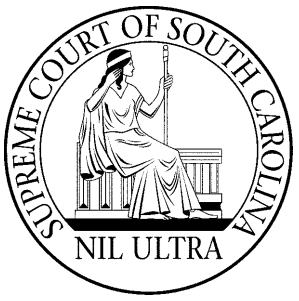

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 16
May 12, 2021
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Miriam Butler, individually, and Evelyn Stewart, in her capacity as personal representative of Joseph Stewart, and both on behalf of others similarly situated,

Plaintiffs,

v.

The Travelers Home and Marine Insurance Company, and The Standard Fire Insurance Company,

Defendants.

Appellate Case No. 2020-001285

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
J. Michelle Childs, United States District Judge

Opinion No. 28026
Heard March 24, 2021 – Filed May 12, 2021

CERTIFIED QUESTION ANSWERED

T. Joseph Snodgrass, Larson King, LLP, of St. Paul, MN; David Eugene Massey and Summer C. Tompkins, Law

Offices of David E. Massey Trial Lawyers, of Columbia; Erik D. Peterson, Mehr, Fairbanks & Peterson Trial Lawyers, PLLC, of Lexington, KY; J. Brandon McWherter, McWherter Scott Bobbitt PLC, of Franklin, TN, all for Plaintiffs.

Stephen E. Goldman and Wystan M. Ackerman, Robinson & Cole LLP, of Hartford, CT; William P. Davis, Baker, Ravenel & Bender, LLP, of Columbia, all for Defendants.

Reynolds H. Blakenship Jr., Yarborough Applegate LLC, of Charleston; Christopher E. Roberts, Butsch Roberts & Associates LLC, of Clayton, MO, both for Amicus Curiae United Policyholders.

Thomas C. Salane and R. Hawthorne Barrett, Turner Padget Graham & Laney, P.A., of Columbia, for Amici Curiae American Property Casualty Insurance Association and National Association of Mutual Insurance Companies.

JUSTICE FEW: The United States District Court for the District of South Carolina certified the following question to this Court pursuant to Rule 244 of the South Carolina Appellate Court Rules:

> When a homeowner's insurance policy does not define the term "actual cash value," may an insurer depreciate the cost of labor in determining the "actual cash value" of a covered loss when the estimated cost to repair or replace the damaged property includes both materials and embedded labor components?

We answer the certified question "yes."

These are two cases filed in one action in federal district court. The cases arose after the homes of Miriam Butler and Joseph Stewart[1] were damaged in separate fires. Butler and Stewart each purchased a homeowner's insurance policy from one of the defendants, both of whom are subsidiaries of The Travelers Companies, Inc. The parties refer to the defendants as "Travelers."

The insurance policies are not in the record before us. From the portions of the policies quoted by the district court and the parties, we know the respective policies provide replacement cost value coverage to repair or replace damaged portions of their homes. However, both policies provide that in the event the insured chooses not to immediately repair or replace the damaged property, the insured will receive payment for actual cash value instead of replacement cost value. The parties and the district court, as is apparently common in the insurance industry, refer to replacement cost value and actual cash value as "RCV" and "ACV."

Butler and Stewart elected not to immediately repair or replace their damaged property. Each thus elected not to receive replacement cost but instead to receive a cash payment for the ACV of the damaged property. As the district court stated, "Plaintiffs do not allege they actually repaired the covered damage, and instead seek relief solely based on the calculation of the ACV payment."

The certified question addresses whether Travelers properly calculated the ACV payments Travelers offered to Butler and Stewart to settle their property damage claims. As far as we can tell, neither policy requires Travelers to use a specific method for calculating such an offer. Generally, insurers use one or a combination of three methods for calculating ACV. *See* 5 Jeffrey E. Thomas et al., NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 47.04[1] (2020) ("Case law recognizes three general categories for measuring 'actual cash value': (1) market value, (2) replacement cost less depreciation and (3) the 'broad evidence' rule." (citing *Elberon Bathing Co., Inc. v. Ambassador Ins. Co., Inc.*, 389 A.2d 439, 444 (N.J. 1978))). As Travelers states in its brief, "One of the well-established methods used for estimating ACV involves estimating the replacement cost value (RCV) of the damage and then subtracting depreciation." To calculate ACV in these two cases, Travelers chose to use the "replacement cost less depreciation" method.

[1] Joseph Stewart passed away. His daughter Evelyn Stewart filed this lawsuit as personal representative of his estate.

According to Butler and Stewart, "Travelers did not and has not calculated any portion of Plaintiffs' losses by appraisal or fair market value."

Specifically, therefore, the question before us is whether—when using the "replacement cost less depreciation" method to calculate the offer it will make to its insured—Travelers may "depreciate" the labor component of the cost of repair or replacement. Our first task in answering the question is to understand what Travelers means by "depreciate." We begin that task by defining the terms RCV and ACV. RCV is clear; it is simply the amount of money it would take to pay a contractor to repair or replace the damaged structure, including cost for materials and labor. ACV also has clear meaning when considered in the abstract. It is the amount of money a willing buyer would pay, and a willing seller would accept, in a transaction with no unnatural constraints. ACV must account for changes in the value of a structure over time. Thus, ACV is what the structure was worth at the time it was damaged. Both RCV and ACV are terms we readily understand in their abstract sense.

Next, we consider how the terms are applied in a specific situation. For RCV, it is simple and straightforward. To calculate RCV, one determines the extent of the damage and solicits bids to have the damage repaired or replaced. The amount of RCV is thus determined by the market and is readily ascertainable, whether it is determined by the value of the low bid, the average of bids, or the otherwise most favorable bid.

ACV, on the other hand, is difficult to determine in a specific situation. While we understand ACV in the abstract, we are left scratching our heads when we consider how Travelers—or anyone—would calculate what it "actually" is.[2] The reason is

[2] Butler and Stewart attach significance to statements this Court previously made supposedly defining ACV in a different context. *See S.C. Elec. & Gas Co. v. Aetna Ins. Co.*, 238 S.C. 248, 262, 120 S.E.2d 111, 118 (1961) (referencing "the cost of materials," which we said "would be depreciable," and "[$]41,881.00, representing cost of winding and installation," which we said "would not be depreciable"). While it is true we used the phrase "actual cash value" in the discussion in which those statements were made, the statements actually refer to a value more similar to RCV. *See* 238 S.C. at 263, 120 S.E.2d at 118 (stating the depreciated material cost should have added to it "the undepreciable $41,881.00 of replacement cost," which we said "would indicate that the actual cost of the new coils, in place, after depreciation, was

there is normally no market for aged and partially deteriorated portions of homes. A fifteen-year-old roof, for example, is not available for purchase in the market, nor is there any market on which to sell one. Thus, the ACV of damage to a portion of a home—in most instances[3]—is a fiction, and it is not possible to precisely ascertain ACV.

This brings us to "depreciation." According to its general definition, depreciation is "a decline in an asset's value because of use, wear, obsolescence, or age." *Depreciation*, BLACK'S LAW DICTIONARY (11th ed. 2019). In the specific context of property insurance, depreciation is "the amount an item has lessened in value since it was purchased, taking into account age, wear and tear, market conditions, and obsolescence." Thomas et al., *supra*, § 47.04[2][a]. Both sides include this definition in their briefs. To calculate ACV using either definition, one would ascertain the original value of the damaged property, probably using the actual cost incurred to build or purchase it, and then estimate the extent to which the original value has declined over the years. It may be necessary to account for inflation, demand, or any other variable that has affected value. With these definitions of depreciation, the starting point for the calculation of ACV is the original value of the structure.

That, however, is not what Travelers did to calculate ACV in these cases. Rather, Travelers began by estimating the RCV of the damaged property, and from that number it subtracted a separate estimate of lost value, which Travelers calls "depreciation." There is no indication in the limited materials before us exactly *how* Travelers goes about determining the appropriate amount for depreciation. It is clear only that Travelers calculated depreciation for both materials and labor, and subtracted both those amounts from RCV to determine what it would offer for ACV. Butler and Stewart agree that starting with RCV and subtracting depreciation is a proper method and do not challenge the specific amount of depreciation Travelers

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$96,061.00"). In any event, we find the statements we made in that case have little impact on the certified question we address in this case.

[3] In some instances, ACV may be determined with precision by using the "market value" method. For example, if a lightning strike damages a kitchen appliance beyond repair, the homeowner may be able to replace it with a unit of similar age and condition purchased at a used appliance store or on some online market.

attributed to labor. Their only disagreement is whether it was proper for Travelers to include labor costs in the depreciation calculation.

This disagreement is the central issue in the federal lawsuit and in this certified question. Butler filed the federal lawsuit claiming Travelers breached her insurance policy by depreciating the cost of labor in calculating ACV. Stewart's daughter Evelyn later intervened to assert the similar claim of her father. As the district court stated, "whether an ACV payout in South Carolina . . . allows for the depreciation of labor . . . is determinative of the outcome of the instant suit."[4] The district court found the question whether an insurer in this situation may depreciate labor costs in calculating an offer of ACV "has not been adequately addressed by controlling precedent of South Carolina's appellate courts," and certified the question to this Court. We accepted the question.

Rule 244(a), SCACR, permits this Court to "answer questions of law." The principles of law applicable to this certified question are well-established. "An insurance policy is a contract between the insured and the insurance company, and the policy's terms are to be construed according to the law of contracts." *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 594, 762 S.E.2d 705, 709 (2014) (citing *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008); *Coakley v. Horace Mann Ins. Co.*, 376 S.C. 2, 5-6, 656 S.E.2d 17, 18-19 (2007); *Estate of Revis v. Revis*, 326 S.C. 470, 477, 484 S.E.2d 112, 116 (Ct. App. 1997)). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Schulmeyer*

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[4] Ordinarily, the propriety of an insurer's method for calculating what offer to make to settle the claim of its insured would not be the issue in a lawsuit of this sort. Rather, the issue would be simply the amount of ACV, or how to instruct the jury that will determine the amount of ACV. In this case, however, Butler and Stewart chose to frame the issue in terms of how Travelers calculates its offers, not in terms of the proper ACV of the damaged property. *See* Jessica Peterman, Note, *Actual Cash Value and Depreciation of Labor on Homeowner's Policies*, 82 Mo. L. Rev. 551, 551 (2017) ("Property and casualty insurance companies are now facing the 'next big wave' of class actions regarding depreciation on homeowner's policies. Specifically, policy language referring to labor depreciation and the actual cash value . . . of that labor is currently . . . being litigated all across the country.") (footnotes omitted).

v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (citing *United Dominion Realty Tr., Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct. App. 1992)). "Where [a] contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Harleysville Grp. Ins. v. Heritage Cmtys., Inc.*, 420 S.C. 321, 350, 803 S.E.2d 288, 304 (2017) (alteration in original) (quoting *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). "Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 615, 732 S.E.2d 626, 628 (2012) (quoting *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008)). "The law provides . . . that construing a contract is a question of law for the court." *Crenshaw v. Erskine Coll.*, 432 S.C. 1, 26, 850 S.E.2d 1, 14 (2020).

Before applying these principles of law to the certified question, we make two observations. First, while ACV is a term that has common meaning across all contexts, it does not have common application in all situations. Variations in the types of property damaged, changes in technology since the original construction, zoning or historic district restrictions on reconstruction, consumer preferences, market conditions, and the specific terms of the applicable homeowner's insurance policy, could affect how the abstract meaning of ACV is applied to the specific situation. For example, consider a case in which a seventy-five-year-old slate roof is damaged by a falling tree. The ACV of the damaged portion of the roof could be affected by (1) whether the insurance policy provides for replacement with original materials; (2) zoning or historic district restrictions that affect the choice of materials; (3) homeowner preference to eventually replace with slate, or with shingles or metal; (4) current market conditions such as unusually low or high demand for materials or labor; and other considerations. The abstract meaning of the term ACV is the same across all these variables, but the application of the term to determine a specific amount of ACV changes as each variable changes.

Second, the district court drafted the certified question with reference only to "embedded labor components." The term "embedded" in this sense means that the labor costs are no longer separable from the cost of materials. To illustrate, the cost of a new roof includes the cost of shingles and nails. Initially, the shingles and nails had labor costs because workers had to make them. By the time the shingles and nails were sold to the roofer, however, those labor costs were "embedded" in the market price the roofer paid to purchase them. Thus, the roofer paid one price for shingles and one price for nails, and there was no differentiation between the cost of

materials in those products and the cost of labor used to make them. Similarly, the cost of a new roof includes paying workers to remove the old roof and install the new one. Up to a certain point in time, these labor costs are separable—not embedded—from the cost of the materials. Eventually, however, even those labor costs become embedded. While some inquiry will reveal how labor and material costs were differentiated in calculating the price, the market has one price for the roof because the materials and labor costs are "embedded" in it. Thus, when a typical homeowner replaces a roof, she pays for the roof as one unit.

With these two observations, our task becomes simple. When the labor cost associated with an item of property is embedded, the value of the item is necessarily calculated as to the unit, not as to the individual parts. We return to the example of shingles and nails. It undoubtedly took considerable labor to manufacture both, but once the item is placed on the market, the price of the item is dictated by how the market interacts with the completed item. Nobody bargains for the purchase of nails by separating out how much the nail manufacturer spent on labor, as opposed to materials.

Similarly, the fact the labor cost is embedded makes it impractical, if not impossible, to include depreciation for materials and not for labor to determine ACV of the damaged property. Rather, the value of the damaged property is reasonably calculated as a unit. Therefore, we answer the certified question "yes," because it makes no sense for an insurer to include depreciation for materials and not for embedded labor. *But see Accardi v. Hartford Underwriters Ins. Co.*, 838 S.E.2d 454, 457 (N.C. 2020) (stating "differentiating between labor and materials when calculating depreciation . . . makes *little* sense") (emphasis added).

It is important to repeat, however, that we have no idea *how* Travelers actually estimates depreciation. Butler and Stewart argue Travelers acted "surreptitiously" in not disclosing to its insureds what it was doing. We find nothing surreptitious in Travelers' actions. Travelers made a calculation of what it was willing to pay for the damage and made an offer to resolve Butler's and Stewart's claims on the basis of that calculation. Butler and Stewart do not agree Travelers offered the appropriate amount, and they each rejected Travelers' offer.

Whether Travelers made a sufficient offer is not a question of law for a court to resolve. Rather, whether the insurer correctly, or even reasonably, made the calculation on which it based an offer to its insured is evidence the fact-finder should

consider in determining ACV. *See Wilcox v. State Farm Fire & Cas. Co.*, 874 N.W.2d 780, 785 (Minn. 2016) ("But whether embedded-labor-cost depreciation is logical or helpful to the trier of fact is ultimately a question of fact, not law."). ACV, in fact, is a question of fact. ACV will vary according to numerous variables, including how the insurer goes about choosing the amount to estimate for depreciation of labor. To the extent an insured believes its insurer made the calculation incorrectly or unreasonably, and made an insufficient offer on that basis, the disagreement relates to a question of fact as to which both parties enjoy the right to a trial by jury.

Thus, we make no effort to address whether Travelers' offer was sufficient. We simply hold that South Carolina law does not prohibit Travelers from including an estimate of the depreciation of embedded labor costs in its calculation of ACV for purposes of making an offer to its insured.

CERTIFIED QUESTION ANSWERED.

KITTREDGE, HEARN and JAMES, JJ., concur. BEATTY, C.J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David B. Lemon, Claimant, Respondent,

v.

Mt. Pleasant Waterworks, Employer, and State Accident Fund, Carrier, Petitioners.

Appellate Case No. 2020-000481

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Workers' Compensation Commission

Opinion No. 28027
Heard May 6, 2021 – Filed May 12, 2021

DISMISSED AS IMPROVIDENTLY GRANTED

Kirsten Leslie Barr, of Trask & Howell, LLC, of Mt. Pleasant, for Petitioners.

Carl H. Jacobson, of Uricchio Howe Krell, PA, of Charleston, for Respondent.

PER CURIAM: We issued a writ of certiorari to review the court of appeals' decision in *Lemon v. Mt. Pleasant Waterworks*, 429 S.C. 59, 837 S.E.2d 738 (Ct.

App. 2019). We now dismiss the writ as improvidently granted.[1]

DISMISSED AS IMPROVIDENTLY GRANTED.

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

[1] Petitioners moved to supplement the record two days prior to oral argument. With Respondent's consent, the motion to supplement the record is granted. However, these additional materials do not affect the disposition of this appeal.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nationwide Insurance Company of America,
Respondent,

v.

Kristina Knight, individually and as Personal Representative of the Estate of Daniel P. Knight,
Petitioner.

Appellate Case No. 2020-000026

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
William H. Seals Jr., Circuit Court Judge

Opinion No. 28028
Heard February 2, 2021 – Filed May 12, 2021

AFFIRMED

Edwin L. Turnage, Harris & Graves, PA, of Greenville, for Petitioner.

Wesley Brian Sawyer, Murphy & Grantland, PA, of Columbia, for Respondent.

JUSTICE FEW: Kristina Knight agreed to an endorsement to her Nationwide automobile insurance policy providing the coverage in the policy would not apply to her husband. She now claims the endorsement excluding coverage for her husband violates public policy and Nationwide cannot enforce it. We find the exclusion is clear and unambiguous and is not in violation of any statute. Therefore, we hold the exclusion is enforceable.

I. Facts and Procedural History

Nationwide Insurance Company of America issued an automobile insurance policy to Kristina Knight for her 1996 Ford Ranger. The policy provided $50,000 per person and $100,000 per accident in liability coverage and in uninsured motorist (UM) coverage. Knight also purchased $50,000 per person and $100,000 per accident in underinsured motorist (UIM) coverage.

Knight signed an exclusion, titled "Voiding Auto Insurance While Named Person is Operating Car," as an endorsement to the policy. The exclusion lists her husband, Danny Knight, as the excluded driver under the policy and provides "all coverages in your policy are not in effect while Danny Knight is operating any motor vehicle."[1] The policy itself also references the endorsement and provides, "The following driver(s) are excluded from all coverages and all vehicles on the policy: Danny Knight."

During the policy period, Danny was tragically killed in a motorcycle accident. Knight, as personal representative of Danny's estate, recovered $25,000 in UIM coverage under Danny's motorcycle insurance policy with Progressive Casualty Insurance Company and $25,000 in UIM coverage under a policy with ACCC Insurance Company insuring a different vehicle Danny owned.

Knight made a claim with Nationwide to recover an additional $25,000 in UIM coverage under her insurance policy. Nationwide denied the claim and filed this

[1] Subsection 38-77-30(7) of the South Carolina Code (2015) provides a spouse of any named insured is an "insured" under an insurance policy while resident of the same household. But for the exclusion, Danny would be an "insured" under the policy.

lawsuit asking the trial court to declare Nationwide did not have to pay the $25,000 because Danny was excluded from all coverages under the policy.

Both parties filed motions for summary judgment. The trial court granted Nationwide's motion and denied Knight's motion. The trial court held "'all coverages' in the Nationwide policy were 'not in effect' at the time of the accident and [Danny] was specifically excluded and [Knight] is not entitled to collect UIM coverage from Nationwide." The court of appeals affirmed. *Nationwide Ins. Co. of Am. v. Knight*, 428 S.C. 451, 835 S.E.2d 538 (Ct. App. 2019). We granted Knight's petition for a writ of certiorari to review the court of appeals' decision. We affirm.

II. Discussion

We begin our analysis of coverage under any insurance policy by considering the language of the policy. In a public policy challenge to the validity of an insurance policy provision, we then examine the applicable statutes to determine whether the provision violates any legislatively-expressed public policy.

A. Terms of the Policy

The insuring language in Knight's policy provides several separate "coverages," including liability, UM, and UIM. The exclusion in the policy states, "With this endorsement, all coverages in your policy are not in effect while Danny Knight is operating any motor vehicle." The exclusion is unambiguous and clearly provides "all coverages" are "not in effect" while Danny is operating "any motor vehicle." Danny was operating a motor vehicle at the time of his tragic accident and death. Therefore, the UIM coverage in the Nationwide policy was not in effect.

B. Public Policy

Insurance companies and insureds are generally free to contract for exclusions or limitations on coverage. *Jordan v. Aetna Cas. & Sur. Co.*, 264 S.C. 294, 297, 214 S.E.2d 818, 820 (1975); *see also Pa. Nat'l. Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 551, 320 S.E.2d 458, 461 (Ct. App. 1984) ("Reasonable exclusionary clauses which do not conflict with the legislative expression of the public policy of the State as revealed in the various motor vehicle insurance statutes are permitted."). In *Williams v. Government Employees Insurance Co. (GEICO)*, 409 S.C. 586, 762 S.E.2d 705 (2014), we explained, "As a general rule, insurers have the right to limit

their liability and to impose conditions on their obligations provided they are not in contravention of public policy or some statutory inhibition." 409 S.C. at 598, 762 S.E.2d at 712 (citing *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535-36, 514 S.E.2d 327, 330 (1999); *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 523, 377 S.E.2d 569, 570 (1989); *Cobb v. Benjamin*, 325 S.C. 573, 580-81, 482 S.E.2d 589, 593 (Ct. App. 1997)).

To be clear, however, this Court has no authority to invalidate an automobile insurance policy provision simply because we believe it is inconsistent with our own notion of "public policy." *See Burns*, 297 S.C. at 523, 377 S.E.2d at 570 (rejecting a challenge to the validity of an exclusion in an automobile insurance policy, and stating, "It is the responsibility of this Court to construe statutes; we have no power to legislate"); *S.C. Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989) ("Once the Legislature has made that choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy."). Rather, the General Assembly establishes the public policy relating to automobile insurance and enacts statutes to let the public and the courts know what that policy is. When an insured challenges a policy provision on the ground the provision violates public policy, the Court's authority is limited to determining whether the policy provision violates a statute.

This was the challenge the Court heard in *Williams*. The insured filed a declaratory judgment action claiming a "family step-down provision" in its automobile insurance policy violated public policy. 409 S.C. at 591, 762 S.E.2d at 708. The three-Justice majority of this Court, the two-Justice dissent, and the circuit court judge who heard the case (now-Justice James), all determined the policy provision was clear and unambiguous. All agreed the effect of the policy provision was to reduce the available liability insurance for non-named insureds from the $100,000 limits purchased by the named insured to the $15,000 statutory mandatory minimum limits. *See Williams*, 409 S.C. at 597, 762 S.E.2d at 711 (majority discussing the unambiguous effect of the policy provision and agreeing with circuit court); 409 S.C. at 608, 762 S.E.2d at 717 (Pleicones, J., dissenting) (agreeing with majority on this point).

The *Williams* Court then addressed whether the unambiguous family step-down provision violated subsection 38-77-142(C) of the South Carolina Code (2015). 409 S.C. at 599-604, 762 S.E.2d at 712-15. As is often the case, section 38-77-142 is not crystal clear. After a lengthy analysis, the *Williams* majority found the effect of

the statute was to prevent other policy provisions from reducing the face amount of liability insurance policy limits purchased by the insured. The majority stated, relying particularly on subsection 38-77-142(C), "Therefore, once the face amount of coverage is agreed upon, it may not be arbitrarily reduced or limited by conflicting policy provisions that effectively retract this stated coverage." 409 S.C. at 604, 762 S.E.2d at 715. Based on this interpretation of section 38-77-142, the *Williams* majority concluded the family step-down provision violated subsection 38-77-142(C) because it reduced the agreed-upon policy limits below the face amount of coverage for family members of the named insured. 409 S.C. at 608, 762 S.E.2d at 717.

The *Williams* dissent did not agree with the majority's interpretation of section 38-77-142, and therefore did not agree that subsection 38-77-142(C) rendered the step-down provision unenforceable. 409 S.C. at 608-10, 762 S.E.2d at 717-18 (Pleicones, J., dissenting). The circuit court also did not agree. 409 S.C. at 593, 762 S.E.2d at 709. Nevertheless, the disagreement was on how to interpret section 38-77-142, not on the Justices' different conceptions of public policy. The majority view became the official interpretation of section 38-77-142 by a three to two vote.[2]

We recently considered another public policy challenge to the enforceability of an automobile insurance policy provision. *Nationwide Mut. Fire Ins. Co. v. Walls*, Op. No. 28012 (S.C. Sup. Ct. filed March 10, 2021) (Shearouse Adv. Sh. No. 8 at 56). In *Walls*, the insured claimed two step-down provisions in the policy were unenforceable under the same section we considered in *Williams*, section 38-77-142. *Walls*, (Shearouse Adv. Sh. No. 8 at 57). Like the Court did in *Williams*, and as we

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[2] We hesitate to put too much emphasis on the fact the General Assembly left the interpretation of section 38-77-142 in *Williams* intact through the six years and three legislative sessions that have elapsed since then, but it is true. This Court has relied in other cases on legislative inaction to validate our prior interpretation of a statute, though the interval of time was considerably longer in the following cases than it has been here. *See, e.g.*, *York v. Longlands Plantation*, 429 S.C. 570, 576, 840 S.E.2d 544, 547 (2020) (noting the General Assembly's inaction after we interpret a statute is some indication it agrees with our interpretation); *McLeod v. Starnes*, 396 S.C. 647, 660, 723 S.E.2d 198, 205 (2012) (same); *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) (same); *State v. 192 Coin-Operated Video Game Machs.*, 338 S.C. 176, 188, 525 S.E.2d 872, 879 (2000) (same).

must do here, we considered only whether the policy provisions violated the applicable statute. *Walls*, (Shearouse Adv. Sh. No. 8 at 60 n.3). Relying on the *Williams* interpretation of section 38-77-142, we held that once the insurance company sold the liability coverage, section 38-77-142 prohibited the insurance company from reducing the amount of the agreed-upon coverage. *Walls*, (Shearouse Adv. Sh. No. 8 at 63). Thus, we did no more in *Walls* than consider whether the step-down provisions violated the legislatively-declared public policy as set forth in a statute. *See Walls*, (Shearouse Adv. Sh. No. 8 at 61) (holding "section 38-77-142(C), as interpreted by this Court in *Williams*, prohibits any step-down provisions in a liability policy's coverage").

To the extent the *Williams* Court made any suggestion that its ruling on the public policy challenge was not based on the specific provisions of a statute, our opinion in *Walls* corrected that. The members of this Court may still disagree on how the language of section 38-77-142 should have been interpreted in *Williams*, *see Walls*, (Shearouse Adv. Sh. No. 8 at 65-73) (Kittredge, J., dissenting), but we cannot disagree that in *Walls* we merely applied the statute—as interpreted by the majority in *Williams*—to the policy provision. Similarly, in this case—in any case—all we may do is apply the relevant statutes to the policy provision.

C. Automobile Insurance Statutes

We turn now to whether any automobile insurance statute prohibits the policy provision in this case. Knight argues the provision violates section 38-77-340 of the South Carolina Code (2015), which provides,

> Notwithstanding the definition of 'insured' in Section 38-77-30, the insurer and any named insured must, by the terms of a written amendatory endorsement, the form of which has been approved by the director or his designee, agree that coverage under such a policy of liability insurance shall not apply while the motor vehicle is being operated by a natural person designated by name. The agreement, when signed by the named insured, is binding upon every insured to whom the policy applies and any substitution or renewal of it. However, no natural person may be excluded unless the named insured declares in the agreement that (1) the driver's license of the excluded

> person has been turned in to the Department of Motor Vehicles or (2) an appropriate policy of liability insurance or other security as may be authorized by law has been properly executed in the name of the person to be excluded.

As is often the case, section 38-77-340 is not crystal clear. The dual purposes of the statute, however, are clear enough. First, the statute permits an insured—like Knight—to purchase insurance for herself at a reasonable rate without having to pay the cost of insuring the excluded driver, whose bad driving record could make the cost of the policy much higher, if not prohibitive. *See Lovette v. U.S. Fid. & Guar. Co.*, 274 S.C. 597, 600, 266 S.E.2d 782, 783 (1980) (stating the purpose of this section is to "alleviate the problem often faced by the owner of a family policy, who . . . has a relatively safe driving record but is forced to pay higher premiums because another member of the family . . . is by definition also included in the policy coverage" (quoting Note, *The South Carolina Insurance Reform Act (Part I): "No Fault" and Contributory Negligence—A Synopsis and Appraisal*, 26 S.C. L. Rev. 705, 726 (1975))). Second, the statute ensures a named insured—like Knight—may not exclude a costly resident relative—like Danny—unless the excluded person has turned in his driver's license or is insured under his own policy. *See Lovette*, 274 S.C. at 600, 266 S.E.2d at 784 (recognizing the legislative purpose "to prevent persons so excluded from driving without insurance").

As our court of appeals has recognized, the dual purposes of section 38-77-340 are "*part of our state's public policy*." *Lincoln Gen. Ins. Co. v. Progressive N. Ins. Co.*, 406 S.C. 534, 541, 753 S.E.2d 437, 441 (Ct. App. 2013). In other words, the public policy of this State—as expressed in section 38-77-340—is to promote the use of an exclusion such as the one in Knight's policy because it both enables good drivers to purchase economically-priced insurance and requires excluded drivers to turn in their driver's license or purchase other insurance before they drive on our roads.

Thus, we interpret section 38-77-340 to require that before the insurance company and an insured may exclude a driver like Danny, they "must . . . agree" in writing "that coverage under such a policy of liability insurance shall not apply," and they must "declare[] in the agreement" that the excluded person either turned in his driver's license or is otherwise insured. We find the public policy set forth in section 38-77-340 is to promote the sort of policy provision at issue in this case, and nothing

in section 38-77-340 prevents Nationwide from enforcing the policy provision excluding Danny from all coverage under the policy.

Knight argues, however, the language of section 38-77-340 is different from the language of the policy provision, and the statutory language should control. In particular, she argues the statute provides "such a policy of liability insurance shall not apply while the motor vehicle is being operated." She argues the word "the" in the statute in place of the word "any" in the policy provision indicates a legislative intent to exclude coverage only when the excluded person is driving the vehicle listed in the policy. Construing section 38-77-340 in this way, she argues, indicates the General Assembly intended to allow such a provision to apply only to liability coverage, not to UIM coverage. We disagree. The argument overlooks the relationship between the terms of an insurance policy and the statutes in which our General Assembly sets forth public policy. While there are statutes that permit certain exclusions, the power to exclude coverage in an insurance policy derives not from any statute, but from the right all parties have to contract for coverage or to exclude coverage. *Jordan*, 264 S.C. at 297, 214 S.E.2d at 820. Statutory expressions of public policy are merely limits on the power to exclude coverage.

Knight also argues the policy provision violates section 38-77-160 of the South Carolina Code (2015) because it excludes statutorily required UIM coverage.[3] We disagree on this point as well. "[S]tatutorily required coverage is that which is required to be offered or provided." *Carter v. Standard Fire Ins. Co.*, 406 S.C. 609, 616, 753 S.E.2d 515, 519 (2013) (quoting *Ruppe v. Auto-Owners Ins. Co.*, 329 S.C. 402, 404-05, 496 S.E.2d 631, 632 (1998)). Thus, UIM coverage is statutorily required coverage because it must be offered.[4] However, UIM coverage is not mandatory because an insured can choose whether or not to purchase it. *Carter*, 406 S.C. at 621-22, 753 S.E.2d at 521-22. Unlike UIM coverage, liability coverage is statutorily required coverage that is also mandatory. *See* S.C. Code Ann. § 38-77-

[3] Knight argues—for the same reason—the policy provision violates section 38-77-150 of the South Carolina Code (2015), which mandates UM coverage in every automobile insurance policy. We decline to address this argument in full because Knight seeks only UIM coverage under the policy.

[4] S.C. Code Ann. § 38-77-160 (providing automobile insurance carriers "shall . . . offer, at the option of the insured, underinsured motorist coverage").

140(A) (2015) (providing an automobile insurance policy may not be issued unless it contains liability coverage). To interpret section 38-77-340 as prohibiting the exclusion of optional UIM coverage for a named individual but allowing the exclusion of mandatory liability coverage for the same individual, as Knight argues, would be illogical. Therefore, we find the exclusion does not violate section 38-77-160.

III. Conclusion

Knight and Nationwide agreed to exclude Danny from all coverages under the policy. No statute prohibits the exclusion. We hold the exclusion is valid and Knight cannot recover UIM coverage for Danny's accident under her insurance policy with Nationwide.

AFFIRMED.

BEATTY, C.J., and HEARN, J., concur. KITTREDGE, J., concurring in a separate opinion in which JAMES, J., concurs.

JUSTICE KITTREDGE: I concur in result. I write separately to note my rejection of the majority's view of *Williams v. GEICO*[5] and especially *Nationwide Mutual Fire Insurance Co. v. Walls*.[6] While joining the majority in result today, I adhere to my dissent in *Walls*.

JAMES, J., concurs.

[5] *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 598, 762 S.E.2d 705, 712 (2014).

[6] *Nationwide Mut. Fire Ins. Co. v. Walls*, Op. No. 28012 (S.C. Sup. Ct. filed Mar. 10, 2021) (Shearouse Adv. Sh. No. 8 at 56).

The Supreme Court of South Carolina

Re: Amendments to the South Carolina Court-Annexed Alternative Dispute Resolution Rules

Appellate Case No. 2020-001509

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 20 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules (SCADR) and Appendix A and Appendix B to the SCADR are amended as set forth in the attachment to this order. These amendments are effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
May 12, 2021

Rule 20(a)(1)(B), SCADR, is amended to provide:

(a) Approval of Circuit Court Mediator Training Programs

(1) An approved training program for mediators of the Court of Common Pleas civil actions shall consist of a minimum of forty (40) hours of instruction, unless otherwise provided by these rules. The curriculum of such programs shall at a minimum include:

. . .

(B) Mediation processes and techniques, including the process and techniques of trial court mediation, for both in-person and Online Dispute Resolution;

Rule 20(b)(1)(C), SCADR, is amended to provide:

(b) Approval of Family Court Mediator Training Programs

(1) An approved training program for mediators in the Family Court shall consist of a minimum of forty (40) hours of instruction, unless otherwise provided by these rules. The curriculum of such programs shall at a minimum include:

. . .

(C) Mediation processes and techniques, including the process and techniques of trial court mediation, for both in-person and Online Dispute Resolution;

Rule 20(c)(1)(b), SCADR, is amended to provide:

(c) Approval of Circuit Court Arbitrator Training Programs

(1) An approved training program for arbitrators of the Court of Common Pleas civil actions shall consist of a minimum of six (6) hours of instruction, unless otherwise provided by these

rules. The curriculum of such programs shall at a minimum include:

. . .

(B) Arbitration processes and techniques, for both in-person and Online Dispute Resolution, including the process and techniques of both binding and non-binding arbitration;

Canon I(B) to Appendix A to the SCADR is amended to provide:

B. It is inconsistent with the integrity of the arbitration process for persons to solicit appointment for themselves. However, a person may indicate a general willingness to serve as an arbitrator. A person who offers herself or himself as available to serve as an arbitrator gives parties and the public the expectation that she or he has the competency to arbitrate effectively, including conducting Online Dispute Resolution. In court-connected or other forms of mandated arbitration, it is essential that arbitrators assigned to the parties have the requisite training and experience.

Section IV of Appendix B to the SCADR is amended to provide:

IV. Competence: A Mediator Shall Mediate Only When the Mediator Has the Necessary Qualifications to Satisfy the Reasonable Expectations of the Parties.

Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's qualifications. Training and experience in mediation, however, are often necessary for effective mediation. A person who offers herself or himself as available to serve as a mediator gives parties and the public the expectation that she or he has the competency to mediate effectively, including conducting Online Dispute Resolution. In court-connected or other

forms of mandated mediation, it is essential that mediators assigned to the parties have the requisite training and experience.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sea Island Food Group, LLC, d/b/a Squeeze, Plaintiff,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, Hilton Smith, East Bay Company, Ltd., Michael J. Quillen Family Limited Partnership, Defendants.

Michael J. Quillen Family Limited Partnership, Third-Party Plaintiff,

v.

Top of the Bay, LLC, Third-Party Defendant.

Top of the Bay, LLC, d/b/a Club Light, Fourth-Party Plaintiff, Respondent,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, Fourth-Party Defendant, Appellant.

Appellate Case No. 2018-000906

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. 5794
Heard December 9, 2020 – Filed January 27, 2021
Withdrawn, Substituted and Refiled May 12, 2021

AFFIRMED

E. Brandon Gaskins, of Moore & Van Allen, PLLC, and Robert Ernest Sumner, IV, of Butler Snow, LLP, both of Charleston; and Charles Robert Scarminach, of Atlanta GA, all for Appellant.

W. Tracy Brown, of The Brown Law Firm, of Summerville, and William Koatesworth Swope, of The Swope Law Firm, PA, of Charleston, for Respondent.

HEWITT, J.: This case arose out of a building owner's decision to terminate the building's master lease after a fire. It comes to us presenting two issues. The first is whether a subtenant has an intentional interference with contract claim against the owner if the owner's wrongful declaration that the building was "totally destroyed" interfered with the sublease. The second is a multi-pronged challenge to the jury's award of punitive damages.

We affirm. There was evidence upon which the jury could find the owner improperly declared the property "totally destroyed." That unjust declaration directly interfered with the building's subleases: necessarily constituting interference with contract. We also agree with the trial court's thorough review of the jury's punitive damages award.

FACTS

The building in question is located at 213 East Bay Street in downtown Charleston. Yashick Development Co. purchased the property in 2003 for approximately $1.8 million. It leased the building to a limited partnership (the Master Tenant). The Master Tenant rented space to subtenants.

A fire started on the building's second floor one night in April 2013. The fire caused extensive damage to the second floor and roof. There was less damage to the building's other areas. In the following months, the Master Tenant hired a company to secure the building and begin the clean-up process. It also hired a company to perform architectural and engineering services for the building's repair.

Within months, the stakeholders became aware of issues related to restoring the building and complying with the applicable earthquake building code. The Master Tenant notified Yaschik of these challenges in June 2013. The Master Tenant also said it believed the total cost of reconstruction would "certainly" exceed the insurance; possibly by "a significant amount." The Master Tenant had a $1 million insurance policy for the property. Yaschik paid substantially more than $1 million when it purchased the building. Still, the master lease only required the Master Tenant to carry $1 million in insurance.

In August 2013, the Master Tenant notified Yaschik again that reconstruction would require significant additional finances because the repair work would exceed the insurance proceeds. The Master Tenant estimated it could cost between $1.5 and $1.8 million in addition to the $500,000 already spent out of the $1 million insurance. Email messages from around the same time show that Yaschik and the Master Tenant disputed who had final responsibility to pay for the repair/rebuild.

Things came to a head the next month; five months after the fire. The Master Tenant sent Yaschik a letter advising of several developments, including the insurance company's decision to pay the remaining insurance. The Master Tenant insisted Yaschik approve the structural plans for the building's repair before submitting them to the City of Charleston. About a week later, Yaschik sent the Master Tenant a letter purporting to terminate the master lease, claiming the building was a total loss.

The relevant part of the lease provides:

> If premises are totally destroyed by fire or other casualty, this lease shall terminate as of the date of such destruction and rental shall be accounted for as between Landlord and Tenant as of that date. If premises are damaged but not wholly destroyed by fire or other casualty, rent shall abate in such proportion as use of premises has been lost to the Tenant. Landlord shall restore premises to substantially

> the same condition as prior to damage as speedily as practicable, whereupon full rental shall commence.

The subleases contained language similar to the master lease regarding the building's destruction due to fire. The Master Tenant and the subtenants took the position that the building was not "totally destroyed" and that Yaschik's termination was ineffective.

At some point, the Master Tenant and subtenants discovered Yaschik had been negotiating since at least May 2013 to sell the building to a neighboring property owner. May 2013 was a month after the fire, and roughly four months before Yaschik declared the building totally destroyed.

Three months *after* Yaschik declared the building destroyed, Yaschik and the neighbor reached a contingent agreement for the property's sale. That transaction never closed. Yaschik instead undertook efforts to restore the property on its own.

The resulting lawsuit involved multiple parties and claims. Many of the claims, if not all of them, stemmed from Yaschik terminating the master lease and subleases.

The claim at issue in this appeal is the claim against Yaschik by a subtenant—Top of the Bay, Inc. d/b/a Club Light (Top). Top claimed Yaschik wrongfully terminated the master lease, interfering with Top's sublease with the Master Tenant. Top also sued the Master Tenant, claiming the Master Tenant breached the sublease by not restoring the fire-damaged premises.

Much of Yaschik's argument on appeal is tied to the fact that the trial court granted the Master Tenant a directed verdict on Top's breach of contract claim, finding the Master Tenant's duty to restore the building, if any, expired once Yaschik terminated the master lease. The trial court denied Yaschik's similar motion on Top's intentional interference claim, finding the issue of whether Yaschik was justified in declaring the premises a total loss was a jury question.

The jury found Yaschik breached the master lease and interfered with the subleases by improperly declaring the building a total loss. It entered substantial verdicts against Yaschik and in favor of the Master Tenant and the subtenants. On the claim at issue here (intentional interference with Top's sublease), the jury awarded Top $1 in nominal damages and $133,333.33 in punitive damages. Yaschik moved for

judgment notwithstanding the verdict (JNOV), a new trial, a new trial nisi remittitur, or setoff. The trial court denied these motions in a detailed written order. This appeal followed.

ISSUES

The first issue is whether the trial court erred in failing to grant Yaschik a directed verdict or JNOV on Top's claim for intentional interference with Top's sublease. The second issue is whether the jury's punitive damages award was improper and contrary to law. Yaschik presented the issues somewhat differently in its brief. We have consolidated some of them for the purposes of this opinion.

DIRECTED VERDICT/JNOV

"In ruling on motions for directed verdict or [JNOV], the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Steinke v. South Carolina Dep't of Labor, Licensing & Reg.*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Id.* "[T]he trial [court] cannot disturb the factual findings of a jury unless a review of the record discloses no evidence which reasonably supports them." *Burns v. Universal Health Servs., Inc.*, 361 S.C. 221, 231–32, 603 S.E.2d 605, 611 (Ct. App. 2004). "The appellate court will reverse the trial court's ruling on a JNOV motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Id.* at 232, 603 S.E.2d at 611.

"The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). "An essential element to the cause of action for tortious interference with contractual relations requires the intentional procurement of the contract's breach. Where there is no breach of the contract, there can be no recovery." *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007) (citation omitted).

The Fourth Circuit has noted that "[w]hat constitutes improper means [of interference] may be somewhat difficult to distill as a rule of law . . . ." *Waldrep Bros. Beauty Supply v. Wynn Beauty Supply Co.*, 992 F.2d 59, 63 (4th Cir. 1993). "Interference with a contract is justified when it is motivated by legitimate business purposes." *Gailliard v. Fleet Mortg. Corp.*, 880 F. Supp. 1085, 1089 (D.S.C. 1995). "Generally, there can be no finding of intentional interference with . . . contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party." *Eldeco*, at 482, 642 S.E.2d at 732 (quoting *Southern Contracting, Inc. v. H.C. Brown Constr. Co.*, 317 S.C. 95, 102, 450 S.E.2d 602, 606 (Ct. App. 1994)). Examples of improper methods include slander, sabotage, violence, fraud, and misrepresentation or deceit. *See Waldrep Bros. Beauty Supply*, 992 F.2d at 63–64.

Yaschik's lead argument relies on a misinterpretation of the trial court's ruling. The trial court explained that it did not find the subtenants failed to demonstrate the Master Tenant breached the subleases; the court found the Master Tenant had a valid defense for any breach of the subleases. Specifically, the trial court found the Master Tenant was relieved of its duties under the subleases once Yaschik declared the building a total loss and terminated the master lease. We agree with the trial court's finding. The "breach" part of Top's interference claim did not require the trial court to find that the Master Tenant was responsible for repairing the building and that the Master Tenant breached that promise. The "breach" element could stand as long as there was evidence Yaschik's declaration of a total loss kept the Master Tenant from honoring the sublease.

Yaschik also argues any interference with Top's sublease was justified. Specifically, Yaschik contends it made a reasonable business decision in deciding to sell the property instead of restoring it at significant cost.

There was certainly evidence from which the jury could conclude Yaschik's decision to declare the building "totally destroyed" was justified in light of the large amount of money it would take in excess of the insurance coverage to restore the building. But there was also evidence that Yaschik did not believe the building was "totally destroyed" and terminated the master lease (as well as the subleases) out of a desire to protect and advance its own interests rather than honor its obligations under the master lease. Yaschik's interest was adverse to the Master Tenant and subtenants in this respect: Yaschik was interested in saving money; the Master Tenant and subtenants were interested in a quick repair allowing their businesses to reopen.

There is evidence in the record that Yaschik believed the building was more marketable if it was not encumbered by the Master Lease and subleases. Thus, on top of the evidence Yaschik did not believe the building was totally destroyed, there was evidence from which the jury could find Yaschik terminated the master lease and subleases to enhance its position at the tenants' detriment and assist its secret negotiations. At bottom, we simply disagree with Yaschik's argument that breaching a contract (and interfering with other agreements) because the contract looks less profitable than desired precludes an intentional interference claim. *Cf.* Restatement (Second) of Torts § 767 (1979) (listing several factors that assist in evaluating whether interference is "improper").

We could not find a South Carolina case directly on point, but Top's intentional interference claim is generally consistent with precedent. Our supreme court previously upheld an intentional interference claim based on the potential that a jury could determine a third party intended to procure a breach of someone else's employment agreement. *See Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 287 S.C. 190, 191, 336 S.E.2d 472, 472 (1985). This court also previously distinguished intentional interference claims by noting that breaches occurring because of a third party's exercise of its undisputed contractual rights are not actionable, but breaches caused by mere business interest can be. *See S. Contracting, Inc. v. H.C. Brown Const. Co.*, 317 S.C. 95, 101, 450 S.E.2d 602, 605 (Ct. App. 1994) (distinguishing *American Sur. Co. v. Schottenbauer*, 257 F.2d 6 (8th Cir. 1958)).

Yaschik conceded at oral argument that whether the building was "totally destroyed" was appropriately a jury question. The judge charged the jury on what it meant for a building to be "totally destroyed" and that the cost of repairs is only one way to measure a building's value. Because evidence supported conflicting inferences about Yaschik's purpose in declaring the building totally destroyed, we find the trial court properly denied Yaschik's motions for directed verdict and JNOV.

PUNITIVE DAMAGES

Yaschik contends Top failed to present clear and convincing evidence that Yaschik's conduct was willful, wanton, or in reckless disregard of Top's rights. It also argues the punitive damages award violates due process because its conduct was not reprehensible and because of the disparity between the actual or potential harm and the award's amount.

"In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence." S.C. Code Ann. § 15-33-135 (2005). The jury has considerable discretion to determine the amount of damages. *See Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 404-05, 714 S.E.2d 904, 915 (Ct. App. 2011) (noting the deference due to the jury on punitive damages). If there is a claim that an award of punitive damages violates due process, an appellate court examines the trial court's constitutional review de novo. *See Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009).

The trial court did not err in determining the jury's punitive damages award was supported by clear and convincing evidence. "In order to recover punitive damages, the plaintiff must present clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011). "The test by which a tort is to be characterized as reckless, [willful] or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights." *Id.* (quoting *Rogers v. Florence Printing Co.*, 233 S.C. 567, 577–78, 106 S.E.2d 258, 263 (1958)).

Top presented evidence that Yaschik was aware Top was a subtenant under the master lease, yet still conducted private negotiations to sell the property and declared the building "destroyed" when it knew the building was not destroyed, thereby (and deliberately) terminating Top's sublease. This is sufficient for a jury to infer Yaschik acted with willful, wanton, or reckless disregard for Top's rights under the sublease.

The due process review of punitive damages involves the following factors:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Hollis, 394 S.C. at 396, 714 S.E.2d at 911 (quoting *Austin v. Stokes–Craven Holding Corp.*, 387 S.C. 22, 52, 691 S.E.2d 135, 151 (2010)).

The degree of reprehensibility is determined by weighing the following factors:

> (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Hollis, 394 S.C. at 397, 714 S.E.2d at 911 (quoting *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185).

We agree with the trial court that the first two reprehensibility factors favor Yaschik: the harm in this case was purely economic and did not involve any indifference or reckless disregard for the health or safety of others. We also agree with the trial court that the third and fifth factors cut the other way. Top's owners were directly and materially impacted by the termination of Top's sublease, Yaschik's actions in terminating the master lease were no mere accident, and the jury could find Yaschik acted deceitfully based on the evidence presented.

As for whether there were repeated wrongful actions versus an isolated incident, even though Yaschik only terminated the master lease one time, the case centered on a series of actions playing out over several months from which the jury could have found multiple instances of deceit. Viewing all five reprehensibility factors, we agree with the trial court that they favor an award of punitive damages.

When looking at the disparity between actual or potential harm and a punitive damages award, a court may consider "the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." *Hollis*, 394 S.C. at 399, 714 S.E.2d at 913 (quoting *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185). Yaschik concedes it has the ability to pay these punitive damages. Further, we agree with the trial court that the award is directly related to the harm caused by Yaschik's conduct and that it is reasonable to believe the six figure award will deter Yaschik from engaging in similar conduct in the future.

Yaschik argues the ratio of punitive to other damages in these case is grossly disproportional and excessive. The jury awarded Top $1 in nominal damages and $133,333 in punitive damages, representing a 133,333:1 ratio. At face value, this ratio would be concerning. *See Duncan v. Ford Motor Co.*, 385 S.C. 119, 145, 682 S.E.2d 877, 890 (Ct. App. 2009) ("[I]n practice few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003))).

However, numerous federal cases have found that a "ratio test" is inapplicable in cases that involve nominal damages. *See Saunders v. Branch Banking And Tr. Co. of VA*, 526 F.3d 142, 154 (4th Cir. 2008) ("[W]hen a jury only awards nominal damages or a small amount of compensatory damages, a punitive damages award may exceed the normal single digit ratio because a smaller amount 'would utterly fail to serve the traditional purposes underlying an award of punitive damages, which are to punish and deter.'" (quoting *Kemp v. Am. Tel. & Tel. Co.*, 393 F.3d 1354, 1364–65 (11th Cir. 2004))); *Williams v. Kaufman Cty.*, 352 F.3d 994, 1016 (5th Cir. 2003) (stating "any punitive damages-to-*compensatory* damages 'ratio analysis' cannot be applied effectively in cases where only *nominal* damages have been awarded"); *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629, 645 (6th Cir. 2005) (noting that in a § 1983 unlawful arrest case, "the plaintiff's economic injury was so minimal as to be essentially nominal" and that in such a case, U.S. Supreme Court precedent "on the ratio component of the excessiveness inquiry—which involved substantial compensatory damages awards for economic and measurable noneconomic harm—are therefore of limited relevance." (footnote omitted)). We agree with this persuasive authority and find a ratio test is inapplicable in this case.

As to the third and final factor of the *Hollis* test, the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases, the parties agree there are no authorized civil penalties applicable in this case. Yaschik points to multiple South Carolina cases in which awards for punitive damages were upheld for tortious interference with contractual relations claims. *See Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 139, 584 S.E.2d 120, 128 (Ct. App. 2003) (finding a 9.9 to 1 ratio was proper); *Collins Music Co. v. Terry*, 303 S.C. 358, 360, 400 S.E.2d 783, 784 (Ct. App. 1991) (finding a 6 to 1 ratio was proper); *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 287 S.C. 190, 193, 336 S.E.2d 472, 474 (1985) (reinstating a punitive damage award with a ratio of 1.5 to 1). However, in all of these cases, the juries awarded meaningful compensatory damages as opposed to the nominal damages awarded here.

We agree with the trial court that it makes sense to look to the damages awarded to the other subtenant that was similarly situated. That subtenant—Sea Island Food Group, LLC d/b/a Squeeze (Squeeze)—was awarded roughly $740,000 in actual damages and nearly $470,000 in punitive damages. Given that Squeeze was in essentially the same position and suffered the same harm as Top, we find the award of $133,333 in punitive damages was reasonable under the circumstances.

We note this analysis is highly fact dependent and that comparing the punitive damage awards to other parties may not be appropriate in other cases. However, given the facts of this case, we find this comparison appropriate.

We agree with the trial court that the nominal damage award was likely based on the fact that Top did not present enough information for the jury to decide the amount of Top's lost profits without speculating. That does not diminish the jury's additional findings that Yaschik violated Top's rights, and did so willfully.

Given all these factors, we find the jury's punitive damages award did not violate Yaschik's due process rights.

CONCLUSION

Based on the foregoing, the trial court's denial of Top's motions for directed verdict, JNOV, and motions related to the punitive damages award are

AFFIRMED.

THOMAS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In Re: Venture Engineering, agent for DT LLC,
Respondent,

v.

Horry County Zoning Board of Appeals, Appellant.

Appellate Case No. 2018-001221

Appeal from Horry County
Larry B. Hyman, Jr., Circuit Court Judge
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5819
Heard February 2, 2021 – Filed May 12, 2021

REVERSED

Matthew R. Magee, of Thomas & Brittain, P.A., of Myrtle Beach, for Appellant.

Robert S. Shelton, of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., of Myrtle Beach, for Respondent.

GEATHERS, J.: Appellant Horry County Zoning Board of Appeals (the Board) challenges the circuit court's order in consolidated appeals from two Board decisions. The circuit court reversed both decisions, which (1) prohibited a client of Respondent Venture Engineering (Venture) from receiving construction and demolition debris from outside sources for recycling and (2) denied Venture's

request for three variances from the zoning ordinances governing concrete recycling businesses. The Board argues the circuit court erred by failing to properly apply the appropriate standard of review to each appeal. The Board also argues the circuit court erred by (1) consolidating the two appeals and (2) considering material outside the respective records on appeal. We reverse the circuit court's order allowing Venture's client to receive demolition debris from outside sources as well as its order granting costs to Venture.[1]

FACTS/PROCEDURAL HISTORY

In January 1981, Arthur Thompkins, Jr. established Thompkins & Associates, Inc. (Thompkins) for the purpose of operating heavy equipment for construction and demolition projects.[2] Thompkins maintained its equipment and office at 310 Piling Road in Myrtle Beach (the Property) within the historic Pine Island Residential District.[3] Another business operated a concrete plant next to the Property but ceased operating at some point before the Board considered the two cases now before the court.

When Thompkins began operating in 1981, the Property was not zoned. According to the Board, in 1987, Horry County enacted its first zoning ordinance and designated the zone in which the Property was located as Limited Industrial (LI), which allows light industrial uses that are "not significantly objectionable in terms of noise, odor, fumes, etc., to surrounding properties." Horry County Code of Ordinances § 717. This zoning classification prohibits "noise, vibration, smoke, gas, fumes, odor, dust, fire hazards, dangerous radiation or any other conditions [that] constitute a nuisance beyond the premises." Horry County Code of Ordinances § 717.1(P).

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[1] Because we reverse the circuit court's orders on the ground that the circuit court failed to properly apply the appropriate standards of review, we need not address the Board's remaining arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

[2] At some point, Arthur's son, Dennis Thompkins, took over the business, and DT, LLC became the Property's owner. For the purpose of consistency, we will refer to Dennis Thompkins and DT, LLC collectively as "Thompkins" throughout the remainder of this opinion.

[3] This community has been inhabited since the 1700s.

According to Thompkins, since it began operating in 1981, the Construction & Demolition (C&D) division of its business "has crushed, processed, and/or recycled both: (1) C&D material from Thompkins' own demolition projects; and (2) C&D material received from outside sources." Most of the material received from outside sources was from demolished buildings that had "block and reinforced concrete." The business accepted only concrete and masonry for recycling. Also, according to Thompkins, (1) in 2007, it was "required to apply for a business license in order to continue operating in its new zoning district"; (2) the license approved of the recycling activity as an accessory use to what was designated on the license as the principal use of the Property,[4] "Construction Heavy Equipment"; and (3) in 2014, a potential investor in the business sought a "zoning compliance letter" from the Horry County Zoning Administrator, Rennie Mincey, to ensure Thompkins was complying with the County's zoning requirements.

In response to the request of Thompkins' investor, the Zoning Administrator determined that because the recycling activity on the Property was approved as an accessory use only, Thompkins was not authorized to accept construction materials from outside contractors for recycling. Thompkins appealed this determination to the Board, which heard the appeal over the course of four meetings in 2015. At the conclusion of its April 13, 2015 meeting, the Board voted to overturn the Zoning Administrator's determination. It is undisputed that this vote would not have been final until the Board could approve the April meeting minutes at its next meeting on May 11, 2015. However, at the beginning of the May meeting, before approving the April minutes, the Board entertained a motion to reconsider the April 13 vote.

The motion had not been included as an agenda item in the public notice of the May meeting, but the County's planning director had telephoned Thompkins' counsel to advise him that it would be considered at the meeting. During the meeting, several individuals residing in the surrounding community testified to express their concerns. All of the residents who testified at the May 2015 meeting were under the mistaken impression that a landfill was going to be located on the Property. Some of these residents also expressed dissatisfaction with noise and dust in the community, but it is unclear whether they were referring to Thompkins' operations or the concrete plant's operations next-door.

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[4] Horry County defines "Accessory use" as "[a] use of land or of a building, or portion thereof, [that] is customarily incidental and subordinate to the principal use of the land or building." Horry County Code of Ordinances § 401.5. "Accessory uses must be located on the same lot with the principal use." *Id.*

The Board ultimately upheld the Zoning Administrator's determination. Thompkins then filed a notice of appeal of the Board's May 11, 2015 order with the circuit court. Several months later, the circuit court issued a consent order for a six-month continuance of the final hearing so that Thompkins could seek a resolution of its dispute with the Board by way of a variance petition. Subsequently, Thompkins, through counsel, retained Venture to assist with the submission of the variance petition to the Board. Venture filed a variance petition with the Board on Thompkins' behalf, and the Board heard the petition on March 14, 2016.

At the hearing, Venture's President, Steve Powell, testified that in 1985, his firm had taken demolition materials from another contractor to Thompkins' business for recycling, adding: "So, I can state from personal experience that materials have been going to this site since well before the zoning was adopted in 1987." Powell later stated: "It was the only site that almost any contractor in building demolitions could take material to for recycling," and "they've been doing that here continuously since 1981." He explained that when Thompkins had to apply for a business license in 2007, no one recognized the significance of the accessory use designation on the license and it was "completely different from what [they had] done."

Some residents disputed Powell's testimony. Janice Dowe testified Powell's claim that Thompkins had been accepting material from other contractors for thirty-five years was "false" because she had lived in the surrounding community for the same amount of time and the community "didn't have this crushing when [she] originally [moved] out there." Wesley Finley testified: "I'm coming up on my thirtieth anniversary[,] and I can guarantee you there was no plant there thirty years ago . . . . There was no noise there."

The Board issued an order denying the variance petition, and Venture appealed this order. On April 5, 2018, the circuit court reversed the Board's order upholding the Zoning Administrator's determination as well as the Board's order denying Venture's variance petition. The circuit court later denied the Board's motion for reconsideration and granted Venture's motion for costs. This appeal followed.

STANDARD OF REVIEW

In reviewing a decision of a zoning board of appeals, this court applies the same standard of review as the circuit court. *Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals*, 423 S.C. 169, 182, 813 S.E.2d 874, 880 (Ct. App. 2018). Section 6-29-840 of the South Carolina Code (Supp. 2020) requires the circuit court to treat

the findings of fact by a zoning board of appeals "in the same manner as a finding of fact by a jury," and "[i]n determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law." In other words, the decision of a zoning board of appeals must not be disturbed if there is supporting evidence in the record. *Rest. Row Assocs. v. Horry Cty.*, 335 S.C. 209, 215, 516 S.E.2d 442, 446 (1999); *Boehm*, 423 S.C. at 182, 813 S.E.2d at 880. Further, a court must not substitute its judgment for that of the board, "even if it disagrees with the decision." *Rest. Row Assocs.*, 335 S.C. at 216, 516 S.E.2d at 446.

Nonetheless, a reviewing court "may rely on uncontroverted facts [that] 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). Moreover, a board's decision "will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Rest. Row Assocs.*, 335 S.C. at 216, 516 S.E.2d at 446. "An abuse of discretion occurs when a [tribunal's] decision is unsupported by the evidence or controlled by an error of law." *Boehm*, 423 S.C. at 182, 813 S.E.2d at 880 (quoting *Newton v. Zoning Bd. of Appeals for Beaufort Cty.*, 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011)).

LAW/ANALYSIS

The Board asserts that the circuit court failed to give deference to the Board as required by the respective standards of review for each appeal. We agree.

A. Zoning Appeal

In its decision upholding the Zoning Administrator's determination, the Board found that Thompkins' recycling business was approved in 2007 as an accessory use "to the existing construction heavy equipment business that was located on the site in 1981." The Board restated the Zoning Administrator's determination that the recycling of construction material "is approved as an accessory use to a construction and heavy equipment business that was approved on the site prior to zoning of [the Property]." The Board also found that the recycling business could continue as an accessory use but was not permitted to receive materials from other contractors and would have to cease operating altogether "[s]hould the approved Construction Heavy Equipment business use cease operation" at its current location. Without further findings or conclusions of law, the Board stated that it was upholding the Zoning Administrator's decision.

On appeal, the circuit court relied on three grounds to reverse the Board's decision. Before addressing these, we hold that the Board's decision was correct as a matter of law for two reasons: (1) the zoning classification for the Property did not permit Thompkins' acceptance of construction debris from other contractors for recycling and (2) the activity of taking outside debris does not qualify as an accessory use. The County designated the zone in which the Property was located as Limited Industrial (LI), which allows light industrial uses that are "not significantly objectionable in terms of noise, odor, fumes, etc., to surrounding properties." Horry County Code of Ordinances § 717. This zoning classification prohibits "noise, vibration, smoke, gas, fumes, odor, dust, fire hazards, dangerous radiation or any other conditions [that] constitute a nuisance beyond the premises." Horry County Code of Ordinances § 717.1(P). At the Board's February 2015 meeting, Wayne Grissett's testimony indicated that Thompkins' recycling operations contributed to the dust encountered by its neighbors. Therefore, the recycling does not qualify as a principal use under section 717.

Further, Horry County defines "accessory use" as "[a] use of land or of a building, or portion thereof, [that] is customarily incidental and subordinate to the principal use of the land or building." Horry County Code of Ordinances § 401.5. This definition is similar to the description of an accessory use found in case law. *See Whaley v. Dorchester Cty. Zoning Bd. of Appeals*, 337 S.C. 568, 579, 524 S.E.2d 404, 410 (1999) ("Accessory uses are those [that] are customarily incident to the principal use."); *id.* ("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.'" (quoting *Borough of Northvale v. Blundo*, 203 A.2d 721, 723 (N.J. Super. Ct. App. Div. 1964))); *see also* 101A C.J.S. *Zoning and Land Planning* § 148 (2021) ("Generally, the uses of property *permitted in particular zones* by a zoning ordinance or regulation include accessory uses customarily incident to the permitted uses." (emphasis added)); *id.* ("'Accessory use' refers to uses customarily incidental to the *listed permitted uses in a district*." (emphasis added) (citing *Capelle v. Orange Cty.*, 607 S.E.2d 103, 106 (Va. 2005))). We are convinced that Thompkins' recycling of materials from other contractors is not "customarily incidental and subordinate to" the maintenance of his heavy construction equipment on the Property. Because this use cannot qualify as an accessory use, the circuit court should have affirmed the Board's decision on this basis. *See* § 6-29-840(A) ("In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.").

Instead, the circuit court relied on three grounds to reverse the Board's decision, the first of which was its conclusion that there was no "legal basis" for the Board's "distinction" between Thompkins' recycling of its own debris and its recycling of debris from other contractors. This conclusion necessarily rests on the premise that the Board squarely ruled on the issue of whether Thompkins' recycling of its own debris meets the County's definition of accessory use in section 401.5. The Board made no such ruling. Rather, the Board summarily stated that the recycling business approved in 2007 "may continue as an accessory use to the Construction Heavy Equipment business approved on the site" and it was upholding the Zoning Administrator's determination that the business was "not permitted to receive and process materials from other contractors." We infer from the record that the Board's **factual** basis for the distinction was the decrease in the amount of dust and noise imposed on Thompkins' neighbors that would result from prohibiting Thompkins from recycling other contractors' debris.

We acknowledge that the Zoning Administrator's predecessor designated Thompkins' recycling business as an "accessory use" on Thompkins' business license in 2007. However, nothing in the record suggests the 2007 designation was ever challenged on its underlying merits and subsequently upheld by the Board,[5] and the issue of whether Thompkins' recycling of its own debris met the County's definition of accessory use was not squarely before the Board in the present case. Therefore, the Board did not need to make a legal distinction between Thompkins' recycling of its own debris and its recycling of debris from other contractors.

Next, the circuit court concluded that the Board's order was arbitrary and capricious because (1) at the Board's April 2015 meeting, Thompkins presented "overwhelming, credible evidence" that it had been receiving material from outside contractors prior to the issuance of its business license in 2007;[6] therefore, the Board

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[5] *See Pelullo v. Croft*, 18 N.E.3d 1092, 1095 (Mass. App. Ct. 2014) ("[T]he right of the public to have the zoning by-law properly enforced cannot be forfeited by the actions of a municipality's officers. Nor can a permit legalize a structure or use that violates a zoning by-law." (quoting *Building Comm'r of Franklin v. Dispatch Commc'ns of New England, Inc.*, 725 N.E.2d 1059, 1066 (Mass. App. Ct. 2000))); *cf. Nemeth v. K-Tooling*, 955 N.Y.S.2d 419, 423 (N.Y. App. Div. 2012) (holding that the issuance of a building permit "cannot confer rights in contravention of the zoning laws" (quoting *City of Buffalo v. Roadway Transit Co.*, 104 N.E.2d 96, 100 (N.Y. 1952))).

[6] Thompkins presented numerous "load tickets" ostensibly documenting its receipt of other contractors' material during November and December 2006.

properly voted to reverse the Zoning Administrator's determination; (2) the Board failed to explain its reconsideration of its April 2015 decision; and (3) reconsideration of the April decision was not listed as an agenda item in the public notice of the May 2015 meeting, yet several residents in the surrounding community appeared at that meeting, indicating someone had informed them a landfill was going to be located on the Property. The circuit court was heavily influenced by Thompkins' assertion of improper influence by an employee of the County's Solid Waste Authority, as summarized in the circuit court's order.[7] However, our review of the record reveals no direct evidence of nefarious activity or improper influence on the Board's decision. Further, the Board's decision was correct as a matter of law because the zoning classification for the Property did not permit Thompkins' acceptance of construction debris from other contractors for recycling and the activity of taking outside debris does not qualify as an accessory use.

The circuit court's third ground for reversing the Board's May 2015 decision was its conclusion that Thompkins had a vested right to continue accepting material from outside sources for recycling because it began this use before the County enacted its first zoning ordinance and, thus, it was a legal nonconforming use. *See Whaley*, 337 S.C. at 578, 524 S.E.2d at 409–10 ("A landowner acquires a vested right to continue a nonconforming use already in existence at the time of a zoning ordinance absent a showing [that] the continuance of the use constitutes a detriment

[7] Specifically, the circuit court found that between April and May 2015, Thompkins "was informed an individual from [the] Solid Waste Authority was contacting members of the Board in an effort to persuade the Board members to reconsider their votes," and Thompkins' counsel "addressed this concern in a letter to counsel for Horry County." The circuit court further stated: "Subsequently, [Thompkins] was informed by [the] Horry County Planning Director . . . [that] the Board was going to move to reconsider its vote overturning [the Zoning Administrator's] decision at their May 11, 2015 Board Meeting."

The circuit court also found that at the Board's May 2015 meeting, the Board moved to reconsider its vote and residents in the surrounding community appeared and "voiced unsubstantiated complaints about Thompkins' business" despite the fact that the reconsideration had not been listed as an item on the Board's published agenda. The circuit court added, "These persons' complaints strongly suggest to the [c]ourt that, between April and May 2015, someone told residents near the Property that Thompkins was going to begin taking in and recycling compost/trash, which Thompkins had never done and did not seek to do."

to the public health, safety, or welfare."). However, the record for the zoning appeal, as opposed to the variance appeal, does not support the circuit court's conclusion.

Although evidence of a nonconforming use was presented at the Board's hearing on the variance request, this hearing occurred approximately ten months after the Board's hearing to review the Zoning Administrator's determination, and therefore, the Board did not have the benefit of this evidence when it issued its order upholding the Zoning Administrator's determination. Further, the circuit court erred in relying on counsel's arguments before the Board as evidence of a nonconforming use. *See S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) ("Arguments made by counsel are not evidence."); *McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.").

The circuit court also erred in relying on the testimony of two individuals working in the construction industry in Horry County because these individuals did not provide any specific dates. They merely indicated that Thompkins had been recycling concrete for other contractors "for years." Therefore, the circuit court's conclusion that Thompkins had a vested right to continue accepting material from outside sources did not have any evidentiary support in the record for the zoning appeal.

Based on the foregoing, the circuit court erred by reversing the Board's decision in the zoning appeal.

B. Variance Appeal

In reviewing a zoning board's decision on a request for a variance from a zoning ordinance's requirements, the circuit court must consider not only the general standard of review from a zoning board's decision but also the specific standards for granting a variance. Section 6-29-800(A)(2) of the South Carolina Code (Supp. 2020) prohibits the granting of a variance unless "strict application of the provisions of the ordinance would result in unnecessary hardship" to the applicant and the board "makes and explains in writing the following findings:

> (a) there are extraordinary and exceptional conditions pertaining to the particular piece of property;

> (b) these conditions do not generally apply to other property in the vicinity;
>
> (c) because of these conditions, the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property; *and*
>
> (d) the authorization of a variance *will not be of substantial detriment to adjacent property or to the public good, and the character of the district will not be harmed by the granting of the variance*.
>
> > (i) The board may not grant a variance, the effect of which would be to allow the establishment of a use not otherwise permitted in a zoning district, to extend physically a nonconforming use of land or to change the zoning district boundaries shown on the official zoning map. The fact that property may be utilized more profitably, if a variance is granted, may not be considered grounds for a variance. Other requirements may be prescribed by the zoning ordinance.

(emphases added). "Granting a variance is an exceptional power [that] should be sparingly exercised and can be validly used only [when] a situation falls fully within the specified conditions." *Rest. Row Assocs.*, 335 S.C. at 215, 516 S.E.2d at 445–46.

In its decision denying the variance request, the Board cited the factors set forth in section 6-29-800(A)(2) and found that in 2007, a certificate of zoning compliance was issued for the recycling business "as an accessory use to the existing construction and heavy equipment business." The Board also found that Thompkins was not then permitted "to receive and process material from other contractors" but was proposing to do so in its variance application. The Board noted that a rezoning of the Property to "MA3 (Heavy/Intense Manufacturing and Industrial District)" was required to allow the proposed use and Thompkins was seeking a variance from three requirements for an MA3 district, i.e., (1) all proposed plant sites shall be located a minimum of five hundred feet from any residential lot; (2) all processing plants shall be located in fully enclosed structures; and (3) the site must be screened through

enhanced buffers around the entire work area (with an opening for approved entrances) if located within one thousand feet of a residential area.[8] The Board's order included a section for conclusions of law, but the sole conclusion was that Thompkins' request did not meet "the criteria set forth in Horry County Code § 1404(B) and S.C. Code Ann. § 6-29-800."[9]

On appeal, the circuit court concluded that it did not need to reach the issues due to its disposition of the zoning appeal. Nevertheless, the circuit court relied on two additional grounds to reverse the Board's decision. First, the circuit court concluded that the Board's decision was arbitrary because Thompkins met the factors set forth in section 6-29-800(A)(2). We disagree.

Although the Board's written order failed to set forth any reasoning, the hearing transcript and the Board's minutes indicate the Board's decision was supported by the testimony of residents in the surrounding community expressing concerns about particulates, noise, and traffic.[10] Additionally, the Board's minutes recount a Board member's statement that the Board "had concerns with the nuisance, airborne particulates[,] and the traffic from the heavy trucks." Therefore, the neighbors' testimony likely persuaded the Board to conclude that the requested variances would be a "substantial detriment" to surrounding residences and would harm the surrounding community's character. *See* § 6-29-800(A)(2)(d) (requiring a finding that the variance will not be a substantial detriment to adjacent property or

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[8] Specifically, Thompkins requested a variance from the requirement that the business must be separated from residential lots by at least five hundred feet and sought to perform recycling operations in the open rather than in a fully enclosed structure. Thompkins also proposed an earthen berm on one side of the property in addition to its existing landscaping rather than meeting the code's specifications for the enhanced buffer.

[9] The language of Horry County Code section 1404(B) is virtually identical to the language in section 6-29-800(A)(2).

[10] *See Vulcan*, 342 S.C. at 494, 536 S.E.2d at 899 ("Generally, the format of a final decision is immaterial as long as the substance of the decision is sufficiently detailed so as to allow a reviewing court to determine if the decision is supported by the facts of the case."); *cf. Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 35, 606 S.E.2d 209, 212 (Ct. App. 2004) (holding that reading the hearing transcript together with a letter informing the applicant of the board's decision provided a "sufficient basis for a reviewing court to determine whether the decision was supported by the facts of the case" because the evidence was "clearly laid out in the transcript" and the issue raised to the board was limited to a narrow factual question).

to the public good and the character of the district will not be harmed). Reaching such a conclusion is a judgment call that is exclusively within the Board's province. *See Rest. Row Assocs.*, 335 S.C. at 216, 516 S.E.2d at 446 (holding that a court must not substitute its judgment for that of the board, "even if it disagrees with the decision").

The circuit court also concluded that Thompkins had a vested right to continue accepting material from outside contractors because it began this use before the County enacted its first zoning ordinance. *See Whaley*, 337 S.C. at 578, 524 S.E.2d at 409–10 ("A landowner acquires a vested right to continue a nonconforming use already in existence at the time of a zoning ordinance absent a showing [that] the continuance of the use constitutes a detriment to the public health, safety, or welfare."). Although the circuit court cited only counsel's arguments before the Board, Venture's President, Steve Powell, gave supporting testimony at the Board's March 14, 2016 hearing. Nonetheless, Thompkins cannot acquire a vested right to continue the nonconforming use if there is a showing that continuing the use "constitutes a detriment to the public health, safety, or welfare." *See id.* The testimony of Thompkins' neighbors constituted such a showing. Therefore, the circuit court erred in reversing the Board's decision on the ground that Thompkins had a vested right to continue accepting material from outside contractors. *See Rest. Row Assocs.*, 335 S.C. at 215, 516 S.E.2d at 446 (holding that the decision of a zoning board of appeals must not be disturbed if the record includes supporting evidence).

Based on the foregoing, the circuit court erred by reversing the Board's decision in the variance appeal.

CONCLUSION

Accordingly, the circuit court's order on the merits and its order granting costs to Venture are

REVERSED.

KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Eric Dale Morgan, Appellant.

Appellate Case No. 2018-001465

Appeal From Spartanburg County
Edward W. Miller, Circuit Court Judge

Opinion No. 5820
Heard March 2, 2021 – Filed May 12, 2021

REVERSED AND REMANDED

Lindsey Sterling Vann and Hannah Lyon Freedman, both of Justice 360, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Sherrie Butterbaugh, and Assistant Attorney General Michael Douglas Ross, all of Columbia; and Solicitor Barry Joe Barnette, of Spartanburg, for Respondent.

HEWITT, J.: Eric Morgan was sentenced to death for a murder he committed roughly two weeks before he turned eighteen. He was resentenced and given life

without parole (LWOP) after the U.S. Supreme Court ruled the death penalty unconstitutional for crimes committed while the offenders were juveniles.

This appeal arises out of Morgan's request for an additional resentencing. He brought that request years after his first resentencing, but shortly after our supreme court's decision in *Aiken v. Byars* invited new proceedings for certain people with LWOP sentences. *See* 410 S.C. 534, 765 S.E.2d 572 (2014).

The circuit court dismissed Morgan's request on the grounds the mitigating features of Morgan's youth had already been explored in Morgan's death penalty trial and in the resentencing when Morgan received LWOP; years before *Aiken* was decided. We reverse because Morgan falls within the class entitled to relief under *Aiken*.

FACTS

Morgan went to trial in March 2004 on charges for murder, armed robbery, and possessing an explosive device. The crime was senseless and tragic. Morgan shot and killed a convenience store clerk as Morgan and a friend attempted to rob the store.

The jury found Morgan guilty of all charges. Based on the jury's recommendation, Judge J. Derham Cole sentenced Morgan to death for the murder, a consecutive sentence of thirty years for armed robbery, and a concurrent sentence of fifteen years for possessing an explosive device.

Our supreme court vacated Morgan's death sentence in 2006 pursuant to the U.S. Supreme Court's decision in *Roper v. Simmons* because Morgan was seventeen at the time he committed the murder. *State v. Morgan*, 367 S.C. 615, 626 S.E.2d 888 (2006); *see also Roper*, 543 U.S. 551 (2005) (holding that sentencing individuals who were minors when they committed a crime was cruel and unusual punishment under the U.S. Constitution). Judge Cole held a resentencing hearing later that year and sentenced Morgan to LWOP. Morgan did not appeal. The transcript from the resentencing hearing was not preserved.

Ten years later—in July 2016—Morgan moved for a second resentencing and argued he fell within *Aiken's* mandate because he was seventeen at the time he committed his crimes. The State moved to dismiss, arguing Morgan already had the benefit of a resentencing hearing meeting *Aiken's* requirements when he was

resentenced in 2006. Morgan disagreed, arguing it was not possible for the court to have sufficiently considered the *Aiken* factors in 2006 because *Aiken* was not decided until 2014.

The State called Judge Cole as a witness at the hearing on the State's motion to dismiss. This was over Morgan's objection. As already noted, Judge Cole presided over Morgan's capital proceedings and his 2006 resentencing. Judge Cole testified he considered several factors at Morgan's 2006 resentencing, including the circumstances of the murder, aggravating and mitigating factors, and testimony from Morgan's friends and family. Judge Cole testified he also considered factors related to youth, including Morgan's age at the time of the crimes, Morgan's maturity level, and other youth-related characteristics. Judge Cole additionally said:

> I didn't ignore the fact that 12 randomly chosen citizens thought that [Morgan] should be sentenced to death based upon the nature of the crime and his particular circumstances. That, of course, is not constitutionally permitted now, but it's not something that should be ignored upon the fact that those selected to hear the facts and apply the law thought he should be put to death. And . . . if the crime happened 16 days later, we wouldn't be sitting here today.

The circuit court ruled Morgan's 2006 resentencing hearing sufficiently considered the factors related to Morgan's youth and therefore satisfied *Aiken's* requirements. Morgan filed a motion for reconsideration which the circuit court denied. This appeal followed.

ISSUES

Did the circuit court err by dismissing Morgan's motion for an *Aiken* resentencing hearing?

Did the circuit court err by allowing Judge Cole to testify?

ANALYSIS

The arguments here are the same arguments summarized above: Morgan contends he falls within the class of individuals identified in *Aiken* and is entitled to a *de novo* sentencing hearing to consider the factors of youth the opinion identified. He claims his 2006 resentencing hearing did not comply with *Aiken* and could not have complied with *Aiken* because *Aiken* was not decided until 2014.

The State argues the circuit court did not err because Morgan received a full mitigation investigation before his 2004 death penalty trial plus an individualized sentencing hearing when he was resentenced in 2006. The State contends Judge Cole's testimony demonstrates he considered Morgan's youth, satisfying *Aiken's* requirements.

There is no question Judge Cole considered Morgan's youth when resentencing Morgan in 2006. Even so, we are convinced this was not sufficient to satisfy *Aiken's* requirements for the reasons given below.

"When considering whether a sentence violates the Eighth Amendment's prohibition on cruel and unusual punishments, the appellate court's standard of review extends only to the correction of errors of law." *State v. Finley*, 427 S.C. 419, 423, 831 S.E.2d 158, 160 (Ct. App. 2019). "Therefore, this court will not disturb the circuit court's findings absent a manifest abuse of discretion." *Id.* "An abuse of discretion occurs when the circuit court's finding is based on an error of law or grounded in factual conclusions without evidentiary support." *Id.*

In *Aiken*, our supreme court held the U.S. Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), applied retroactively. *See Aiken*, 410 S.C. at 534, 765 S.E.2d at 572. *Miller* held that mandatory imposition of LWOP sentences on juveniles was cruel and unusual punishment. *See Miller*, 567 U.S. at 489. *Aiken* held that juvenile offenders were entitled to an individualized sentencing hearing if they were "convicted for homicides committed while they were juveniles" and "were sentenced to [LWOP] according to existing sentencing procedures, which made no distinction between defendants whose crimes were committed as an adult and those whose crimes were committed as a juvenile." 410 S.C. at 537, 765 S.E.2d at 573.

The *Aiken* majority[1] explained that *Miller* established "an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered." *Id.* at 543, 765 S.E.2d at 577. *Aiken* also held "any juvenile offender who receives a sentence of [LWOP] is entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment[,]" regardless of whether it had been mandatory for the circuit court to impose an LWOP sentence. *Id.* at 544, 765 S.E.2d at 577. *Aiken* specifically required South Carolina courts to consider the following factors of youth when sentencing juveniles:

> (1) the chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate the risks and consequence"; (2) the "family and home environment" that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the "incompetencies associated with youth—for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys"; and (5) the "possibility of rehabilitation."

Id. at 544, 765 S.E.2d at 577 (quoting *Miller*, 567 U.S. at 477–78). These factors "require[] the sentencing authority 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" *Id.* (quoting *Miller*, 567 U.S. at 480).

There have only been a few published cases in this area after *Aiken*. Those cases all involved individuals who were not similarly situated to the *Aiken* petitioners—none of those individuals received LWOP sentences. *See State v. Smith*, 428 S.C. 417, 836 S.E.2d 348 (2019) (finding a mandatory minimum sentence of thirty years' imprisonment for murder did not violate the Eighth Amendment or *Miller*); *State v.*

[1] Because Justice Pleicones stated he would reach the same result as the lead opinion under the South Carolina Constitution, we refer to the lead opinion (authored by Justice Hearn) as "the majority." *See Aiken*, 410 S.C. at 545–46, 765 S.E.2d at 578 (Pleicones, J., concurring).

Slocumb, 426 S.C. 297, 827 S.E.2d 148 (2019) (finding an eighty year aggregate sentence for multiple crimes committed as a juvenile did not violate the Eighth Amendment pursuant to *Miller*, *Graham v. Florida*,[2] or *Aiken*); *Finley*, 427 S.C. at 419, 831 S.E.2d at 158 (finding the defendant's mandatory sentence for life imprisonment but *with* the possibility of parole did not violate the Eighth Amendment and that the defendant was not entitled to resentencing).

Morgan's case cannot be meaningfully distinguished from *Aiken* in that same way. Morgan plainly falls within the class *Aiken* identified: he was under the age of eighteen at the time he committed the murder and was sentenced to LWOP at his 2006 resentencing hearing. *See Aiken*, 410 S.C. at 537, 765 S.E.2d at 573 (declaring juvenile offenders were entitled to an individualized sentencing hearing if they were (1) convicted for homicide offenses while they were juveniles and (2) were sentenced to LWOP according to existing sentencing procedures that made no distinction between defendants whose crimes were committed as an adult and those whose crimes were committed as a juvenile).

We agree with the State that the record contains evidence that Judge Cole considered Morgan's youth. We also acknowledge Morgan's first sentencing proceeding was a death penalty proceeding. Still, we cannot agree that adding these past hearings together produces a hearing that complied with *Aiken*. *Aiken* clearly states that even though some of the sentencing proceedings for the petitioners in that case "touch[ed] on the issues of youth," none approached the sort of hearing envisioned by *Miller* where the factors of youth were "carefully and thoughtfully considered." 410 S.C. at 543, 765 S.E.2d at 577.

First, there is a problem of timing. *Miller*—the key U.S. Supreme Court case that led to *Aiken*—was not decided until 2012. *Aiken* was not decided until 2014. We do not doubt the sentencing judge diligently considered Morgan's age and other factors associated with youth. Still, it was not possible for the court in 2006 to *fully* consider the factors identified in *Miller* and *Aiken*. Those cases did not exist yet.

Second, there is no getting around the fact that *Aiken* added new things for the sentencing court to consider. Some of the *Aiken* and *Miller* factors have a degree of overlap with the statutory mitigating factors that would have been the focus of Morgan's capital sentencing proceeding. *See* S.C. Code Ann. § 16-3-20(C)(b)

[2] 560 U.S. 48 (2010).

(2015) (listing age, mentality, and being under eighteen as mitigating circumstances). Yet, there is plainly a difference between those factors and the more extensive ones identified in *Aiken* that are specifically targeted at youth. For example, although the sentencing court was free to consider the possibility of rehabilitation prior to *Aiken*, it did so without the analytical framework from *Aiken*. And nothing before *Aiken* put extra weight on the opposite side of the scale from LWOP—*Aiken* requires the sentencing court to consider how the differences between youth and adults counsel against an irrevocable lifetime sentence. Even if we pretended these differences did not exist, a sentencing hearing where youth is but one of many considerations is different than conducting a sentencing proceeding where youth is a special consideration and where specific factors related to youth are mandatory guideposts.

Finally, our decision is driven by our reading of the *Aiken* dissent. The dissent noted South Carolina's discretionary sentencing scheme already allowed courts to consider the hallmark features of youth in sentencing. *Id.* at 547, 765 S.E.2d at 579 (Toal, C.J., dissenting). Of particular note, the dissent analyzed one of the *Aiken* petitioners—Angelo Ham—who received an LWOP sentence after a lengthy sentencing hearing in which many factors were considered, including factors related to youth. *Id.* at 547–52, 765 S.E.2d at 579–81. In applauding the sentencing court's diligent work in conducting the hearing, the dissenters wrote it was "absurd that the majority orders resentencing for *all* petitioners without considering the adequacy of the original hearings." *Id.* at 552, 765 S.E.2d at 581–82.

The majority did not let the point go unanswered. The lead opinion explained that "although some of the hearings touch[ed] on the issues of youth, none of them approach[ed] the sort of hearing envisioned by *Miller* where the factors of youth [were] carefully and thoughtfully considered." *Id.* at 543, 765 S.E.2d at 577. The majority directly addressed the dissent's criticisms, explaining:

> The dissent's discussion of the individual sentencing hearings—in particular its recitation of Angelo Ham's—does not dissuade us of the accuracy of this statement. Instead it highlights the distinction between its reading of *Miller* and ours—we recognize and give credence to the decision's command that courts afford youth and its attendant characteristics constitutional meaning. The

> dissent would simply continue to treat the characteristics of youth as any other fact.
>
> We are likewise unfazed by the dissent's criticism that we have failed to pinpoint an abuse of discretion; that admonition appears to arise from a fundamental misunderstanding of our holding. We have determined that the sentencing hearings in these cases suffer from a constitutional defect—the failure to examine the youth of the offender through the lens mandated by *Miller*. We decline to denominate the error an abuse of discretion because the sentencing courts in these instances did not have the benefit of *Miller* to shape their inquiries. Those courts will have the opportunity on resentencing to exercise their discretion within the proper framework as outlined by the United States Supreme Court.

Id. at 543 n.8, 765 S.E.2d at 577 n.8.

We believe Morgan's case is not meaningfully different from Angelo Ham's and that we are bound by the *Aiken* majority's reasoning that the degree to which youth was considered in this case could not satisfy the requirements of *Miller* or *Aiken* because the "constitutional meaning" afforded to youth and its attendant characteristics require a sentencing hearing tailored to those characteristics.

In reaching this conclusion, we note that we are not expanding any constitutional protections, but rather are finding Morgan falls within the protections prescribed under *Miller* and *Aiken*. *See Slocumb*, 426 S.C. at 306, 827 S.E.2d at 153 (stating both federal and South Carolina "precedent prohibits us from extending federal constitutional protections beyond the boundaries the Supreme Court itself has set").

Because this issue is dispositive, we decline to address Morgan's remaining issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

CONCLUSION

We reverse the circuit court's order denying Morgan's request for an *Aiken* resentencing hearing and remand this case to the circuit court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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