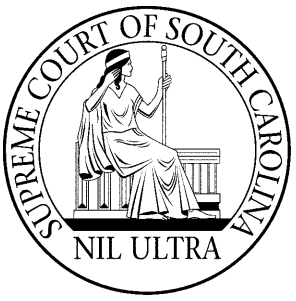

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 20
May 18, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Appellant,

v.

Whitlee Jones, Respondent.

Appellate Case No. 2014-002123

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27637
Heard January 13, 2016 – Filed May 18, 2016

AFFIRMED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Alphonso Simon, Jr., all of Columbia; Solicitor Scarlett Anne Wilson, of Charleston, for Appellant.

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Respondent.

JUSTICE BEATTY: Whitlee Jones was indicted for the murder of her boyfriend after she fatally stabbed him at their shared residence. In a pretrial motion, Jones asserted immunity from prosecution under the "Protection of

Persons and Property Act" (the Act).[1] Following a hearing, the circuit court judge granted the motion, finding Jones established by a preponderance of the evidence that she was entitled to immunity under section 16-11-440(C) of the Act.[2] In this

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[1] S.C. Code Ann. §§ 16-11-410 to -450 (2015); *see id.* § 16-11-450(A) (stating, in relevant part, "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force").

[2] Pertinent to this appeal are the following provisions of section 16-11-440:

> (A) A person is *presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself* or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> > (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered *a dwelling, residence, or occupied vehicle*, or if he removes or is attempting to remove another person against his will from the *dwelling, residence, or occupied vehicle*; and
> >
> > (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.
>
> (B) *The presumption provided in subsection (A) does <u>not</u> apply if the person*:
>
> > (1) *against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle* including, but not limited to, an owner, lessee, or titleholder; or
> >
> > * * *
>
> (C) A person who is not engaged in an unlawful activity and *who is attacked in <u>another place</u> where he has a right to be, including, but not limited to, his place of business*, has no duty to retreat and has the

direct appeal,[3] the State challenges the judge's order on two assertions of error: (1) section 16-11-440(C) is inapplicable because the stabbing occurred within Jones's residence and not "another place where [s]he ha[d] the right to be" as identified in subsection (C); and, alternatively, (2) Jones failed to establish that she was acting in self-defense when she stabbed her boyfriend. We affirm.

I. Factual / Procedural History

During the early morning hours of November 2, 2012, Jones fatally stabbed Eric Lee, her live-in boyfriend, one time in the chest while in their shared residence. The events leading up to the stabbing were established during the pretrial hearing.

In her written statement to police, Jones recounted that during the evening of November 1, 2012, she and Lee were involved in a physical altercation over a cell phone that Lee had purchased and given to Jones. According to Jones, Lee began pushing her and punching her as she began to leave their apartment. Jones stated that, while she was outside the apartment, Lee pulled her hair and attempted to force her back inside. During this confrontation, some of Jones's hair weave was removed from her head as Lee dragged her down the street. A neighbor, who witnessed the commotion, called 911 for help at 11:28 p.m. Jones claimed that Lee continued to try and force her back into the apartment. After she threw the phone on the ground, Jones was able to flee the apartment when Lee went to retrieve the phone. At some point during the confrontation, Jones called her friend, Erica Grant, and left a voicemail message urging Grant to pick her up from the apartment. The message also recorded Jones repeatedly pleading for Lee to "get off" of her.

> right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(A), (B), (C) (2015) (emphasis added).

[3] *See State v. Duncan*, 392 S.C. 404, 407 n.2, 709 S.E.2d 662, 663 n.2 (2011) (finding an order granting a motion to dismiss under the Act is immediately appealable); *see also State v. Isaac*, 405 S.C. 177, 747 S.E.2d 677 (2013) (clarifying *Duncan* and holding that the denial of a request for immunity is not immediately appealable).

Jones stated that she returned to the apartment after she "cooled down." When she opened the door, Jones observed Lee throwing her things around. After Jones called her cousin, Jasmine Taylor, to pick her up, she began collecting her things as Lee yelled at her that "[it's] over" and "rush[ed][her] to leave." When Taylor and Grant arrived at the apartment, Jones began to place her belongings in the car. According to Jones, Lee followed her around the apartment making sure that she did not take any of his possessions. Taylor, who assisted Jones while Grant remained in the car, testified that Lee continued to argue with Jones.

Jones stated that when she went upstairs to retrieve her shoes, she noticed a knife and "grabbed it for protection." After the three went downstairs, Jones and Lee remained in the living room while Taylor stood outside the living room. Jones stated that Lee "started yelling and pushing me again telling me to get out." Jones further claimed that Lee then grabbed her, asked her if she was mad, and began shaking her while telling her "It's over. It's your fault." Because Jones believed that Lee was getting ready to hit her again, she "grabbed the knife out of [her] shirt and stabbed him" one time in the chest. Jones then ran out of the apartment. Taylor did not witness the stabbing, but stated that she heard an "uh" before Jones ran out.

Taylor and Jones then got into Grant's car and drove away. However, they only drove around the corner before Jones told them to turn around and admitted that she had stabbed Lee. They returned to the apartment where they found Lee on the ground in the doorway. Taylor testified that Lee was still conscious and was moaning. Jones and Taylor drove Lee to the hospital where he later died. Grant remained at the apartment to wait for police, who had been called by a neighbor at 12:12 a.m. on November 2, 2012 to report what had happened.

Subsequently, a Charleston County grand jury indicted Jones for murder. Jones asserted immunity from prosecution under section 16-11-440(C) of the Act. Following a hearing, the circuit court judge granted Jones's motion. Initially, the judge noted that section 16-11-440(A) would not apply in Jones's case because Lee was a lawful resident of the place where the stabbing occurred. As a result, the judge found Jones was "defaulted to Section (C)." The judge explained:

> Section (C) operates in a similar manner as section (A), but does not allow for the presumption of reasonable fear. Because [Lee] was a co-resident, subsection (A) is inapplicable to [Jones] and she is therefore defaulted into subsection (C).

In so ruling, the judge rejected the State's argument that the language in subsection (C), "in another place where he has a right to be," would exclude Jones's dwelling, residence or occupied vehicle, because those places are expressly identified in subsection (A). The judge determined "the 'another place' language is intended to encompass dwellings, residences or occupied vehicles, along with any other place where a person has a right to be and is acting lawfully."

The judge explained that "[o]ne seeking to utilize section (C) against another co-resident simply loses the presumption of reasonable fear of imminent peril of death or great bodily injury" as provided in section (A). The judge recognized that while section (C) applies to an incident that occurs in a dwelling, residence or occupied vehicle, it removes the presumption of reasonable fear. The judge reasoned that "[t]o hold that a person cannot utilize Section 16-11-440(C) if the person were inside of their own home would create a nonsensical result--that a person can defend themselves from attack by their spouses, lovers, or any other co-resident while outside of their home, but not inside of their home."

Applying subsection (C), the judge found Jones established by a preponderance of the evidence that she was entitled to immunity under section 16-11-440(C) because she: (1) was not engaged in unlawful activity at the time of the attack; (2) was attacked in a place where she had a right to be; (3) did not have a duty to retreat but, rather, had the right to stand her ground and meet force with deadly force; and (4) acted in self-defense. The State filed a direct appeal from this order.

II. Standard of Review

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review." *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013); *see State v. Duncan*, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011) (recognizing that the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007).

III. Discussion

A. Arguments

The State contends Jones is not immune from prosecution under section 16-11-440(C) because the stabbing occurred in Jones's residence and not in "another place where she had a right to be" as identified in subsection (C). Because the South Carolina Legislature used the phrase "dwelling, residence, or occupied vehicle" in subsections (A), (B), (D), and (E) of section 16-11-440, the State maintains the Legislature's purposeful use of the term "another place" in subsection (C) means the Legislature clearly intended subsection (C) to apply to places other than a defendant's dwelling, residence, or occupied vehicle.

Further, the State argues that if the Legislature intended the Act to cover scenarios similar to the one presented in Jones's case, then subsection (B) would not expressly limit the application of subsection (A) when the person "[a]gainst whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle." Finally, the State asserts the legislative intent of the Act was to expand the common law Castle Doctrine to include an occupied vehicle and place of business, which was accomplished by the enactment of subsections (A) and (C), respectively.

Even if subsection (C) is applicable, the State claims the judge erred in finding Jones established that she was acting in self-defense when she stabbed Lee. The State submits the evidence in the record does not support the judge's determination that Jones believed she was in imminent danger of losing her life or sustaining bodily injury and that such fear was reasonable. The State notes that no witnesses saw Lee hit or attack Jones just prior to the stabbing. The State also points out that Jones voluntarily returned to the apartment after the initial physical altercation and was not being held against her will as Lee was insisting that she leave the apartment. Consequently, the State contends the judge erred in granting Jones immunity from prosecution under the Act.

B. Analysis

1. Applicability of Subsection (C)

a. Castle Doctrine Codified / Default into Subsection (C)

Under the Castle Doctrine, "[o]ne attacked, without fault on his part, on his own premises, has the right, in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense." *State v. Gordon*, 128 S.C. 422, 425, 122 S.E. 501, 502 (1924) (citation omitted). The Legislature explicitly codified the Castle Doctrine when it promulgated the Act and extended its protection, when applicable, to include an occupied vehicle and a person's place of business. *See* S.C. Code Ann. § 16-11-420(A) (2015) ("It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business.").

As explained by this Court in *Curry*[4], "[s]ection 16-11-440(A), the main thrust of the Act, provides a presumption of reasonable fear of imminent peril of death or great bodily injury to a person who uses deadly force if he is attacked by or attempting to remove another from a dwelling, residence or occupied vehicle." *Curry*, 406 S.C. at 370, 752 S.E.2d at 266. "However, the presumption of subsection (A) does not apply if the victim has an equal right to be in the dwelling or residence." *Id.*

Here, there is no dispute that Lee had an equal right to be in the apartment at the time of the stabbing. Thus, as recognized by this Court in *Curry*, Jones was defaulted into seeking immunity under subsection (C), which deals with the use of force by one who is attacked in another place where he has a right to be. *See Curry*, 406 S.C. at 370, 752 S.E.2d at 266 (concluding defendant, who sought

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[4] In *Curry*, the defendant and the victim were socializing at the defendant's mother's apartment when an argument and fight ensued. *Curry*, 406 S.C. at 369, 752 S.E.2d at 265. The defendant shot the victim based on the belief that the victim was lunging towards him. *Id.* At the close of the State's case, the defendant moved for a directed verdict pursuant to the Act. *Id.* The trial judge denied the motion and the jury convicted the defendant of voluntary manslaughter. *Id.* This Court found evidence supported the judge's denial of immunity under subsections (A) and (C) of section 16-11-440. *Id.* at 370-72, 752 S.E.2d at 266-67.

immunity under the Act after he fatally shot the victim, was defaulted into section 16-11-440(C) where the victim was a social guest and rightfully in the defendant's mother's apartment).

While *Curry* is instructive, our decision is not dispositive of the instant appeal. First, we did not expressly analyze whether a residence qualifies as "another place" under subsection (C). Second, the decision in *Curry* was presented in the posture of a directed verdict motion and a jury charge issue rather than a motion for pretrial immunity. Third, unlike Jones and Lee, the defendant and the victim in *Curry* were not cohabitants in the residence since the shooting occurred in the defendant's mother's apartment. Finally, *Curry* did not resolve all issues regarding the Act as we stated that "[t]he full reach of the Act and whether the statutory provisions in the Act extend beyond the common law Castle Doctrine are questions for another day." *Curry*, 406 S.C. at 373, 752 S.E.2d at 267.

b. Interpretation of Subsection (C)

Although this Court tangentially addressed the applicability of section 16-11-440(C) in *Curry*, the Court of Appeals has on two occasions expressly interpreted this provision. The court, however, reached conflicting results.

In *Manning*, the defendant was charged with murder following the death of his girlfriend at the defendant's home. *State v. Manning*, Op. No. 5228 (S.C. Ct. App. filed May 7, 2014) (Shearouse Adv. Sh. No. 18 at 16). The defendant claimed immunity from prosecution under the Act and, alternatively, claimed self-defense. *Id.* After the trial judge denied the defendant's pretrial motion for immunity, the matter proceeded to trial and the defendant was convicted of voluntary manslaughter. *Id.* The Court of Appeals issued a published opinion affirming Manning's conviction and sentence on May 7, 2014. *Id.* In reaching its decision, the court held in part that, based upon a plain reading of section 16-11-440(C), "the language 'in another place' refers to a place *other than one's dwelling, residence*, or occupied vehicle, as subsection 16-11-440(A) governs unlawful acts in one's dwelling, residence, or occupied vehicle." *Id.* at 23 (emphasis added). However, the court withdrew the opinion, granted rehearing, and subsequently held new oral arguments after the retirement of one of the judges on the panel.[5]

[5] Despite the withdrawal of this opinion, members of the Bench and Bar continue to cite it as authority in opposition to a defendant's claim of immunity under section 16-11-440(C). Therefore, we find it necessary to address this decision in our analysis.

Following re-argument, the Court of Appeals affirmed in part and remanded in an unpublished opinion. *State v. Manning*, Op. No. 2014-UP-411 (S.C. Ct. App. filed Nov. 19, 2014), *cert. granted* (May 20, 2015). This decision, however, did not address the applicability of section 16-11-440(C).

One month after *Manning* was decided, the Court of Appeals issued its decision in *State v. Douglas*, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014), *cert. granted* (Nov. 5, 2015). In *Douglas*, the defendant was arrested and indicted for the murder of an acquaintance while at the defendant's residence. *Id.* at 312, 768 S.E.2d at 235. Prior to trial, the defendant filed a motion to dismiss the case on the ground he was entitled to immunity pursuant to section 16-11-440(C). *Id.* At the hearing on the motion, the defendant testified that after a day of golfing and drinking, he and the victim went back to the defendant's residence where they continued drinking. *Id.* at 313, 768 S.E.2d at 236. After the victim excused himself to use the restroom, he returned to the living room holding a bottle of the defendant's anti-anxiety medication. *Id.* The victim continued to taunt the defendant about the medication and refused to relinquish the bottle. *Id.* During the resultant physical altercation, the defendant fatally shot the victim. *Id.* at 314, 768 S.E.2d at 236. The State appealed the circuit court's order granting the defendant's motion for immunity. *Id.* at 315, 768 S.E.2d at 237.

The Court of Appeals affirmed based upon its interpretation of section 16-11-440(C). In so ruling, the court reasoned:

> The State places emphasis on the word "another" in the phrase "another place where [the accused] has a right to be" in subsection (C) of section 16-11-440. The primary definition of "another" is "different or distinct from the one first considered." *Merriam Webster's Collegiate Dictionary* 51 (11th ed. 2003). This definition would arguably modify "place," as used in section 16-11-440(C), in such a way as to make "dwelling, residence, or occupied vehicle" and "another place" mutually exclusive. This is the interpretation the State proposes. On the other hand, the second and third definitions of "another" are "some other" and "being one more in addition to one or more of the same kind," respectively. *Id.* The third definition is more inclusive and arguably would *not* eliminate "dwelling, residence, or occupied vehicle" as a possible "place" where the person using deadly force has a right to be pursuant to section 16-11-440(C).

* * *

> The General Assembly's use of this language in section 16-11-420 clearly indicates its intent to provide the protections of the Act to persons within their own home facing not only unwelcome intruders but also "attackers," including those who are initially invited into the home and later place the homeowner in reasonable fear of death or great bodily injury. Further, the language of section 16-11-440(C) itself indicates that its application is not limited to businesses. Therefore, the more inclusive definition of "another" is the proper definition to employ in interpreting section 16-11-440(C). *See Sparks*, 406 S.C. at 128, 750 S.E.2d at 63 ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." (citation and quotation marks omitted)); *Broadhurst*, 342 S.C. at 380, 537 S.E.2d at 546 ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." (citation omitted)).

Douglas, 411 S.C. at 330-31, 768 S.E.2d at 245.

We agree with the Court of Appeals that the phrase "another place" in subsection (C) encompasses a residence. However, while *Douglas* resolved the discrete point of law that Jones's residence qualifies as "another place" where she had the right to be, the instant case requires further analysis as it implicates a policy decision regarding immunity under the Act for domestic situations.

In particular, we must evaluate the propriety of the circuit court judge's statement that "[t]o hold that a person cannot utilize Section 16-11-440(C) if the person were inside of their own home would create a nonsensical result--that a person can defend themselves from attack by their spouses, lovers, or any other co-resident while outside of their home, but not inside of their home." We agree with the judge's assessment because the legislative history and text of the Act reveal that the Legislature did not intend such an absurd result. *See Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) ("The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature."); *State v. Baucom*, 340 S.C. 339, 342, 531 S.E.2d 922, 923 (2000) ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed

in the light of the intended purpose of the statute."); *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) ("We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.").

We need not delve too deeply into the statutory language to discern the intended purpose of the Act as the Legislature explicitly stated in the Preamble that it was enacted to "authorize the lawful use of deadly force against an intruder *or attacker in a person's dwelling, residence*, or occupied vehicle under certain circumstances." Act No. 379, 2006 S.C. Acts 2908, 2908 (emphasis added). Although the Preamble generally identifies the fundamental purpose of the Act, the Legislature clearly enunciated its intent and reasons for promulgating the Act in section 16-11-420, which states:

> (A) It is the *intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle* and to extend the doctrine to include an occupied vehicle and the person's place of business.
>
> (B) The General Assembly finds that it is *proper for law-abiding citizens to protect themselves*, their families, and others *from* intruders and *attackers without fear of prosecution* or civil action for acting in defense of themselves and others.
>
> (C) The General Assembly finds that Section 20, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and *this right shall not be infringed*.
>
> (D) The General Assembly finds that *persons residing in* or visiting *this State have a right to expect to remain unmolested and safe within their homes*, businesses, and vehicles.
>
> (E) The General Assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, *nor should a person or victim be required to needlessly retreat in the face of* intrusion or *attack*.

S.C. Code Ann. § 16-11-420 (2015) (emphasis added). In order to accomplish these objectives, the Legislature enacted section 16-11-440. This section identifies the circumstances for which a person may invoke the protection of the Act.

Section 16-11-440(C) is broadly worded and, as recognized in *Douglas*, does not eliminate the inclusion of a residence as "another place." Specifically, subsection (C) states:

> A person who is not engaged in an unlawful activity and *who is attacked in another place where he has a right to be, including, but not limited to, his place of business*, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

Id. § 16-11-440(C) (emphasis added). By using the language "but not limited to, his place of business," we find the Legislature intended the protection of subsection (C) to apply to incidents, provided the other requirements are met, without a geographical restriction.

Contrary to the State's position, the elimination of the presumption of reasonable fear from subsection (C) as provided in (A) did not remove the Act's protection from one attacked in his or her home by a cohabitant. Rather, we believe the Legislature intended to authorize a cohabitant to invoke the protection of the Act but required this person to establish his or her reasonable fear of the attacker. We find the Legislature did so in order to differentiate between an intruder, who is presumably a violent stranger intent on harming the residents, versus a "household member"[6] or a cotenant, who is presumably a welcome member of the home.

To interpret 16-11-440(C) as the State proposes would improperly limit the protection of the Act based on the geography of the incident and the identity of the assailant. Moreover, under the State's interpretation, one charged with a violent

[6] Defining a "household member" as a spouse, former spouse, persons who have a child in common, or a male and female who are cohabiting or formerly have cohabited. S.C. Code Ann. § 16-25-10(3) (Supp. 2015).

crime against a cohabitant in their shared residence would *never* be entitled to immunity from prosecution despite the inclusion of section 16-11-440(C) in the Act.

Furthermore, we believe a decision that prohibits a person, who is attacked in his or her residence, from seeking immunity under the Act would not only be in direct contravention of the provisions of the Act but would undoubtedly infringe on the person's Second Amendment right to bear arms, which was specifically identified in section 16-11-420(C) as a foundational basis for the Act.[7] *See District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) ("[T]he inherent right of self-defense has been central to the Second Amendment right.").

Consequently, in order to effectuate the Legislature's intent to protect persons in South Carolina from violence being perpetrated upon them, particularly in their residence or "Castle," we conclude Jones was authorized to invoke the protection of the Act under section 16-11-440(C) because her residence qualified as "another place" that she had a right to be.

c. Pre-Act Castle Doctrine Cases

Notably, our conclusion is consistent with decisions from this Court that pre-date the Act, particularly the seminal Castle Doctrine case of *State v. Gordon*, 128 S.C. 422, 122 S.E. 501 (1924), which states:

> Where a house, premises, or place of business is jointly occupied, used, and possessed by two persons, as by partners, joint tenants, or tenants in common, each joint occupant, being equally entitled to possession, *need not retreat when attacked while in the building or premises by the other joint occupant*.

Id. at 426, 122 S.E. at 502 (citation omitted) (emphasis added); *see Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992) (discussing, in dicta, law of self-defense with respect to battered woman's syndrome and noting that a battered woman who acts while on her own premises has no duty to retreat); *State v. Grantham*, 224 S.C.

[7] U.S. Const. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."); S.C. Const. art. I, § 20 (providing in part that "[a] well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed").

41, 77 S.E.2d 291 (1953) (holding that husband who shot and killed his wife while she was advancing upon him with a knife in their home was not bound to retreat in order to invoke the benefit of self-defense); *but see State v. Stephenson*, 85 S.C. 247, 252, 67 S.E. 239, 241 (1910) ("Assuming that a husband attacked in his house by his wife, who was there by right, should retreat, such duty would be annulled if the wife joined with a trespasser in making the assault.").

d. Policy Rationale

Our decision is also aligned with the majority of jurisdictions in the United States that apply "Stand Your Ground" laws to protect victims of domestic violence who are, in general, cohabitants in a residence.

Whether a victim of domestic violence may invoke immunity from prosecution under the provisions of Stand Your Ground laws has been the subject of much debate amongst legal scholars. *See, e.g.*, Brandi L. Jackson, *No Ground On Which to Stand: Revise Stand Your Ground Laws So Survivors of Domestic Violence are No Longer Incarcerated for Defending Their Lives*, 30 Berkeley J. Gender L. & Just. 154, 168-70 (2015) (noting that "[s]ome SYG jurisdictions have limited the application of the defense to only those situations where an *intruder* attacked the defendant, depriving domestic violence survivors of the SYG privilege when their attacker is an intimate partner or a cohabitant," but recognizing several jurisdictions have abolished "the distinction between an intruder and co-occupant when evaluating whether the defendant could invoke the SYG defense").

Appellate courts have responded by authorizing a person, who is charged with a violent crime against a cohabitant that occurs in their residence, to invoke the doctrine of self-defense and seek immunity from prosecution. *See, e.g.*, *State v. White*, 819 N.W.2d 473 (Neb. Ct. App. 2012) (adopting majority rule that the privilege of non-retreat should apply equally regardless of whether the attacker is a cohabitant or an unlawful entrant); *State v. Effler*, 698 S.E.2d 547 (N.C. Ct. App. 2010) (recognizing that ordinarily a person is not required to retreat when assaulted in his dwelling or within the curtilage thereof, whether the assailant be an intruder or lawful occupant of the premises); *State v. Thomas*, 673 N.E.2d 1339, 1343 (Ohio 1997) ("The majority of jurisdictions in the United States have held that there is no duty to retreat when one is attacked in one's home, regardless of whether or not the assailant has a right to be in the home equal to that of the one being assailed."); *State v. Harden*, 679 S.E.2d 628, 640 (W.Va. 2009) (adopting majority position and holding that "an occupant who is, without provocation, attacked in his or her home, dwelling or place of temporary abode, by a co-

occupant who also has a lawful right to be upon the premises, may invoke the law of self-defense and in such circumstances use deadly force, without retreating, where the occupant reasonably believes, and does believe, that he or she is at imminent risk of death or serious bodily injury"). *See Generally* Linda A. Sharp, Annotation, *Homicide: duty to retreat where assailant and assailed share the same living quarters*, 67 A.L.R. 5th 637 (1999 & Supp. 2015) (collecting state cases involving the question of whether a person attacked in his or her living quarters, which the person shared or occupied with the assailant, is under a duty to retreat before using deadly force to repel the attack; recognizing majority view that there is no rational reason for a distinction between an intruder and a cohabitant when considering the policy for preserving human life in the domicile).[8]

2. Self-Defense

Having determined that subsection (C) is applicable to the facts of the instant case, the question becomes whether there is evidence to support the judge's ruling that Jones acted in self-defense.

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[8] In view of the ongoing conflict over the language of section 16-11-440(C), the Legislature may wish to clarify this provision. Further, we take this opportunity to invite the Legislature to evaluate the language of section 16-11-450, which states:

> A person who uses deadly force as permitted by the provisions of this article *or another applicable provision of law* is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with the applicable law or the person using the deadly force knows or reasonably should have known that the person is a law enforcement officer.

S.C. Code Ann. § 16-11-450(A) (2015) (emphasis added). We believe the use of the language "or another applicable provision of law," which presumably includes the common law of self-defense, arguably entitles all defendants who claim self-defense to a pretrial determination of immunity under the Act. *See Singleton v. State*, 313 S.C. 75, 82, 437 S.E.2d 53, 58 (1993) ("The common law remains in full force and effect in South Carolina unless changed by clear and unambiguous legislative enactment.").

"Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013). Therefore, the defendant must demonstrate the elements of self-defense, save the duty to retreat, by a preponderance of the evidence. *Id.* However, if section 16-11-440(A) applies, there is no requirement that the defendant prove he believed he was in imminent danger of losing his life or sustaining serious bodily injury given the presumption of reasonable fear of imminent peril of death or great bodily injury is included in subsection (A).

In order to establish a case of self-defense, the defendant must demonstrate the following elements:

> First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

Curry, 406 S.C. at 371 n.4, 752 S.E.2d at 266 n.4 (quoting *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)).

Under this Court's deferential standard of review, we hold there is evidence to support the judge's findings as to each element of self-defense. First, there is nothing in the record to suggest that Jones was at fault in bringing on the difficulty as she attempted to leave the apartment before the first altercation, returned the disputed cell phone to Lee, and contacted her friends to pick her up from the apartment. Second, Jones claimed in her statement that she believed Lee was going to hit her again and that had she not acted as she did, then she would have been killed. Third, Jones's belief that she was in imminent danger of losing her life

or sustaining great bodily injury[9] was reasonable given Lee's actions toward her earlier in the evening, which included Lee punching Jones, dragging her by her hair, and forcing her back into the apartment. Further, Jones stated that as she was leaving the apartment Lee grabbed her, asked her if she was mad, and began shaking her while telling her "It's over. It's your fault." Finally, as previously discussed, Jones had no duty to retreat because she was attacked in her own home.

IV. Conclusion

We conclude the circuit court judge properly granted Jones immunity from prosecution pursuant to section 16-11-440(C) because Jones's residence qualified as "another place" where she had the right to be, she met the other statutory requirements, and there is evidence to support the judge's ruling that Jones acted in self-defense.

Accordingly, we affirm the judge's order granting Jones immunity from prosecution.

AFFIRMED.

KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur. PLEICONES, C.J., concurring in result only.

[9] As defined by the Act, "great bodily injury" means "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of a bodily member or organ." S.C. Code Ann. § 16-11-430(2) (2015).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Public Interest Foundation and Edward D. Sloan, Jr,. individually, and on behalf of all others similarly situated, Petitioners,

v.

James H. "Jay" Lucas, as Speaker of the S.C. House of Representatives, Henry D. McMaster, as President of the S.C. Senate, and The State of South Carolina, Respondents.

Hugh K. Leatherman, Sr., in his capacity as President Pro Tempore of the South Carolina Senate, Intervenor.

Appellate Case No. 2015-001443

IN THE ORIGINAL JURISDICTION

Opinion No. 27638
Heard March 22, 2016 – Filed May 18, 2016

PROVISO STRICKEN

James G. Carpenter, Esquire, of Carpenter Law Firm, PC, of Greenville, for Petitioners.

Michael J. Anzelmo, and Blake Terence Williams, both of Nelson Mullins Riley & Scarborough; Richard L. Pearce, Patrick G. Dennis, and Charles Fennell Reid, all

of Columbia, for Respondent James H. "Jay" Lucas, Jr.; Attorney General Alan McCrory Wilson and Deputy Solicitor General J. Emory Smith, Jr., both of Columbia, for Respondents State of South Carolina and Lieutenant Governor Henry D. McMaster.

Kenneth M. Moffitt and Edward Houseal Bender, both of Columbia, for Intervenor Hugh K. Leatherman, Sr.

CHIEF JUSTICE PLEICONES: We agreed to hear this constitutional challenge to the 2015-16 Appropriations Act in our original jurisdiction.[1] Petitioners contend, and we agree, that the inclusion of Proviso 84.18[2] in that act violates the "one subject" requirement found in S.C. Const. art. III, § 17. As explained below, we hold that where the general appropriations act contains a section that is not germane to the purpose of that act, i.e., one that does not "reasonably and inherently relate to the raising and spending of tax monies," that section may be excised by a court. In so doing, we modify our holding in *Am. Petroleum Inst. v. South Carolina Dep't of Rev.*, 382 S.C. 572, 677 S.E.2d 16 (2009).[3]

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[1] The dissent would hold that whether the 2015-16 Appropriations Act violates the State Constitution is too insignificant a matter to warrant this Court's exercise of its original jurisdiction, and would therefore dismiss the petition. Moreover, the dissent would base this dismissal on petitioners' motives, and not on the merits, thereby permitting petitioners to refile in circuit court. The dissent fails to appreciate that were this case to be decided in the circuit court, that court would be bound by stare decisis and would be required to strike the Act in its entirety. *Am. Petroleum Inst. v. South Carolina Dep't of Rev.*, 382 S.C. 572, 677 S.E.2d 16 (2009). The circuit court could not alter that remedy any more than can the petitioners by their pleadings. The consequences of such a ruling would call into question the ability of the state to meet its fiscal obligations. Unlike the dissent, we find that the public interest requires we exercise our original jurisdiction to decide this case in an expeditious manner. Rule 245, SCACR; *See Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014).

[2] 2015 Act No. 91, Part 1B, § 84, Proviso 84.18.

[3] The dissenting opinion maintains that we can avoid deciding a constitutional issue here by simply proclaiming the Proviso invalid. We disagree. The Proviso,

FACTS

South Carolina Code Ann. § 57-1-410 (Supp. 2015) provides for the appointment of an administrative official denominated the Secretary of Transportation. This statute, enacted as § 5 of 2007 Act No. 114, reads:

> The Governor shall appoint, with the advice and consent of the Senate, a Secretary of Transportation who shall serve at the pleasure of the Governor. A person appointed to this position shall possess practical and successful business and executive ability and be knowledgeable in the field of transportation. The Secretary of Transportation shall receive such compensation as may be established under the provisions of Section 8-11-160 and for which funds have been authorized in the general appropriations act.

The next section of 2007 Act No. 114 provided:

> Unless extended by subsequent act of the General Assembly, the Governor's authority to appoint the Secretary of the Department of Transportation pursuant to Section 57-1-410 terminates and is devolved upon the Department of Transportation Commission effective July 1, 2015. All other provisions regarding the rights, powers, and duties of the secretary shall remain in full force and effect.
>
> 2007 Act No. 114, § 6.

Proviso 84.18 purports to suspend the 2015 termination/devolution provision of 2007 Act No. 114, § 6, for the fiscal year, i.e., until June 30, 2016, thus leaving intact the appointment authority given to the Governor in § 5.

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standing alone, is not invalid. Rather the issue before the Court is whether the inclusion of the Proviso in the Appropriations Act renders the Act violative of S.C. Const. art. III, § 17. That is the constitutional issue we cannot "decline to reach." Once the Act is found to violate the Constitution, the question of the appropriate remedy for that constitutional violation is necessarily before the Court.

Petitioners seek a declaration that the inclusion of Proviso 84.18 in the appropriations act violates art. III, § 17. This section of our state constitution provides:

> § 17. One subject.
>
> Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title.

Article III, § 17 has three objectives:

> "(1) to apprise the members of the General Assembly of the contents of an act by reading the title; (2) to prevent legislative 'log-rolling',[4] and (3) to inform the people of the State of the matters with which the General Assembly concerns itself." *Am. Petroleum Inst. v. South Carolina Dep't of Revenue*, 382 S.C. 572, 576, 677 S.E.2d 16, 18 (2009).
>
> *Sea Cove Dev., LLC v. Harborside Comm. Bank*, 387 S.C. 95, 101, 691 S.E.2d 158, 161 (2010).

"Log-rolling" is defined as a "legislative practice of including several propositions in one measure . . . so that the Legislature . . . will pass all of them, even though these propositions may not have passed if they had been submitted separately." *Am. Petroleum* at 577, 677 S.E.2d at 18, citing Blacks Law Dictionary 849 (7th ed. 1999).

The crux of petitioners' art. III, § 17 challenge is that the subject matter of Proviso 84.18, suspension of the appointment power found in 2007 Act No. 114, § 6, is neither germane to, nor does it provide the means, methods, or instrumentalities for, effectuating the purpose of the general appropriations act, i.e. the raising or expenditure of revenue. *See, e.g., Hercules, Inc. v. S.C. Tax Comm'n*, 274 S.C. 137, 141-2, 262 S.E.2d 45, 47-48 (1980). As such, petitioners argue that the

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[4] Other terms used for this practice are 'bobtailing,' *see, e.g., Keyserling v. Beasley*, 322 S.C. 83, 470 S.E.2d 100 (1996), and 'hodgepodge.' *See, e.g., Arthur v. Johnston*, 185 S.C. 324, 194 S.E. 151 (1937).

inclusion of Proviso 84.18 in the 2015-16 Appropriations Act violates S.C. Const. art. III, § 17. We agree.

The Court has decided a number of cases involving a challenge to a provision of the annual appropriations act as violative of art. III, § 17. In the following cases, the "log-rolling" challenge was denied because the challenged section was found to be germane to the purpose of the act:

1. *Giannini v. S.C. DOT*, 378 S.C. 573, 664 S.E.2d 450 (2008) (reenactment of Tort Claims Act Caps are reasonably and inherently related to raising and spending of tax monies).

2. *Town of Hilton Head Island v. Morris*, 324 S.C. 30, 484 S.E.2d 104 (1997) (requirement that local governments remit real estate transfer fees to the state).

3. *Keyserling v. Beasley*, 322 S.C. 83, 470 S.E.2d 100 (1996) (provisions creating a committee to negotiate new contracts and fees for waste disposal and to repeal an earlier law thereby allowing landfill to continue to accept out-of-state waste and associated fees).

4. *State Farm Mut. Auto. Ins. Co. v. Smith*, 281 S.C. 209, 314 S.E.2d 333 (1984) (insurance commission to collect a fee/tax from automobile insurers).

5. *Powell v. Red Carpet Lounge*, 280 S.C. 142, 311 S.E.2d 719 (1984) (altering definition of machines subject to licensing fee).

6. *Hercules, Inc. v. S.C. Tax Comm'n*, 274 S.C. 137, 262 S.E.2d 45 (1980) (suspension of tax assessment statute of limitations).

7. *Caldwell v. McMillan*, 224 S.C. 150, 77 S.E.2d 798 (1953) (proviso permitting Highway Department to build a kitchen and lease the space to a restaurateur).

8. *State ex rel. Roddey v. Byrnes*, 219 S.C. 485, 66 S.E.2d 33 (1951) (issuance of state bonds; school construction; sales and use tax).

9. *Crouch v. Benet*, 198 S.C. 185, 17 S.E.2d 320 (1941) (bonds to build additional facilities).

In the following cases, however, provisions of the appropriations act were found to violate art. III, § 17 because their content was not germane to the raising or spending of tax monies:

1. *Ex parte Georgetown Water & Sewer Dist.*, 284 S.C. 466, 327 S.E.2d 654 (1985) (permitting referendums in special purpose districts to decide method of electing members and/or nature of budget).

2. *Maner v. Maner*, 278 S.C. 377, 296 S.E.2d 533 (1982) (amendments to act creating the Court of Appeals).

3. *S.C. Tax Comm'n v. York Elec. Coop.*, 275 S.C. 326, 270 S.E.2d 626 (1980) (Uniform Disposition of Unclaimed Property Act giving state custody of certain unclaimed property).

We agree with petitioners that *Ex parte Georgetown*, *supra*, *Maner*, *supra*, and *York Elec. Coop.*, *supra*, dictate that we hold that the inclusion of Proviso 84.18 in the 2015-16 Appropriations Act violates the log-rolling prohibition found in art. III, § 17. The provision at issue in *Ex parte Georgetown*, like Proviso 84.18, was concerned with the manner in which the governing body of a state entity would be selected. Like Proviso 84.18, *Maner* involved administrative, not monetary matters. Finally, in *York Elec. Coop.*, the Court found the Unclaimed Property Act was not revenue providing, but instead merely procedural. We find that the suspension of the devolution of the Secretarial selection authority from the Governor to the Commission is a matter of administration and procedure involving the method of choosing an official.

Intervenor Leatherman argues, however, that because the Secretary necessarily has some discretion in making significant fiscal decisions on behalf of DOT, any

legislation touching on the selection of the individual vested with this authority is properly included in the appropriations act. Article III, § 17, however does not sweep this broadly: "The test applied in *York* and *Hercules*, both of which involved appropriations acts, was whether the challenged legislation was reasonably and inherently related to the raising and expenditure of tax monies." *Maner*, 278 S.C. at 382, 296 S.E.2d at 536. The right to appoint the Secretary, whatever that officer's authority to expend agency funds, does not meet this test. The suspension of the appointment authority in Proviso 84.18 does not "reasonably and inherently" relate to the raising or spending of tax money and is therefore not germane to the purpose of the appropriations act.

Respondent Lucas takes a different approach and suggests a new analytical approach to art. III, § 17 challenges to legislation contained in an appropriations act. He suggests that the scope of the 2015-16 Appropriations Act was expanded beyond mere fiscal concerns by the words "the operation of state government" in its title. The full title of the Appropriations Act is:

> **AN ACT TO MAKE APPROPRIATIONS AND TO PROVIDE REVENUES TO MEET THE ORDINARY EXPENSES OF STATE GOVERNMENT FOR THE FISCAL YEAR BEGINNING JULY 1, 2015, TO REGULATE THE EXPENDITURE OF SUCH FUNDS, AND TO FURTHER PROVIDE FOR THE OPERATION OF STATE GOVERNMENT DURING THIS FISCAL YEAR AND FOR OTHER PURPOSES.**

First, we are not convinced that the title is susceptible of a reading that separates "operation of state government" from fiscal issues. Further, if Respondent Lucas were correct, and 2015 Act No. 91 embraces both appropriations and the entire "operation of state government," it would *ipso facto* violate the "one subject" requirement of art. III, § 17.

Respondent Lucas next argues the Court should not read Proviso 84.18 "in isolation" but rather in the context of all of Proviso 84, citing *Keyserling*, *supra*. We find his reliance on this decision is misplaced. *Keyserling* was a challenge to two parts of a section of the 1995 Appropriations Act. *See* 1995 Act No. 145, Part 11, § 79. Section 79, which addressed the Barnwell low-level radioactive waste landfill, contained four parts:

(A) added a statute imposing a tax on low-level out-of-state waste;

(B) amended a statute to create a committee to negotiate a new waste disposal compact, with the committee authorized to negotiate new fees;

(C) required a part of all revenues generated by the landfill be remitted to the General Fund; and

(D) repealed a statute which established the original waste disposal compact.

Subsections (B) and (D) were challenged as not related to revenue raising and therefore violative of art. III, § 17. The Court rejected the challenges, holding that (B) was germane as it authorized a committee to negotiate new fees and that (D), by repealing the existing compact, permitted the landfill to continue to accept out-of-state waste, thereby generating funds while the new compact and new fees were negotiated under (B). The Court concluded: "Without these sections, [the landfill] will not generate the amount of revenues sought by the General Assembly." *Keyserling* at 87, 470 S.E.2d at 102.

Respondent Lucas relies on language from *Keyserling* which "rejects Petitioners' claim that we should read the provisions of Section 79 in isolation, requiring each provision to relate **directly** to appropriations." *Id*. at 88, 470 S.E.2d at 103. (emphasis supplied). In *Keyserling*, subsection (B) did not **directly** relate to appropriations as it authorized the commission to negotiate the new fees, but did not itself set that amount, and subsection (D) did not **directly** set a fee, but by deleting a statute, permitted a fee to continue to be collected. While neither section **directly** raised revenue, both were nonetheless "reasonably and inherently" related to revenue raising, and were necessary to make the whole of Section 79 effective. Other examples of provisions in appropriations acts that did not **directly** relate to revenue raising or spending, but were nonetheless found to be reasonably and inherently related to this purpose, are: (1) a provision that defined the machines subject to a license fee but did not itself set that fee, *Powell*, *supra*; (2) a proviso that suspended a statute of limitations so as to permit a tax assessment to continue to be collected, *Hercules*, *supra*; and (3) a subsection which authorized the

building of a cafeteria and a contract with a restaurateur, without directing the amount that could be spent. *Caldwell*, *supra*.

While a provision in the appropriations act need not **directly** relate to spending revenue, *Keyserling*, *supra*, it must "reasonably and inherently" relate to this purpose. *Hercules*, *supra*. Moreover, the "viewed in isolation" language from *Keyserling* is addressed to a "stand-alone" section of the appropriations act concerned with one isolated issue: adding, deleting, and amending statutes to permit the continued operation of a revenue-generating landfill. Here, the challenge is to a single proviso included in a section of the appropriations act containing a large agency's entire budget. We find "the stand alone" passage in *Keyserling* cited by Respondent Lucas does not apply so as to make Proviso 84.18 germane to the Appropriations Act. Moreover, if Respondent Lucas were correct, then the appropriations act could include any item, however tangentially related to an agency's operations, so long as that item were included in that agency's budget section. Such a rule would effectively exempt the appropriations act from the ambit of art. III, § 17. The language of the constitution and our precedents, however, require that the general appropriations act, like every other "Act or resolution having the force of law" relate only to "one subject." S.C. Const. art. III, § 17.

The issue is whether Proviso 84.18, suspending the termination of the Governor's appointment power, is reasonably and inherently related to the raising and spending of tax monies. *See Town of Hilton Head*, *supra*, 324 S.C. at 35, 484 S.E.2d at 107. We hold that it is not, and thus its inclusion in the Appropriations Act renders that Act violative of art. III, § 17. *See Ex parte Georgetown*, *supra*; *Maner*, *supra*; *York Elec. Coop.*, *supra*.

Having determined that the inclusion of Proviso 84.18 in the Appropriations Act violates art. III, § 17, the next question is the appropriate remedy. Prior to 2009, the Court took the view that when certain provisions of an act violated the "one subject" rule, the Court could strike down the offending provision(s) and leave standing the germane part of the legislation. This remedy has been applied in appropriations act challenges. *E.g.*, *Ex parte Georgetown*, *supra*. In 2009, however, in a case not involving the appropriations act, we held that if the constitutional "one subject" requirement were violated, then the entire act must be struck down. *Am. Petroleum*, *supra*.

Pursuant to *Am. Petroleum*, we could find that because Proviso 84.18 violates art. III, § 17, we must strike the entire 2015-2016 Appropriations Act. As explained below, however, we find this drastic remedy is not necessary when the offending language is included in the general appropriations act.

It is well settled that the purpose of the appropriations act is the raising and spending of revenue. *E.g.*, *Crouch*, *supra* (1941); *State ex rel. Roddey*, *supra*, (1951). The intent of the General Assembly in enacting an appropriations act is clear and we would not be in the position of usurping the General Assembly's prerogative to determine an act's "proper subject" when the legislation at issue is the appropriations act since the only items which are germane to that subject are those that "reasonably and inherently relate to the raising and spending of tax monies." *See Plowden v. Beattie*, 185 S.C. 229, 240, 193 S.E. 651, 656 (1937) ("The appropriations act is the one "big piece" of legislation to occupy the time of the legislature at each session of the General Assembly, and is probably the most studied bill . . . ."). Accordingly, we modify our decision in *Am. Petroleum*, *supra* and now hold that when deciding an art. III, § 17 challenge to the annual appropriations act, we have the authority to excise any provision that is not germane to fiscal issues.

CONCLUSION

We hold that the inclusion of Proviso 84.18 in 2015 Act No. 91 violates art. III, § 17, and order that Proviso 84.18 be stricken from the Act. As a result, the authority to appoint the Secretary of Transportation devolved from the Governor to the Department of Transportation Commission effective July 1, 2015 pursuant to 2007 Act No. 114, § 6.

PROVISO STRICKEN.

BEATTY, KITTREDGE and HEARN, JJ., concur. FEW, J., dissenting in a separate opinion.

JUSTICE FEW: I respectfully do not join the majority opinion. In my view, this case does not present a question of sufficient public interest to justify this Court hearing it in our original jurisdiction. *See Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991) ("Only when there is an extraordinary reason such as a question of significant public interest or an emergency will this Court exercise its original jurisdiction."). Though this Court already granted the petition to hear the case, the Court has dismissed such petitions in the past when it became clear the case was not appropriate for original jurisdiction. *See, e.g.*, *Milton v. Richland Cty.*, Op. No. 2015-MO-046, slip op. at 5 (S.C. Sup. Ct. filed August 5, 2015) (after finding "Petitioner has failed to demonstrate a justiciable controversy," the Court "dismiss[ed] this matter in our original jurisdiction as it is not appropriate for our review"). I would dismiss the petition.

This case is a companion to one in which the same petitioners contend the transfer of authority to appoint the Secretary of Transportation—from the Governor to the Department of Transportation—is unconstitutional under the separation of powers requirement set forth in article I, section 8 of the South Carolina Constitution. In the companion case, Petitioners seek to prevent the transfer of authority from occurring, contending the authority must remain with the Governor because the Department of Transportation is an executive branch department. In this case, however, striking Proviso 84.18 of the 2015-2016 Appropriations Act[5] accelerates that transfer of authority. Thus, the relief Petitioners seek in this case is inconsistent with the relief they seek in the companion case. By granting relief, we bring about the very event Petitioners seek to prevent in the companion case—the transfer of authority to appoint the Secretary away from the Governor.

However, if Proviso 84.18 is effective, the transfer has not yet occurred, and Petitioners' separation of powers challenge in the companion case is not ripe for judicial determination. Thus, by granting Petitioners the relief they seek here, we enable them to seek relief in the companion case that would otherwise not be ripe. That is what this case is about. While I do not suggest there is anything improper in Petitioners' motives, Petitioners clearly did not bring this case to accelerate the timing of an event they contend is unconstitutional. Rather, this case was filed only to prevent a finding in the companion case that the challenge to that transfer is

[5] Act No. 91, 2015 S.C. Acts 429, 916.

not ripe. In my opinion, acknowledging this assists us in understanding the controversy before us and better enables us to evaluate the public interest at stake.

In an unpublished opinion in the companion case—issued simultaneously with this opinion—we deny without explanation the relief Petitioners seek there. *S.C. Pub. Interest Found. v. Rozier*, Op. No. 2016-MO-019 (S.C. Sup. Ct. filed May 18, 2016). In that opinion, the Court states only, "After careful consideration of the briefs, and after oral argument, we find no merit to petitioners' challenge and therefore decline to issue the declaratory relief they seek." *Rozier*, slip op. at 2. Therefore, this Court issues its opinion in this case for the purpose of determining a companion case is ripe, so the Court may deny relief in the companion case without any explanation. This is not the type of "significant public interest" that warrants this Court's exercise of its original jurisdiction.

As to the merits of the majority opinion, I do not agree that this Court should adopt a new rule in this case that "when deciding an art[icle] III, [section] 17 challenge to the annual appropriations act, we have the authority to excise any provision that is not germane to fiscal issues." Such a broad proclamation of law is not necessary to resolve the controversy before the Court. *See generally In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (reciting "this Court's firm policy to decline to rule on constitutional issues unless such a ruling is required"); *Fairway Ford, Inc. v. Cty. of Greenville*, 324 S.C. 84, 86, 476 S.E.2d 490, 491 (1996) (reciting the "firm policy of declining to reach constitutional issues unnecessary to the resolution of the case before us"). *See also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51, 128 S. Ct. 1184, 1191, 170 L. Ed. 2d 151, 161 (2008) (reciting "the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied'" (quoting *Ashwander v. TVA*, 297 U.S. 288, 346-347, 56 S. Ct. 466, 483, 80 L. Ed. 688, 711 (1936) (Brandeis, J., concurring))).

The new rule the Court adopts is not necessary because this case poses a narrow question: whether the transfer of authority to appoint the Secretary occurred on July 1, 2015—as originally contemplated by section 6 of Act 114 of 2007—or has been delayed to July 1, 2016—as provided in Proviso 84.18. The question can be further narrowed into two sub issues: (1) whether Petitioners have proven a violation of article III, section 17, and (2) if so, the remedy this court should impose for the violation. The majority makes this point, stating, "Once the Act is

found to violate the Constitution, the question of the appropriate remedy for that constitutional violation is necessarily before the Court." *See supra* note 3. Here, the majority determined a constitutional violation occurred. Turning then to remedy, the "appropriate remedy for that constitutional violation" should be narrowly tailored to fit the question before the Court. In my opinion, the Court may fully answer the question before it and completely resolve the controversy Petitioners presented by merely stating the Proviso did not extend the transfer of authority. It is not appropriate to consider the remedy of invalidating the entire 2015-2016 Appropriations Act because answering that broad legal question is not necessary to resolve the narrow controversy before us.

Moreover, Petitioners' complaint does not seek a declaration as to the constitutionality or enforceability of the entire Appropriations Act. Generally, if a plaintiff asks only for a narrow remedy, there is no reason for a court to decide whether to grant a more drastic remedy. Petitioners ask in their complaint only that we "declare that Proviso 84.18 violates [article III, section 17], and therefore is null and void."[6] Thus, it is not necessary in this case to decide whether the remedy should include a declaration that the entire Appropriations Act is unconstitutional. No party has requested such a remedy, and such a remedy is not necessary to resolve the controversy before us. Rather, to answer the very narrow question before the Court in this case, we need make only this very narrow ruling—because the Proviso violates the one-subject limitation, it is not effective to delay the transfer of authority to appoint the Secretary of Transportation.

The importance of the restraint I propose is illustrated by what the majority considers the necessity to "modify our decision" of only seven years ago in *American Petroleum Institute v. South Carolina Department of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009), an opinion that describes itself as a "depart[ure] from recent precedent" of only one year before that—*South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008). *Am. Petroleum*, 382 S.C. at 579, 677 S.E.2d at 19-20. In my opinion, even the rule announced in *American Petroleum* was unnecessary to resolve the controversy before the Court

[6] In their reply brief, Petitioners include a heading stating, "Ruling the Entire Act Unconstitutional . . . Can Be an Appropriate Remedy." However, they make no argument that doing so enables the relief they actually seek—ensuring the issues raised in the companion case are ripe for judicial determination.

in that case.[7] I believe this Court should adhere in this case to its "firm policy of declining to reach constitutional issues unnecessary to the resolution of the case before us." *Fairway Ford*, 324 S.C. at 86, 476 S.E.2d at 491. By doing so, we might find it unnecessary to change the law so frequently.

For the reasons explained, I respectfully dissent.

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[7] In *American Petroleum*, the Court considered a challenge to an act containing four sections—one providing a sales tax exemption for "certain energy efficient products," one providing a sales tax exemption for "sales of handguns, rifles, and shotguns during the 'Second Amendment Weekend,'" one regarding the blending of fuel with ethanol and having nothing to do with any sales tax exemption, and one providing the effective date. 382 S.C. at 575, 677 S.E.2d at 17. The challenge was brought by the American Petroleum Institute, and related only to the fuel blending provision—not the sales tax exemptions. 382 S.C. at 576, 677 S.E.2d at 18. The controversy before the court, therefore, involved whether the businesses represented by the Petroleum Institute and the intervenor South Carolina Petroleum Marketers Association must comply with the fuel blending provision. The controversy had nothing to do with the payment of sales taxes on energy efficient products or firearms. To resolve the controversy before the Court, therefore, it was not necessary to determine the constitutionality of any sales tax exemption. Nevertheless, the Court proceeded to make the broad proclamation that it was "constrained" to declare the entire act unconstitutional. 382 S.C. at 578, 677 S.E.2d at 19.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas Easterling, Appellant,

v.

Burger King Corporation and Capital Restaurant Group, LLC, Respondents.

Appellate Case No. 2014-000338

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5404
Heard November 10, 2015 – Filed May 18, 2016

AFFIRMED

William Mullins McLeod, Jr. and David Ellis Roberts, both of McLeod Law Group, LLC, of Charleston, for Appellant.

John L. McDonald, Jr. and Christina Rae Fargnoli, both of Clawson & Staubes, LLC, of Charleston, for Respondents.

WILLIAMS, J.: Thomas Easterling appeals the circuit court's grant of summary judgment in favor of Burger King Corporation and Capital Restaurant Group, LLC (collectively "Burger King"), arguing the court erred in failing to (1) find Burger King breached its duty to take reasonable action to protect him against a

foreseeable risk of physical harm; (2) find Burger King had notice of and created an unreasonable and dangerous condition on its premises; (3) find Burger King breached its duty of care by deviating from its own internal policies; and (4) properly rule upon the arguments presented and vacate the grant of summary judgment in light of his Rule 59(e), SCRCP, motion. We affirm.

FACTS/PROCEDURAL HISTORY

This case stems from an attack on Easterling that occurred in the drive-through and parking lot of a Burger King restaurant located at 945 Folly Road in Charleston, South Carolina.

At approximately 10:00 P.M. on July 8, 2008, Easterling was waiting to place his order at Burger King when Gary Eastwood, who was in a truck directly behind him in line, rear-ended Easterling. Easterling explained he did not engage Eastwood, whom he had never seen before, after the initial contact because he "thought it was just an accident." According to Easterling, he "just wanted to get [his] food and go home." Easterling further conceded he did not report the initial accident to anyone at Burger King when he placed his order.

After Easterling placed his order and entered the drive-through lane, however, Eastwood began "pushing the accelerator but keeping his foot on the brake, so the tires were spinning. It was making loud screeching noises, and smoke was going everywhere." As Easterling moved forward in the drive-through lane to pick up his food, Eastwood began spinning his tires again and then rear-ended Easterling a second time. Easterling described this impact as a "hard hit," stating it "jarred [his] entire upper body back" when Eastwood rear-ended him again. According to Easterling, at this point, "[t]he people inside Burger King were looking out the window to see what was going on."

Following the second impact, Easterling stepped out of his vehicle to assess the damage. While Easterling was assessing the damage, Eastwood exited his vehicle and approached Easterling in a "very aggressive" fashion. Eastwood lunged at Easterling, put his shoulder in Easterling's stomach, and grabbed Easterling around the waist. At some point during the altercation, Easterling hit the curb, tripped, and fell backward down the embankment. Easterling stated he must have bumped his head when he hit the ground because he was "knocked unconscious." When Easterling regained consciousness, Eastwood was on top of him and proceeded to violently bite his nose off.

Easterling confirmed that Eastwood attacked him approximately two minutes after getting out of his vehicle. Further, Easterling agreed the attack was "totally unexpected" and "happened so quickly that . . . there was really no time to make a run inside the restaurant." According to Easterling, he "had no idea what [Eastwood] was going to do" when Eastwood exited his vehicle. Regarding the time frame of the incident, Easterling stated the following:

> Q: And Tommy, from the time that you got into the drive-through line until . . . the customer that helped you -- picked [Eastwood] up off of you, how long a time period are we talking about that expired? Do you have any --
>
> A: Like I said, that's a notoriously slow drive-through. To me, it felt like an eternity, but being four cars in front of me, I would say from the time that the guy helped me up, I would say eight minutes.
>
> Q: And . . . from the time of the second impact, and when you got out to go check the damage to your car, what kind of time elapsed there where he charged you and basically tackled you and bit your nose off?
>
> A: Just a matter of a few minutes.

(emphasis omitted).

Kimberly Jones, the manager of Burger King, worked the drive-through window at the time of the incident and recalled taking Easterling's and Eastwood's orders that evening. Jones testified that, when a car pulls up to the drive-through speaker box, she can hear everything going on inside and outside of the car through her headset. Jones, however, heard no honking, tire screeching, or yelling while Easterling and Eastwood were in the drive-through line waiting on their food.

Jones was unaware of Eastwood's behavior until the car in front of Easterling pulled up to the drive-through window, at which point she heard a customer yelling and honking the horn. Further, Jones indicated she did not know Eastwood was the one causing the commotion until Easterling pulled up to the window. Jones testified as follows regarding the time frame:

> Q: So from the time that you started serving -- or the time that you saw the car in front of [Easterling], where you kind of looked out the window and saw what was going on, how long do you think elapsed between then and the time [Easterling] got to your window?
>
> A: From the time the car got in front of [Easterling]?
>
> Q: Yeah.
>
> A: Basically, maybe 10, 12 minutes. From the whole incident, or just [Easterling] getting to my window?
>
> Q: [Easterling] getting to your window.
>
> A: Maybe five minutes.

Jones initially thought nothing of Eastwood blowing his horn and yelling. According to Jones, it was normal for people who were in a rush to honk in the drive-through because "they don't know once you get in there, you can't get out." Nevertheless, Jones then observed Eastwood rear-end Easterling's car. Jones stated Easterling jumped out of his car seconds after she saw Eastwood rear-end him and the altercation happened very quickly. As soon as Jones saw Easterling's injuries, she called the police.

When asked how much time passed from the commotion between the cars to the police being called, Jones estimated it was "15, 20 minutes, maybe, for all of that to happen." Jones admitted no one at Burger King called the police until they saw Easterling's face. Jones had never seen anything like this before, and she felt as if she acted as quickly as possible under the circumstances. According to Jones, a police officer at a nearby establishment arrived on the scene "less than a minute" after she called.

Jones did not remember the police ever being called to that Burger King for any issues other than automobile accidents. Prior to this incident, Jones had never witnessed someone intentionally rear-end another customer in the drive-through lane. Likewise, she was unaware of any violent crimes, fights, or other physical altercations ever taking place at Burger King. Jones did not think the Burger King was an unsafe place to work, nor did she feel it was located in an unsafe area.

Deputy Will Muirhead, of the Charleston County Sheriff's Office, responded to the incident. Based upon his investigation, Deputy Muirhead determined this was a "quick" altercation that, in a matter of seconds, evolved into a tragedy. Deputy Muirhead stated the scuffle lasted only minutes, and he did not believe "anybody knew what was going to happen until it happened." In Deputy Muirhead's opinion, this was a random criminal attack. While he noted a drive-through was "a common area for accidents to occur," Deputy Muirhead did not consider a drive-through "to be a common area for criminal activity." Further, he did not find the Burger King in question to be an unsafe establishment.

Easterling filed the instant lawsuit against Burger King, asserting negligence causes of action for losses and damages he sustained during the July 8, 2008 attack. Burger King filed an answer denying any liability. Following the completion of discovery, Burger King moved for summary judgment on the grounds that no genuine issue of material fact existed and it owed no legal duty to Easterling. The parties both filed memoranda addressing whether summary judgment was appropriate.

The circuit court held a hearing on the summary judgment motion and took the matter under advisement. Thereafter, the court filed a Form 4 order granting Burger King's motion to dismiss. The court then filed a subsequent Form 4 order amending its previous order, in which the court granted Burger King's motion for summary judgment.

Easterling filed a Rule 59(e) motion to alter or amend the grant of summary judgment, and the circuit court denied Easterling's motion in a Form 4 order. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in failing to find Burger King breached its duty to take reasonable action to protect Easterling against a foreseeable risk of physical harm?

II. Did the circuit court err in failing to find Burger King created an unreasonable and dangerous condition on its premises?

III. Did the circuit court err in failing to find Burger King breached its duty of care by deviating from its own internal policies?

IV. Did the circuit court err in failing to properly rule upon the arguments presented and vacate the grant of summary judgment in light of Easterling's Rule 59(e) motion?

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment by applying the same standard as the circuit court under Rule 56(c), SCRCP. *Woodson v. DLI Props., LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014).

> Summary judgment is proper if, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show . . . no genuine issue of material fact [exists] and . . . the moving party is entitled to judgment as a matter of law.

Id. "In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment." *Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011).

LAW/ANALYSIS

I. Burger King's Duty to Easterling

Easterling first contends the circuit court erred in granting summary judgment because Burger King breached its duty to take reasonable action to protect him against a foreseeable risk of physical harm. We disagree.

> In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages.

Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006).

"[F]or liability to attach based on a theory of negligence, the parties must have a relationship recognized by law as providing the foundation for a duty to prevent an injury." *McCullough v. Goodrich & Penington Mortg. Fund, Inc.*, 373 S.C. 43, 47, 644 S.E.2d 43, 46 (2007). "In any negligence action, the threshold issue is whether the defendant owed a duty to the plaintiff." *Gopal*, 395 S.C. at 134, 716 S.E.2d at 913. "The court must determine, as a matter of law, whether the law recognizes a particular duty. *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999).

The parties in the case at hand agree that Easterling was an invitee. *See Sims v. Giles*, 343 S.C. 708, 716, 541 S.E.2d 857, 861 (Ct. App. 2001) ("An invitee is a person who enters onto the property of another at the express or implied invitation of the property owner." (quoting *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 441, 494 S.E.2d 827, 831 (Ct. App. 1997))). "The duty of a storeowner to its invitees is to take reasonable care to protect them." *Bullard v. Ehrhardt*, 283 S.C. 557, 559, 324 S.E.2d 61, 62 (1984); *see also Sims*, 343 S.C. at 718, 541 S.E.2d at 863 ("The owner of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty."). As our supreme court has clarified, "a business owner has a duty to take reasonable action to protect its invitees against the *foreseeable* risk of physical harm." *Gopal*, 395 S.C. at 135, 716 S.E.2d at 913.

In *Gopal*, our supreme court reviewed four tests that various jurisdictions use to determine foreseeability. 395 S.C. at 135–39, 716 S.E.2d at 913–16 (discussing the imminent harm rule, prior or similar incidents test, totality of the circumstances approach, and balancing test). "After giving due consideration to each test and the associated policy implications, the [*Gopal* c]ourt adopted the balancing approach." *Lord v. D & J Enters., Inc.*, 407 S.C. 544, 555, 757 S.E.2d 695, 700 (2014) (citing *Gopal*, 395 S.C. at 139, 716 S.E.2d at 915).

> In reaching this decision, the [c]ourt recognized that "[t]he balancing approach acknowledges that duty is a flexible concept, and seeks to balance the degree of foreseeability of harm against the burden of the duty imposed." The [c]ourt explained that "the more

> foreseeable a crime, the more onerous is a business owner's duty of providing security."

Id. at 555–56, 757 S.E.2d at 700 (second alteration in original) (citations omitted).

Under the balancing test, "the presence or absence of prior criminal incidents is a significant factor in determining the amount of security required of a business owner, but their absence does not foreclose the duty to provide some level of security if other factors support a heightened risk." *Gopal*, 395 S.C. at 138, 716 S.E.2d at 915.

> In adopting the balancing approach, the [*Gopal* c]ourt emphasized that it was not altering the "consistently imposed . . . duty on business owners to employ reasonable measures to protect invitees from foreseeable harm." Rather, the [c]ourt "merely elucidate[d] how to determine (1) if a crime is foreseeable, and (2) given the foreseeability, determine the economically feasible security measures required to prevent such harm." The [c]ourt further noted that "[t]he optimal point at which a dollar spent equals a dollar's worth of prevention will not always be apparent, but may be roughly ascertained with the aid of an expert, or some other testimony." In replacing the "imminent harm test" adopted in *Shipes*,[1] the [c]ourt found . . . "the balancing approach appropriately weighs both the economic concerns of businesses[] and the safety concerns of their patrons." By adopting this test, the [c]ourt hoped to "encourage a reasonable response to the crime phenomenon without making unreasonable demands."

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[1] *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 484, 238 S.E.2d 167, 169 (1977) (adopting the imminent harm rule, under which a landowner owes no duty to protect invitees from violent acts of third parties, unless the owner knows or has reason to know "acts are occurring or about to occur on the premises that pose imminent probability of harm to an invitee"), *abrogated by Gopal*, 395 S.C. at 138–39, 716 S.E.2d at 915.

Lord, 407 S.C. at 556, 757 S.E.2d at 701 (third and fifth alterations in original) (internal citations omitted).

In the instant case, Easterling argues Burger King should be held liable because it had actual knowledge of the altercation prior to him sustaining injuries from Eastwood. According to Easterling, Jones "witnessed the attack occurring for a lengthy period . . . and, nonetheless, consciously chose to allow the assault to ensue instead of contacting law enforcement or attempting to intervene." Easterling further contends Burger King had notice of prior criminal incidents on its premises and, thus, had an affirmative duty to provide security personnel or implement other security measures to protect its customers from foreseeable harm.

Initially, we find Easterling's argument regarding Burger King's actual notice to be misplaced because, in raising this issue, he relies heavily upon the imminent harm rule from *Shipes*.[2] As noted above, our supreme court set forth a new rule in

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[2] Both parties direct our attention to four other cases in which our courts have addressed a business's liability to invitees for the crimes of third parties. *See Bullard*, 283 S.C. at 559, 324 S.E.2d at 62 (holding, as a matter of law, a bar could not have foreseen its patron throwing a bottle and, therefore, no duty arose that could have been breached because it happened spontaneously, leaving no time for the bar to try to prevent something of which it had no knowledge or reason to know would happen); *Munn v. Hardee's Food Sys., Inc.*, 274 S.C. 529, 531, 266 S.E.2d 414, 415 (1980) (holding that evidence indicating a group of people met under spontaneous circumstances as a result of some derogatory, racial comments made outside of the Hardee's restaurant, and not in the presence of its employees, was insufficient to show Hardee's knew or had reason to know such acts were occurring or about to occur and, thus, was insufficient to establish the restaurant's liability for the decedent's fatal injuries); *Miletic v. Wal-Mart Stores, Inc.*, 339 S.C. 327, 332–33, 529 S.E.2d 68, 70–71 (Ct. App. 2000) (holding the store did not owe a duty to protect its customer from the criminal acts of third parties because it had no notice of comparable assaults in the area in the past two years and was not the type of operation that attracted or provided a climate for crime); *Callen v. Cale Yarborough Enters.*, 314 S.C. 204, 206, 442 S.E.2d 216, 218 (Ct. App. 1994) (declining to hold Hardee's liable for the crimes of third persons, despite knowledge that numerous other violent incidents had occurred in prior years, because no incidents that evening put the restaurant on notice of unrest or potential for violence and Hardee's was not the type of operation that attracted or provided a

Gopal. Accordingly, we must analyze the scope of Burger King's duty by employing the balancing test to determine (1) if a crime was foreseeable, and (2) given the foreseeability of the crime, the economically feasible security measures that were required to prevent such harm.

Turning to the foreseeability prong, Easterling introduced a prior incidents report for this particular Burger King location that spanned 2002–2008. While the report demonstrated a pattern of police responding to calls at the Burger King for various problems,[3] it revealed only one incident of armed robbery occurring on Burger King's premises in 2004.[4] In Jones's deposition testimony, she confirmed that commotion was not infrequent in the Burger King drive-through, indicating accidents were common and drunken people would often come through the lane. According to Jones, customers would become frustrated while waiting on their orders and start honking their horns and yelling at each other. Jones could not remember any physical altercations taking place in the drive-through, but she did recall a time in which robberies were taking place around the Burger King that necessitated the restaurant hiring an off-duty police officer for a week.

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climate for crime). Although *Bullard*, *Munn*, *Miletic*, and *Callen* seem to be directly on point at first blush, the courts in these cases applied the imminent harm rule from *Shipes* in determining liability. Because we must apply the *Gopal* framework, these cases are not controlling. Our focus is not on whether Burger King knew or should have known Eastwood was about to physically attack Easterling in the drive-through on that particular evening, but rather if a crime of that nature was foreseeable to Burger King balanced against the economically feasible security measures required to prevent such harm.

[3] The prior incidents report for this Burger King location shows most of the calls to which police responded were for car accidents, disturbances, theft, suspicious persons, and other petty or nonphysical crimes.

[4] Easterling also submitted a crime report for the half-mile radius surrounding Burger King that spanned 2002–2012. Given that his expert, Dr. Kirkham, stated it would be unreasonable to expect a business to be aware of all crimes going on in its area, we decline to rely upon this report as evidence of foreseeability. *See Gopal*, 395 S.C. at 141, 716 S.E.2d at 917 (stating "a determination of whether a business proprietor's security measures were reasonable in light of a risk will, at many times, be identified by an expert").

Dr. George Kirkham, Easterling's criminology and security expert, testified that—based upon his review of the prior incidents report as well as the nightly disturbances Jones recounted in her testimony—Burger King was aware of "road rage" problems in its drive-through. Dr. Kirkham also testified regarding the problems associated with drive-through lanes in general, but conceded he had no knowledge of any physical assaults taking place at this Burger King. In our view, an isolated armed robbery incident that occurred four years prior to the July 8, 2008 incident—coupled with evidence of car accidents and customer frustration in the drive-through that never escalated beyond honking and yelling—is insufficient to establish a physical assault was foreseeable. Further, although the prior incidents report indicated a pattern of police responding to problems at this Burger King, none of the incidents were remotely similar to that which occurred on the night in question. Accordingly, we find Easterling failed to produce any evidence a physical assault was foreseeable to Burger King.

Even if the crime was foreseeable, we find Easterling failed to produce any evidence that Burger King's security measures were unreasonable. Dr. Kirkham testified that "[t]he most significant thing [Burger King] could have done would have been to train [its] employees—managers, line workers, cooks, people working the windows—train everyone there . . . to recognize suspicious situations . . . [and] call the police immediately." While we certainly agree this is an economically feasible security measure, based upon the record before us, we are unable to ascertain how Burger King failed to implement it in this case. All accounts indicate the incident, while tragic, happened very quickly and created only a small window of time within which Burger King's employees could react and call for assistance. Burger King's employees did, however, call the police once they became aware of the severity of the situation.

Easterling argues Burger King had a duty to hire a police officer to patrol the restaurant at night based upon the fact it had done so in the past. Nevertheless, Easterling's expert, Dr. Kirkham, equivocated as to whether it was necessary for Burger King to institute such a measure, explaining he did not "have enough information . . . to know who and how and when security or off-duty police should be deployed there." As our supreme court has noted, "the hiring of security personnel is no small burden." *Gopal*, 395 S.C. at 141, 716 S.E.2d at 916–17. Although Burger King previously hired an off-duty police officer, this was in response to a string of armed robberies in the area—not on its premises—and was only a temporary solution. Given the evidence regarding the nature of prior

incidents at this Burger King location, as well as a lack of testimony from Easterling's expert calling for such a measure, we find it would be unreasonable to require Burger King to hire security personnel. Thus, we find Easterling failed to present a mere scintilla of evidence that (1) Burger King's preventative actions were unreasonable or (2) it should have expended more resources to curtail the risk of criminal activity on its premises.

Based on the foregoing, even when casting the evidence in a light most favorable to the nonmoving party, we find Easterling failed to produce any evidence that Burger King did not execute economically feasible security measures to prevent a physical assault in its drive-through. Therefore, we affirm the circuit court's grant of summary judgment in favor of Burger King as to this issue.

II. Unreasonable and Dangerous Condition

Next, Easterling contends Burger King should be held liable for his injuries because Burger King created an unreasonable and dangerous condition on its premises by constructing a drive-through lane adjacent to an embankment. Easterling claims he was unable to exit the drive-through lane to safety because of the embankment. We disagree.

"A merchant is not an insurer of the safety of his customer but owes only the duty of exercising ordinary care to keep the premises in a reasonably safe condition." *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). "A merchant is not required to maintain the premises in such condition that no accident could happen to a patron using them." *Id*. at 629 n.1, 541 S.E.2d at 833 n.1.

> To recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, the plaintiff must show either (1) that the injury was caused by a specific act of the [storekeeper] which created the dangerous condition; or (2) that the [storekeeper] had actual or constructive knowledge of the dangerous condition and failed to remedy it.

Id. at 628, 541 S.E.2d at 832. "The property owner has a duty to warn an invitee only of latent or hidden dangers of which the property owner has or should have knowledge." *Harris v. Univ. of S.C.*, 391 S.C. 518, 524, 706 S.E.2d 45, 48 (Ct.

App. 2011) (quoting *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 256, 607 S.E.2d 362, 365 (Ct. App. 2004)). "A property owner generally does not have a duty to warn others of open and obvious conditions, but a landowner may be liable if the landowner should have anticipated the resulting harm." *Id.* (quoting *Sides*, 362 S.C. at 256, 607 S.E.2d at 365).

Based upon our review of the record, we hold Burger King owed no duty to warn Easterling of the embankment because it was an open and obvious condition on the premises. *See id.* (noting a property owner generally has no duty to warn others of open and obvious dangers). Moreover, we find Burger King could not have anticipated a brutal physical altercation arising from its construction of a drive-through lane directly adjacent to an embankment. *Cf. id.* (stating "a landowner may be liable if the landowner should have anticipated the resulting harm" (quoting *Sides*, 362 S.C. at 256, 607 S.E.2d at 365)). We also note that Easterling—who was parked at the front of the line when Eastwood rear-ended him a second time—could have chosen to exit the drive-through instead of getting out of his car and approaching Eastwood's vehicle. Although Easterling contends the embankment trapped him in the drive-through, the record indicates he was completely free to leave at the time he exited his vehicle.

Therefore, we affirm the circuit court's grant of summary judgment in favor of Burger King as to this issue.

III. Internal Policies and Procedures

Easterling further contends the circuit court erred in granting summary judgment because Burger King breached the duty owed to him by deviating from its own internal policies and procedures. A review of the record reveals Easterling never raised this issue to the circuit court below. Specifically, Easterling failed to raise the issue in his memorandum in opposition of summary judgment, in his Rule 59(e) motion, or at the summary judgment hearing. Accordingly, because Easterling raises this argument for the first time on appeal, we find the issue is not preserved for appellate review and decline to address it. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit] court to be preserved for appellate review."); *id.* (noting that, without an initial ruling from the circuit court, an appellate court is unable to evaluate whether the circuit court committed error).

IV. Failure to Rule Upon the Arguments Presented

Finally, Easterling contends the circuit court erred in failing to properly rule upon his arguments and vacate the grant of summary judgment in light of his Rule 59(e) motion. We disagree.

As a preliminary matter, we note that Easterling's reliance upon this court's decision in *Bowen v. Lee Process System, Co.*, 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2009), is misplaced because—as he concedes in his brief—our supreme court overruled *Bowen* in *Woodson*. Easterling nevertheless argues this court "is unable to ascertain the basis behind the circuit court's order" because the circuit court ruled upon the motion for summary judgment via Form 4 order. We disagree, however, and find the parties provided an ample record for this court to conduct meaningful appellate review of the circuit court's grant of summary judgment and rule upon the merits of this case. *See Woodson*, 406 S.C. at 527, 753 S.E.2d at 433 (noting appellate courts apply the same standard as the circuit court under Rule 56(c), SCRCP, and finding the court of appeals had "a sufficient record before it to permit meaningful appellate review and make a decision on the merits"); *Porter v. Labor Depot*, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct. App. 2007) (stating "not all situations require a detailed order, and the [circuit] court's form order may be sufficient if the appellate court can ascertain the basis for the circuit court's ruling from the record on appeal"). The circuit court acted within its discretion in issuing a Form 4 order, and we find Easterling's arguments to the contrary unavailing.[5]

CONCLUSION

Based on the foregoing analysis, the circuit court's grant of summary judgment in favor of Burger King is

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[5] Easterling also asserts the circuit court erred in denying his Rule 59(e) motion for the same reasons it erred in granting summary judgment. Easterling, however, cites no authority in his brief to support this contention and then turns to the argument that the Rule 59(e) motion preserved his arguments on appeal. To the extent Easterling argues the circuit court abused its discretion in denying his Rule 59(e) motion, we likewise reject this argument because it is without merit.

AFFIRMED.

HUFF, A.C.J., and THOMAS, J., concur.