The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF EDWIN DONALD GIVENS, PETITIONER

Petitioner was definitely suspended from the practice of law for nine (9) months, retroactive to May 15, 2014. *In the Matter of Edwin Donald Givens*, 411 S.C. 456, 769 S.E.2d 438 (2015). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
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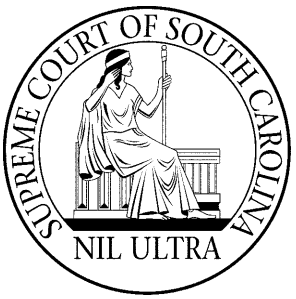
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
April 30, 2015



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 18
May 6, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

W. H. Bundy, Jr., Respondent,

v.

Bobby Brent Shirley, Petitioner.

Appellate Case No. 2013-001263

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Kershaw County
Roderick Murchison Todd, Jr., Special Referee

Opinion No. 27520
Heard March 3, 2015 – Filed May 6, 2015

AFFIRMED AS MODIFIED

John W. Wells, of Baxley Pratt & Wells, P.A., of Lugoff, for Petitioner.

Michael Brent McDonald, of Smith Bundy Bybee & Barnett, P.C., of Mount Pleasant, for Respondent.

JUSTICE BEATTY: In this declaratory judgment action, W. H. Bundy, Jr. sought a determination of whether Bobby Brent Shirley established a prescriptive easement over a road on rural property owned by Bundy. The special referee found Shirley was entitled to the easement. The Court of Appeals reversed. *Bundy*

v. Shirley, Op. No. 2013-UP-153 (S.C. Ct. App. filed May 8, 2013). This Court granted Shirley's petition for a writ of certiorari to review the decision of the Court of Appeals. We affirm as modified.

I. Factual / Procedural History

As stipulated by the parties, the Bundy property traced back to a plat prepared on September 26, 1960. The plat depicts a continuous dotted line that includes Saxon Road, which is maintained by Sumter County and Kershaw County, and the disputed dirt road leading to the Bundy property. In 1968, Sumter County and Kershaw County began maintaining that portion of Saxon Road in their respective counties. The maintenance extended from the Sumter-Kershaw County line to the Miller property, which is the last occupied residence on Saxon Road.

Although there were multiple predecessors-in-title, Bundy ultimately purchased his seven tracts of rural property in Kershaw County on March 14, 2003 from Bowater Timber 1, L.L.C ("Bowater"). Throughout Bowater's ownership, the South Carolina Department of Natural Resources ("SCDNR") had a legal interest in the property as it was enrolled in the Wildlife Management Area Program between 1985 and 2003. This program allowed the public to access all portions of the property subject to the program's rules and regulations, which included the requirement that a person seeking to hunt on the property procure a permit. During the off-season, Bowater strung a locked cable on two posts at the entrance of the property. On December 22, 2003, Bundy conveyed a conservation easement on the property to Congaree Land Trust, which prevents development and subdivision of the property in the future and allows Bundy to plant pine trees.

The thirty-seven acre tract of land known as the Shirley property was acquired by Shirley's parents on May 10, 1985. Shirley's parents transferred the property to Shirley on February 21, 2005. While there were several predecessors-in-title, the pertinent ownership relied on by Shirley was the Bennett family ownership between December 19, 1947 and April 29, 1969. As stipulated by the parties, Elijah Bennett and his family used Saxon Road and the disputed road as their sole access to the Shirley property. Bennett farmed the land from 1948 until 1957 and rented a portion of the property to the Miller family during the 1960s.

Shirley, whose property is landlocked by surrounding owners, used the disputed road on Bundy's property from 1985 to 2004 for ingress and egress to his property. Throughout the time period that the property was leased to SCDNR,

Shirley used a key, which was given to him and his father by a SCDNR game warden, to unlock the gate.

In early 2004, shortly after Bundy purchased his property, Shirley received permission from Bundy to erect a gate over the disputed road in an effort to limit the public from using the surrounding property to dump trash. The gate was located at the same location as the Bowater cable. Shortly thereafter, Bundy hired a company to clear a portion of his property so that he could plant pine trees. Shirley became upset when a logging truck, which was owned by the company hired by Bundy, blocked access to his property. According to Bundy, Shirley called him and threatened him with violence regarding the incident. As a result of the threat, Bundy called Shirley on September 12, 2005 and instructed him to take down the gate and told him to stop using the disputed road to access his property. In response, Shirley yelled at Bundy and threatened him again with violence. Shirley testified that he believed he had a right to use the road because he thought it was a continuation of Saxon Road.

On March 24, 2009, Bundy filed a declaratory judgment action seeking a determination of whether Shirley had a prescriptive easement over the disputed road. Alternatively, if the court ruled that Shirley was entitled to the easement, Bundy sought a determination regarding the type of easement and the rights and duties of the easement holder, including whether the easement was assignable or transferable. Shirley filed an Answer and Counterclaim in which he sought a declaration that the disputed road was public or, alternatively, that he had a private, permanent easement. In his Reply, Bundy alleged several affirmative defenses to Shirley's counterclaims, including that Shirley was barred from recovery based on the equitable doctrines of estoppel and unclean hands and that Shirley's use of the disputed road was permissive.

Following a two-day trial, the special referee ruled that Shirley was entitled to an easement, which measured eight feet in width, across Bundy's property. Based on the stipulations of the parties, the testimony presented, and the exhibits, the special referee concluded that Shirley proved by a preponderance of the evidence that the Bennett family used the disputed roadway between 1947 and 1969 "continuously" and in a "manner that was adverse to the interests of the owners at that time of the tract now owned by [Bundy]." Having concluded that Shirley established a prescriptive easement during the Bennett ownership period, the special referee found it was "unnecessary to establish a prescriptive easement during the Shirley ownership period." However, the special referee concluded, as a

matter of law, that Shirley had proven that "his parents and he used the disputed road continuously for a period of twenty (20) years."

The special referee also found that Shirley's "continued use of the clearly identified disputed road under a claim of right establishes a prescriptive easement during the Shirley ownership period without the need to show that the use was adverse." Citing *Revis v. Barrett*,[1] the special referee stated "[p]ermission does not defeat an easement by prescription based on claim of right." The special referee also rejected Bundy's evidence that Shirley's use was permissive. Referencing Shirley's "violent outburst" toward Bundy, the special referee concluded that Shirley's use of the disputed road was adverse and hostile.

The special referee further determined that Sumter County and Kershaw County derived their right to maintain a portion of Saxon Road from a prescriptive easement because there was no evidence presented that either county obtained any right-of-way deeds. Because the counties maintained a portion of Saxon Road, the special referee found that Saxon Road is a public road and, therefore, "the disputed road in this case is unmistakably a portion of Saxon Road."

Subsequently, Bundy filed a timely motion for reconsideration in which he alleged, *inter alia*, the special referee erred in finding that Saxon Road is a public road and ruling as a matter of law that permissive use does not defeat a claim of a prescriptive easement. The special referee affirmed the grant of a prescriptive easement to Shirley. However, he granted Bundy's motion in part as the special referee reversed his ruling on Shirley's claim of an easement based on a public dedication theory. Bundy appealed the special referee's orders to the Court of Appeals.

The Court of Appeals reversed the special referee's decision, finding Shirley did not establish that his use of the disputed road was adverse or under a claim of right for twenty years. *Bundy v. Shirley*, Op. No. 2013-UP-153 (S.C. Ct. App. filed May 8, 2013). In so ruling, the court initially held the special referee erred as a matter of law in concluding that permission "does not defeat an easement by prescription based on a claim of right." *Id.*, slip op. at 2. The court found the

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[1] *See Revis v. Barrett*, 321 S.C. 206, 467 S.E.2d 460 (Ct. App. 1996) (affirming master's ruling that plaintiff was entitled to a prescriptive easement as there was ample evidence to support the master's finding that plaintiff's belief about her right to use the road flowed from a "claim of right" not from the defendant's grant of permission).

special referee's conclusion was contrary to established law, which states that permission defeats a claim to a prescriptive easement because the use of the disputed property is no longer deemed adverse or under claim of right. *Id.*, slip op. at 2-3 (citing *Paine Gayle Props., L.L.C. v. CSX Transp., Inc.*, 400 S.C. 568, 585-86, 735 S.E.2d 528, 537-38 (Ct. App. 2012)).

With this principle in mind, the court noted that the parties stipulated: (1) the property Shirley now owns was transferred to Shirley's parents on May 10, 1985; and (2) in 2004, Shirley put up a gate on the disputed road with the permission of Bundy. *Id.*, slip op. at 2. Based on these stipulations, the court concluded that Bundy's grant of permission for Shirley to build the gate defeated a claim of right or adverse use of the disputed road. *Id.*, slip op. at 2-3. Additionally, the court ruled the special referee erred in finding that because Shirley established a "prescriptive easement during the Bennett ownership period, it [was] unnecessary to establish a prescriptive easement during the Shirley ownership period." *Id.*, slip op. at 3.

In order to utilize the Bennett family's prescriptive use of the disputed road, the court found Shirley was required to offer evidence that the disputed road continued to be used under a claim of right or in an adverse manner during the time period between the Bennett family's use and the Shirley family's use. *Id.* The court determined Shirley failed to present evidence that the use of the disputed road was adverse or under claim of right between 1968[2] and 1985, the time period between the Bennett family's ownership and the Shirley family's ownership. *Id.* Consequently, the court concluded that even if the special referee was correct that the Bennett family had a prescriptive easement over the disputed road, Shirley was unable able to tack the Bennett family's use to establish his prescriptive easement claim. *Id.* Accordingly, the court found the special referee erred by granting Shirley a prescriptive easement. *Id.* Finding this ruling dispositive of the appeal, the court declined to address Bundy's remaining arguments. *Id.*

Following the filing of the court's opinion on April 10, 2013, Shirley timely filed a petition for rehearing and a reply to Bundy's return to the petition for rehearing. Before reviewing Shirley's reply that was filed the afternoon of May 8, 2013, the court denied the petition for rehearing, withdrew the original opinion, and filed a substituted opinion on May 8, 2013. However, in an order dated May 20, 2013, the court stated that it had reviewed Shirley's reply but declined to alter

[2] The record reflects the Bennett family owned their property from 1947 to 1969.

its decision denying the petition for rehearing or substituting the opinion. This Court granted Shirley's petition for a writ of certiorari to review the decision of the Court of Appeals.

II. Standard of Review

Declaratory judgments are neither legal nor equitable. *Felts v. Richland Cnty.*, 303 S.C. 354, 400 S.E.2d 781 (1991); *Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 542 S.E.2d 752 (Ct. App. 2001). The standard of review for a declaratory judgment action is, therefore, determined by the nature of the underlying issue. *Doe v. S. C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 557 S.E.2d 670 (2001); *Wiedemann*, 344 S.C. at 236, 542 S.E.2d at 753; *see Travelers Indem. Co. v. Auto World of Orangeburg, Inc.*, 334 S.C. 137, 511 S.E.2d 692 (Ct. App. 1999) (recognizing that a suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of underlying issue).

The determination of the existence of an easement is a question of fact in a law action. *Jowers v. Hornsby*, 292 S.C. 549, 357 S.E.2d 710 (1987). The instant case was referred to a special referee for entry of a final judgment. Accordingly, our scope of review is limited to correction of errors of law, and we will not disturb the special referee's factual findings that have some evidentiary support. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). However, the determination of the extent of a grant of an easement is an action in equity. *Inlet Harbour v. S. C. Dep't of Parks, Recreation & Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). Thus, we may take our own view of the evidence on the latter issue. *Id.*

III. Discussion

A. Violation of Due Process

As an initial matter, Shirley asserts the Court of Appeals violated his right to procedural due process under the Fourteenth Amendment to the United States Constitution[3] by denying his petition for rehearing prior to reviewing his timely reply to Bundy's return to his petition for rehearing. He claims the remedy for this due process violation is for this Court to grant certiorari to review the decision of the Court of Appeals.

[3] U.S. Const. amend. XIV.

We find this issue is moot as Shirley received the requested relief when this Court granted his petition for a writ of certiorari. *See Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591 (2001) (stating that a case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy); *Waters v. S. C. Land Res. Conservation Comm'n*, 321 S.C. 219, 467 S.E.2d 913 (1996) (recognizing that a justiciable controversy is a real and substantial controversy that is ripe and appropriate for judicial determination, as opposed to a dispute or difference of contingent, hypothetical or abstract character). However, even assuming the issue is proper for the Court's consideration, we find it is without merit.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Id.* "Due process is flexible and calls for such procedural protections as the particular situation demands." *S. C. Dep't of Soc. Servs. v. Wilson*, 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

Before reviewing Shirley's reply that was filed the afternoon of May 8, 2013, the Court of Appeals denied the petition for rehearing, withdrew the original opinion, and filed a substituted opinion on May 8, 2013. After recognizing the error, the court reviewed Shirley's reply and issued an order on May 20, 2013 stating that it had reviewed Shirley's reply but declined to alter its decision denying the petition for rehearing and substituting the opinion. We find that Shirley's right to due process was not violated because he was afforded an opportunity to be heard and received judicial review of his reply.

B. Prescriptive Easement

As to the merits of the Court of Appeals' decision, Shirley contends the court erred in reversing the special referee's grant of a prescriptive easement. Specifically, Shirley claims the Court of Appeals erred in ruling as a matter of law that Bundy's grant of permission to build a gate on the disputed road defeated his claim for a prescriptive easement. Additionally, Shirley avers the Court of Appeals erred by requiring him to prove a period of use that was adverse or under

claim of right in excess of the requisite twenty-year period for a prescriptive easement.

a. Standard of Proof

An easement is a right given to a person to use the land of another for a specific purpose. *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 232, 662 S.E.2d 452, 455 (Ct. App. 2008). "An easement may arise in three ways: (1) by grant; (2) from necessity; and (3) by prescription." *Kelley v. Snyder*, 396 S.C. 564, 572, 722 S.E.2d 813, 817 (Ct. App. 2012). Here, Shirley sought an easement by prescription. "A prescriptive easement is not implied by law but is established by the conduct of the dominant tenement owner." *Boyd v. BellSouth Tel. Tel. Co.*, 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006). To establish a prescriptive easement, one must show: (1) continued and uninterrupted use or enjoyment of the right for a period of twenty years; (2) the identity of the thing enjoyed; and (3) use or enjoyment which is either adverse or under claim of right. *Pittman v. Lowther*, 363 S.C. 47, 50, 610 S.E.2d 479, 480 (2005).

Although the elements of a prescriptive easement are well-established, the standard of proof as to these elements has given rise to confusion among the bench and bar. This confusion is understandable as the majority of the prescriptive easement cases in this state do not specifically enunciate the standard. Instead, our state cases: (1) simply outline the elements of a prescriptive easement and identify the claimant as having the burden of proving these elements; or (2) analogize the establishment of a prescriptive easement to that of adverse possession, which requires clear and convincing proof. *See, e.g.*, *Morrow v. Dyches*, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997) ("The party claiming a prescriptive easement has the burden of proving all elements."); *Davis* v. *Monteith*, 289 S.C. 176, 180, 345 S.E.2d 724, 726 (1986) (stating claimant had the burden of proving adverse possession by clear and convincing evidence); *see* 12 S.C. Jur. *Easements* § 10 (Supp. 2015) ("A prescriptive easement is analogous to adverse possession.").

Our state decisions on adverse possession are instructive because "[t]he right to an easement by prescription is substantially the same in quality and characteristics as that required to acquire title to real estate by adverse possession." 25 Am Jur. 2d *Easements & Licenses* § 39 (2014). Even so, these cases are not dispositive given the fundamental differences between a claim of adverse possession and one by prescription. Specifically, "adverse possession operates to *divest title* to the land at issue whereas the rights of prescriptive easement in land

are measured and defined *by the use* made of the land giving rise to the easement." *Id.* (emphasis added).

Moreover, other state jurisdictions are divided as to whether the standard of proving a prescriptive easement is by clear and convincing evidence or a preponderance of the evidence. *See* Daniel J. Smith, *Establishment of Private Prescriptive Easement*, 2 Am. Jur. *Proof of Facts* 3d 125 § 3 (1988 & Supp. 2015) (recognizing that majority of jurisdictions hold that the burden of proving an easement is on the party claiming such right and must be established by clear and convincing proof); James W. Ely, Jr. and Jon W. Bruce, *The Law of Easements and Licenses in Land* § 5:3 (Westlaw/Next 2015) ("Courts often stress the need for clear and convincing evidence. In some states, however, a claimant need only establish a prescriptive easement by a preponderance of the evidence." (footnotes omitted)).

While the Court of Appeals found it unnecessary to address this issue, we believe this case presents us with an opportunity to resolve the nebulous and conflicting authority. Our case law, albeit scant, provides some guidance. Notably, this Court in 1917 alluded to the heightened standard of proof when it stated, "a private way is an easement in favor of another, *in derogation of the rights of the owner*; and hence is not to arise without *clear, unequivocal proof of such facts* as will give the right from the owner to the claimant." *Williamson v. Abbott*, 107 S.C. 397, 401, 93 S.E. 15, 16 (1917) (emphasis added) (citation omitted).

Despite this pronouncement, *Williamson* has been rarely cited by our appellate courts. Yet, the Court's statement encapsulates the fundamental reason for applying a heightened standard of proof. Essentially, by claiming a prescriptive easement, a claimant seeks for a property owner to forfeit rights to the subject property. *See* Daniel J. Smith, *Establishment of Private Prescriptive Easement*, 2 Am. Jur. *Proof of Facts* 3d 125 § 3 (1988 & Supp. 2015) ("This stricter standard of proof may be a result of the general opinion expressed by courts and commentators that prescriptive rights are not favored in the law since they result in corresponding losses or forfeitures of rights of other persons."). Given that a prescriptive easement results in diminished rights of the property owner, we find that a claimant seeking a prescriptive easement must be held to a strict standard of proof. Accordingly, we join the majority of state jurisdictions and hold that a party claiming a prescriptive easement has the burden of proving all elements by clear and convincing evidence. We find this conclusion comports with prior case law and public policy.

Having determined the appropriate standard of proof,[4] we now analyze Shirley's procedural and substantive challenges to the decision of the Court of Appeals.

b. Permissive Use

As a threshold matter, Shirley asserts the issue of permissive use serving as a bar to a prescriptive easement was not preserved for appellate review because it was not raised to and ruled upon by the special referee. We disagree with Shirley as Bundy repeatedly argued before the special referee that permissive use precludes the establishment of a prescriptive easement. Significantly, Shirley acknowledges this as he states in another section of his brief, "[a]t trial, Bundy raised the defense of permissive use to defeat the prescriptive easement sought by Shirley." The parties also stipulated that "[i]n 2004, Shirley put up a gate located on the property line between the Bundy Property and the property owned by the Miller Family with the permission of Bundy." Furthermore, the special referee expressly stated that "[p]ermission does not defeat an easement by prescription based on a claim of right" and ruled that Shirley proved his use was adverse despite Bundy's evidence of permissive use. Bundy challenged this ruling in his post-trial motion. Finally, Bundy raised the issue in his briefs to the Court of Appeals. Accordingly, we find the issue of Shirley's permissive use of the road was properly preserved for review by the Court of Appeals and this Court. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998) (stating an issue must be raised to and ruled upon by the trial judge to be preserved for appellate review).

Even if the permissive use issue is deemed to have been properly preserved, Shirley claims the Court of Appeals improperly invaded the province of the special referee as factfinder because it substituted its own findings regarding permissive use. We find Shirley's argument to be without merit as the Court of Appeals expressly relied on the stipulations of fact and noted that stipulations are binding on the parties as well as the court. *See Bundy v. Shirley*, Op. No. 2013-UP-153, slip op. at 3 (S.C. Ct. App. filed May 8, 2013) (citing *McCrea v. City of Georgetown*, 384 S.C. 328, 332, 681 S.E.2d 918, 921 (Ct. App. 2009)). Thus, the Court of Appeals did not make its own findings of fact. Instead, it applied the law on prescriptive easements to the facts in the record.

[4] Because the correct standard of proof is clear and convincing evidence, we find the special referee erred as a matter of law in applying a preponderance of the evidence standard.

Next, Shirley argues the Court of Appeals erred in citing *Paine Gayle Props., L.L.C. v. CSX Transp., Inc.*, 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012) for the proposition that permission defeats a claim to a prescriptive easement. *Bundy*, slip op. at 3. Shirley contends *Paine*, which was decided after the parties filed their briefs with Court of Appeals, should not have been applied retroactively by the Court of Appeals because it creates a "new affirmative defense" and a "new substantive right." Shirley explains that "permission to erect a gate, by itself, has never been held to defeat a prescriptive easement before in South Carolina common law."

In *Paine*, a landowner brought an action against a railroad company seeking an order establishing an easement across a right-of-way held by the railroad. *Paine*, 400 S.C. at 573, 735 S.E.2d at 531. The parties filed cross-motions for summary judgment, and the circuit court granted summary judgment to the railroad company. *Id.* The landowner appealed the decision to the Court of Appeals. *Id.*

The Court of Appeals affirmed, finding the circuit court properly granted summary judgment to the railroad company on the issues of easement by equitable estoppel, prescription, laches, and necessity. *Id.* at 575-93, 735 S.E.2d at 532-41. With respect to the landowner's prescriptive easement claim, the court found the landowner failed to present evidence creating a genuine factual issue as to whether the use of the right-of-way was "adverse" or under "claim of right" for the requisite twenty years. *Id.* at 583-87, 735 S.E.2d at 536-38.

In so ruling, the court extensively quoted *Williamson v. Abbott*, 107 S.C. 397, 93 S.E. 15 (1917) for the proposition that permissive use of property cannot ripen into an easement by prescription. *Paine*, 400 S.C. at 584, 735 S.E.2d at 537. Based on this authority, the Court of Appeals in *Paine* found the evidence established the permissive character of the landowner's use of the right-of-way and, as a result, did not show that the landowner's use was adverse or under claim of right. *Id.* at 587, 735 S.E.2d 538. Additionally, the court noted that by seeking permission from the railroad company to install a gate on the access road, the landowner implicitly acknowledged the railroad company's rights, which was inconsistent with the landowner's claim of right. *Id.* at 586, 735 S.E.2d at 538.

Ultimately, the court concluded the railroad company gave permission to the landowner to use its right-of-way. *Id.* Because there was no probative evidence showing that, after the railroad company granted this permission, the landowner made any distinct and positive assertion of a right hostile to the railroad company, the landowner's use could not be adverse or under a claim of right. *Id.*

Alternatively, even if the landowner's use could be characterized as adverse or under claim of right, the court found no probative evidence showing such an intent on the part of all previous owners of the property dating back twenty years. *Id.*

We are unpersuaded by Shirley's argument that *Paine* was retroactively applied as it was decided on November 14, 2012 before the Court of Appeals heard oral arguments on January 9, 2013. Thus, it was incumbent upon Shirley to either distinguish *Paine* or argue against it during oral arguments.

Even construing the Court of Appeals' application of *Paine* as retroactive, we discern no error. Based on our reading of *Paine*, the decision did not create new liabilities or substantive rights. Instead, the Court of Appeals relied on the 1917 case of *Williamson* for the proposition that permissive use of property cannot ripen into an easement by prescription. *Paine*, 400 S.C. at 583-86, 735 S.E.2d at 536-38. The Court of Appeals did not alter the holding in *Williamson*. Rather, it cited *Williamson* as supporting authority for its decision. Thus, prospective application was not required because the court did not create liability where formerly none existed. *See Toth v. Square D Co.*, 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989) ("The general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively. Prospective application is required when liability is created where formerly none existed." (citations omitted)).

Having rejected Shirley's procedural issues, the question becomes whether the Court of Appeals correctly ruled as a matter of law that Bundy's grant of permission to Shirley to erect the gate automatically defeated his claim for a prescriptive easement. Shirley argues this ruling was in error for the following reasons: (1) the Court of Appeals' reliance on *Williamson* was incorrect because, unlike the instant case, the permissive use at issue in *Williamson* began at the "inception" of the use of the property; (2) the Court of Appeals improperly relied on a single stipulation of fact to reach its decision and, therefore, ignored the balance of the evidence presented at trial; and (3) even if the facts can be construed to find that Bundy granted Shirley permission to erect the gate, this permission was not fatal to his claim of a prescriptive easement.

Initially, we find that Shirley misconstrues *Williamson* as he seizes upon certain language in isolation to support his position. In *Williamson*, our Supreme Court stated:

> It is the well-settled rule that *use by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription*, since user as of right, as distinguished from permissive user, is lacking, ***if permissive in its inception***, such permissive character will continue of the same nature, and no adverse user can arise, until there is a distinct and positive assertion of a right hostile to the owner, and brought home to him.
>
> * * *
>
> The asking and obtaining of permission, whether from the tenant or owner of the servient estate, stamps the character of the use as *not having been adverse, or under claim of right*, and, therefore, as lacking that essential element which was necessary for it to ripen into a right by prescription.

Williamson v. Abbott, 107 S.C. 397, 400-01, 93 S.E. 15, 16 (1917) (citation omitted) (emphasis added). *Williamson* stands for the general proposition that permissive use defeats the acquisition of a prescriptive easement. If the permissive use begins at inception or the time of purchase and continues, this permissive use can never ripen into a prescriptive easement. However, permissive use may not always begin at the inception of the claimant's ownership. Thus, *Williamson* also provides that permissive use, which is granted during the claimed twenty-year period, will defeat the establishment of a prescriptive easement, i.e., once permission is granted by the landowner there is no longer adverse use or use under a claim of right. Accordingly, we find the Court of Appeals correctly cited *Williamson* as supporting authority for its decision.

Rooted in *Williamson*, the law is well-established that evidence of permissive use defeats the establishment of a prescriptive easement because use that is permissive cannot also be adverse or under a claim of right. *See Paine*, 400 S.C. at 586, 735 S.E.2d at 538 (quoting *Williamson* and recognizing that a claimant's permissive use of landowner's property cannot begin to ripen into a prescriptive easement until the claimant makes a distinct and positive assertion of right hostile to the landowner); *Horry Cnty. v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993) (holding evidence, which established that use of property was permissive, showed use of property was not adverse); *Williamson*, 107 S.C. at 401, 93 S.E. at 16 (stating that permissive use of property "stamps the character of the use as not having been adverse, or under claim of right"); *see also* 12 S.C. Jur. *Easements* § 10 (Supp. 2015) ("Use with the permission of the owner is not

adverse."). Stated another way, when a claimant uses property with the permission of the owner, he or she acknowledges the owner's rights and uses the property without an affirmative, hostile act toward the owner's rights.

Here, Shirley maintained that he was entitled to a prescriptive easement based on a claim of right to the property and, alternatively, that his use was adverse. We find that each of Shirley's theories fails due to his permissive use of the Bundy property. When Shirley's parents purchased the property in 1985, the SCDNR leased the property from Bowater and permitted the public to hunt on the property. Thus, during hunting season, Shirley's use of the property was either with the permission of Bowater or not exclusive as he had no greater right than members of the public. *See Cleland v. Westvaco Corp.*, 314 S.C. 508, 511, 431 S.E.2d 264, 266 (Ct. App. 1993) (finding that claimant "did not establish a private right under a prescriptive easement, because he failed to produce evidence that his use was exclusive and was different from the right which could be asserted by members of the general public"). During the off-season, Bowater locked the cable restricting access to the property. Shirley, however, used the property with the permission of Bowater as he was given a key by the SCDNR game warden. Although the presence of the locked cable was not dispositive of permissive use, it is strong evidence of permissive use of the disputed road. *See Rathbun v. Robson*, 661 P.2d 850, 852 (Mont. 1983) ("Although the presence of gates alone will not defeat a prescriptive easement, they are strong evidence indicating permissive use.").

Furthermore, as stipulated by the parties, Bundy granted Shirley permission in 2004 to construct a gate on his property in the same location as the Bowater cable. By contacting Bundy regarding the gate, Shirley implicitly acknowledged Bundy's right to the property, thus, defeating Shirley's own claim of right theory. *See Paine*, 400 S.C. at 586, 735 S.E.2d at 538 (concluding that claimant's decision to seek permission from landowner to install a gate on an access road constituted an implicit acknowledgment of landowner's rights that was "inconsistent with a claim of right, which is without recognition of the rights of the owner of the servient estate" (citation omitted)).

The parties' stipulations also established that Bundy did not merely acquiesce in Shirley's use of the property but expressly granted Shirley permission to use his property to build a gate. Not until Bundy revoked his permission in 2005 and requested that Shirley remove the gate did Shirley assert his right to use the disputed road or affirmatively act in a manner hostile to Bundy's ownership rights.

Therefore, we find the Court of Appeals correctly held that Shirley's permissive use of the property defeated his acquisition of a prescriptive easement.

c. Requisite Twenty-Year Period

Alternatively, even if his personal use was not adverse or under claim of right for a continuous twenty-year period, Shirley argues the requisite time period was established because his predecessor-in-title, the Bennett family, used the disputed road adversely and continuously from 1947 to 1969. As a result, Shirley claims the Court of Appeals erred in requiring him to prove a period of use beyond the Bennett family ownership and, in turn, in excess of twenty years.

Shirley maintains that such a decision violates the principle that once an easement has been "perfected" it applies to all future owners of the dominant estate unless the owner of the servient estate shows some adverse act to obstruct the road that would defeat the easement. For this principle, Shirley relies on the language in *Cuthbert v. Lawton*, 14 S.C.L. (3 McCord) 194 (1825), which states "after twenty years of uninterrupted use, [the easement by prescription] could only be defeated by an adverse and continued obstruction for five years." As a result, Shirley asserts Bundy had the burden of showing some adverse act to obstruct the disputed road between 1969, the end of the Bennett family's ownership, and 1985, the beginning of the Shirley family's ownership.

We question the propriety of *Cuthbert* because the case inexplicably requires a five-year period of adverse and continued obstruction to defeat an established prescriptive easement. In the 190 years since the *Cuthbert* decision was issued, our case law regarding prescriptive easements has evolved and now refers to and requires "continual use" for the easement to remain viable to subsequent claimants. *See Jones v. Daley*, 363 S.C. 310, 318, 609 S.E.2d 597, 600-01 (Ct. App. 2005) ("[U]nder long established principles of South Carolina law, once a right of way by prescription has been established by twenty years of continuous use, a later diminishment in the frequency of that use does not necessarily nullify the established right by prescription. Furthermore, in order to satisfy the continual use requirement, the use must only be of a reasonable frequency as determined from the nature and needs of the claimant." (citing *Cuthbert*)).

Moreover, *Cuthbert* is also factually distinguishable from the instant case. *Cuthbert* concerned an easement used by the former owners of the defendant's dominant estate for thirty-one uninterrupted years up until the defendant's ownership. *Cuthbert,* 14 S.C.L at 194. The court found that an easement by

prescription was established during that thirty-one years and the diminished use of the easement by the defendant did not defeat the easement. *Id.* In contrast, in this case, there is no evidence of the use of the easement from 1969, when Shirley alleges the easement was perfected, and 1985, the time Shirley's parents purchased the property. Unlike the defendant in *Cuthbert*, Shirley attempts to rely on the ownership of remote predecessors-in-title with no evidence regarding the use of the other owners in his chain-of-title. Consequently, we find Shirley's reliance on *Cuthbert* to be misplaced.

However, Shirley is correct that the adverse use to establish a claim for prescriptive easement need not be continuous to him personally. *See Morrow v. Dyches*, 328 S.C. 522, 527, 492 S.E.2d 420, 423 (Ct. App. 1997) ("A party may 'tack' the period of use of prior owners in order to satisfy the 20-year requirement."); *see also Kelley v. Snyder*, 396 S.C. 564, 575, 722 S.E.2d 813, 819 (Ct. App. 2012) ("The time of possession may be tacked not only by ancestors in heirs, but also between parties in privity in order to establish the 20-year period." (citation omitted)).

Nonetheless, Shirley cannot establish the period of prescription merely by referencing the twenty-two-year ownership by the Bennett family. Instead, there are specific requirements that must be met. As explained by one secondary source:

> Successive uses of land by different persons may be tacked, or added together, to satisfy the prescriptive period. Tacking is permitted when the successive adverse users are in privity of estate. Although the requirement of privity has been variously defined, the prevailing view is that there must be some relationship whereby the successive users have come into possession under or through their predecessors in interest. *It follows that claimant may not tack the claimant's adverse use to that of strangers, nor may a claimant tack the claimant's adverse use to that of a predecessor in title when the predecessor's usage terminated before claimant acquired the land. Moreover, a claimant cannot tack adverse use with prior adverse use when intervening parties used land with permission. Nor is tacking permissible when it is unclear that use by claimant's predecessor was adverse*. In order to establish continuity of use by tacking, a claimant must show that predecessors in title actually used the alleged easement.

James W. Ely, Jr., and Jon W. Bruce, *The Law of Easements and Licenses in Land*, § 5:19 (Westlaw/Next 2015) (footnotes omitted) (emphasis added).

Applying the foregoing to the facts of the instant case, we initially question whether Shirley presented clear and convincing evidence that the Bennett family had a prescriptive easement. Other than the twenty-two-year period of ownership, there is limited evidence that the Bennetts' use met the elements of a prescriptive easement. In particular, Edward Bennett, who testified on behalf of Shirley, had no knowledge regarding the use of the property or the disputed road after he moved away from home in 1960.

But, even assuming the Bennett family acquired a prescriptive easement, there is no evidence as to whether the intervening predecessors-in-title actually used the disputed road. *Cf. Jones v. Daley*, 363 S.C. 310, 318, 609 S.E.2d 597, 601 (Ct. App. 2005) (stating that "in order to satisfy the continual use requirement, the use must only be of a reasonable frequency as determined from the nature and deeds of the claimant"). Furthermore, Shirley did not establish that the previous owners' use of the disputed road continued to be adverse or under a claim of right between 1969 and 1985. *See Morrow*, 328 S.C. at 528, 492 S.E.2d at 424 ("[I]f tacking is used, 'the use by the previous owners must also meet the requirements of a prescriptive easement'" (quoting 25 Am. Jur. 2d *Easements and Licenses* § 70, at 640 (1996))); *Kelley*, 396 S.C. at 575, 722 S.E.2d at 819 ("If tacking is used, the use by the previous owners must have also been adverse or under a claim of right."). Accordingly, we hold the Court of Appeals correctly found that Shirley could not tack the Bennett family's use to establish his prescriptive easement claim.

IV. Conclusion

In conclusion, we find the Court of Appeals correctly reversed the special referee's grant of a prescriptive easement to Shirley. We modify the decision to the extent we hold that a party claiming a prescriptive easement has the burden of proving all elements by clear and convincing evidence.

Based on the foregoing, the decision of the Court of Appeals is

AFFIRMED AS MODIFIED.

TOAL, C.J., KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

The Supreme Court of South Carolina

Re: Rule Amendments

Appellate Case Nos. 2014-000335, 2014-002183, and 2014-002391

ORDER

On January 29, 2015, the following orders were submitted to the General Assembly pursuant to Article V, § 4A of the South Carolina Constitution.

(1) An order amending Rule 45(b)(1) of the South Carolina Rules of Civil Procedure.

(2) An order amending Rules 16 and 19 of the South Carolina Rules of Magistrates Court.

(3) An order amending Rule 4(d)(2) of the South Carolina Court-Annexed Alternative Dispute Resolution Rules.

Since ninety days have passed since submission without rejection by the General Assembly, the amendments contained in the above orders are effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
April 29, 2015

The Supreme Court of South Carolina

Re: Amendment to the South Carolina Rules of Civil Procedure

Appellate Case No. 2014-000335

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 45(b)(1) of the South Carolina Rules of Civil Procedure (SCRCP) is amended as set forth in the attachment to this order. This amendment shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 29, 2015

Rule 45(b)(1), SCRCP, is amended to provide as follows:

> **(1)** A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made in the same manner prescribed for service of a summons and complaint in Rule 4(d) or (j). If the person's attendance is commanded, then that person shall, upon his arrival in accordance with the subpoena, be tendered fees for each day's attendance of $25.00 and the mileage allowed by law for official travel of State officers and employees from his residence to the location commanded in the subpoena. When the subpoena is issued on behalf of the State of South Carolina or an officer or agency thereof, fees and mileage need not be tendered. Unless otherwise ordered by the court, prior notice in writing of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b) at least 10 days before the time specified for compliance.

The following Note is added to Rule 45, SCRCP:

Note to 2015 Amendment:

Paragraph (b)(1) is amended to provide that fees for attendance and reimbursement for mileage must be tendered when the person arrives in accordance with the subpoena, rather than at the time of the service of a subpoena. The amendment also clarifies that a person commanded to appear is entitled to a fee for each day's attendance, and mileage is properly measured from the person's residence to the location commanded in the subpoena. Parties issuing subpoenas commanding the attendance of a person should take care to promptly notify the person if his or her attendance is no longer required because a trial, hearing, or deposition has been cancelled or rescheduled.

The Supreme Court of South Carolina

Re: Amendments to South Carolina Rules of Magistrates Court

Appellate Case No. 2014-002183

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rules 16 and 19 of the South Carolina Rules of Magistrates Court (SCRMC) are amended as set forth in the attachment to this order. These amendments shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 29, 2015

Rule 16(b), SCRMC, is amended to provide as follows:

> **(b)** If, at the close of all the evidence, a directed verdict is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised during the trial of the case if the case is being tried before a jury. If a jury verdict is returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if a directed verdict had been granted. A jury verdict is final if no motion for a new trial or judgment notwithstanding the verdict is filed with the court within ten (10) days of the rendering of the jury verdict and the court has not on its own motion ordered a new trial or directed a verdict notwithstanding the jury verdict. However, in cases involving landlords and tenants under Chapters 37 and 40, Title 27 of the South Carolina Code, a jury verdict is final if no motion for a new trial or judgment notwithstanding the verdict is filed with the court within five (5) days of the rendering of the jury verdict and the court has not on its own motion ordered a new trial or directed a verdict notwithstanding the jury verdict.

Rule 19(b), (c), and (d), SCRMC, are amended to provide as follows:

> **(b)** The motion for a new trial shall be made in writing and filed with the court no later than ten (10) days after notice of the judgment. However, a motion for a new trial in cases involving landlords and tenants under Chapters 37 and 40, Title 27 of the South Carolina Code, must be filed within five (5) days after notice of the judgment. The court shall notify all opposing parties that the motion has been filed and shall provide those parties a copy of the motion in a manner provided for in Rule 8.

(c) Not later than ten (10) days after entry of judgment, the court, on its own initiative, may order a new trial for any reason for which it might have granted a new trial on motion of a party. However, the court may order a new trial under this paragraph not later than five (5) days after entry of judgment in cases involving landlords and tenants under Chapters 37 and 40, Title 27 of the South Carolina Code. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds for granting a new trial.

(d) A motion to alter or amend the judgment shall be filed no later than ten (10) days after notice of the judgment, except that in cases involving landlords and tenants under Chapters 37 and 40, Title 27 of the South Carolina Code, the motion shall be filed no later than five (5) days after notice of the judgment. The court shall notify all opposing parties that the motion has been filed and shall provide those parties a copy of the motion in a manner provided for in Rule 8.

The Supreme Court of South Carolina

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

Appellate Case No. 2014-002391

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, the South Carolina Court-Annexed Alternative Dispute Resolution Rules are hereby amended as provided in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Art. V, § 4A of the South Carolina Constitution.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 29, 2015

Rule 4(d)(2) of the South Carolina Court-Annexed Alternative Dispute Resolution Rules is amended to add subparagraph (C), which provides as follows:

(C) Either party may request the appointment of a mediator at any time by submitting a Request for Appointment of Mediator Form to the Clerk of Court. Upon receipt of a Request for Appointment of Mediator Form, the Clerk of Court shall appoint a primary mediator and a secondary mediator according to the same process set forth in Rule 4(d)(2)(B). A Notice of ADR appointing the mediators shall be issued upon a form approved by the Supreme Court or its designee.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Trident Medical Center, LLC, d/b/a Berkeley Regional Medical Center, Appellant/Respondent,

v.

South Carolina Department of Health and Environmental Control and Roper St. Francis Hospital–Berkeley, d/b/a Roper St. Francis Hospital,

Of Whom South Carolina Department of Health and Environmental Control is the Respondent and Roper St. Francis Hospital is the Respondent/Appellant.

Trident Medical Center, LLC, d/b/a Berkeley Regional Medical Center, Appellant/Respondent,

v.

South Carolina Department of Health and Environmental Control and Roper St. Francis Hospital–Berkeley, d/b/a Roper St. Francis Hospital,

Of whom South Carolina Department of Health and Environmental Control is the Respondent and Roper St. Francis Hospital is the Respondent/Appellant.

CareAlliance Health Services and Roper St. Francis Hospital–Berkeley, Respondents/Appellants,

v.

South Carolina Department of Health and Environmental Control and Trident Medical Center, LLC,

Of whom South Carolina Department of Health and Environmental Control is the Respondent and Trident Medical Center, LLC, is the Appellant/Respondent.

Appellate Case No. 2012-213506

Appeal From The Administrative Law Court
John D. McLeod, Administrative Law Judge

Opinion No. 5297
Heard October 7, 2014 – Filed February 18, 2015
Withdrawn, Substituted and Refiled May 6, 2015

AFFIRMED

David B. Summer Jr., William R. Thomas, and Faye A. Flowers, all of Parker Poe Adams & Bernstein LLP, of Columbia, for Appellant/Respondent.

William Marshall Taylor Jr., Ashley Caroline Biggers, and Vito Michael Wicevic, all of Columbia, for Respondent South Carolina Department of Health and Environmental Control.

James G. Long III and Jennifer J. Hollingsworth, both of Nexsen Pruet, LLC, of Columbia, for Respondents/Appellants.

GEATHERS, J.: These cross-appeals involve a decision of the South Carolina Administrative Law Court (ALC) upholding the issuance by the South Carolina Department of Health and Environmental Control (DHEC) of a Certificate of Need (CON) for hospital construction in Berkeley County to both Roper St. Francis Hospital–Berkeley (Roper) and Trident Medical Center, LLC (Trident) pursuant to the State Certification of Need and Health Facility Licensure Act, S.C. Code Ann. § 44-7-110 to -394 (2002 and Supp. 2014) (the CON Act). Trident challenges the

issuance of a CON to Roper, arguing the "Bed Transfer Provision" in the 2008-2009 State Health Plan prohibits DHEC from issuing a CON for the transfer of beds from Roper's hospital in downtown Charleston to a hospital that has not yet been built.

On the other hand, Roper's primary position is that the ALC's decision should be affirmed in its entirety, but if this court accepts Trident's argument and reverses the issuance of a CON to Roper, then the issuance of a CON to Trident must also be reversed. Because we affirm the ALC's decision to uphold the issuance of a CON to both Roper and Trident, we need not address Roper's appeal issue.

FACTS/PROCEDURAL HISTORY

In 2008, Berkeley County's estimated population was 158,140. However, there were (and still are) no acute care hospital beds licensed in Berkeley County. On August 13, 2008, Trident submitted an application for a CON to build a new fifty-bed acute care hospital in the Town of Moncks Corner in central Berkeley County pursuant to the 2004-2005 State Health Plan.[1] The 2004-2005 State Health Plan's inventory of general hospitals indicated that Trident's existing North Charleston facility had a need for forty-two additional beds,[2] and Trident sought to use this facility-specific need to obtain DHEC's approval for the proposed fifty-bed facility in Moncks Corner pursuant to a provision in the State Health Plan referred to as the "Fifty Bed Rule." This provision allows a hospital with a need for beds to add up to the greater of fifty beds or the actual projected number of needed beds to its inventory to provide for a cost-effective addition:

> Should there be a need shown for additional beds for a hospital, then an increase may be approved. In order to

[1] The 2008-2009 State Health Plan did not become effective until September 12, 2008. *See* S.C. Code Ann. Regs. 61-15 § 504 (2011) (amended 2012) ("All decisions on [CON] applications shall be made based on the currently approved State Health Plan in effect at the time such application is accepted. Should a new plan be adopted during any phase of the review or appeals process, the applicant shall have the option of withdrawing the application and resubmitting under the newly adopted plan or continuing the review or appeal process under the plan in use when the application was submitted.").

[2] Trident explains that due to a "prior conversion of nursing home beds to hospital beds, [its North Charleston facility] actually had a bed need of [seventeen]" when it filed the CON application for the proposed hospital in Moncks Corner.

> provide for a cost-effective addition, up to the greater of 50 beds or the actual projected number of additional beds may be approved, provided the hospital can document and demonstrate the need for additional beds.

Chapter II.G.1 § (A)(4)(d), 2004-2005 State Health Plan (Fifty Bed Rule).

Trident proposed to build the new hospital on a twenty-one acre site adjacent to its existing freestanding emergency department and outpatient center, Moncks Corner Medical Center. Trident indicated it planned to convert the building that houses the emergency department into a medical office building and move the emergency department into the new hospital.

A few months after Trident's CON submission, on December 10, 2008, Roper submitted an application for a CON to transfer some of its existing beds in its facility in downtown Charleston to a proposed new fifty-bed acute care hospital in the City of Goose Creek in southern Berkeley County pursuant to the Bed Transfer Provision of the 2008-2009 State Health Plan.[3] The Bed Transfer Provision allows for the transfer of beds between affiliated hospitals in order to serve their patients in a more efficient manner, provided certain conditions are met. *See infra*. The new hospital is to be known as "Roper St. Francis Hospital–Berkeley."

On May 21, 2009, DHEC conducted a joint project review hearing on the two applications. On June 26, 2009, DHEC approved both applications. DHEC also determined that Trident and Roper were not "competing applicants" and, thus, it could properly grant CONs to both. The term "competing applicants" is defined in section 44-7-130(5) of the South Carolina Code (2002) as

> two or more persons or health care facilities as defined in this article who apply for [CONs] to provide similar services or facilities in the same service area within a time frame as established by departmental regulations and *whose applications, if approved, would exceed the need for services or facilities*.

(emphasis added). When DHEC is considering competing applications, it must award a CON on the basis of which applicant most fully complies with the CON

[3] Chapter II.G.1 § (A)(4)(j), 2008-2009 State Health Plan (Bed Transfer Provision).

Act, the State Health Plan, project review criteria,[4] and applicable DHEC regulations. S.C. Code Ann. § 44-7-210(C) (2002) (amended 2010).

On July 6, 2009, Trident submitted two requests for final review conferences before DHEC's board (the Board), seeking (1) a reversal of the staff's decision to grant a CON to Roper, and (2) a determination that Trident and Roper were "competing applicants" and Trident was the applicant that most fully complied with the CON Act, the State Health Plan, project review criteria, and applicable DHEC regulations. On July 10, 2009, Roper also filed a request for a final review conference before the Board, seeking a determination that Roper was the applicant that most fully complied with the CON Act, the State Health Plan, project review criteria, and applicable DHEC regulations in the event the Board found Trident and Roper to be competing applicants. The Board declined to conduct final review conferences.

On August 7, 2009, Trident and Roper collectively filed three separate requests for a contested case review before the ALC. Trident sought (1) reversal of DHEC's determination that Trident and Roper were not competing applicants and (2) reversal of DHEC's issuance of a CON to Roper. Roper sought a decision either upholding DHEC's issuance of CONs to both applicants or finding that Roper was the applicant that most fully complied with the CON Act, the State Health Plan, project review criteria, and applicable DHEC regulations.

The ALC consolidated the proceedings for trial and discovery purposes. Beginning on January 30, 2012, the ALC conducted a contested case hearing that lasted through February 16, 2012. Prior to receiving testimony, the ALC granted Roper's motion for partial summary judgment, concluding that if the applicants were found to be competing, the matter would be remanded to DHEC for identification of the applicant that most fully complied with the CON Act, the State Health Plan, project review criteria, and applicable DHEC regulations.

On September 26, 2012, the ALC issued a written decision upholding DHEC's issuance of a CON to both Trident and Roper. In its decision, the ALC deferred to DHEC's interpretation of the Bed Transfer Provision and the Fifty Bed Rule and

[4] There are thirty-three criteria for DHEC's review of a project. S.C. Code Ann. Regs. 61-15 § 802 (2011) (amended 2012). Each section of Chapter II of the State Health Plan designates the most important project review criteria for the particular type of facility or service addressed in that section. Chapter I.H, 2008-2009 State Health Plan; Chapter I.I, 2004-2005 State Health Plan.

found that if both applications were approved, they would not exceed the need for acute care hospital beds in the area. On October 5, 2012, Trident filed a motion for reconsideration, which was denied on November 1, 2012. These appeals followed.

ISSUES ON APPEAL

1. Did the ALC err in deferring to DHEC's interpretation of the Bed Transfer Provision?

2. Did the ALC err in concluding that Trident and Roper were not competing applicants?

STANDARD OF REVIEW

The Administrative Procedures Act governs the standard of review from a decision of the ALC, allowing this court to

> reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2014). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

Further, this court may not substitute its judgment for the judgment of the ALC as to the weight of the evidence on questions of fact. *Spartanburg Reg'l Med. Ctr. v. Oncology & Hematology Assocs. of S.C., LLC*, 387 S.C. 79, 89, 690 S.E.2d 783,

788 (2010) (citing § 1-23-380(5)).[5] In a nutshell, this court's review "is limited to determining whether the findings were supported by substantial evidence or were controlled by an error of law." *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9, 698 S.E.2d 612, 617 (2010).

LAW/ANALYSIS

I. Bed Transfer Provision

Trident does not challenge any of the ALC's findings of fact. Rather, Trident maintains that the ALC committed an error of law in deferring to DHEC's interpretation of the Bed Transfer Provision. Trident argues the Bed Transfer Provision prohibits DHEC from issuing a CON for the transfer of beds from an existing hospital to a hospital that has not yet been constructed. To address this argument, we will first discuss the general provisions governing CONs and then focus on the Bed Transfer Provision and the section of the 2008-2009 State Health Plan in which this provision can be found.

Background

The purpose of the CON Act is to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services [that] will best serve public needs, and ensure that high quality services are provided in health facilities in this State." S.C. Code Ann. § 44-7-120 (2002). To achieve these purposes, the CON Act requires (1) the issuance of a CON before undertaking a project prescribed by the CON Act; (2) the adoption of procedures and criteria for submitting a CON application and for review before issuing a CON; (3) the preparation and publication of a State Health Plan; and (4) the licensing of health care facilities. *Id.* DHEC is designated the sole state agency for control and administration of the CON program and licensing of health facilities. S.C. Code Ann. § 44-7-140 (2002). A person or health care facility must obtain a CON before, among other things, establishing a new health care facility or changing the existing bed complement of a health care facility. S.C. Code Ann. § 44-7-160 (2002) (amended 2010).

[5] "The ALC presides over the hearing of a contested case from DHEC's decision on a CON application and serves as the finder of fact." *Spartanburg Reg'l*, 387 S.C. at 89, 690 S.E.2d at 788.

With the advice of a health planning committee, of which most of the members are appointed by the Governor, DHEC must prepare a State Health Plan for use in administering the CON program. S.C. Code Ann. § 44-7-180(A), (B) (2002) (amended 2010). The State Health Plan must include

> (1) an inventory of existing health care facilities, beds, specified health services, and equipment; (2) projections of need for additional health care facilities, beds, health services, and equipment; (3) standards for distribution of health care facilities, beds, specified health services, and equipment including scope of services to be provided, utilization, and occupancy rates, travel time, regionalization, other factors relating to proper placement of services, and proper planning of health care facilities; and (4) a general statement as to the project review criteria considered most important in evaluating [CON] applications for each type of facility, service, and equipment, including a finding as to whether the benefits of improved accessibility to each such type of facility, service, and equipment may outweigh the adverse [e]ffects caused by the duplication of any existing facility, service, or equipment.

§ 44-7-180(B). The State Health Plan must also include projections and standards for certain health services and equipment having "a potential to substantially impact health care cost and accessibility." *Id.*

DHEC is required to submit the State Health Plan to the Board for final revision and adoption at least once every two years. S.C. Code Ann. § 44-7-180(C). Finalization of the State Health Plan requires a public comment period and a public hearing. *Id*. ("[DHEC] shall adopt by regulation a procedure to allow public review and comment, including regional public hearings, before adoption or revision of the plan."). Because the legislature has required these stringent requirements for the State Health Plan's implementation, it is clear the legislature intended for the State Health Plan to be an enforceable document. *Cf. Spectre, LLC v. S.C. Dep't of Health & Envtl. Control*, 386 S.C. 357, 371, 688 S.E.2d 844, 851 (2010) (noting the stringent requirements for DHEC's enactment of the Coastal Management Program "suggest that the General Assembly did not believe it was meant to be an unenforceable document"); *id.* at 371-72, 688 S.E.2d at 851-52 (rejecting the argument that because the promulgation of the Coastal Management

Program did not comply with the Administrative Procedures Act, the Coastal Management Program was not enforceable and noting the legislature "created a separate and more rigorous procedure for promulgation of the [Coastal Management Program] and, because DHEC acted in accordance with the specified procedure, the [Coastal Management Program] is valid").

The State Health Plan has designated four regions of the state for the purpose of keeping an inventory of health facilities and services. *E.g.*, Chapter II.A, 2008-2009 State Health Plan. Each region is further divided into service areas. *Id.* In the 2008-2009 State Health Plan and the 2004-2005 State Health Plan, most service areas consist of individual counties. However, in the 2008-2009 State Health Plan, two service areas consist of multiple counties: (1) the Tri-County Service Area, consisting of Berkeley, Charleston, and Dorchester counties; and (2) the Orangeburg/Calhoun Service Area.[6] In the 2004-2005 State Health Plan, only the Tri-County Service Area consists of multiple counties.[7]

Finally, DHEC may not issue a CON unless an application complies with the State Health Plan, project review criteria, and other regulations. § 44-7-210(C); *see also* S.C. Code Ann. Regs. 61-15 § 801.3 (2011) (amended 2012) ("[N]o project may be approved unless it is consistent with the State Health Plan."); S.C. Code Ann. Regs. 61-15 § 802.1 ("The proposal shall not be approved unless it is in compliance with the State Health Plan.").

In the present case, Trident contends Roper's proposed hospital is not consistent with the 2008-2009 State Health Plan because it does not comply with the plain language of the Bed Transfer Provision,[8] which states:

> Changes in the delivery system due to health care reform have resulted in the consolidation of facilities and the establishment of provider networks. These consolidations and agreements may lead to situations where affiliated hospitals may wish to transfer beds between themselves *in order to serve their patients in a more efficient manner*. A proposal to transfer or

[6] *See* Chapter II.G.1 § A, 2008-2009 State Health Plan.
[7] *See* Chapter II.G.1 § A, 2004-2005 State Health Plan.
[8] It is undisputed that the Bed Transfer Provision is the only provision in the 2008-2009 State Health Plan that Roper may use to obtain a CON for a new hospital.

exchange hospital beds requires a [CON] and must comply with the following criteria:

1. A transfer or exchange of beds may be approved only if there is no overall increase in the number of beds;

2. Such transfers may cross county lines; however, the applicants must document with patient origin data the historical utilization of the receiving facility by residents of the county giving up beds;

3. Should the response to Criterion 2 fail to show a historical precedence of residents of the county transferring the beds utilizing the receiving facility, the applicants must document why it is in the best interest of these residents to transfer the beds to a facility with no historical affinity for them;

4. The applicants must explain the impact of transferring the beds on the health care delivery system of the county from which the beds are to be taken; any negative impacts must be detailed along with the perceived benefits of such an agreement;

5. The facility receiving the beds must demonstrate the need for the additional capacity based on both historical and projected utilization patterns;

6. The facility giving up the beds may not use the loss of these beds as justification for a subsequent request for the approval of additional beds;

7. A written contract or agreement between the governing bodies of the affected facilities approving the transfer or exchange of beds must be included in the [CON] application;

8. Each facility giving up beds must acknowledge in writing that this exchange is permanent; any further transfers would be subject to this same process.

Chapter II.G.1 § (A)(4)(j), 2008-2009 State Health Plan (emphasis added). Trident argues this language allows DHEC to issue a CON for the transfer of beds between hospitals only when both hospitals already exist.

DHEC's Interpretation

In 2009, the Board specifically addressed the Bed Transfer Provision in the 2004-2005 State Health Plan, which is identical to the Bed Transfer Provision in the 2008-2009 State Health Plan. The interpretation of the Bed Transfer Provision was an issue in a contested case pending before the ALC, i.e., *Lexington County Health Services District, Inc. v. South Carolina Department of Health & Environmental Control*, Docket No. 07-ALJ-07-0520-CC. During the pendency of this contested case, the ALC remanded the question of whether the Bed Transfer Provision "allows the approval of a CON application for the transfer of . . . hospital beds for the purpose of establishing a new hospital facility." The Board concluded:

> Read as a whole, the General Hospital section of the [State Health Plan] recognizes that changes in the health care delivery system may call for the transfer of unused beds at one facility to a new facility constructed to receive them.
>
> Accordingly, the Board has determined that the 2004-2005 South Carolina Health Plan, which includes the [Bed] Transfer Standard, allows for approval of a CON application for the transfer of licensed general acute care hospital beds to establish a new hospital.

The Board noted that DHEC's staff had properly interpreted and applied the 2004-2005 State Health Plan in approving the transfer of seventy-six acute care hospital beds from Palmetto Health Baptist Hospital in downtown Columbia to create

Palmetto Health Baptist Parkridge, which was to be built in northwest Richland County.[9]

Deference to DHEC's Interpretation

Our supreme court has recently expounded on the application of statutes and regulations administered by an administrative agency. In *Kiawah Development Partners, II, v. South Carolina Department of Health & Environmental Control*, the court stated:

> Interpreting and applying statutes and regulations administered by an agency is a two-step process. First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. If the statute or regulation is silent or ambiguous with respect to the specific issue, the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference.

Op. No. 27065 (S.C. Sup. Ct. refiled December 10, 2014) (Shearouse Adv. Sh. No. 49 at 11) (citations and internal quotation marks omitted).

The court further stated, "We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* at 25 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).[10] After tracing the history of South Carolina's deference doctrine, the

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[9] Although there is no conflict between the Board's interpretation of the Bed Transfer Provision and the staff's interpretation, we note that when such a conflict exists, "an agency's Appellate Panel [(here, the Board)], not its staff, is typically entitled to deference in interpreting agency regulations." *Neal v. Brown*, 383 S.C. 619, 624, 682 S.E.2d 268, 270 (2009).

[10] *See also Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012) ("[W]e give deference to the interpretation of a regulation by the agency charged with it[s] enforcement." (citation omitted)); *S.C. Dep't of Revenue v. Anonymous Co. A*, 401 S.C. 513, 516, 678 S.E.2d 255, 257 (2009) ("'The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent

court concluded, "[W]e give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations." *Id.* at 24.

In the present case, as we evaluate the deference given by the ALC to DHEC's interpretation of the Bed Transfer Provision, we must be mindful of the General Assembly's entrustment of South Carolina's health care marketplace to DHEC for cost containment, prevention of unnecessary duplication, serving public needs, and ensuring the high quality of healthcare services. *See* § 44-7-120 (stating the purpose of the CON Act). DHEC plays a significant role in the drafting and approval of the State Health Plan, as it does in promulgating regulations. Therefore, we may interpret the State Health Plan using the rules of statutory construction applied to regulations,[11] with one caveat: "[E]ach *section* of the [State Health Plan] must be read as a whole." Chapter I.I, 2008-2009 State Health Plan (emphasis added).

In *Murphy v. South Carolina Department of Health & Environmental Control*, our supreme court was presented with DHEC's interpretation of its regulation

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compelling reasons.'" (quoting *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006))); *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) ("Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a *compelling* reason to differ." (emphasis added) (citations omitted)); *Spruill v. Richland Cnty. Sch. Dist. 2*, 363 S.C. 61, 65, 609 S.E.2d 524, 526 (2005) (stating that an agency's construction of its own regulation "is accorded most respectful consideration and will not be overturned absent *compelling* reasons." (emphasis added) (citation and internal quotation marks omitted)); *Dorman v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 159, 167, 565 S.E.2d 119, 123 (Ct. App. 2002) ("[T]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." (citation and internal quotation marks omitted)); *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 39, 48, 564 S.E.2d 341, 346 (Ct. App. 2002) ("The construction of a regulation by the agency charged with executing the regulations is entitled to the most respectful consideration and should not be overruled without cogent reasons." (citation omitted)).

[11] *Murphy*, 396 S.C. at 639, 723 S.E.2d at 195 (holding that regulations are interpreted using the rules of statutory construction).

concerning state water quality certifications.[12] 396 S.C. at 636-38, 723 S.E.2d at 192-94. In particular, the court examined the following language in Regulation 61-101: "'Certification will be denied if (a) the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired.'" *Id*. at 640, 723 S.E.2d at 195 (footnote omitted) (quoting S.C. Code Ann. Regs. 61–101.F.5(a) (Supp. 2011)). DHEC interpreted the term "vicinity," which was not defined in the regulation, to include more than the immediate project area. *Id.* DHEC's project manager for the proposed project testified that DHEC "interpreted the 'vicinity of the project' on a case by case basis according to its best professional judgment as each project is different." *Id.* The court concluded, "Because this interpretation is both reasonable and consistent with the plain language of the regulation, we see no reason to deviate from DHEC's construction and application." *Id.* at 640-41, 723 S.E.2d at 195.

Likewise, in the present case, DHEC's interpretation of the Bed Transfer Provision is not only reasonable but also consistent with the Bed Transfer Provision's plain language. The following language from the preamble to the Bed Transfer Provision indicates a purpose of building flexibility into the State Health Plan when dealing with provider networks:

> Changes in the delivery system due to health care reform have resulted in the consolidation of facilities and the establishment of provider networks. These consolidations and agreements may lead to situations where affiliated hospitals may wish to transfer beds between themselves *in order to serve their patients in a more efficient manner*.

(emphasis added).

We note Trident argues that Roper's Charleston facility and its proposed new hospital in Goose Creek are not "affiliated hospitals" because the definition of "affiliated hospitals" in Chapter II.B of the 2008-2009 State Health Plan excludes two facilities whose relationship has been established for the purpose of transferring beds. However, the record shows that Roper is not attempting to

[12] A state water quality certification is required before the Army Corps of Engineers may issue a permit to fill portions of "waters of the United States" pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344.

establish a relationship with a legally separate entity that has its own network of existing hospitals. Rather, Roper seeks to expand its own network of hospitals with the intent to provide convenience for its existing patients residing in Berkeley County, who now travel to Roper's facility in downtown Charleston.[13] The new hospital will be a continuation of an existing network of acute care facilities serving Roper patients in the Tri-County service area, i.e., Roper Hospital in downtown Charleston, Bon Secours St. Francis in Charleston County, Roper St. Francis Mount Pleasant Hospital, and a freestanding Emergency Department and Ambulatory Surgery Facility in Berkeley County.

The remainder of the Bed Transfer Provision consists of a list of eight criteria with which a CON applicant must comply. *See supra*. The language in this list certainly *accommodates* those CON applications for the transfer of beds to a receiving facility already in existence at the time the application is submitted. Yet, there is no language in this list that either expressly or impliedly *requires* the receiving facility to be in existence when the CON application is submitted. Therefore, the plain language of the Bed Transfer Provision can be reasonably interpreted to include a receiving facility that will be constructed after DHEC issues the CON.

In any event, the Bed Transfer Provision is not a section unto itself—it is part of Chapter II.G.1 § (A) ("General Hospitals").[14] Therefore, we may not consider the language of the Bed Transfer Provision in isolation. Rather, Chapter I.I of the 2008-2009 State Health Plan states, "The criteria and standards set forth in the [State Health Plan] speak for themselves, and each *section* of the [State Health Plan] must be read *as a whole*." (emphases added). *Cf. Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the

[13] The ALC found that twenty-three percent of those Berkeley County residents who were admitted to a hospital traveled past Trident Medical Center to seek care at Roper's facilities in downtown Charleston and west of the Ashley River.

[14] *See* Chapter I.H (indicating what constitutes a "section" in Chapter II by noting, "A general statement has been added to each *section* of Chapter II stating the project review criteria considered to be the most important in reviewing [CON] applications for each type of facility, service, and equipment. . . . In addition, a finding has been made in each *section* as to whether the benefits of improved accessibility to each such type of facility, service[,] and equipment may outweigh the adverse [e]ffects caused by the duplication of any existing facility, service[,] or equipment." (emphases added)).

purpose, design, and policy of lawmakers," and "the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." (citation and internal quotation marks omitted)); *id.* at 128-29, 750 S.E.2d at 63 (holding that words in a statute must be construed in context and that the court "may not, in order to give effect to particular words, virtually destroy the meaning of the entire context; that is, give the particular words a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent" (citation and internal quotation marks omitted)).

Hence, we must examine all the provisions of Chapter II.G.1 § (A) ("General Hospitals") before determining whether there is a compelling reason to reject DHEC's interpretation of the Bed Transfer Provision. Section (A) includes provisions that describe how the bed capacity of a general hospital is determined, set forth an inventory of general hospitals in the state and an explanation of the inventory, explain how the need for beds in the respective service areas is calculated, list required services a general hospital must provide, set forth factors to be considered regarding modernization of facilities, and describe the relative importance of the project review criteria for general hospitals. Of particular interest is the discussion of the most important project review criteria for general hospitals. *See* Chapter II.G.1 § (A), 2008-2009 State Health Plan. Significant emphasis should be placed on these criteria in interpreting section (A) as a whole. These criteria are

a. Compliance with the Need Outlined in [the State Health Plan];
b. Community Need Documentation;
c. Distribution (Accessibility);
d. Acceptability;
e. Financial Feasibility;
f. Cost Containment; and
g. Adverse Effects on Other Facilities.

Id. These criteria are not listed in order of importance. Chapter I.H, 2008-2009 State Health Plan. In fact, "[t]he relative importance assigned to each specific criterion is established by [DHEC] depending upon the importance of the criterion applied to the specific project." S.C. Code Ann. Regs. 61-15 § 801.2. Further, "[a] project does not have to satisfy every criterion in order to be approved," provided the project is consistent with the applicable State Health Plan. S.C. Code Ann. Regs. 61-15 § 801.3.

The first listed criterion, "Compliance with the Need Outlined in [the State Health Plan]," refers to the need for, or surplus of, beds at each listed hospital in the respective service areas. Notably, items (d) and (e) of Chapter II.G.1 § (A)(4), 2008-2009 State Health Plan, contemplate circumstances in which population projections that are not considered in the State Health Plan demonstrate the need for beds in a service area.[15] These provisions demonstrate that the published results of the calculations for each hospital and each service area are not the final determinant of need for a particular service area. Rather, flexibility is built into the requirements for general hospitals when determining need.

The second listed criterion, "Community Need Documentation," states that the proposed project should provide services that meet a documented need of the target population and current or projected utilization should justify the expansion or implementation of the proposed service. S.C. Code Ann. Regs. 61-15 § 802.2. The third listed criterion, "Distribution (Accessibility)," provides, in pertinent part, that the proposed service "should be located so that it may serve medically underserved areas" and "allow for the delivery of necessary support services in an acceptable period of time." S.C. Code Ann. Regs. 61-15 § 802.3.

The fourth listed criterion, "Acceptability," states that the proposed project and the applicant should have the support of "affected persons,"[16] including local providers

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[15] *See* Chapter II.G.1 § (A)(4)(d), 2008-2009 State Health Plan ("The hospital requesting the addition must document the need for additional beds *beyond those indicated as needed by the methodology stated above*, based on historical and projected utilization, as well as projected population growth or other factors demonstrating the need for the proposed beds." (emphasis added)); *id.* at (4)(e) ("An applicant requesting additional beds beyond those indicated as needed by the methodology stated above[] must document the need for additional beds based on historical and projected utilization, floor plan layouts, *projected population growth that has not been considered in this Plan*[,] or other factors demonstrating the need for the proposed beds." (emphasis added)).

[16] "Affected person" means

> the applicant, a person residing within the geographic area served or to be served by the applicant, persons located in the health service area in which the project is to be located and who provide similar services to the proposed project, persons who before receipt by [DHEC] of the proposal being reviewed have formally indicated

and the target population. S.C. Code Ann. Regs. 61-15 § 802.4. The fifth listed criterion, "Financial Feasibility," requires the applicant to project the immediate and long-term financial feasibility of the proposed project. S.C. Code Ann. Regs. 61-15 § 802.15. The sixth listed criterion, "Cost Containment," requires the applicant to demonstrate that its chosen funding method is the most feasible option and the project's impact on the applicant's cost to provide services is reasonable. S.C. Code Ann. Regs. 61-15 § 802.16. Finally, the seventh listed criterion, "Adverse Effects on Other Facilities," states, "The impact on the current and projected occupancy rates or use rates of existing facilities and services should be weighed against the increased accessibility offered by the proposed services." S.C. Code Ann. Regs. 61-15 § 802.23. This criterion also provides that the staffing of the proposed service should not unnecessarily deplete the staff of existing facilities or cause an excessive rise in staffing costs. *Id.*

All of these criteria undoubtedly afford DHEC broad discretion in bringing its expertise in health care planning to the evaluation of CON applications for general hospitals. In turn, the incorporation of these criteria into the section in which the Bed Transfer Provision is located, Chapter II.G.1 § (A), signifies the intent of the State Health Planning Committee to provide flexibility in the application of section (A) to each proposed project with its own unique circumstances. Thus, it is reasonable for DHEC to interpret the Bed Transfer Provision as allowing the transfer of beds to a hospital that has not yet been built when the transfer would improve health care access for the target population. This is consistent with the plain language of the Bed Transfer Provision as well as the General Assembly's stated purpose for the CON Act: "[T]o promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services [that] *will best serve public needs*, and ensure that high quality services are provided in health facilities in this State." § 44-7-120 (emphasis added).

> an intention to provide similar services in the future, persons who pay for health services in the health service area in which the project is to be located and who have notified [DHEC] in writing of their interest in [CON] applications, the State Consumer Advocate and the State Ombudsman.

S.C. Code Ann. Regs. 61-15 § 103.1 (2011) (amended 2012).

Just as the *Murphy* court found DHEC's flexible interpretation of its water quality certification regulation reasonable and consistent with the regulation's plain language,[17] we find DHEC's interpretation of the Bed Transfer Provision in the 2008-2009 State Health Plan reasonable and consistent with the plain language of that provision. Therefore, we find no compelling reason to reject DHEC's interpretation of the Bed Transfer Provision within section (A). *See S.C. Coastal Conservation League*, 363 S.C. at 75, 610 S.E.2d at 486 ("Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ."); *Spruill*, 363 S.C. at 65, 609 S.E.2d at 526 (holding courts traditionally defer to an executive agency's construction of its own regulation and this "construction is accorded most respectful consideration and will not be overturned absent compelling reasons" (citation and internal quotation marks omitted)).

Based on the foregoing, the ALC properly deferred to DHEC's interpretation of the Bed Transfer Provision.

II. Competing Applicants

Trident assigns error to the ALC's finding that Trident and Roper were not "competing applicants." Trident argues that as a matter of law, the approval of both CON applications would exceed the need for hospital beds in the area, and, therefore, DHEC was required to determine which applicant most fully complied with the CON Act, the State Health Plan, project review criteria, and applicable DHEC regulations. We disagree.

Section 44-7-130(5) defines "competing applicants" as

> two or more persons or health care facilities as defined in this article who apply for [CONs] to provide similar services or facilities in the same service area within a time frame as established by departmental regulations and *whose applications, if approved, would exceed the need for services or facilities*.

(emphasis added).[18] When DHEC is faced with competing applications, it is required to award a CON, "if appropriate," based on which, if any, application

[17] 396 S.C. at 640-41, 723 S.E.2d at 195.

[18] Similarly, Regulation 61-15 defines "competing applicants" as

most fully complies with the CON Act, the State Health Plan, the project review criteria, and applicable DHEC regulations. § 44-7-210(C).

Here, the parties agree that (1) both Trident and Roper propose to provide similar services and facilities in the same service area; and (2) Trident's and Roper's respective CON applications were filed within the appropriate time frame for competing applications. However, Trident challenges the ALC's finding that the approval of both applications would not exceed the need for hospital facilities in the service area. Roper, on the other hand, argues substantial evidence supports the ALC's finding.

Nevertheless, Trident characterizes this issue as an issue of law, asserting that the question of whether both projects would exceed the need for hospital beds in the service area is determined solely by the indication of need set forth in the 2008-2009 State Health Plan's hospital inventory, which reflects an excess of forty-eight hospital beds for the Tri-County Service Area and an excess of six beds in Roper's inventory. Trident concludes that Roper's proposed hospital, "by itself or in conjunction with Trident's proposed hospital exceeds the need for hospital beds in the service area." We disagree. Section 44-7-130(5) clearly focuses on whether the proposed projects would *cause* an excess of services or facilities for the service area.

We agree with Trident that this issue is one of law but only because, in this case, we need not look to indicators of need outside of the 2008-2009 State Health Plan—the approval of both CONs will not exceed the need already documented in

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> two or more persons and/or health care facilities as defined in this regulation who apply for [CONs] to provide similar services and/or facilities in the same service area and *whose applications[,] if approved[,] would exceed the need for this facility or service*. An application shall be considered competing if it is received by [DHEC] no later than fifteen (15) days after a Notice of Affected Persons is published in the State Register for one or more applications for similar services and/or facilities in the same service area.

S.C. Code Ann. Regs. 61-15 § 103.6 (emphasis added).

the 2008-2009 State Health Plan.[19] Roper is not seeking to add new beds to the service area. On the contrary, the existing hospital beds at Roper's facility in downtown Charleston were already approved for a CON. Thus, Roper is merely seeking to transfer beds that are already available for use in the service area to a location in the very same service area that will be more convenient for its existing patients residing in Berkeley County, who now travel to Roper's facility in downtown Charleston.

Further, Trident's proposed addition of beds to the service area is filling a need already documented in the State Health Plan's hospital inventory. Moreover, the number of beds added by Trident that will exceed the number designated in the hospital inventory are allowed under the Fifty Bed Rule. *See supra*.

Based on the foregoing, the ALC correctly determined that Trident and Roper are not "competing applicants."

CONCLUSION

Accordingly, the ALC's decision is

AFFIRMED.

WILLIAMS and McDONALD, JJ., concur.

[19] At oral argument, Roper asserted the supreme court's opinion in *Spartanburg Reg'l*, 387 S.C. at 90-91, 690 S.E.2d at 789, established that the determination of "competing applicants" is always a factual determination. We do not read the *Spartanburg Reg'l* opinion that broadly. The determination *in that case* was factual. However, in this case, we need not go beyond the methodology set forth in the 2008-2009 State Health Plan to determine that Trident and Roper are not competing applicants.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Paige Weeks Johnson, as Personal Representative of the Estate of Christie Lane Valenzuela, Respondent,

v.

Sam English Grading, Inc., Appellant.

Appellate Case No. 2012-213307

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

Opinion No. 5315
Heard January 6, 2015 – Filed May 6, 2015

AFFIRMED

Charles E. Carpenter, Jr., of Carpenter Appeals & Trial Support, LLC, and James C. (Trey) Cox, III and Danielle F. Payne, both of Grier, Cox, & Cranshaw, LLC, all of Columbia, for Appellant.

John Paul Detrick, of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Hampton, Ronald A. Maxwell, Sr., of Maxwell Law Firm, of Aiken, L. Lisa McPherson, of McWhirter Bellinger & Associates, PA, of Lexington, and Robert Norris Hill, of Law Office of Robert Hill, of Lexington, for Respondent.

KONDUROS, J.: In this appeal from a negligence action, Sam English Grading, Inc. (The Company) contends the trial court erred in admitting certain evidence and denying its motions for directed verdict or judgment notwithstanding the verdict (JNOV). It also argues the trial court erred in giving a coercive version of an *Allen*[1] charge. We affirm.

FACTS/PROCEDURAL HISTORY

On August 7, 2009, Michael Valenzuela was driving his motorcycle on Redds Branch Road in Aiken County, with his wife, Christie Valenzuela, as a passenger on the back. The speed limit was forty-five miles per hour, and Michael testified he was driving between forty to forty-five miles per hour. As they approached the driveway to Owens Corning (Corning), Christie tapped Michael on his side to alert him to a problem. Michael did not see anything at first and then noticed a lot of dust coming from a large piece of equipment, a pan[2], driving on a private driveway owned by Corning, towards Redds Branch Road, which was about twenty to thirty feet away from the intersection. Michael estimated the pan was traveling at least thirty miles per hour. Michael believed the driver did not see him and they were going to crash if he continued driving his motorcycle, so after braking and skidding, he "threw the [motorcycle] down." As a result, Christie died and Michael suffered injuries. The pan did not enter the roadway but stopped by making a quick right turn and coming to rest on top of the stop sign. The motorcycle and pan came to rest within five to ten feet of each other.

The Company has collected Corning's debris for many years. Every few years, the Company would use the pan to take dirt from a pit Corning owned and move it to fill Corning's landfill, which required it to cross Redds Branch Road.

Paige Weeks Johnson, as personal representative of Christie's estate, brought an action for negligence against the Company for acts including the failure to warn with signs or other devices the motoring public of the danger the Company created. At trial, Michael testified he had one to two seconds to react. He testified no flagman was near the intersection or anywhere else near the site but he wished a sign, a flagman, or some kind of warning had been present. Michael stated he also

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[1] *Allen v. United States*, 164 U.S. 492 (1896).

[2] The pan was also referred to as a scraper. It weighed around 73,000 pounds and was forty-one feet long and twelve feet tall.

wished the driver of the pan would have acknowledged him once he was skidding. He provided the driver did not begin braking until Michael had already put his motorcycle down. Michael testified that before the day of the accident, he had not driven though that area in the last ten years.

Three witnesses testified, over the Company's objections, about prior incidents with the Company's equipment at the intersection. Ann Johnson testified she frequently traveled on Redds Branch Road by the driveway and it was dangerous because equipment was always going back and forth across the road. She provided that a few days prior to the accident, as she passed the driveway, she looked in her rearview mirror and a "huge piece of equipment just zoomed across right behind [her]." She indicated she had never seen a flagman or warning signs at the site.

Laura Boozer testified she traveled by the incident site up to six or eight times a day because she worked at Corning's plant. She provided that about a month before the Valenzuelas' accident, she and her husband were driving down the road and her husband had to slam on his brakes to avoid hitting the pan crossing the road. She testified no flagman or warning signs were in the area. She indicated that because she and her husband were familiar with the spot, they would slow down and watch for trucks in the road.

Virginia Gunter testified she had regularly driven past the intersection where the accident occurred for many years. She indicated it was rare for the equipment to stop and she had to remind herself to slow down and look around when she drove through the area. She stated she had never seen a flagman or warning signs there.

The driver of the pan for the Company, Jeffery D. Lewis, testified that another employee, Johnny Tindel, directed him to come across the street just before the accident. Lewis believed this meant no traffic was coming and he could proceed through the intersection without stopping. When Lewis was about thirty feet from the intersection, Tindel motioned for him to stop. Lewis glanced to his left and saw the motorcycle and began braking and turned sharply to the right. He knocked over the stop sign with the pan. Lewis testified there was no way for Michael to tell he was going to brake and turn to the right to avoid entering the road. Lewis indicated the pan was not loaded at the time of the accident and was able to move faster than when it was loaded. Lewis also testified that on a typical day, he would drive back and forth across the road at least fifty times. He testified no warning signs were on the road the day of the accident.

Eric Pruitt, a dump truck driver, was regularly at the landfill and observed the accident. He believed Lewis was going to enter the road but instead made a right turn and ran over the stop sign. Pruitt testified Tindel acted as a spotter for Lewis, looking for traffic on Redds Branch Road.

James A. McLaurin, a state trooper at the time of the accident, was dispatched to the scene of the accident. He testified he did not notice any evidence of a flagman but did speak to Tindel. McLaurin believed Tindel was responsible for letting Lewis know whether it was clear or not clear for him to cross Redds Branch Road. He also testified that Christopher English (Chris), the co-owner of the Company, told him he had installed the stop sign at the end of the private driveway. During McLaurin's testimony, Johnson introduced into evidence, over objection, a contract between the Company and Corning from 1984. McLaurin indicated the contract specified advance warning signs should be placed one thousand feet from where trucks were entering the highway. He provided that was consistent with where the state normally places such signs. He further testified the contract required a flagman sign at five hundred feet from where trucks enter the highway, which was an adequate distance to warn the public. He stated these measures are for the safety of the motoring public.

Chris testified about a contract the Company had with Corning which had been in existence since 2009. That contract mandated the Company provide a flagman and was in existence at the time of the accident. He also testified that regarding the time in question, a flagman was not at the site. He stated the flagman was only necessary for flagging his equipment across the road, not for the public's safety. He provided he previously had a flagman directing the public at the intersection but stopped providing one when the flagman was almost hit by a motorist who refused to stop. Chris also testified an encroachment permit referenced in the contract required advance warning signs but those warning signs were not necessary if the flagman was not directing public motorists. He indicated he operated the pan when Lewis did not. Chris stated he placed the stop sign at the private drive but told his drivers they did not have to stop at it if they had someone motioning traffic was clear. He testified Tindel's main job was to sweep debris off the road.

Samuel Curtis English, Chris's brother, worked for the Company and testified Tindel's job was to use the equipment to sweep dirt not to control traffic. He testified the Company did not use a flagman.

The video deposition of Clifford A. Merritt, a professional engineer with Corning, was played for the jury. Merritt was involved with the Company and Corning's contract to construct an earthen perimeter berm[3] at the landfill. He testified Corning was required to get an encroachment permit in 1984 from the South Carolina Highway Department but it was now expired because it was no longer needed. He indicated because the permit was needed to do work along a public road, Corning needed it when it constructed the driveway. The permit required whoever was crossing the road with a piece of equipment to have a flagman and advance warning signs. He stated that even though the permit expired, the guidelines and the need for a flagman and warning signs were still required. He testified the Company agreed to the terms requiring the flagman and warning signs.

He also provided he issued an addendum to the contract dated May 22, 2009, that required the Company to provide a flagman and maintain road crossing signs and other road crossing safety measures in compliance with the 1984 encroachment permit. Merritt testified the Company was aware of the requirements for a flagman based on the previous construction projects it had done for Corning. Merritt indicated Corning required the flagman and signs to ensure proper traffic control and safety on Redds Branch Road and the Company was aware of that. Merritt also testified he had observed the flagman and warning signs at the incident site over the years during periodic reviews. He provided that the flagman and warning signs were only required during the time periods when an earthen berm was being constructed. Construction of an earthen berm started in August 2009 and finished in September or October 2009.[4]

Kelly B. Kennett testified for Johnson as an expert in accident reconstruction. When asked if he felt like a flagman was needed at the intersection, he replied:

> [W]hen you have site distances and roadway configurations that just do not allow a motorist to see

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[3] A berm is a small hill or wall of dirt or sand.

[4] Lewis, the driver of the pan, indicated that at the time of the accident, the Company had begun the process of building the berm.

> either a motorist driving a [pan] going this way or a motorist on Redds Branch Road here, then you need a different method to alert people and, certainly, a flagman is one of those ways.

He further indicated:

> [T]he desired effect is just like they are out on the highway or whatever. I mean, hopefully, you slow down. You pay attention. You get additional time to perceive and react because you're going more slowly. So, you know, again, it just gives people notice from something other -- you don't have to wait to actually see the hazard. You get notice before you get to the hazard that something is coming.

Kennett also testified that based on his review of the evidence gathered from the scene, the pan was not going to stop at the stop sign with ordinary braking. Kennett explained:

> In this particular case the [pan] is literally 20 feet from the intersection at its unbroken speed. Now it turns out it progresses very -- not very much more distance and it does this hard 90-degree turn and it turns out that it comes out of short of the intersection, but at 20 feet from . . . an intersection at an unbroken, unchecked speed with no effective braking, that's going to appear to be an imminent hazard to ordinary motorists.

The Company moved for a directed verdict, arguing it had no duty to stop at the stop sign, have advance warning signs, or have a flagman. It also asserted Johnson had not proved proximate cause. The trial court denied the motion, finding the record contained ample evidence to present a jury question. The company renewed its motion for directed verdict at the close of its case, which the trial court again denied.

Following closing arguments, the trial court charged the jury, and the jury began deliberating at 11:45 a.m. on the Friday before Labor Day. At 2:04 p.m., the trial

court addressed the jury regarding a note it sent asking what certain code sections provided, and the jury returned to deliberations at 2:14 p.m. At 5:40 p.m., the trial court brought the jury back into the courtroom after it sent a note asking, "At what point do we declare a hung jury?" The trial court gave the jury an *Allen* charge and stated it could order dinner for the jury and stay until "nine, ten, eight, whatever you want to stay to. If we can't agree, we can come back tomorrow, Saturday. If you don't want to come back tomorrow we'll come back Tuesday morning . . . ." The court further stated:

> You have done a super good job and I ask that you go back and let's give it a good faith stab. If you can't get it done tonight, we'll come back in the morning or if you don't want to come back on Saturday we can come back Tuesday and I'll be glad -- you're probably tired of pizza. I am. It's the third time I've had it this week. My wife is out of town. I'm sick of it; so we'll get something different or if you want to -- if you want to go home about 8 o'clock or 9 o'clock and come back fresh in the morning if we can't reach -- but we're going to give it a shot.

The trial court also stated:

> I ask, you know, please, on behalf of these parties and all my court personnel have been here all week. We've all put in a lot of time. Nobody has put in . . . harder time than y'all have. Y'all have the hardest decision. I am going to ask that you respect each other and try to work it out. Now, do you want me to order you supper or do you want to wait a little while and let me know? Why don't you send me a note [at] 6:30 or a quarter 'til 7 and let me know how we are.

Additionally, the trial court stated:

> Y'all don't go back there and fuss at me now, please. That's what the law requires me to do when we reach this situation. That was -- what I was citing y'all was an 1898

> case of the [United States] Supreme Court; so y'all aren't the first jury or the first trial that couldn't come to an agreement. You won't be the last, but every one of them that's faced with this situation I urge you, please, consider each other's opinion and in the spirit of compromise or whatever let's reach a verdict in this case. Thank you. Madam forelady, I'll just wait to hear from you about whether you want me to order you something or whether you want to come back tomorrow.

Following the trial court's statements, the Company objected that the instruction indicated the jury had to reach a verdict and that was not what the law required. The trial court overruled the objection, stating "I don't think my instructions said that at all. I asked them, urged them to try to. I told them we'd come back, but we hadn't been out but less than six hours; so that's not -- I certainly didn't indicate that to them." At 7:04 p.m., the jury came back into the courtroom because it had some legal questions and assured the trial court it was being civilized. The trial court answered the questions and sent the jury out to continue deliberating at 7:14 p.m. At 8:47 p.m., the jury returned with a verdict.

The jury found the Company was negligent and its negligence proximately caused Christie's death. The jury also found Michael was negligent and proximately caused Christie's death. The jury found Michael was 35% at fault and the Company was 65% at fault. The jury found Christie's estate sustained $2.9 million in actual damages. The jury also found the Company's conduct was willful, wanton, careless, or reckless. Following deliberations on the amount of punitive damages[5], the jury determined Johnson was not entitled to punitive damages. The Company filed post-trial motions, which the trial court denied.[6] This appeal followed.

[5] Those deliberations occurred on the Tuesday following Labor Day.

[6] The post-trial motions are not included in the record, only the trial court's order denying them. The order does not specify the grounds for the motions.

LAW/ANALYSIS

I. Admission of Contract

The Company argues the trial court erred in admitting into evidence a private contract between it and Corning. We disagree.

"The admission of evidence is within the trial court's discretion." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000). "The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law." *Id.* "The trial court has broad discretion in the admission or rejection of evidence and will not be overturned unless it abuses that discretion." *Davis v. Traylor*, 340 S.C. 150, 157, 530 S.E.2d 385, 388 (Ct. App. 2000). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Menne v. Keowee Key Prop. Owners' Ass'n, Inc.*, 368 S.C. 557, 568, 629 S.E.2d 690, 696 (Ct. App. 2006) (internal quotation marks omitted). "To warrant a reversal based on the admission of evidence, the appellant must show both error and resulting prejudice." *Conway v. Charleston Lincoln Mercury Inc.*, 363 S.C. 301, 307, 609 S.E.2d 838, 842 (Ct. App. 2005).

The trial court has wide discretion in determining the relevancy of evidence. *Moore v. Moore*, 360 S.C. 241, 257-58, 599 S.E.2d 467, 476 (Ct. App. 2004). "Evidence is relevant and admissible if it tends to establish or make more or less probable some matter in issue." *Johnson v. Horry Cnty. Solid Waste Auth.*, 389 S.C. 528, 534, 698 S.E.2d 835, 838 (Ct. App. 2010) (citing Rules 401 and 402, SCRE). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *Johnson*, 389 S.C. at 534, 698 S.E.2d at 838 (internal quotation marks omitted).

"Generally, a third person not in privity of contract with the contracting parties does not have a right to enforce the contract." *Hardaway Concrete Co. v. Hall Contracting Corp.*, 374 S.C. 216, 225, 647 S.E.2d 488, 492 (Ct. App. 2007). "However, if a contract is made for the benefit of a third person, that person may

enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." *Id.* at 225, 647 S.E.2d at 492-93 (internal quotation marks omitted).

> A tortfeasor may be liable for injury to a third party arising out of the tortfeasor's contractual relationship with another, despite the absence of privity between the tortfeasor and the third party. The tortfeasor's liability exists independently of the contract and rests upon the tortfeasor's duty to exercise due care. This common law duty of due care includes the duty to avoid damage or injury to foreseeable plaintiffs.

Dorrell v. S.C. Dep't of Transp., 361 S.C. 312, 318, 605 S.E.2d 12, 14-15 (2004) (citations omitted). South Carolina courts have "allowed the imposition of tort liability to a third party as a result of contractual obligations despite the absence of privity between the tortfeasor and the third party. The key inquiry is foreseeability, not privity." *Terlinde v. Neely*, 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980) (citation omitted).

The trial court ruled in limine to allow Johnson to amend the pleadings to address the contract, and the Company did not raise this as an issue in its brief. During trial, the court overruled the Company's objections to the contract.

The contract was introduced into evidence during the testimony of former state trooper McLaurin, who was dispatched to the scene of the accident. McLaurin read the contract and testified it referred to advance warning signs and where they should be placed. He testified the purpose of a flagman was for the safety of the public.

Merritt, the Corning employee, testified the Company and Corning had a current contract that had the same conditions as the 1984 contract. Therefore, the age of the 1984 contract and its expiration did not prejudice the Company because the same conditions were in the current contract. Merritt testified the purpose of the warning systems provided by the contract were to ensure safety. It was foreseeable the public and the Company's equipment could have an accident without the warning signs and flagman in place. Accordingly, the trial court did not err in admitting the contract.

II. Admission of Witnesses' Testimonies

The Company contends the trial court erred in allowing multiple witnesses to testify about previous incidents at the same intersection with the Company. We disagree.

"The admission of evidence is within the trial court's discretion." *R & G Constr.*, 343 S.C. at 439, 540 S.E.2d at 121. "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Menne*, 368 S.C. at 568, 629 S.E.2d at 696 (internal quotation marks omitted). "To warrant a reversal based on the admission of evidence, the appellant must show both error and resulting prejudice." *Conway*, 363 S.C. at 307, 609 S.E.2d at 842.

The trial court has wide discretion in determining the relevancy of evidence. *Moore*, 360 S.C. at 257-58, 599 S.E.2d at 476. "Evidence is relevant and admissible if it tends to establish or make more or less probable some matter in issue." *Johnson*, 389 S.C. at 534, 698 S.E.2d at 838 (citing Rules 401 and 402, SCRE). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *Johnson*, 389 S.C. at 534, 698 S.E.2d at 838 (internal quotation marks omitted).

> [I]n actions based on negligence it is irrelevant to prove that the plaintiff or the defendant has on similar occasions been careful or negligent; in like manner it is irrelevant to show that either party has hitherto had the reputation of being prudent or negligent. . . . [T]he best authorities clearly sustain the doctrine that the fact of a person having once or many times in his life done a particular act in particular way does not prove that he has done the same thing in the same way upon another and different occasion. . . . The weight of authority seems to be against admitting evidence of general conduct under proven circumstances to show conduct of the same kind

> under similar circumstances on a particular occasion, when there were eyewitnesses of the occurrence. . . . Evidence of habit is frequently rejected when offered for the purpose of showing that a person acted in accordance with such habit on a particular occasion, especially where direct evidence is or can be produced, or the act is otherwise fully proved.

Holcombe v. W.N. Watson Supply Co., 171 S.C. 110, 117, 171 S.E. 604, 606 (1933) (internal quotation marks omitted).

However, evidence of similar accidents, transactions, or happenings is admissible in South Carolina when a special relation between them would tend to prove or disprove some fact in dispute. *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005); *Reed v. Clark*, 277 S.C. 310, 314, 286 S.E.2d 384, 387 (1982); *Pittman v. Galloway*, 281 S.C. 70, 75, 313 S.E.2d 632, 635 (Ct. App. 1984). "This rule, which governs the admissibility of prior accidents, transactions, or happenings, is based on relevancy, logic, and common sense." *Whaley*, 362 S.C. at 483, 609 S.E.2d at 300 (internal quotation marks omitted). "Because evidence of other accidents may be highly prejudicial, [a] plaintiff must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue." *Id.* (alteration by court) (internal quotation marks omitted). "Evidence of similar facts, conditions, or occurrences is inadmissible if not pertinent to the issues in the case." *Burbach v. Investors Mgmt. Corp. Int'l*, 326 S.C. 492, 501, 484 S.E.2d 119, 123 (Ct. App. 1997) (Goolsby, J., dissenting) (quoting *Martin v. Amusements of Am., Inc.*, 247 S.E.2d 639, 642 (N.C. Ct. App. 1978) ("[E]vidence of similar occurrences or conditions may be admitted upon a showing of substantial identity of circumstances and reasonable proximity in time." (internal quotation marks omitted))).

In *Oconee Roller Mills, Inc. v. Spitzer*, 300 S.C. 358, 359-60, 387 S.E.2d 718, 719 (Ct. App. 1990), a negligence case involving "an accident between a tractor-trailer and a farm animal," this court found "no error in the admission of the evidence of [a] prior escape" of a cow. "One witness testified the incident occurred within nine months of the accident. The jury could assess the relevance of the evidence as it pertained to the issue of negligence in guarding the cattle. There is no requirement that the prior incident involve the same animal." *Id.*

In *Burbach*, 326 S.C. at 498, 484 S.E.2d at 122 (en banc), an action by tenants against their landlord, the tenants argued that even if the testimony of the landlord's prior tenant was not properly admissible under the Unfair Trade Practices Act, it was admissible on the issue of punitive damages. This court agreed finding it "was relevant to the first five factors set forth in *Gamble*[7]. Without the evidence, the trial judge could not have conducted the required post-trial verdict review of punitive damages." *Id.* at 498-99, 484 S.E.2d at 122 (citation omitted).

> [T]o ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review and may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) *the existence of similar past conduct*; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) as noted in *Haslip*, 'other factors' deemed appropriate.

Gamble, 305 S.C. at 111-12, 406 S.E.2d at 354 (emphasis added).

The witnesses testified about situations in which they had near misses with the Company's pan; these were similar acts. The same driver, equipment, and spotter were always used and had come very close in the past to causing an accident. The testimonies showed the failure to have a flagman and warning signs was a continuing issue for the Company. They also showed the Company had knowledge the pan was coming close to causing accidents and thus an accident was foreseeable. One of the incidents had occurred just days before the accident in this case. Therefore, the trial court did not abuse its discretion in finding the testimonies admissible. Further, even if the testimonies were not admissible as evidence the Company was negligent in Valenzuela's accident, like in *Burbach*, the testimonies were relevant and thus admissible to show the Company had previous instances of what could be seen as carelessness at the intersection, which went to

[7] *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991).

Johnson's claim for punitive damages.[8] Accordingly, the trial court did not abuse its discretion in allowing the testimonies.

III. Directed Verdict/JNOV

The Company asserts the trial court erred in failing to grant it a directed verdict or JNOV.[9] It contends Michael's negligence, not the Company's, caused the accident and the pan driver committed no negligent acts. It also maintains if we reverse the trial court's admissions of evidence complained of above, no evidence was presented it was liable for the accident.

"An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008). "[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). When a party provides no legal authority regarding a particular argument, the argument is abandoned and the court will not address the merits of the issue. *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011).

This issue is abandoned. In the Company's first argument, it does not provide any case law, and it does not indicate how the trial court erred. It only explains the

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[8] The punitive damages portion of the trial was bifurcated so the jury would not hear information about the Company's financial standing while it considered actual damages.

[9] The record does not contain a motion for JNOV. The appellant has the burden of presenting an appellate court with an adequate record. *Harkins v. Greenville Cnty.*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000). "The appellate court will not consider any fact [that] does not appear in the record on appeal." Rule 210(h), SCACR; *see also Sheppard v. State*, 357 S.C. 646, 657 n.3, 594 S.E.2d 462, 469 n.3 (2004) (refusing to consider the State's failure to produce a witness's prior statements because the statements were not included in the record). Motions must be made on the record to be preserved for appellate review. *Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 306, 529 S.E.2d 45, 57 (Ct. App. 2000). Accordingly, we will not consider the Company's argument regarding the JNOV.

ways it alleges Michael was the only negligent party. In its argument regarding directed verdict and JNOV, it again cites no case law and simply argues that without the wrongly admitted evidence, Johnson provided no evidence of its negligence and thus it was entitled to a directed verdict or JNOV. Neither of these sections sufficiently makes an argument, and thus, these two arguments are abandoned.

IV. *Allen* Charge

The Company argues the trial court erred in giving a version of an *Allen* charge that was coercive. We disagree.

"An *Allen* charge is an instruction advising deadlocked jurors to have deference to each other's views, that they should listen, with a disposition to be convinced, to each other's argument . . . ." *State v. Lee-Grigg*, 374 S.C. 388, 418 n.1, 649 S.E.2d 41, 57 n.1 (Ct. App. 2007) (internal quotation marks omitted), *aff'd*, 387 S.C. 310, 692 S.E.2d 895 (2010). "Review of an *Allen* charge requires this court to consider the charge in light of the accompanying circumstances." *State v. Williams*, 366 S.C. 260, 264, 543 S.E.2d 260, 262 (Ct. App. 2001). "Whether an *Allen* charge is unconstitutionally coercive must be judged in its context and under all the circumstances." *Dawson v. State*, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002) (internal quotation marks omitted). "The trial judge has a duty to urge the jury to reach a verdict, but he may not coerce it." *Williams*, 344 S.C. at 263, 543 S.E.2d at 262 (internal quotation marks omitted). When the trial court's comments have clearly coerced the jury into reaching a verdict, appellate courts have found a violation of the statute and mistrial the appropriate remedy. *Buff v. S.C. Dep't of Transp.*, 342 S.C. 416, 422, 537 S.E.2d 279, 282 (2000).

"Factors to be considered in determining whether a charge is coercive include the length of the deliberations prior to the charge, the length of the deliberations following the *Allen* charge, and the total length of deliberations." *Williams*, 344 S.C. at 264, 543 S.E.2d at 262-63 (footnotes omitted). "The trial judge may not indicate to or threaten the jury that they must agree or, failing to agree, they will remain in the jury room for a specified length of time." *Id.* at 264, 543 S.E.2d at 263. "In addition, a trial judge may not direct the *Allen* charge towards the minority voter(s) on the panel." *Id.* In *Tucker v. Catoe*, 346 S.C. 483, 492-94, 552 S.E.2d 712, 717-19 (2001), the court "considered various factors to determine whether the given *Allen* charge was unconstitutionally coercive." *Dawson*, 352

S.C. at 20, 572 S.E.2d at 447. "One factor addressed whether the trial judge inquired into the jury's numerical division; another considered whether the charge spoke specifically to the minority jurors." *Id*.

> When a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, the court may state anew the evidence or any part of it and explain to it anew the law applicable to the case and may send it out for further deliberation. *But if it returns a second time without having agreed upon a verdict, it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of law.*

Buff, 342 S.C. at 420, 537 S.E.2d at 281 (emphasis added by court) (quoting S.C. Code Ann. § 14-7-1330 (1976)) (internal quotation marks omitted).

In *Williams*, 344 S.C. at 265, 543 S.E.2d at 263,

> The jury deliberated for approximately two hours on Tuesday before the trial judge sent them home for the evening. They resumed deliberations for one hour and a half the following morning before notifying the trial judge they were deadlocked. After the *Allen* charge, the jury deliberated less than twenty minutes, reheard testimony, and deliberated for approximately two more hours before reaching a verdict. The total deliberations took less than six hours.

This court found "no coercion in the timing of the *Allen* charge or in the total length of deliberations." *Id.*

The court also found "the trial judge did not coerce a verdict by implying the jury would have to deliberate indefinitely. The judge informed the jurors he would make arrangements for their comfort should the jurors get tired or become hungry." *Id.* The court determined:

> Considering the *Allen* charge as a whole, it is clear that the judge was solicitous of the welfare of the jurors and his remarks concerning getting a motel room for them or providing a rest period for them were not calculated to be of a threatening nature, but were genuine expressions of concern for their comfort and welfare. We therefore conclude that the charge was not coercive.

Id. at 266, 543 S.E.2d at 264.

In *State v. Ayers*, 284 S.C. 266, 268-69, 325 S.E.2d 579, 580-81 (Ct. App. 1985), the jury deliberated for a little over two hours, requested a recharge of a statute, and deliberated further for more than an hour. The jury then reported it could not reach a verdict. *Id.* at 269, 325 S.E.2d at 581. The forelady told the trial court, "'no matter how long we stay in that room, or if we stayed in here two long weeks or forever, we would never be able to change some of the convictions.'" *Id.* The trial court responded, "'I am prohibited from declaring a mistrial until a substantial time has elapsed in terms of the jury being able to consider the evidence and the testimony.'" *Id.* The trial court further said he could either make hotel accommodations for the jury or let it continue deliberating and commented "on the expense of operating the judicial system and the importance of bringing matters to a conclusion." *Id.* About two hours later, the jury reported it was making progress, but defense counsel moved for a mistrial, arguing the verdict was being coerced. *Id.* This court reviewed the *Allen* charge as a whole and concluded the trial court's instructions were not coercive. *Id*; *see also State v. Tillman*, 304 S.C. 512, 521, 405 S.E.2d 607, 612-13 (Ct. App. 1991) (concluding the *Allen* charge was not coercive when given after four hours of deliberation and the verdict was rendered one hour and fifteen minutes after the charge). *But see Rowland v. Harris*, 218 S.C. 42, 45-46, 61 S.E.2d 397, 398-99 (1950) (finding the trial court should have granted a mistrial when its actions could have led the jury to believe it would spend the weekend in the jury room until it reached a unanimous verdict); *State v. Simon*, 126 S.C. 437, 445-46, 120 S.E. 230, 233 (1923) (stating the trial court erred by telling the jurors they must remain overnight in a small jury room for fifteen and a half hours unless they could agree on a verdict); *State v. Kelley*, 45 S.C. 659, 663-64, 24 S.E. 45, 47 (1896) (holding the trial court erred when the jury deliberated from 4:00 p.m. one day until 6:00 p.m. the next day without lunch the second day, the jury indicated it could not agree, the judge instructed the jury to

retire again, and the foreman responded "[w]e have been in the room for twenty-four hours, and can't agree").

The trial court's statement about ordering dinner and about his wife being out of town were not coercive. Additionally, the trial court was not going to force the jury to come back on Saturday; he also offered the option of Tuesday. Reading all of the trial court's instructions together, they were not coercive. The Company takes issue with the concept of the *Allen* charge in general and argues that many states do not allow them. However, South Carolina does allow them. Accordingly, the trial court did not err in giving a version of an *Allen* charge.

V. Statement to Jury

The Company contends Johnson's statement at trial that the employees of the Company were not at fault mandated the trial court to direct a verdict for the Company. In its Appellant's brief, it concedes this issue was not raised at trial but argues this is an additional sustaining ground. However, in its reply brief, it concedes this cannot be an additional sustaining ground because it is the Appellant.[10] However, the Company argues it did not have to raise the issue at trial as it relates to subject matter jurisdiction because "[i]f the employees are not at fault there is nothing for the court to litigate." We find the issue unpreserved.

"An appellate court may not, of course, *reverse* for any reason appearing in the record." *I'On, L.L.C.*, 338 S.C. at 421-22, 526 S.E.2d at 724. "[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (internal quotation marks omitted). "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *Id.* at 301-02, 641 S.E.2d at 907 (internal quotation marks omitted).

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[10] "[A] respondent . . . may raise . . . any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. The issue of subject matter jurisdiction may be raised at any time including when raised for the first time to an appellate court." *Linda Mc Co. v. Shore*, 390 S.C. 543, 557, 703 S.E.2d 499, 506 (2010) (citation and internal quotation marks omitted). "A court's subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question." *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011).

This argument is not preserved for our review. Despite the Company's contention, this argument does not involve subject matter jurisdiction. Subject matter jurisdiction is the power to hear certain types of cases, and the circuit court has the power to hear negligence actions, as this action was. Therefore, this argument needed to be raised to the trial court. Because it was not, it is not preserved for our review.

CONCLUSION

Based on the foregoing, the trial court's decision is

AFFIRMED.

HUFF and SHORT, JJ., concur.