may remain, subject to the regulations of this Article." T.Z.O. § 21-151(A). For nonconforming structures, "*[s]tructural alterations, including enlargements, are permitted if the structural alteration does not increase the extent of nonconformity*." T.Z.O. § 21-151(B)(1) (emphasis added).

> (l) Incidental repairs and normal maintenance necessary to keep a Nonconforming Structure in sound condition are permitted unless such repairs are otherwise expressly prohibited by this Zoning Ordinance.
>
> (2) Nothing in this Article will be construed to prevent Structures from being structurally strengthened or restored to a safe condition, in accordance with an official order of a public official.

T.Z.O. § 21-149(F).

The following relevant definitions are provided by the Town's zoning ordinance. T.Z.O. § 21-203. "Principal Use. The specific, primary purpose for which land or a building is used." *Id.* "Building, Principal. [ ]A building in which the principal use of the lot is conducted." *Id.* "Accessory Use or Structure. A use or structure subordinate to the Principal Building on a lot and used for purposes customarily incidental to the main or principal use or building and located on the same lot." *Id.* "Garage, private. An accessory building or portion of a Principal Building used only for the private storage of motor vehicles, campers, boats, boat trailers and lawn mowers, as an accessory use." *Id.*

> Dwelling. A building or portion of a building arranged or designed to provide living quarters for a single family, with no structural features impeding free access throughout the entire structure by all members of the family.
> . . . .
> Dwelling, Single Family. A detached Principal Building other than a mobile home designed for or occupied exclusively by a single family on a single lot.
> Dwelling, Upper Story. An attached dwelling constructed as an integral part of a non-residential Principal Building located on the second floor.

Id. The definition for Residence simply states "See 'Dwelling.'" *Id.*

> Nonconforming Structure. Any building or structure that was legally established but no longer complies with the density, lot coverage, floor area, height and dimensional standards of this Zoning Ordinance.
> Nonconforming Use. A land use that was legally established but that is no longer allowed by the use regulations of the Zoning District in which it is located.
> Nonconformities. Uses, structures, lots, signs and other situations that came into existence legally and continued to exist as a legal nonconforming use until the time of the adoption of this ordinance but that do not conform to one or more requirements of this Zoning Ordinance.

Id.

FACTS/PROCEDURAL HISTORY

This case involves structures on real property Boehm bought in 2001 located at 2720 Goldbug Avenue on Sullivan's Island, South Carolina. In addition to the principal residential building (main house), Unit B is a building with a garage on the ground level and an apartment located above the garage. Unit B is completely separate from the main house, has its own electric meter, and is connected to the sewer system. It received a certificate of occupancy on November 20, 1989.[1]

In 2001, the Town issued Boehm a permit to build a "slat house"[2] immediately adjacent, but not attached, to Unit B. In 2003, Boehm divided the property into two condominiums. Boehm conveyed ownership of the main house to his son but retained ownership of Unit B. In 2009, Boehm applied for a variance to attach the slat house roof to the walkway at the back of Unit B, but the building official denied it and the BZA affirmed the denial.

In 2013, Boehm requested a building permit to increase the roof height of Unit B by two feet. The Town's zoning administrator denied Boehm's request. The

[1] The record conflicts as to whether or not Unit B or another building other than the main house was in existence prior to Hurricane Hugo, which made landfall on Sullivan's Island on September 21, 1989.
[2] A slat house is a type of arbor or garden structure.

zoning administrator noted: "Because accessory structures are permitted a maximum height of 18 feet, the detached garage/unit is already exceeding the maximum height allowed (22-24 feet), and therefore would not allow your requested height increase of two feet." The zoning administrator granted Boehm a permit to establish a roof overhang to cover the outside steps to the entrance of the apartment portion of Unit B. However, the administrator later determined the posts for the roof were outside of the building footprint and issued a stop work order. He additionally observed alterations to the back deck—including connecting the slat house to Unit B, removing handrails, and installing built-in furniture and planters. The administrator determined Boehm had not obtained permits for those alterations and issued citations.

Boehm appealed the zoning administrator's decisions to the BZA, which held a public hearing on the matter. At that hearing,[3] Boehm testified that when he was considering buying the property at 2720 Goldbug, he discussed the property with the zoning administrator at that time, Kent Prause. Boehm provided he asked Prause what it meant to have the two structures on one property. He contended Prause informed him "the larger of the two dwellings would be the conforming dwelling[] and the smaller of the two dwellings . . . would be the nonconforming dwelling."[4] Boehm further asserted he relied on Prause's statements in deciding to purchase the property. Boehm also indicated he has had a rental license every year he has owned Unit B and has rented it out, first to his son and later to regular tenants. He maintained he does not park vehicles in the bottom part; he instead uses it to store furniture and "junk." He stated that to the best of his knowledge, it had never been used by the main house as a garage.

Boehm also testified that in 2001, Prause advised him to build the slat house as an accessory structure to Unit B to serve as a deck. According to Boehm, Prause explained a slat house was a garden structure that if it was the same height as the existing deck/walkway, would serve the purpose of the deck. Boehm asserted the slat house was an accessory building to Unit B. Boehm stated the occupants of Unit B had to climb over the rail to access the deck. Boehm indicated that in 2009,

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[3] During the hearing, in response to an objection by Boehm's attorney, a member of the BZA noted because the BZA was not a court, court rules did not apply.
[4] Over Boehm's objection, a member of the BZA stated she had spoken by telephone to Prause that day and he told her he did not tell Boehm this.

he applied for a variance and the then zoning administrator, Randy Robinson, denied it citing section 21-150(F) of the Town Zoning Ordinance, which is entitled "Two or more Principal Buildings on one lot."[5] He also testified that in 2010, Robinson gave him permission to screen in the slat building. Boehm further explained he had built the benches on the slat house roof to serve as a safety rail because he was previously told he could not install a safety rail.

Boehm further testified that in 2013, while Robinson was still zoning administrator, they met to discuss elevating the roof on Unit B. Boehm claimed Robinson told him he could raise the roof by two feet and suggested a specific contractor to contact for an estimate. Boehm indicated he did not have the plans to raise the roof drawn before the current zoning administrator, Joe Henderson, took office. According to Boehm, Henderson denied the application because Unit B was a garage.[6] Boehm requested Frank Timko, the former building official who issued the Certificate of Occupancy for Unit B in 1989, send a letter to Henderson. That letter stated: "Both [another official] and I determined that the property at 2720 Goldbug prior to [Hurricane Hugo] had 2 habitable dwelling structures. The main house . . . was determined to be the conforming princip[al] building. The garage apartment . . . was determined to be the non-conforming princip[al] building." Boehm further described how Henderson had stated in an email to him that if Unit B was a principal building, Boehm would be allowed to raise the roof two feet. Boehm testified on cross-examination he did not obtain permits for the benches because he did not realize he needed a permit to install furniture.

Additionally, Boehm testified that in regards to the roof covering the stairs and walkway, he obtained a permit and began building it. He indicated the "side 6 footers" and "the 4 footers in back" were put in and Robinson[7] inspected and approved them. Boehm claimed the construction company poured the concrete for the footers the next day, installed the posts two days later, and two days after that

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[5] The order from the Board regarding this variance states Robinson referenced subsections 21-150(B) and (F)(3) when determining the variance application should be denied.

[6] Henderson noted at the hearing he had been with the Town for "[a]bout nine months."

[7] The record indicates Robinson remained involved in some capacity with the Town Zoning office when Henderson became the zoning administrator, but the record is unclear as to what his new position was.

Robinson posted a stop work order. Henderson also sent a letter to Boehm listing the violations. Boehm indicated he obtained and submitted to Robinson a letter from an architect indicating the roof posts needed to be placed where they were to maintain "the structural integrity of the existing deck walkway."

Henderson also testified at the hearing. He stated that because the certificate of occupancy for Unit B refers to it as an apartment above garage, it is a garage. He indicated an apartment is a dwelling. He asserted for Unit B to be a principal building, the certificate of occupancy "would have to not say 'garage.'" He admitted the ordinance defines a garage as either an accessory building or a portion of a principal building. He stated the principal use of 2720 Goldbug is residential and the apartment is residential. He also indicated the use of Unit B was residential. He claimed raising the roof height of Unit B would increase the volume and square footage. He noted under the Zoning Ordinance, a building's footprint does not include "decks, walkways, or stairs." He believed that because of that definition, the Town probably should not have issued Boehm the permit to build a roof over the stairs in the first place. He indicated building the roof and replacing the stairs made the stairs stronger and last longer and thus, intensified the use. Robinson spoke and took issue with Boehm's characterization of their past conversations. Robinson also provided that what really mattered was if "a permit is applied for, reviewed, and approved," not what he opined to a property owner.

On April 10, 2014, the BZA determined Unit B was a garage with an apartment on the top floor. Specifically, the BZA affirmed the (1) denial of a request to increase the roof height of Unit B by two feet; (2) issuance of a stop work order for construction beyond the scope of the work illustrated on a building permit; and (3) issuance of violations related to the alteration of the slat house. Boehm appealed the BZA's decision to the circuit court. The circuit court determined "[t]he BZA made no factual findings as to why [Unit B] was a garage" according to the Town's Zoning Ordinance and remanded the matter to the BZA with instructions to make findings of fact "to support [its] conclusion that the structure at issue is a garage under the terms of the Zoning Ordinance."

On January 8, 2015, the BZA held another public meeting and adopted six findings of fact to support its prior decision. Those findings were as follows:

> 1. The certificate of occupancy for the upstairs living quarters issued November 20, 1989[,] classified the

apartment as an apartment above garage. This certificate of occupancy refers to the structure as a garage and the apartment as being above the garage. . . .

2. The inspection ticket issued November 20, 1991[,] approved the use of apartment over garage. This document shows a request and approval of the use of the apartment over the garage. . . .

3. The May 15, 2001 survey of 2720 Goldbug Avenue . . . identifies the structure as garage with apartment. The survey identifies the owner of the property at the time of the survey as . . . Boehm, the applicant. The Board finds that the identification of the building on this survey as a garage with an apartment is further support for the Board's finding that the structure is a non-conforming accessory structure. The survey does not identify the structure as a residence, dwelling, house, principal building or apartment. The survey identifies the structure as a garage, noting that the garage structure includes an apartment. . . .

4. The design of the structure, which can be readily observed by reference to the photographs, drawings, documents and testimony in the record, is that of a garage that has an apartment on top. There are two garage doors on the front of the structure, which open to the bays. The only entrance to the apartment above the garage is the staircase on the exterior right side of the structure. The structure is designed for the private storage of cars, boats, trailers, lawn equipment or other recreational items. . . .

5. [Boehm] agreed in his testimony before the Board that the structure is comprised of a garage on the first floor and an apartment on the second floor. [Boehm] characterized the structure as a dwelling with a garage below it, but did not dispute that the first floor was indeed a garage. In fact, a real estate listing from

> [Boehm's] real estate company described the first floor of the secondary structure as follows: "a garage for two cars, a storage/workshop area for your favorite hobbies. Instead of cars put a pool table and ping pong table in the garage." When asked about this listing, [Boehm] continued to characterize the structure as a dwelling with a garage below it. . . .
>
> 6. The Board finds that the structure at issue and use of the structure as a garage with a non-conforming apartment on the second story is customarily incidental to the principal use in building located on the lot, a principal building used as a residence. The Board recognizes the structures on the lot are now part of a condo regime, but finds that the establishment of the condo regime does not convert an accessory structure into a second principal building.

The Board concluded these findings all supported its determination "the structure is a non-conforming accessory structure"—"an accessory structure with a non-conforming, but approved, apartment use on the second floor."

Boehm again appealed to the circuit court. On April 7, 2015, the circuit court held a hearing on the matter. The circuit court found (1) none of the BZA's findings supported its decision Unit B was a garage or an accessory structure; (2) Unit B was a nonconforming principal building under the zoning ordinance; and (3) Boehm was allowed to make the requested structural additions to Unit B. This appeal followed.

STANDARD OF REVIEW

"[S]ection 6-29-840 [of the South Carolina Code] prescribes the standard of review a circuit court should apply when considering an appeal from a local zoning board." *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 35, 606 S.E.2d 209, 212 (Ct. App. 2004). That section provides "[t]he findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." S.C. Code Ann. § 6-29-840(A) (Supp. 2017). A jury's factual findings will not be disturbed on appeal unless the record contains no

evidence reasonably supporting the jury's findings. *Austin*, 362 S.C. at 35, 606 S.E.2d at 212.

"On appeal, we apply the same standard of review as the circuit court below . . . . In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the [b]oard is correct as a matter of law." *Id.* at 33, 606 S.E.2d at 211. "However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Id.* (quoting *Rest. Row Assocs. v. Horry Cty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Newton v. Zoning Bd. of Appeals for Beaufort Cty.*, 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011) (quoting *Cty. of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002)).

LAW/ANALYSIS

I. Accessory Building[8]

Appellants contend the circuit court improperly substituted its judgment for the BZA's as the standard of review required deference to the BZA. Appellants also argue the circuit court incorrectly interpreted the zoning ordinance. Appellants assert no party disputes Unit B includes both a garage and an apartment and under the zoning ordinance, a garage can be either an accessory structure or part of a principal building. Appellants also contend Unit B fails to meet the zoning ordinance's definition of a dwelling because it does not have free access through the entire structure—the ground level garage and the second floor apartment have separate exterior entrances. We disagree.

A court will not substitute its judgment for the judgment of the board in a zoning law case. *Rest. Row Assocs. v. Horry Cty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999).

[8] Appellants raise this as their second issue in their brief but we reverse the order in which we address their arguments.

> The court may not feel that the decision of the board was the best that could have been rendered under the circumstances. It may thoroughly disagree with the reasoning by which the board reached its decision. It may feel that the decision of the board was a substandard piece of logic and thinking. None the less, the court will not set aside the board's view of the matter just to inject its own ideas into the picture of things.

Id. (quoting *Talbot v. Myrtle Beach Bd. of Adjustment*, 222 S.C. 165, 173, 72 S.E.2d 66, 70 (1952)). A "[z]oning [b]oard's findings of fact are final and conclusive on appeal." *Bishop v. Hightower*, 292 S.C. 358, 360, 356 S.E.2d 420, 421 (Ct. App. 1987). However, "[a] reviewing court in a zoning case may rely on uncontroverted facts which appear in the record, but not in a zoning board's findings." *Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals*, 342 S.C. 480, 491, 536 S.E.2d 892, 898 (Ct. App. 2000).

"[I]ssues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." *Helicopter Sols., Inc. v. Hinde*, 414 S.C. 1, 9, 776 S.E.2d 753, 757 (Ct. App. 2015) (alteration by court) (quoting *Mikell v. Cty. of Charleston*, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009)). "Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, a broader and more independent review is permitted when the issue concerns the construction of an ordinance." *Id.* at 9-10, 776 S.E.2d at 757 (quoting *Mikell*, 386 S.C. at 158, 687 S.E.2d at 329).

This court has noted "we review a zoning ordinance to give it a 'practical, reasonable and fair interpretation consonant with the purposes, design, and policy of the lawmakers.'" *Vulcan Materials Co.*, 342 S.C. at 489, 536 S.E.2d at 897 (quoting *City of Myrtle Beach v. Juel P. Corp.*, 337 S.C. 157, 177, 522 S.E.2d 153, 164 (Ct. App. 1999), *rev'd*, 344 S.C. 43, 543 S.E.2d 538 (2001)). "As with statutes, the lawmakers' intent embodied in an ordinance 'must prevail if it can be reasonably discovered in the language used.'" *Id.* at 490, 536 S.E.2d at 897 (quoting *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995)). "The Board['s] . . . construction of its own ordinance, the enforcement of which it is charged with, should be given some

consideration and not overruled without cogent reason therefor." *Purdy v. Moise*, 223 S.C. 298, 304-05, 75 S.E.2d 605, 608 (1953).

This deferential standard of review does not mean a zoning board can never be reversed. In *Wyndham Enterprises, LLC v. City of North Augusta*, 401 S.C. 144, 151, 735 S.E.2d 659, 663 (Ct. App. 2012), this court reversed the circuit court's decision to affirm the BZA "because the BZA's decision was not supported by competent, substantial, and material evidence, and was based on opinion and speculation testimony." Further, in *Bannum, Inc. v. City of Columbia*, 335 S.C. 202, 204-05, 516 S.E.2d 439, 439-40 (1999), the supreme court found the zoning board's denial of a permit for an exception was arbitrary and reversed the denial. The court found the zoning board "either discounted or disregarded every single bit of evidence put up by" the appellant and "[i]nstead, it based its holding on the four factors submitted by" the opponents to the exception. *Id.* at 205, 516 S.E.2d at 440-41. Additionally, in *Helicopter Solutions, Inc.*, 414 S.C. at 9-10, 776 S.E.2d at 757-58, this court affirmed the circuit court's reversal of the zoning board, finding the circuit court's decision was based on the construction of an ordinance—which was a legal conclusion, not a factual finding.

"[I]n the area of statutory construction, our role is limited to determining legislative intent and effectuating that intent." *Eagle Container Co. v. Cty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895 (2008). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *Id.* (quoting *McClanahan v. Richland Cty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002)). "'[W]ords in a statute must be construed in context,' and 'the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute.'" *Id.* at 570, 666 S.E.2d at 895-96 (alteration by court) (quoting *S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991)). "The language must also be read in a sense [that] harmonizes with its subject matter and accords with its general purpose." *Id.* at 570, 666 S.E.2d at 896 (quoting *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)). "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *Id.* at 570-71, 666 S.E.2d at 896 (quoting *Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994)).

A use in the zoning context "is '[t]he purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained.'" *Heilker v. Zoning Bd. of Appeals for the City of Beaufort*, 346 S.C. 401, 407, 552 S.E.2d 42, 45 (Ct. App. 2001) (alteration in original) (quoting *Town of Kingstown v. Albert*, 767 A.2d 659, 664 (R.I. 2001)); *see also Bonaventure Int'l, Inc. v. Borough of Spring Lake*, 795 A.2d 895, 901 (N.J. Super. Ct. App. Div. 2002) ("When a municipality adopts a zoning ordinance or when an existing zoning ordinance is changed, inevitably there will be uses which are newly prohibited and structures which do not conform with the bulk requirements. These are known as nonconforming uses and structures respectively. . . . [A] nonconforming structure may house a nonconforming use."). "A determination by a zoning board that a particular purpose or activity does or does not constitute a 'use' is a finding of fact." *Heilker*, 346 S.C. at 412, 552 S.E.2d at 48. "'[N]onconforming use' and 'vested right' refer to the same concept—a use of property [that] existed lawfully before the enactment of a zoning ordinance may continue afterwards even though the use does not comply with the zoning restriction." *Vulcan Materials Co.*, 342 S.C. at 496 n.13, 536 S.E.2d at 900 n.13.

"[T]he substantial value of property lies in its use. If the right of use [is] denied, the value of the property is annihilated, and ownership is rendered a barren right." *Vulcan Materials Co.*, 342 S.C. at 499, 536 S.E.2d at 902 (second alteration by court) (quoting *James v. City of Greenville*, 227 S.C. 565, 579, 88 S.E.2d 661, 668 (1955)). "A landowner acquires a vested right to continue a nonconforming use already in existence at the time his property is zoned in the absence of a showing that the continuance of the use would constitute a detriment to the public health, safety or welfare." *Id.* at 498, 536 S.E.2d at 901 (quoting *F.B.R. Inv'rs v. Cty. of Charleston*, 303 S.C. 524, 527, 402 S.E.2d 189, 191 (Ct. App. 1991)); *see also Friarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 269, 349 S.E.2d 891, 893 (Ct. App. 1986) ("Generally, in American jurisdictions a landowner who uses his property for a lawful purpose before the enactment of zoning which subsequently prohibits that use may continue the nonconforming use after the enactment of zoning unless the use clearly constitutes a public nuisance. Otherwise, the landowner would be deprived of a constitutionally protected right.").

"Vested rights under zoning ordinances are undergirded by the same constitutional footing which precludes retroactive application of zoning ordinances." *Friarsgate,*

Inc., 290 S.C. at 269, 349 S.E.2d at 893. The majority rule regarding vested rights, as recognized by this court, provides:

> A landowner will be held to have acquired a vested right to continue and complete construction of a building or structure, and to initiate and continue a use, despite a restriction contained in an ordinance or an amendment thereof where, prior to the effective date of the legislation and in reliance upon a permit validly issued, he has, in good faith, (1) made a substantial change of position in relation to the land, (2) made substantial expenditures, or (3) incurred substantial obligations.

Id. (quoting 4 A. Rathkopf, *The Law Of Zoning and Planning* Section 50.03 (1986)).

"[T]he intention of all zoning laws, as regards a nonconforming use of property, is to restrict and gradually eliminate the nonconforming use." *Christy v. Harleston*, 266 S.C. 439, 443, 223 S.E.2d 861, 863 (1976). "[W]hether construction of a new structure to house an existing nonconforming use is permissible, depends primarily on the applicable zoning ordinance." *Id.*

Our supreme court has defined accessory uses as

> those which are customarily incident to the principal use. "In order to qualify as a use incidental to the principal use of a nonconforming premises, such use must be clearly incidental to, and customarily found in connection with, the principal use to which it is allegedly related." 101A C.J.S. *Zoning & Land Planning* § 154, p. 479. An accessory use must be one "so necessary or commonly to be expected that it cannot be supposed that the ordinance was intended to prevent it." *Borough of Northvale v. Blundo*, 203 A.2d 721, 723 (N.J. Super. Ct. App. Div. 1964).

Whaley v. Dorchester Cty. Zoning Bd. of Appeals, 337 S.C. 568, 579, 524 S.E.2d 404, 410 (1999) (citation omitted).

In the present case, the circuit court properly determined Unit B was a second principal building. "A 'use' in the zoning context is 'the purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained.'" *Heilker*, 346 S.C. at 412, 552 S.E.2d at 48. The zoning ordinance likewise defines the principal use as "[t]he specific, primary purpose for which land or a building is used." T.Z.O § 21-203. The zoning ordinance also defines a principal building as "[a] building or buildings in which the principal use of the lot is conducted. The term also specifically applies to multiple dwellings located on the same lot, including an historic structure used as an accessory dwelling unit." T.Z.O. § 21-25(A)(2). The purpose of the lot at 2720 Goldbug is residential. Unit B meets the definition of a principal building because its use is the same as the rest of the property—residential.

Further, Unit B does not fit the definition of a garage in the Zoning Ordinance, which is a building "used only for the private storage of motor vehicles, campers, boats, boat trailers and lawn mowers," none of which are stored in Unit B according to the record. T.Z.O § 21-203. Further, Unit B is taller than allowed by the Town's Zoning Ordinance requirements for an accessory building and has a sanitary sewer hookup, an electric meter, and its own accessory buildings, all of which are not permitted for a garage or an accessory building. Additionally, the definition of a garage includes that it can be a part of a principal building although the ordinance states that one must be able to access the garage through the residential portion, which is not possible with Unit B. Although a few aspects of Unit B do not fall cleanly within the zoning ordinance's definition of a residential principal building, this is not unusual as it is a nonconforming structure. If it cleanly met all requirements, it would not be nonconforming. At the hearing, the current zoning administrator and his immediate predecessor disputed that Unit B is a second principal residence, instead maintaining it must be an accessory building because it is a garage, as demonstrated by the description of the building as an apartment over a garage and their belief that it looks like a garage. Even though our standard of review is deferential to the Board, the record contains no evidence to support the Board not finding Unit B is a second principal building.

The denial of Boehm's request for a variance in 2009 cited to both subsection 21-150(B) and (F)(3), listing subsection (F) first. Subsection B pertains to expansion of nonconforming uses. Subsection F deals only with two principal buildings on one lot; if this was not the case with 2720 Goldbug, the zoning

administrator would have had no reason to reference it, as it would already have been covered by subsection B. Subsection (F)(3), which is what is specifically cited to in the 2009 order, states the nonconforming principal building is regulated by subsections A through E; hence, the citation to subsection B. Additionally, BZA's order regarding the denial of his permit application in 2009 stated the building official's denial of the application "to connect the slat house to the other deck and *house*" was affirmed. (emphasis added). Further, the letter from the former Town official from the time when Unit B received its certificate of occupancy stated it is a second principal building. Additionally, Boehm testified the zoning administrator in place when he bought the building told him the same. Accordingly, we find the circuit court did not err in finding Unit B was a second principal building.

II. Principal Building

Appellants maintain the circuit court erred by finding Boehm was not precluded from making substantial alterations to the structure—raising the roof height, connecting the slat house, and extending the roof over the outdoor staircase— even if Unit B was in fact a nonconforming principal building. Appellants argue Boehm's proposed structural alterations to Unit B increased the extent of the nonconformity and were prohibited. We disagree.

As zoning ordinances in South Carolina can vary in each town or city, no South Carolina case has considered the exact situation here. The Town's zoning ordinance contains two key provisions related to the issue here. For a nonconforming structure, "[s]tructural alterations, including enlargements, are permitted if the structural alteration does not increase the extent of nonconformity." T.Z.O. § 21-151(B)(1). Second is a "Nonconforming Use shall not be expanded except to eliminate or reduce the nonconforming aspects." T.Z.O. § 21-150(B).

"There is no hard and fast rule to determine when an improvement amounts to an extension of a nonconforming use or a change in use. 'Each case must be considered and determined on its own facts.'" *Cohen v. Duncan*, 970 A.2d 550, 564 (R.I. 2009) (citation omitted) (quoting *Santoro v. Zoning Bd. of Review of Warren*, 171 A.2d 75, 77 (R.I. 1961)).

"Expansion of a nonconforming use means expansion of the nonconforming features of the building in which the use is being operated." 4 Edward H. Ziegler Jr., *Rathkopf's The Law of Zoning and Planning* § 73:16 (4th ed.). "[T]he prevailing national rule [is] that the addition of new facilities or the enlargement of existing ones is a prohibited expansion or extension of the non-conforming use if it is *incompatible* with the permitted use or if the *nature* of the use *substantially changes*." *City of New Orleans v. JEB Props., Inc.*, 609 So. 2d 986, 989 (La. Ct. App. 1992).

Many states have relied on a three-part test to determine what constitutes a change or substantial extension of a prior nonconforming use of land: (1) whether the use reflects the nature and purpose of the use prevailing when the zoning bylaw took effect; (2) whether there is a difference in the quality or character, as well as the degree, of use; and (3) whether the current use has a different effect on the neighborhood. *See, e.g.*, *Bio Energy, LLC v. Town of Hopkinton*, 891 A.2d 509, 519 (N.H. 2005); *Raymond v. Zoning Bd. of Appeals of City of Norwalk*, 820 A.2d 275, 297 (Conn. App. Ct. 2003); *Oakham Sand & Gravel Corp. v. Town of Oakham*, 763 N.E.2d 529, 533 n.5 (Mass. App. Ct. 2002); *JEB Props., Inc.*, 609 So. 2d at 989-90; *McKemy v. Baltimore Cty.*, 385 A.2d 96, 103-04 (Md. Ct. Spec. App. 1978).

In a case from the Supreme Court of New Hampshire, the dwelling at issue was nonconforming because (1) it was situated on a lot smaller than the minimum prescribed size; (2) it was too close to the adjoining lot lines; and (3) it contained three family units while located in an area zoned for single and two-family residences only. *Town of Seabrook v. D'Agata*, 362 A.2d 182, 183 (N.H. 1976). The property owners "constructed an addition to their dwelling consisting of a twenty-eight by eight foot storage room in a formerly unoccupied area under the second floor of a portion of the building." *Id.*

The supreme court found the property owners' enclosure of the carport did not constitute "'*an expansion of the non-conforming use*.'" *Id.* (emphasis added). The court interpreted the phrase non-conforming use to mean

> *an expansion in the non-conforming features of the dwelling, rathto* [sic] *the zoning ordinance and which is in fact commonly found in the defendants' neighborhood.* The defendants' storage room neither constitutes living

> quarters for another family nor does it affect the proximity of the dwelling to the sidelines. It does not enlarge the square footage of the dwelling so as to render the lot size proportionally more inadequate. To deny the defendants the right to build within the confines of their building a structure identical to that possessed by many of their conforming neighbors is in effect to penalize them for the nonconforming nature of their property.

Id. (emphasis added).

In the present case, subsection 21-150(B) of the Town Ordinance, which is referenced by subsection (F), provides a "Nonconforming Use shall not be expanded except to eliminate or reduce the nonconforming aspects." For a nonconforming use, if the town had intended "[u]se shall not be expanded" to mean the volume of a nonconforming building cannot be increased, it should have used that exact terminology, as some other places have done. *See In re Carrigan Conditional Use & Certificate of Compliance*, 117 A.3d 788, 793 (Vt. 2014) (providing in that case, "the bylaws allow[ed] a noncomplying structure to be 'enlarged, expanded or moved,'" as long as any modification did "'not increase the degree of noncompliance" and noting "degree of noncompliance'" was defined as "'[t]he extent to which the footprint, height, or *total area (volume)* of a structure does not comply with the requirements of these regulations'" (emphasis added)). Simply because the height of Unit B would be increased, does not mean the use would be expanded or the extent of the nonconformity increased. Additionally, placing the posts for the roof outside of the footprint of the stairs would enlarge the footprint for the stairs but not necessarily expand the use or nonconformity of Unit B. Further, the Zoning Ordinance explicitly excludes stairs and decks as part of the footprint. T.Z.O. § 21-25(A)(1). Moreover, the part of the Zoning Ordinance concerning nonconforming structures specifically allows the structure to be enlarged if it "does not increase the extent of nonconformity." T.Z.O. § 21-151(B)(1).

If Boehm is allowed to increase the height of Unit B by two feet, Unit B will still be under the maximum height allowed for a principal building by the Zoning Ordinance. *See* T.Z.O. § 21-54(A). Further, the purpose or use of Unit B would not change if Boehm is allowed to make any of the alterations he requested. Unit B was and still will be a residence. A change in use would be if a residence were

to become a business, an industrial site, or a farm. Boehm's requested changes do not even change Unit B from a one-family to a multiple-family residence. As explained in Section I, Unit B is nonconforming because it is the second residence on the lot. With Boehm's proposed changes, the lot will still have just two residences. Further, the proposed changes do not add bedrooms or increase the square footage/floor space and does not occupy any more space on the lot. Therefore, Boehm's changes would not increase Unit B's nonconformance.

Additionally, the benches and planters on the deck/slathouse do not change the purpose of Unit B. Further, the benches allow the apartment to "be put to productive use" in allowing occupants to use the slat house safely. T.Z.O. § 21-149(B). Moreover, a roof over a stairway does not change the purpose and was approved; for safety Boehm slightly increased the area it covered from the original proposal. Boehm's architect provided the posts for the roof over the stairs were moved out from the original plan to ensure the integrity of the existing deck walkway. The Zoning Ordinance provides "[n]othing in this [a]rticle will be construed to prevent [s]tructures from being structurally strengthened." T.Z.O. § 21-149(F)(2). The roof protects the stairs from weather, which the zoning administrator acknowledged, testifying the roof would make the stairs last longer. The roof allows occupants to enter the apartment regardless of weather and protects the stairs from wear and tear from weather. T.Z.O. § 21-149(B). The Zoning Ordinance specifically allows the protection of property already in place, i.e., the stairs, which are being exposed to the weather and are the only means of access to the second floor. T.Z.O. § 21-149(F). *See Crawford v. Bldg. Inspector of Barnstable*, 248 N.E.2d 488, 490 (Mass. 1969) ("It is the case of repairs replacing rotted exposed parts of a building, and alterations to preserve the replaced parts from deterioration by weather and to improve the appearance of the building rather than to enlarge the use of the building. Whatever enlargement followed the alteration (and there was none whatever so far as overall floor space was concerned) was negligible rather than substantial and was incidental rather than purposeful."). Therefore, as Unit B is a second principal building, none of the proposed alterations increased the nonconformity or expanded the nonconforming use. Accordingly, the circuit court's reversal of the Board's denial of Boehm's three appeals is

AFFIRMED.
WILLIAMS, J., and LEE, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Hock RH, LLC, and York Preparatory Academy,
Appellants,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2015-002087

Appeal From The Administrative Law Court
Deborah Brooks Durden, Administrative Law Judge

Opinion No. 5547
Heard June 8, 2017 – Filed March 28, 2018

REVERSED

Stephen M. Cox, of Robinson Bradshaw & Hinson, PA, of Rock Hill, for Appellants.

Sean G. Ryan and Jason Phillip Luther, both of the South Carolina Department of Revenue, of Columbia, for Respondent.

MCDONALD, J.: York Preparatory Academy (YPA) and Hock RH, LLC (Hock) appeal an order of the administrative law court (ALC) affirming the South Carolina Department of Revenue's (DOR's) denial of Appellants' tax protest and request for a refund of 2013 property taxes paid on property leased by YPA, a public charter

school. Appellants argue they are entitled to the refund because, in 2014, the General Assembly amended section 59-40-140(K) of the South Carolina Code to clarify that real property leased by public charter schools is exempt from ad valorem taxation. We reverse.

Facts and Procedural History

In 2009, the South Carolina Public Charter School District issued YPA a charter to establish and operate a public charter school under the South Carolina Charter Schools Act.[1] YPA subsequently organized as a nonprofit corporation and is exempt from Federal income tax.[2]

On April 7, 2011, YPA entered a twenty-five year lease agreement with Hock, with the lease to begin on November 1, 2012. In late 2012, YPA moved to Hock's forty-five acre campus on Golden Gate Court in Rock Hill (the Campus). Since that time, YPA has used the Campus exclusively to educate students from kindergarten through twelfth grade. Under the terms of the lease agreement, YPA is responsible for all maintenance and upkeep of the Campus and its facilities and any property taxes. On September 27, 2013, Appellants executed a lease memorandum granting YPA the option to purchase the Campus. Appellants recorded the lease memorandum in York County on October 8, 2013.

On November 4, 2013, YPA sought a property tax exemption for the Campus from DOR pursuant to S.C. Code Ann. § 12-37-220(A)(2) (Supp. 2012). DOR denied YPA's application by determination letter dated January 31, 2014, concluding that "§ 12-37-220(A)(2) makes no provision for leased property. Because [YPA] does not own [the Campus], an exemption through § 12-37-220(A)(2) does not exist."[3] Using funds tendered by YPA, Hock paid the 2013 property taxes of $271,801.51 on February 20, 2014.

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[1] S.C. Code Ann. §§ 59-40-10 to -240 (2004 & Supp. 2017).

[2] *See* 26 U.S.C.A. § 501(3)(c) (Supp. 2016).

[3] Appellants did not appeal this determination to the ALC.

Hock conveyed the Campus to YPA in February 2014. On March 26, 2014, DOR notified YPA that it had granted a § 12-37-220(A)(2) exemption for the Campus for the 2014 tax year.

On May 29, 2014, the South Carolina General Assembly passed Act 208 to amend legislation "exempting all earnings or property of charter schools from state or local taxation, except for the sales tax, so as to clarify that property of charter schools exempt from such taxation includes owned or leased property." 2014 S.C Act No. 208. The amendment was subsequently codified with an effective date of June 2, 2014. S.C. Code Ann. § 59-40-140(K) (Supp. 2014).

Citing the 2014 amendment, on October 6, 2014, Appellants filed for a refund of the 2013 property taxes. DOR denied the refund request on February 3, 2015, determining Appellants were not entitled to an exemption under § 59-40-140(K) for the 2013 tax year because the 2014 amendment did not apply retroactively.

On March 3, 2015, Appellants appealed DOR's determination to the ALC, where the parties filed cross-motions for summary judgment. The ALC granted DOR's motion for summary judgment on September 2, 2015, finding Appellants were not entitled to a refund because § 59-40-140(K)'s exemption of leased property did not apply retroactively.

Standard of Review

"[A] question of statutory interpretation is one of law for the court to decide. A reviewing court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law." *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 316, 731 S.E.2d 869, 870–71 (2012); *see* § 1-23-610(B)(a), (d) (Supp. 2017).

Law and Analysis

Appellants argue the ALC erred in ruling they were not entitled to a refund of the 2013 property taxes because the 2014 amendment to S.C. Code Ann. § 59-40-140(K) merely clarified an already existing law exempting public charter school properties from *all* state and local property taxes. We agree.

"The general rule is that a strict construction is required of constitutional and statutory provisions that grant exemptions . . . from taxation." *Charleston Cty. Aviation Auth. v. Wasson*, 277 S.C. 480, 485, 289 S.E.2d 416, 419 (1982). "Constitutional and statutory language creating exemptions from taxation will not be strained or liberally construed in favor of the taxpayer claiming the exemption. *Id.* (quoting *York Cty. Fair Ass'n v. S.C. Tax Comm'n*, 249 S.C. 337, 341, 154 S.E.2d 361, 363 (1967)). A distinction exists, however, as to the tax exemptions of individuals as opposed to those of the instrumentalities of government. Our supreme court has explained:

> [E]xemptions of the property of municipal corporations are liberally construed, for exemptions of such property [are] the rule and taxation the exception. With us[,] municipal corporations are merely agencies of the state for governmental purposes; and it has never been the policy of this state to tax its own agencies or instrumentalities of government.

Charleston Cty. Aviation Auth., 277 S.C. at 85–86, 289 S.E.2d at 419–20 (quoting *Town of Myrtle Beach v. Holliday*, 203 S.C. 25, 30, 26 S.E.2d 12, 14 (1943)).

In 1996, the General Assembly enacted legislation "which provides for the manner in which a charter school shall be formed, funded, regulated, and governed." 1996 S.C. Act No. 447; S.C. Code Ann. §§ 59-40-10 to -240 (Supp. 1996).

> In authorizing charter schools, it is the intent of the General Assembly to create a legitimate avenue for parents, teachers, and community members to take responsible risks and create new, innovative, and more flexible ways of educating all children within the public school system. The General Assembly seeks to create an atmosphere in South Carolina's public school systems where research and development in producing different learning opportunities are actively pursued and where classroom teachers are given the flexibility to innovate and the responsibility to be accountable. As such, *the provisions of this chapter should be interpreted liberally* to support the findings and goals of this chapter and to

> advance a renewed commitment by the State of South Carolina to the mission, goals, and diversity of public education.

S.C. Code Ann. § 59-40-30(A) (Supp. 1996) (emphasis added).

At the time of its enactment, S.C. Code Ann. § 59-40-140(J) (Supp. 1996) provided, "Charter schools are exempt from all state and local taxation, except the sales tax, on their earnings and property. Instruments of conveyance to or from a charter school are exempt from all types of taxation of local or state taxes and transfer fees." In 2006, the General Assembly amended the statute, moving the language of subsection (J) to subsection (K). 2006 S.C. Act No. 274; S.C. Code Ann. § 59-40-140(K) (Supp. 2006). The 2006 amendment recodified subsection (J) verbatim. *Id.* On May 29, 2014, the General Assembly amended subsection (K), with an effective date of June 2, 2014. 2014 S.C. Act 208; S.C. Code Ann. § 59-40-140(K) (Supp. 2014). The 2014 amendment omits the word "all" and replaces it with the phrase "whether owned or leased." *Id.* The effect is as follows: "Charter school are exempt from ~~*all*~~ state and local taxation, except the sales tax, on their earnings and property *whether owned or leased*. Instruments of conveyance to or from a charter school are exempt from all types of taxation of local or state taxes and transfer fees." *Id.* (omission from and addition to statute emphasized).

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (quoting *State v. Scott*, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* (quoting *Scott*, 351 S.C. at 588, 571 S.E.2d at 702). "It is [also] 'proper to consider the title or caption of an act in aid of construction to show the intent of the legislature.'" *Rhame v. Charleston Cty. Sch. Dist.*, 412 S.C. 273, 276–77, 772 S.E.2d 159, 161 (2015) (quoting *Lindsay v. S. Farm Bureau Cas. Ins. Co.*, 258 S.C. 272, 277, 188 S.E.2d 374, 376 (1972)). "Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. If the statute is ambiguous, however, courts must construe the terms of the statute." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). "In construing statutory language, the statute

must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect." *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998).

"In the construction of statutes[,] there is a presumption that statutory enactments are to be considered prospective rather than retrospective . . . unless the intention to make them retrospective is clearly apparent from the terms thereof." *Neel v. Shealy*, 261 S.C. 266, 273, 199 S.E.2d 542, 545 (1973). "Statutes are not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt." *S.C. Nat'l Bank v. S.C. Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989). "When the Legislature adopts an amendment to a statute, [our appellate courts recognize] a presumption that the Legislature intended to change the existing law." *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008). However, "a subsequent statutory amendment may also be interpreted as clarifying original legislative intent." *Id.* at 46, 659 S.E.2d at 130.

By Act 208, the General Assembly amended subsection (K) to expressly provide that "Charter schools are exempt from state and local taxation, except the sales tax, on their earnings and property whether owned or leased." 2014 S.C. Act 208; S.C. Code Ann. § 59-40-140(K) (Supp. 2014). Act 208 is titled, "An act to amend section 59-40-140 . . . *so as to clarify that property of charter schools exempt from such taxation includes owned or leased property*." 2014 S.C. Act. 208 (emphasis added); *see Rhame*, 412 S.C. at 276–77, 772 S.E.2d at 161 (explaining it is proper to consider the title of an act to determine legislative intent). Thus, by its own words, the General Assembly's stated purpose for the 2014 amendment was to clarify rather than broaden the exemption already afforded.

Prior decisions of our supreme court further support the conclusion that the 2014 amendment merely clarified the Legislature's previous intent. In *Duvall v. South Carolina Budget & Control Board*, a retiree challenged the calculation of his benefits, arguing an amendment addressing unused annual leave "was a material change to the statute, thereby indicating that his interpretation of the statute (in its prior form) is correct." 377 S.C. at 46, 659 S.E.2d at 130. The supreme court disagreed. *Id.* at 47, 659 S.E.2d at 130. In determining the amendment was not a material change but was instead intended to clarify the General Assembly's original intent, the court looked to the title of Act 14, which "specifically stated that the amendment of section 9-1-1020 'relat[ed] to member contributions for purposes of

the South Carolina Retirement System, *so as to clarify* the contribution requirements on unused annual leave and the use of such payments in calculating average final compensation.'" *Id.* (alteration in original) (quoting 2005 S.C. Act No. 14, § 3). Finding "that the title of the Act itself indicates the amendment was a clarification of, rather than a change to, the law," the court declined the appellant's challenge as to the exclusion of the annual leave benefits. *Id.*

In *Edwards v. State Law Enforcement Division*, our supreme court rejected the argument that a statutory amendment clarified rather than changed a law requiring pardoned sex offenders to comply with the statute's registration requirements. 395 S.C. 571, 576, 720 S.E.2d 462, 464 (2011). There, a sex offender who had received a pardon on his two "Peeping Tom" convictions requested an order declaring he was no longer required to register as a sex offender. *Id.* at 574, 720 S.E.2d at 463. The Attorney General asserted that the pardon did not relieve the appellant from the registration requirement because the amendments were remedial and procedural in nature, and thus, applied retroactively. *Id.* The circuit court determined the pardon relieved the appellant from the registration requirement. *Id.*

On appeal, our supreme court noted the Legislature amended the challenged code section after enacting our state's pardon statute, which provides, "[A]n individual is fully pardoned from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided." *Id.* at 577, 720 S.E.2d at 465 (quoting S.C. Code Ann. § 24-21-940 (2007)). The court stated,

> It is clear that the General Assembly's amendments to the sex offender registry statute changed rather than clarified the law. The statute was silent regarding pardons at its creation in 1994. In 2004, the General Assembly mandated . . . that a pardon relieved an individual of all criminal and civil penalties accompanying her crime. In 2005 and 2008, the General Assembly ensured that the broad application of the pardon statute would not relieve sex offenders of their registration obligation.

Id. In rejecting the Attorney General's position that the statutory amendments merely clarified an existing law addressing pardoned sex offenders, the court

explained, "The purpose of the amendment evinces the legislature's intent to except the sex offender registry requirements from the broad relief afforded by the pardon statute, and no evidence can be shown of a previous legislative intent that would require clarification." *Id.* at 578–79, 720 S.E.2d at 466.

Ample evidence in this case supports Appellants' position that the 2014 amendment clarified, rather than changed, the law. YPA is a public charter school exempt from ad valorem taxation by the plain language of both § 59-40-140(K) and our state constitution. *See* S.C. Const. art. X, § 3(a), (b) ("There shall be exempt from ad valorem taxation: (a) all property of the State, counties, municipalities, school districts and other political subdivisions, if the property is used exclusively for public purposes; (b) all property of all schools, colleges and other institutions of learning and all charitable institutions in the nature of hospitals and institutions caring for the infirmed, the handicapped, the aged, children and indigent persons, except where the profits of such institutions are applied to private use."). Such exemption is further codified in § 12-37-220(A)(1) and (2). *See* S.C. Code Ann. § 12-37-220(A)(1), (2) (Supp. 2013) ("Pursuant to the provisions of Section 3, Article X of the State Constitution and subject to the provisions of Section 12-4-720, there is exempt from ad valorem taxation: (1) all property of the State, counties, municipalities, school districts . . . , if the property is used exclusively for public purposes . . . ; (2) all property of all schools, colleges, and other institutions of learning . . . , except where the profits of such institutions are applied to private use."). Although the Campus was privately owned during the 2013 tax year, it is undisputed that YPA exclusively used the Campus as a public charter school and was responsible by contract for payment of the 2013 property taxes. *See Charleston Cty. Aviation Auth.*, 277 S.C. at 487, 289 S.E.2d at 420 ("When the use of property is for a public purpose, an incidental private use or benefit will not negate or alter the public purpose use of the property.").

Relying on *TNS Mills v. South Carolina Department of Revenue*, 331 S.C. 611, 503 S.E.2d 471, DOR submits that applying S.C. Code Ann. § 59-40-140(K) (Supp. 2014) retroactively will "have harmful effects" because counties may suffer "devastating" consequences if forced to refund property tax payments erroneously collected from charter schools that leased their campuses between 2006 and 2014. We reject this contention. First, the record contains no evidence that any other charter school has applied for such a refund, and S.C. Code Ann. § 12-54-85(F)(1)

(2014) sets forth appropriate deadlines to protect counties against such uncertainties.[4]

Further, we find *TNS Mills* inapplicable to the facts at hand. TNS Mills was entitled to certain property tax exemptions for pollution control equipment for tax years 1986 through 1991, but on its returns, TNS Mills left blank the sections where taxpayers were to report the equipment necessary to trigger the exemptions. *Id.* at 616, 503 S.E.2d 474. In 1992, TNS Mills filed amended property tax returns claiming exemptions for pollution control equipment for tax years 1986 through 1991; DOR granted the exemptions. *Id.* Although Spartanburg County issued a refund in excess of $400,000, Cherokee County and one of its school districts appealed. *Id.* DOR then refused the exemptions, and the circuit court reversed DOR's refusal. *Id.*

Our supreme court reinstated DOR's final determination that the pollution control exemptions could not be granted retroactively. *Id.* at 629, 503 S.E.2d at 481. In relevant part, the court found TNS Mills did not timely apply for the exemptions by merely signing its tax returns, and DOR lacked the authority to grant the retroactive exemptions under the applicable statute. *Id.* at 617–24, 503 S.E.2d at 474–78. We find *TNS Mills* distinguishable from this case based on an analysis of this timeline alone. In accordance with the requirements of S.C. Code Ann. § 12-54-85(F) (Supp. 2014), YPA sought the property tax refund on October 6, 2014—less than six months after Act 208 was passed and approximately four months after the amended statute's effective date.[5]

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[4] *See* S.C. Code Ann. § 12-54-85(F)(1) (2014) ("Except as provided in subsection (D), claims for credit or refund must be filed within three years from the time the return was filed, or two years from the date the tax was paid, whichever is later. If no return was filed, a claim for credit or refund must be filed within two years from the date the tax was paid. A credit or refund may not be made after the expiration of the period of limitation prescribed in this item for the filing of a claim for credit or refund, unless the claim for credit or refund is filed by the taxpayer or determined to be due by the department within that period.").

[5] And, as noted above, YPA sought a § 12-37-220(A)(2) property tax exemption on November 4, 2013, prior to both the statutory amendment at issue and the timely filing of the refund request.

It is not insignificant to our decision that even before the 2014 clarifying amendment, the property on which YPA operated the charter school was exempt from ad valorem taxation; the word "all" in § 59-40-140(K) (Supp. 2006), the plain language of § 12-37-220(A)(1) and (2) (Supp. 2013), and the South Carolina Constitution entitled YPA to the exemption. This reading of § 59-40-140(K) (Supp. 2006) is strengthened by our General Assembly's statement of intent that the provisions of the South Carolina Charter Schools Act "should be interpreted liberally to support the findings and goals" of the Act. S.C. Code Ann. § 59-40-30(A) (Supp. 1996). DOR argues the prior version of § 59-40-140(K) was ambiguous because it did not specify what type of property was exempt, other than to state that such property was exempt from "all state and local taxation" on "earnings and property." *See* S.C. Code Ann. § 59-40-140(K) (Supp. 2006); *but see Charleston Cty. Aviation Auth.*, 277 S.C. at 85–86, 289 S.E.2d at 419–20 ("[E]xemptions of the property of [instrumentalities of government] are liberally construed, for exemptions of such property [are] the rule and taxation the exception." quoting *Town of Myrtle Beach*, 203 S.C. at 30, 26 S.E.2d at 14). Yet, § 59-40-140(K) (Supp. 2006) certainly did not specify that *only* property owned by charter schools was so exempt. Thus, DOR and the ALC erred in declining to apply the plain language required by the South Carolina Charter Schools Act to YPA's refund request.

Conclusion

For the foregoing reasons, the decision of the ALC is

REVERSED.

GEATHERS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Dent, Appellant,

v.

East Richland County Public Service District, Employer, and State Accident Fund, Carrier, Respondents.

Appellate Case No. 2015-001702

Appeal From The Workers' Compensation Commission

Opinion No. 5548
Heard February 8, 2017 – Filed March 28, 2018

REVERSED

Matthew C. Robertson, of McDaniel Law Firm, of Columbia, for Appellant.

Page Snyder Hilton, of the State Accident Fund, of Columbia, for Respondents.

LOCKEMY, C.J.: James Dent appeals the South Carolina Workers' Compensation Commission Appellate Panel's (Appellate Panel) order, arguing the Appellate Panel erred in (1) failing to find he is totally and permanently disabled, and (2) finding his disability is primarily the result of his lung cancer and not his work-related back injury. We reverse.

FACTS/PROCEDURAL BACKGROUND

James Dent was employed by the East Richland County Public Service District (the District) as a sewer line maintenance foreman.[1] On May 1, 2012, Dent sustained an admitted injury to his lower back in the course of his employment while attempting to move a manhole cover.

Dent was initially treated by Dr. Paula Belmar. Dent complained to Dr. Belmar of low back pain which radiated down his right leg. Dr. Belmar noted Dent's back pain and lumbar radiculopathy[2] in her assessment and prescribed Dent pain medication and made referrals for physical therapy and an MRI. On June 25, 2012, Dent underwent a lumbar spine MRI which revealed a neoplasm in the lung. Dent was subsequently diagnosed with lung cancer.[3]

In July 2012, Dent began treatment with Dr. Brett Gunter. Dr. Gunter ordered a second MRI to evaluate Dent's lower back pain. The MRI revealed moderate spinal stenosis at L3-4 and L4-5. Dr. Gunter diagnosed Dent with lumbar spondylosis with moderate stenosis and lumbar radiculopathy. He ordered physical therapy and lumbar epidural steroid injections.[4] Dr. Gunter also referred Dent to a work hardening program. Following an evaluation, it was determined Dent was not a candidate for the program due to shortness of breath and back pain. The physical therapist who performed the evaluation and observed Dent's physical abilities over a period of several months, found Dent would be limited to performing sedentary to limited light physical demand labor.

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[1] Dent is fifty-eight years old. He was employed by the District for twenty-seven years.

[2] Lumbar radiculopathy is the "compression and irritation of nerve roots in the lumbar region, with resultant pain in the lower back and lower limbs." *Lumbar Radiculopathy*, Mosby's Dictionary of Medicine, Nursing & Health Professionals (10th ed. 2017).

[3] Dent's cancer was treated with chemotherapy and radiation. His last chemotherapy treatment was in December 2013. As of the time of oral argument in this case, Dent's cancer was in remission.

[4] Dent stated to Dr. Gunter he would not consider a surgical alternative should one be offered.

On May 8, 2013, Dr. Gunter opined Dent had reached maximum medical improvement (MMI) with a 10% permanent impairment to the whole person and released Dent to work at a medium duty level. Dr. Gunter further opined Dent may require non-steroidal anti-inflammatory drugs for future medical treatment.

On July 8, 2013, Dent received an independent medical exam (IME) from Dr. Leonard Forrest. Dr. Forrest noted Dent suffered pain in his back and right leg and opined Dent had lost more than 50% of the use of his back and suffered a 21% impairment to the whole person as a result of his work accident. Dr. Forrest further opined Dent could not return to work—even sedentary work—as a result of his injury. According to Dr. Forrest, Dent's inability to work was not a result of his lung cancer.

In November 2013, Dent received a vocational evaluation from Harriet Fowler. Fowler opined,

> given [Dent's] advancing age . . ., education and functional academic levels including illiteracy, work history and attendant skills (all heavy and very heavy categories and lower skilled), and significant and severe physical limitations it is clearly more likely than not that [Dent] is and will be . . . unable to obtain or maintain substantial gainful employment.

On September 20, 2013, Dent filed a Form 50 alleging he was permanently and totally disabled as a result of his work accident. Dent alleged he suffered compensable injuries to his back, right leg, and left leg. The District and the State Accident Fund (collectively, Respondents) subsequently filed a Form 51, admitting an injury to Dent's back and denying any injury to Dent's legs.

A hearing was held before the Single Commissioner on February 7, 2014. At the hearing, Dent alleged he was entitled to permanent total disability (PTD) due to either (1) loss of earning capacity under section 42-9-10 of the South Carolina Code (2015) or (2) a 50% or more loss of use of the back under subsection 42-9-30(21) of the South Carolina Code (2015). Dent testified his lower back pain rates as an eight out of ten and radiates down his right—and sometimes, left—leg. Dent also testified he has numbness and weakness in his right leg and difficulty sitting and standing for long periods of time. According to Dent, the physical therapy and steroid injections he was prescribed did not provide him with any lasting pain relief. Dent further testified he has been employed as a heavy laborer his entire

working career and does not believe he could return to the type of work he previously performed.

Respondents argued Dent only sustained an injury to his back as a result of his work accident and was not totally and permanently disabled. Respondents asserted Dr. Gunter's 10% impairment rating should be accorded the greatest weight and argued Dent could perform work within the restrictions placed by his medical providers. Respondents further asserted Dent's lung cancer was a disabling factor which eclipsed his back injury.

In an April 14, 2014 order, the Single Commissioner held (1) Dent sustained a work-related injury to his back; (2) Dent's right leg was affected by his back injury; (3) this was a "'one body part' (*i.e. Singleton*) case"[5]; (4) Dent's disability stemmed primarily from his lung cancer; (5) Dent had reached MMI and was entitled to an award of 35% permanent partial disability (PPD) pursuant to subsection 42-9-30(21); and (6) Dent was entitled to further medical treatment for his back. The Single Commissioner found Dr. Forrest's 21% impairment rating was not persuasive given Dent "was treated conservatively, and did not undergo surgery."

Dent subsequently appealed the Single Commissioner's findings to the Appellate Panel. Following a hearing, the Appellate Panel remanded the case to the Single Commissioner for clarification regarding its finding that Dent's right leg was affected by his back injury but that this was a "one body part" case requiring application of the rule in *Singleton*. On remand, the Single Commissioner issued an order on February 24, 2015, withdrawing her finding that this was a "one body part" case but still denying Dent was totally and permanently disabled as a result of

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[5] In *Singleton v. Young Lumber Company*, 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960), Singleton suffered an injury to a scheduled member, his leg, and no other condition was claimed to have contributed to his disability. Singleton argued the injury to his leg was so disabling that he should be found totally disabled. *Id.* at 468, 114 S.E.2d at 844. The court held that because the injury was confined to a scheduled member, compensation must be determined under the scheduled injury statute as provided by the legislature. *Id.* at 473, 114 S.E.2d at 846. Thus, an impairment involving only a scheduled member is compensated under the scheduled injury statute and not the general disability statute. *Id.* The court held, "To obtain compensation in addition to that scheduled for the injured member, [Singleton] must show that some other part of his body is affected." *Id.* at 471, 114 S.E.2d at 845.

his back injury. The Appellate Panel affirmed the Single Commissioner's February 2015 order in full on July 10, 2015. This appeal followed.

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the [Appellate Panel]." *Murphy v. Owens Corning*, 393 S.C. 77, 81, 710 S.E.2d 454, 456 (Ct. App. 2011) (citing S.C. Code Ann. § 1-23-380 (Supp. 2011)). "Under the substantial evidence standard of review, this court may not substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." *Id.* at 81-82, 710 S.E.2d at 456. "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (quoting *S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (2005)). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008).

LAW/ANALYSIS

Dent argues the Appellate Panel erred in failing to find he was permanently and totally disabled pursuant to either section 42-9-10 or subsection 42-9-30(21) of the South Carolina Code (2015).

"South Carolina provides three methods to obtain disability compensation: 1) total disability under S.C. Code Ann. § 42-9-10; 2) partial disability under S.C. Code Ann. § 42-9-20; and 3) scheduled disability under S.C. Code Ann. § 42-9-30." *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 105, 580 S.E.2d 100, 102 (2003). "The first two methods are premised on the economic model, in most instances, while the third method conclusively relies upon the medical model with its presumption of lost earning capacity." *Id.*

I. Section 42-9-10

First, Dent contends the Appellate Panel erred in failing to find PTD under section 42-9-10 of the South Carolina Code (2015). We agree.

Section 42-9-10 provides for PTD "[w]hen the incapacity for work resulting from an injury is total." S.C. Code Ann. § 42-9-10(A) (2015). In *Wynn v. Peoples Natural Gas Company of South Carolina*, 238 S.C. 1, 11-12, 118 S.E.2d 812, 817-18 (1961), our supreme court stated:

> Disability in compensation cases is to be measured by loss of earning capacity. Total disability does not require complete helplessness. Inability to perform common labor is total disability for one who is not qualified by training or experience for any other employment. On the other hand the rule in most states is that an employee who is capable of performing other work that is continuously available to him will not be deemed totally disabled because he is unable to resume the duties of the particular occupation in which he was engaged at the time of his injury. The generally accepted test of total disability is inability to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.

(internal citations omitted). The burden is on the employee to prove he or she is totally disabled under section 42-9-10. *Coleman v. Quality Concrete Prods., Inc.*, 245 S.C. 625, 630, 142 S.E.2d 43, 45 (1965).

"The policy behind allowing a claimant to proceed under the general disability § 42-9-10 and § 42-9-20 allows for a claimant whose injury, while falling under the scheduled member section, nevertheless affects other parts of the body and warrants providing the claimant with the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section." *Brown v. Owen Steel Co.*, 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994). "When, however, a scheduled loss is not accompanied by additional complications affecting another part of the body, the scheduled recovery is exclusive." *Id.* As stated in *Singleton*, "Where the injury is confined to the scheduled member, and there is no *impairment* of any other part of the body because of such injury, the employee is limited to the scheduled compensation [pursuant to section 42-9-30]. . . . To obtain compensation in addition to that

scheduled for the injured member, claimant must show that some other part of his body is *affected.*" 236 S.C. at 471, 114 S.E.2d at 845 (emphasis added).

In *Colonna v. Marlboro Park Hospital*, 404 S.C. 537, 546, 745 S.E.2d 128, 133 (Ct. App. 2013), this court, after reviewing *Singleton* and other case law, held a claimant must prove not only that another body part was *affected* by an injury to a scheduled member, but that another body part was *impaired or injured* for section 42-9-10 to apply. In *Colonna*, the claimant sought workers' compensation benefits for a compensable injury to her ankle and right foot. 404 S.C. at 541, 745 S.E.2d at 130. To address the pain in the claimant's ankle and foot, a spinal cord stimulator was implanted in her back. *Id.* at 542, 745 S.E.2d at 131. The claimant asserted the stimulator affected her back, and thus she should be entitled to proceed under section 42-9-10. *Id.* at 545, 745 S.E.2d at 133. The court found the substantial evidence in the record did not support a finding that the claimant suffered an additional injury or impairment to the back. *Id.* at 547, 745 S.E.2d at 134. The court noted none of the medical evidence indicated the claimant ever complained of back pain to her doctors. *Id.* While the court recognized that the claimant testified lifting heavy objects caused her back pain and the implantation of the stimulator hindered her ability to drive, it found it was constrained by its limited standard of review when faced with conflicting testimony. *Id.* Thus, the court deferred to the Commission's finding that the implantation of the stimulator did not constitute a separate injury to her back. *Id.* at 548, 745 S.E.2d at 134.

Here, unlike in *Colonna*, Dent presented sufficient evidence to support his claims that his back injury has caused additional injury or impairment to his leg. Dent complained of persistent pain, numbness, and weakness in his right leg to his doctors, and Drs. Belmar and Gunter both diagnosed Dent with lumbar radiculopathy. The Appellate Panel also found Dent's right leg was affected by his back injury. We find the evidence of Dent's leg pain in the record is substantial evidence of an injury affecting Dent's right leg. Thus, Dent was entitled to proceed under section 42-9-10.

In addition, the record contains substantial evidence that Dent is permanently and totally disabled under section 42-9-10 due to an incapacity for work. In finding Dent was not permanently and totally disabled, the Appellate Panel relied primarily on Dr. Gunter's imposition of medium duty work restrictions. However, we find substantial evidence does not support a finding that Dent is qualified for medium duty or even sedentary work. Dent's entire work history consists of heavy labor including sewer line maintenance, furniture delivery, and glass and vending machine installation. All of the experts in the record agree Dent cannot return to

his previous employment or any heavy labor job. Dr. Forrest also opined Dent would not be able to perform sedentary work. Dr. Forrest concluded that although Dent has a high school education, he did not foresee Dent being able to learn new skills to work a sedentary position. In addition, Dent's physical therapist, who actually observed and tested his physical capacities, found Dent was only capable of sedentary work.

The opinions of Dr. Forrest and the physical therapist are supported by the results of Dent's vocational evaluation. In the evaluation, Fowler opined Dent is and will be unable to obtain or maintain substantial gainful employment due to factors such as advancing age, educational and functional academic levels including illiteracy, work history, and severe physical limitations. Fowler further noted that although Dent has some memory loss related to the effects of chemotherapy and radiation, he would still likely be unable to obtain gainful employment without any memory loss. Fowler found Dent scored at a 3rd grade level in arithmetic, a 4th grade level in spelling, and a 5th grade level in reading. This finding supports Dent's testimony that he would not be able to do a job that requires him to use a computer, complete paperwork, or do arithmetic. In making her determination regarding Dent's capacity for work, Fowler considered the opinions of Dr. Belmar, Dr. Gunter, Dr. Forrest, and the physical therapist. She gave greater credence to the findings of Dr. Forrest and the physical therapist, noting they had more specific training in rehabilitation and determining physical abilities than Dr. Gunter, a neurologist. Fowler further noted Dr. Forrest's evaluation reflected Dent's "most current condition."

A finding that a claimant can perform sedentary or medium duty work does not constitute evidence that such work is available to the claimant. Although Dr. Gunter opined Dent could work at a medium duty level, we note a transferable skills capacity analysis, which analyzed over 12,000 job titles in the United States economy and their respective requirements, revealed there were no jobs titles that would be within Dent's current transferable abilities. As our supreme court found in Wynn, "[i]nability to perform common labor is total disability for one who is not qualified by training or experience for any other employment." Accordingly, based on the record as a whole, we hold substantial evidence supports a finding that Dent is unable to work and is entitled to a permanent, total disability award pursuant to section 42-9-10. *See Coleman*, 245 S.C. at 630, 142 S.E.2d at 45 (holding the burden is on the employee to prove he or she is totally disabled, specifically that he or she is unable to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist).

Accordingly, we reverse the Appellate Panel's determination that Dent was not permanently and totally disabled.

II. Subsection 42-9-30(21)

Dent also contends the Appellate Panel erred in failing to find PTD under subsection 42-9-30(21) of the South Carolina Code (2015). Given that resolution of the prior issue is dispositive of this appeal, the court need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

III. Lung Cancer

Finally, Dent argues the Appellate Panel erred in finding his disability was primarily the result of his lung cancer. Specifically, Dent contends the Appellate Panel's finding is based on speculation and not supported by substantial evidence in the record. We agree.

The Appellate Panel found, "Although the undersigned greatly sympathizes with [Dent], we find that [Dent's] disability stems primarily from his cancer condition, including but not limited to the effects of the chemotherapy and radiation [Dent] has undergone." In support of this finding, the Appellate Panel cited Dent's (1) statement to physical therapy personnel that he planned to retire due his lung cancer; (2) use of a cane; and (3) memory loss.

The only expert medical testimony in the record regarding whether Dent is disabled due to his back injury or his lung cancer is Dr. Forrest's testimony that "the lung cancer is not playing any role in my opinion currently, which is that Mr. Dent is unable to return to work at any level." The Appellate Panel found Dr. Forrest's opinion was unpersuasive primarily due to information contained in Dent's work hardening evaluation. In the evaluation, Dent's physical therapist stated Dent planned to retire "[d]ue to lung cancer and back injury." The Appellate Panel placed great weight on the physical therapist's listing of lung cancer as the first reason for Dent's decision to retire. However, the record is not clear whether Dent listed lung cancer first to the therapist or whether that is simply the order she chose to record the information. Additionally, we note the physical therapist reversed the order in a letter to Dent's attorney stating, "[g]iven [Dent's] medical conditions of known low back injury . . . and lung cancer . . ." the testing involved in a functional capacity evaluation would be limited.

The Appellate Panel also relied on Dent's use of cane to support its finding that his disability was a result of his lung cancer. The Appellate Panel concluded Dent's use of a cane was "attributable to his weakened condition from cancer, radiation and chemotherapy." There is no medical evidence in the record to support this determination; therefore, we find it is speculative for the Appellate Panel to find Dent's use of a cane is related to his cancer diagnosis or treatment.

Further, while we recognize Dent testified he has memory loss due to the chemotherapy he received for his lung cancer, we note Fowler opined in Dent's vocational evaluation that Dent would be unable to obtain and maintain employment even without memory issues. Fowler further opined Dent's lung cancer did not play a role in her determination that Dent is unable to return to work.

Finally, we note the record does not include any evidence from Dent's oncologist or any other medical expert supporting the Appellate Panel's determination regarding Dent's lung cancer. Accordingly, we hold the Appellate Panel's finding that Dent's disability is primarily the result of his lung cancer is not supported by substantial evidence; thus, we reverse the Appellate Panel as to this issue.

CONCLUSION

The Appellate Panel's finding that Dent is not totally and permanently disabled due to his work injury is

REVERSED.

HUFF, J., concurs.

THOMAS, J., dissenting: I respectfully dissent because I believe we are constrained by our standard of review to affirm the Appellate Panel's finding that Dent was not permanently and totally disabled (PTD) under section 42-9-10 of the South Carolina Code (2015). The Appellate Panel determined Dent was not PTD under section 42-9-10 because he could perform medium duty work and, thus, had not lost his earning capacity. *See Fields v. Owens Corning Fiberglas*, 301 S.C. 554, 555, 393 S.E.2d 172, 173 (1990) (explaining a finding of disability under section 42-9-10 "must be predicated upon a showing of a loss of earning capacity"). The Appellate Panel based its decision on Dr. Gunter's recommendation that Dent could perform medium duty work and assignment of a

10% impairment rating to Dent's back. The Appellate Panel explained it considered a vocational report and a report from Dr. Forrest, which both suggested Dent could not perform medium duty work, but it gave greater weight to Dr. Gunter's opinions and recommendations. Dr. Gunter was one of Dent's treating physicians.

Under the circumstances of this case, we are constrained to affirm because our standard of review requires us to determine only whether substantial evidence supports the Appellate Panel's decision. Here, Dr. Gunter's opinion that Dent could perform medium duty work constitutes substantial evidence supporting the Appellate Panel's decision. *See Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (noting we presume the findings of the Appellate Panel are correct and will set them aside only if unsupported by substantial evidence); *Taylor v. S.C. Dep't of Motor Vehicles*, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006) (explaining substantial evidence is not "evidence viewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action"). Although the opinions from Dr. Forrest and the vocational report conflict with Dr. Gunter's opinion, we defer to the Appellate Panel when the evidence conflicts. *See Hall v. United Rentals, Inc.*, 371 S.C. 69, 80, 636 S.E.2d 876, 882 (Ct. App. 2006) ("Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive."); *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995) ("Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive."). The Appellate Panel chose to place more weight on Dr. Gunter's opinions, which was in its discretion as the factfinder. *See Harbin v. Owens-Corning Fiberglas*, 316 S.C. 423, 427, 450 S.E.2d 112, 114 (Ct. App. 1994) ("The existence of any conflicting opinions between the doctors is a matter left to the [Appellate Panel].").

Further, I find the majority's reliance on the "transferable skills capacity analysis," which is located within the above-mentioned vocational report, is misplaced. The analysis was based on the opinions of Dr. Forrest and a report from a physical therapist. Dr. Forrest claimed Dent was "unable to return to work at any level," and the physical therapist agreed. Thus, the analysis searched for potential jobs for Dent based on criteria that assumed he could not physically perform any manual labor or even a sedentary job. Predictably, such an analysis returned zero potential jobs for Dent. However, as noted above, the Appellate Panel considered the claims of Dr. Forrest and the physical therapist and rejected their reports in favor of the opinion from another treating physician, Dr. Gunter. Dr. Gunter's opinion was that

Dent was physically capable of performing medium duty work. Accordingly, under the Appellate Panel's finding that Dent could perform medium duty work, a job analysis would only be relevant if performed with the criteria set for someone who could perform medium duty work. Said another way, if Dent could perform medium duty work, then a job analysis that assumed Dent could not perform any type of work would render an inaccurate analysis of whether Dent had meaningful employment opportunities. Thus, the job analysis within the vocational report carried little, if any, weight because it did not assess whether Dent had any employment opportunities based on his ability to perform medium duty work as found by the Appellate Panel and supported by Dr. Gunter's opinion. As a result, I believe the majority's reliance on the job analysis within the vocational report is misplaced.

Accordingly, substantial evidence supports the Appellate Panel's determination that Dent could perform medium duty work and had not lost his earning capacity, and thus, I would affirm the Appellate Panel's ruling that Dent was not PTD under section 42-9-10.