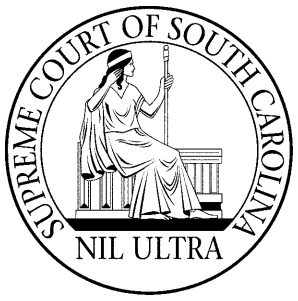

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 22
June 27, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Gloria Y. Leevy, Respondent

Appellate Case No. 2012-211953

Opinion No. 27137
Submitted May 14, 2012 – Filed June 27, 2012

DEFINITE SUSPENSION

Disciplinary Counsel Lesley M. Coggiola and Assistant Disciplinary Counsel William Curtis Campbell, both of Office of Disciplinary Counsel.

Gloria Y. Leevy, of Atlanta GA, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to any sanction set forth in Rule 7(b), RLDE, Rule 413, SCACR. Respondent further agrees to pay the costs incurred in the investigation and prosecution of this matter and to complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School. We accept the Agreement and suspend respondent from the practice of law in this state for three (3) years. We further order respondent to pay the costs incurred in the investigation and prosecution of this matter and to complete the Legal Ethics and Practice Program Ethics School,

Trust Account School, and Advertising School prior to seeking reinstatement. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

On or about December 2007 or January 2008, respondent issued a check in the amount of $250 payable to the South Carolina Bar Lawyer Referral Service on her law firm trust account. Respondent asserts that, at the time she wrote the check from her trust account, there were no client funds in the account.

In addition, respondent admits she failed to complete monthly reconciliations of the trust account. She acknowledges she failed to maintain the records required by Rule 417, SCACR. Respondent has provided evidence to ODC of her acquisition of equipment to enable her to better organize her accounting records so that she will be in compliance with the Rules of Professional Conduct and Rule 417, SCACR.

Matter II

Respondent represented the Complainant in a civil matter in 2001. She admits she failed to diligently pursue the action on behalf of the Complainant. In addition, respondent admits she failed to communicate with Complainant by not responding to Complainant's letters and telephone calls. Respondent states substitute counsel has now taken over the representation of Complainant.

Matter III

Respondent represented the Complainant in a wrongful termination action. Respondent admits she failed to diligently represent the Complainant because she failed to effectuate proper service on the defendants. In addition, respondent failed to communicate with Complainant. Respondent admits she relocated her law office and failed to notify Complainant of the new address or telephone number.

Matter IV

On November 1, 2008, respondent was appointed to represent Complainant in a pending criminal matter. Respondent failed to diligently act upon notice of the appointment and did not meet with Complainant or otherwise acknowledge her appointment. Respondent admits she failed to communicate with Complainant. Respondent states substitute counsel has been appointed for Complainant.

Matter V

Respondent undertook to represent the Complainant in a discrimination/education action regarding Complainant's child. Respondent failed to file an appeal and failed to file suit in the United States District Court as requested by Complainant; respondent admits she failed to make it clear to Complainant that she would not file suit in federal court, but in state court.

Respondent admits she failed to timely communicate with Complainant. She admits she did not notify Complainant of the relocation of her law office and failed to provide Complainant of her new address or other contact information.

Matter VI

Respondent represented Complainant in a case seeking recovery of Complainant's belongings that were being held in storage. Respondent admits she filed the initial action in 2005 with the belief that the cause of action did not arise until the belongings were sold for storage fees. Respondent was later made aware that the belongings were sold for the storage fees in 2001 and the statute of limitations had expired.

Respondent admits she did not diligently pursue this case. She also admits she failed to maintain communications with Complainant.

In 2008, respondent secured substitute counsel for Complainant, but the case was ultimately lost as it was not filed within the statute of limitations.

Matter VII

Respondent admits she undertook to represent two parties in personal injury cases in 2002. Respondent states that she associated another attorney who actually handled the settlement of the cases. That attorney is no longer a licensed attorney in South Carolina.

Respondent later learned that the Complainant, a medical provider for both parties, was not paid from the settlement proceeds. Respondent is now informed that the Complainant is owed $6,038 in one case and $5,818 in the other case. Respondent accepts full responsibility for the failure to make payment to the Complainant. She represents she fully intends to make the Complainant whole with regards to the funds owed.

Matter VIII

Respondent admits that she accepted Complainant's case materials and a check in the amount of $5,000 as a fee to handle the case. Respondent did not place the funds in her trust account but, rather, deposited the funds into her personal account.

Respondent left South Carolina realizing she would not be able to function as a lawyer and returned Complainant's retainer in April 2010 by issuing a starter check on a new checking account. The check was returned to Complainant's bank as it could not be negotiated.

Respondent did not forward Complainant her materials as she had promised. Respondent admits she failed to safeguard Complainant's funds and materials, failed to communicate with Complainant, and failed to act diligently on Complainant's behalf.

Respondent failed to answer the Notice of Investigation.

In mitigation, respondent notified ODC that she been suffering from depression due to illness and the death of family members. ODC encouraged respondent to seek help from Lawyers Helping Lawyers and was informed respondent did avail herself of that service at some point during these proceedings. Respondent

represents she is unable to function as a practicing member of the legal community at this time.

Law

Respondent admits that by her conduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2 (lawyer shall abide by client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued), Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client), Rule 1.4 (lawyer shall keep client reasonably informed about the status of the matter and promptly comply with reasonable requests for information), Rule 1.15 (lawyer shall hold property of clients or third persons in lawyer's possession in connection with a representation separate from lawyer's own property; lawyer shall promptly deliver to client or third person any funds or other property that client or third person is entitled to receive), Rule 8.1(b) (lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from disciplinary authority, and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice). She also admits she violated Rule 417, SCACR. Respondent acknowledges she has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate the Rules of Professional Conduct).

Conclusion

We accept the Agreement and suspend respondent from the practice of law in this state for three (3) years. We further order respondent to pay the costs incurred in the investigation and prosecution of this matter to the Commission on Lawyer Conduct and to complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School prior to seeking reinstatement. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richard Freemantle, individually and on behalf of himself and all others similarly situated, Appellant,
v.
Joe Preston, in his official capacity and individually, while Administrator of Anderson County; Anderson County, a political subdivision of the State of South Carolina; Anderson County Council, the Legislative and Executive body of Anderson County; Ron Wilson, in his official capacity and individually; Bill McAbee, in his official capacity and individually; Larry Greer, in his official capacity and individually; Michael Thompson in his official capacity and individually; Gracie Floyd, in her official capacity and individually, Respondents.

Appellate Case No. 2010-181306

Appeal From Anderson County
J. Cordell Maddox, Circuit Court Judge

Opinion No. 27138
Heard April 17, 2012 – Filed June 27, 2012

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Charles R. Griffin, Jr., of Anderson, for Appellant.

James W. Logan, of Logan Jolley & Smith, of Anderson, Kevin W. Sturm, of Sturm & Cont, of Spartanburg,

Candy M. Kern-Fuller, of Upstate Law Group, of Easley, Andrew F. Lindemann, of Davidson & Lindemann, of Columbia, D. Randle Moody, II, and Joseph O. Smith, both of Roe Cassidy Coates & Price, of Greenville, and Chuck Allen, of Anderson, for Respondents.

JUSTICE KITTREDGE: This is an appeal from the trial court's dismissal of claims pursuant to Rule 12(b)(6), SCRCP. Appellant Richard Freemantle, a citizen and taxpayer of Anderson County, sought to invalidate a severance agreement between Anderson County and its former county administrator, contending the approval of the severance agreement violated the common law and South Carolina's Freedom of Information Act ("FOIA"). The trial court dismissed the action finding that Appellant's status as a taxpayer did not confer standing to challenge the severance agreement. We agree with the able circuit judge in most respects concerning Appellant's lack of standing. We disagree with the trial court only insofar as the FOIA claim is concerned, for traditional standing principles do not apply under FOIA because the legislature has conferred standing on any citizen to enforce the Act's provisions. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

I.

Appellant filed this action in November 2009 to challenge the legality of a severance agreement between Anderson County ("the County") and Joey Preston, a former Anderson County Administrator. In addition to suing the County and Preston, Appellant named as Defendants the Anderson County Council ("Council") and several former and current Council members in their official and individual capacities. We collectively refer to Defendants as Respondents.

Preston was hired as County Administrator in July 1998. His employment contract with the County provided for an initial employment term of three years and a continuing, annual renewal of employment in the absence of written notice not to renew the contract. The contract provided Preston with an annual salary of $95,000 and contemplated annual pay increases consistent with the County's wage and compensation plan. In the event the County terminated Preston's employment without cause, which he alleged occurred in September 2008, the employment contract provided Preston was to be entitled to severance pay, including the financial benefits remaining on the balance of his contract, compensation for

earned sick and annual leave, and additional severance pay based upon the length of his total service to the County.

The balance of power on Council was substantially altered as a result of the November 2008 election. With the new Council coming in, one of the final acts of the outgoing Council was to execute a severance agreement for Preston that provided him over one million dollars in severance benefits, which was well in excess of that provided for in his employment contract. The severance agreement also included a release provision, stating that the County would never seek legal redress against Preston for any claims relating to his employment with the County. This occurred in a Council meeting on November 18, 2008, amid allegations of secret meetings and collusion. By a vote of 5-2, the outgoing Council approved the severance agreement. The severance agreement was not placed on the meeting's agenda.

Appellant filed a complaint against Respondents on behalf of himself and all others similarly situated seeking monetary relief and various declaratory judgments. Specifically, Appellant alleged that Council's vote approving the severance agreement was invalid. In addition, Appellant contended the successor Anderson County Council was in any event not bound by the severance agreement. Relief was sought pursuant to various causes of action, including covin and collusion, breach of fiduciary duties, illegal gift of county funds, misfeasance, malfeasance, conspiracy, violations of public policy, and violations of FOIA, S.C. Code Ann. §§ 30-4-10 to -165 (Supp. 2011).[1]

Thereafter, Respondents moved for the suit to be dismissed pursuant to Rules 12(b)(6), SCRCP, asserting that Appellant, as a taxpayer, lacked standing. Respondents further asserted that they were entitled to legislative immunity, and Appellant's claims were barred by Rule 12(b)(8), SCRCP, due to a pending action seeking similar relief. In its order of dismissal, the trial court found that Appellant

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[1] Appellant asserts Respondents failed to properly notice an executive session meeting of the Personnel Committee on November 4, 2008. Additionally, Appellant maintains that Respondents were aware of the severance agreement prior to the November 18, 2008 meeting but did not place the severance agreement on the agenda prior to the meeting. Appellant contends that the Council's failure to include the severance package on the agenda violated section 30-4-80 of the South Carolina Code, which requires that agenda for a public body meeting must be posted at least twenty-four hours prior to scheduled meetings and requires that bodies make reasonable and timely efforts to give notice of their meetings.

lacked standing under the constitution, the public importance exception, and pursuant to state statute. Alternatively, the trial court held that Respondents were entitled to legislative immunity and that Appellant's action was barred under Rule 12(b)(8) because a "duplicative" action was pending in circuit court.

II.

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* (internal quotations omitted). If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper. *Sloan Constr. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008).

III.

Appellant relies on his status as a taxpayer in contending the trial court erred in finding Appellant lacked standing to assert his various claims against Respondents. Standing may be acquired: (1) through the rubric of "constitutional standing"; (2) under the "public importance" exception; or (3) by statute. *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). We hold the trial court properly found Appellant lacks standing under the traditional standing principles. However, we find Appellant possesses standing pursuant to state statute.

A. *Constitutional Standing*

To establish constitutional standing, a plaintiff must first show he has suffered an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[2] *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61

[2] To establish constitutional standing, a plaintiff must also show a causal connection between the injury and the conduct complained of and it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *ATC South*, 380 S.C. at 195, 669 S.E.2d at 339.

(1992) (internal quotations and citations omitted)). "[A] private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom." *Evins v. Richland Cnty. Historic Pres. Comm'n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000). A taxpayer lacks constitutional standing when he "'suffers in some *indefinite* way in common with people *generally*.'" *ATC South*, 380 S.C. at 198, 669 S.E.2d at 341 (quoting *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923)) (emphasis added).

In our judgment, the injury, if any, to Appellant as a taxpayer is common to all citizens and taxpayers of Anderson County. Thus, this feature of commonality defeats the constitutional requirement of a concrete and particularized injury. We therefore affirm the trial court in rejecting Appellant's claim of taxpayer standing under constitutional standing principles.

B. *The "Public Importance" Exception*

This Court has often recognized the "public importance" exception to the general standing requirements. "[S]tanding is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *Id.* at 198, 669 S.E.2d at 341 (quoting *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007) (citation omitted)). In cases falling within the ambit of important public interest, standing is conferred "without requiring the plaintiff to show he has an interest greater than other potential plaintiffs." *Davis*, 372 S.C. at 500, 642 S.E.2d at 741-42 (finding recreation commissioners have standing under the public importance exception to challenge the constitutionality of an act which authorizes their removal from office). However, a matter is deemed to be of public importance only where a resolution is needed for future guidance. *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d, 470, 472 (2004) ("[U]nder certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance."). Thus, "[f]or a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance." *ATC South*, 380 S.C. at 199, 669 S.E.2d at 341.

This nexus between the public importance exception and the need for future guidance from the Court is invariably linked to a need for and entitlement to injunctive relief. That Appellant sought monetary damages for himself in his common law causes of action, while claiming to represent the taxpayers of

Anderson County, directly conflicts with the purpose and spirit of the public importance exception. Moreover, the personnel choices of Anderson County, even in the face of a seemingly excessive severance package, do not necessitate further guidance. Thus, we affirm the circuit court's finding that this action does not warrant invocation of the public importance exception.

C. *Statutory Standing*

The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute. FOIA contains a specific standing provision allowing any citizen of South Carolina to seek a declaratory judgment or injunctive relief to enforce the Act's requirements. S.C. Code Ann. § 30-4-100(a) (Supp. 2011) ("Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases . . . .").

This Court specifically addressed the issue of standing under FOIA in *Fowler v. Beasley*, 322 S.C. 463, 472 S.E.2d 630 (1996) (citizens brought action against county legislative delegation, school board, and governor seeking injunction to prevent school board candidate from serving due to violations of FOIA). In *Fowler*, the county delegation and school board contended citizens of Charleston County lacked standing to seek an injunction because they had "no personal stake in the outcome." 322 S.C. at 466, 472 S.E.2d at 632. In following the legislature's unmistakable intent, this Court disagreed and stated "[FOIA] permits any citizen to apply to the circuit court for injunctive relief. Accordingly, respondents have standing to challenge the Delegation's procedures under the FOIA." *Id.*; *see also Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006) ("[T]his Court has held that standing under FOIA does not require the information seeker to have a personal stake in the outcome." (internal quotations omitted)); *Bus. License Opposition Comm. v. Sumter Cnty.*, 304 S.C. 232, 403 S.E.2d 638 (1991) (holding appellants are entitled to litigate the nature and effect of a violation of FOIA and the appropriate relief, if any, to be awarded).

The legislature has specifically conferred standing upon any citizen of South Carolina to bring a FOIA claim against a public body for declaratory or injunctive relief, or both. Appellant has pled that he is a citizen of the State and that FOIA has been violated. Nothing more is required. Therefore, the trial court erred in

finding Appellant lacked standing to assert his FOIA claims.[3] On remand, Appellant shall be entitled to pursue his FOIA claims seeking declaratory and injunctive relief.

IV.

Appellant also argues the trial court erred in alternatively dismissing the action on the bases of the affirmative defense of legislative immunity and pursuant to Rule 12(b)(8), SCRCP, since there was not a duplicative action already pending in trial court. We agree and find dismissal on the grounds of legislative immunity and Rule 12(b)(8) was improper pursuant to Rule 220(b)(1), SCACR, and the following authorities: *Frazer v. Badger*, 361 S.C. 94, 101, 603 S.E.2d 587, 590 (2004) ("Immunity under the [Tort Claims] statute is an affirmative defense that must be proved by the defendant at trial."); *Jensen v. S.C. Dep't of Soc. Servs.*, 297 S.C. 323, 333, 377 S.E.2d 102, 108 (Ct. App. 1988) ("Dismissal under Rule 12(b)(6) is seldom appropriate when the defense of immunity is pleaded. In such cases the court must determine whether the public official acted within the scope of his discretionary authority."); *see also Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 105-06, 674 S.E.2d 524, 531-32 (Ct. App. 2009) (finding that Rule 12(b)(8) should be interpreted "narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8)").[4]

V.

On the basis of Appellant's lack of standing, we affirm the trial court's dismissal of all of Appellant's claims save his FOIA claims for declaratory and

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[3] We note that the trial court's order indicates potential limitations regarding the FOIA causes of action, specifically the statute of limitations, if the Appellant were found to have standing under FOIA. However, such issues are not within the scope of our review and should be more fully vetted in the trial court upon remand.

[4] Respondents claim a pending action, *Anderson County v. Preston*, C.A. No. 2009-CP-04-4482 (Anderson, S.C., Ct. Common Pleas (Complaint filed Nov. 12, 2009)), is duplicative of the action before us. In that action, Anderson County, as plaintiff, seeks to rescind the severance agreement, the return of any monies paid to Preston, and a constructive trust and return of monies paid to the Retirement System. Although both actions seek to ultimately invalidate the severance agreement, the parties and claims of the two actions are not substantially similar to warrant Rule 12(b)(8) dismissal.

injunctive relief. Pursuant to section 30-4-100 of the South Carolina Code, Appellant is legislatively conferred standing to pursue a FOIA claim. Additionally, we hold that dismissal on the alternative bases of legislative immunity and Rule 12(b)(8), SCRCP, was improper. Therefore, we reverse and remand for further consideration of Appellant's FOIA causes of action.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dutch Fork Development Group II, LLC and Dutch Fork Realty, LLC, Respondents,

v.

SEL Properties, LLC and Stephen E. Lipscomb, Defendants, of whom Stephen E. Lipscomb is the, Appellant.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 27139
Heard May 2, 2012 – Filed June 27, 2012

REVERSED

A. Camden Lewis and Keith M. Babcock, both of Lewis and Babcock, of Columbia, for Appellant.

Carmen Vaughn Ganjehsani and Charles E. Carpenter, Jr., both of Carpenter Appeals and Trial Support, of Columbia; Glenn E. Bowens, of Blythewood, and Anthony S. H. Catone, of Lexington, for Respondents.

JUSTICE BEATTY: Stephen E. Lipscomb ("Appellant"), the manager of SEL Properties, LLC ("SEL") appeals a jury verdict against him for tortious interference with a contract entered into by SEL with Dutch Fork Development Group, II, LLC and Dutch Fork Realty, LLC (collectively "Respondents"). Appellant contends that he, as the manager of the limited liability company, cannot be held individually liable in tort for a contract that was breached by SEL. Alternatively, Appellant challenges the jury's award of $3,000,000 in actual damages to Respondents on the grounds: (1) the trial judge erred in charging the jury that lost customers and lost goodwill were elements of damages as there was no evidence of such damages; and (2) the award was improper and should have been reduced as the actual damages for the tort claim were "coextensive" with or subsumed in the jury's award of actual damages to Respondents for the breach of contract claim against SEL. For reasons that will be discussed, we find that Appellant was entitled to a directed verdict as to the claim of tortious interference with a contract. Accordingly, we reverse the jury's award of damages.

I. Factual/Procedural History

As a result of discussions with Donald and William Melton, members of Dutch Fork Development Group, II, LLC ("DFDG") and Dutch Fork Realty, LLC ("DFR"), SEL purchased a 122.28-acre piece of property in Richland County for $800,000 on August 8, 2000. The property, which was to be known as Rolling Creek Estates, was the subject of two contracts entered into between SEL and Respondents for the development of residential subdivisions.

The parties entered into the first contract on November 14, 2000, which involved the development of the Courtyards at Rolling Creek ("Courtyards") in Phases I, II, and III. The second contract, which was entered into on October 17, 2002 and contained substantially the same terms as the first contract, involved the development and marketing of a 14.9-acre parcel that was to be known as Rolling Creek Phase 4 ("Rolling Creek").

Pursuant to the first contract, the parties agreed to develop the Courtyards in three phases over the five-year term of the contract. SEL was responsible for: securing financing for the purchase of the property; securing

engineering studies, surveying, and landscaping; and the costs related to the infrastructure. SEL also had "final approval of all costs pertaining to the development of the property."

In terms of Respondents, DFDG was responsible for the development of the property. In consideration of adequate performance, SEL was to pay DFDG: (1) a development fee of $54,000 for each phase of the development, which was contingent upon the sale of 60% of the lots developed in the phase and the "letting" of the contract of the next phase; and (2) 25% of the net profits received from the sale of the lots sold in each of the three phases.

DFR was granted the "exclusive right to sell" for "a period of five (5) years provided that DFR [sold and closed] no less than (20%) percent of the lots available for the sale per year in each Phase of the development." Additionally, DFR was granted the "exclusive right to sell new homes constructed in the development at a sales commission not to exceed seven (7) percent" for a period of "twelve (12) months after construction is commenced on the home." DFR was also entitled to a real estate commission of 10% upon the closing of the sale of developed lots to non-builders; however, DFR would not receive a commission for any lot sales to builders.

On November 19, 2001, SEL obtained a loan from the National Bank of South Carolina ("NBSC") in the amount of $2,001,375 to provide for the development of Phase I of the Courtyards. Shortly thereafter, SEL was reimbursed $800,000 from the loan proceeds for the original land acquisition. Appellant, however, personally guaranteed that the development loan would be repaid and that expenses would be covered.

According to Respondents, the sale of lots was delayed for nearly a year due to SEL's failure to obtain a bonded plat until August 22, 2002, which, in turn, prevented DFR from initiating sales until the infrastructure was completed. After the infrastructure was installed, it was discovered that the roads were subject to isolated pavement failures. Because the repairs were not made expeditiously, a decision Respondents attributed to SEL's failure to fund, the road sustained significant deterioration that resulted in costly reconstruction and delays in sales.

In addition to these structural delays, Respondents discovered that Appellant, without the knowledge of DFDG, contacted the project engineer to redesign the development plans for Phases II and III. SEL's failure to promptly pay the engineering firm delayed the final approval of the redesigned plans until March 1, 2007 and, in turn, DFR's sale of the lots in this portion of the Courtyards.

These delays were compounded by financial problems as Phase I incurred expenses that exceeded the original budget and proceeds from the development loan. Due to the resultant cash flow problem, SEL incurred overdraft charges and work delays stemming from the failure to promptly pay the engineering firm and contractors.

Respondents' dissatisfaction with SEL's handling of the project was exacerbated by the discovery that lots were being sold at a price below fair market value to K&L Contracting, LLC ("K&L"), a home construction company that was managed in part by Appellant. According to Respondents, these sales from SEL to K&L circumvented its "exclusive right to sell" and prevented them from receiving commissions on homes that were sold by K&L.

By letter dated May 28, 2004, SEL terminated the development contract. In the letter, SEL referenced the "numerous road problems and budget problems throughout the development." As the primary basis for termination, SEL cited "[t]he failure of DFDG and DFR to sell at least twenty (20%) percent of the available lots in any one year period." Respondents challenged the termination, asserting the requisite number of lots had been sold.

Following the termination, SEL continued to sell and close lots. Ultimately, SEL entered into a contract on September 15, 2006 with Essex Homes, SE, Inc. ("Essex Homes") in the amount of $7,633,000 for the development of Phases II and III.

In February 2005, Respondents filed an action against SEL and Appellant. As to SEL, Respondents alleged causes of action for breach of contract and breach of contract accompanied by a fraudulent act.

Respondents further alleged against Appellant, in his individual capacity, causes of action for conversion and tortious interference with a contract.

At trial, Appellant admitted that Respondents were owed money as a result of SEL's breach of the two contracts.[1] Appellant, however, disputed that Respondents were entitled to $3,030,667[2] in total damages,[3] which was the amount claimed by Respondents' expert witness, Lynn Richards. Appellant also maintained that his decisions and actions regarding the project were not made for his personal benefit but, rather, on behalf of SEL.

Prior to the submission of the case to the jury, the judge directed a verdict in favor of Appellant as to Respondents' cause of action for conversion. Additionally, the judge directed a verdict in favor of Respondents as to SEL's breach of the contract in failing to pay Respondents the Phase I development fees in the amount of $54,000. In the charge, the judge noted this ruling and instructed the jury on the remaining breach of contract claims against SEL and recoverable damages. The judge also instructed the jury regarding the separate claim of tortious interference with a contract against Appellant and the recoverable damages.

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[1] Appellant acknowledged that Respondents had in fact complied with the sales requirement of the contract and were only three lots short of reaching the 60% mark to proceed to the next phase. He, however, claimed that at the time the termination letter was written he mistakenly believed Respondents were required to sell two lots per month.

[2] This amount represents: $162,000 (Development Fees) + $1,121,950 (Profit Split) + $1,746,717 (Real Estate Commissions) = $3,030,667

[3] In his closing argument, defense counsel claimed the damages should total $242,717. According to counsel, this amount represented Phase I and Phase IV damages plus the development fee for Phase IV. This amount was based on the testimony of SEL's expert witness, Marty Ouzts, who limited his calculation of damages to those that were incurred prior to the intended expiration of the contract in November 2005.

Ultimately, the jury returned a verdict in favor of Respondents against SEL in the amount of $299,144[4] in actual damages for the breach of contract cause of action and $1,000,000 in punitive damages for the breach of contract accompanied by fraudulent act claim. The jury returned a verdict in favor of Respondents against Appellant in the amount of $3,000,000 in actual damages and $1,000,000 in punitive damages for the tortious interference with a contract cause of action.

Following the denial of post-trial motions, SEL and Appellant appealed the jury's verdicts to the Court of Appeals. Two months later, SEL settled the claims for breach of contract and breach of contract accompanied by a fraudulent act by paying $1.5 million to Respondents. As a result of the settlement, SEL dismissed its appeal. This Court certified Appellant's appeal from the Court of Appeals pursuant to Rule 204(b), SCACR.

II. Discussion

A.

Although Appellant identifies three issues and raises multiple theories, his primary contentions are that: (1) he, as the manager of SEL, cannot be held individually liable for the claim of tortious interference with the contract; and (2) even if he is liable, the award of actual damages was improper. Essentially, Appellant claims Respondents' only form of recovery was for a breach of contract claim, a claim that has now been satisfied through a settlement agreement. For reasons that will be discussed, we agree with Appellant.

[4] In addition to the general verdict form, the jury was given special interrogatories with respect to the actual damages for the breach of contract claim. The question posed was as follows: "For the Breach of Contract cause of action, does the amount of actual damages include an award for Phase 2 and/or Phase 3?", to which the jury answered "Yes." The jury noted that it attributed $54,000 of the total actual damage award to Phase 2.

B.

Appellant contends that as a matter of law he, as the manager of an LLC, may not be held individually liable for a claim of tortious interference with a contract. Citing section 33-44-303(a) of the South Carolina Code,[5] Appellant asserts that he is statutorily protected against "this type of individual liability."

Alternatively, Appellant avers that even if he can be found individually liable in tort, he was immune from liability as he acted on behalf of SEL and, thus, was a party to the contract that was breached by SEL. Citing the general rule that one cannot be held liable for tortious interference with a contract to which he is a party, Appellant argues the trial judge erred in denying his motions for a directed verdict and judgment notwithstanding the verdict ("JNOV") as to the claim of tortious interference with a contract.

Recently, a majority of this Court rejected Appellant's contention that a manager of an LLC may not be held individually liable for torts of the LLC. 16 Jade Street, LLC v. R. Design Constr. Co., LLC, Op. No. 27107 (S.C. Sup. Ct. filed Apr. 4, 2012) (Shearouse Adv. Sh. No. 12 at 28), rehearing granted, (May 4, 2012). Jade Street, however, is not dispositive as the instant case involves a separate question of whether Respondents could sustain a claim of tortious interference with a contract. In answering this question, we must examine the general rule that a claim for tortious interference with a

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[5] Section 33-44-303(a) provides:

> Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.

S.C. Code Ann. § 33-44-303(a) (2006).

contract cannot be made against one who is a party to the contract at issue. Specifically, we must decide whether Appellant was a party to the contract that was admittedly breached by SEL. In analyzing this question, it is necessary to identify the elements of the tort and the privileges afforded a corporate agent whose corporation is a party to the contract.

"The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." Camp v. Springs Mortgage Corp., 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). "[A]n action for tortious interference protects the property rights of the parties to a contract against unlawful interference by third parties." Threlkeld v. Christoph, 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct. App. 1984). "Therefore, it does not protect a party to a contract from actions of the other party." Id.

"It is generally recognized that when a contract is breached by a corporation as the result of the inducement of an officer or agent of the corporation acting on behalf of the corporation and within the scope of his employment, the inducement is privileged and is not actionable." Bradburn v. Colonial Stores, Inc., 273 S.C. 186, 188, 255 S.E.2d 453, 455 (1979). Thus, "[t]he actions of a principal's agent are afforded a qualified privilege from liability for tortious interference with the principal's contract." CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc., 357 F.3d 375, 385 (3d Cir. 2004). See generally Thomas G. Fischer, Annotation, Liability of Corporate Director, Officer, or Employee for Tortious Interference with Corporation's Contract with Another, 72 A.L.R. 4th 492, §§ 3-8 (1989 & Supp. 2012) (analyzing state cases involving the question of whether a director, officer, or employee could be held personally liable for tortious interference with a corporate contract where individual was considered a party to the contract, acted to serve the corporate interests, or acted on behalf of personal interests).

"The reason for this privilege is that holding an agent liable would be like holding the principal itself liable for the tort of interfering with its own contract, instead of holding the principal liable for breach of contract." CGB Occupational Therapy, Inc., 357 F.3d at 385. "The agent's privilege is

qualified, however, because it applies only when the agent is acting within the scope of its authority." Id. "Conversely, an agent may be liable for tortious interference, just as if the agent were an outside third party, if the allegedly interfering acts were conducted outside the scope of the agent's authority." Id.; Kia v. Imaging Scis. Int'l, Inc., 735 F. Supp. 2d 256, 268 (E.D. Pa. 2010) ("[A] corporate officer can be liable for tortious interference only if he was acting in a personal capacity or outside the scope of his authority." (citations omitted)); see 3A William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations, Chapter 11, XXVIII, § 1117 (West 2012) ("[A] director is not personally liable for the corporation's contractual breaches unless he or she assumed personal liability, acted in bad faith, or committed a tort in connection with the performance of the contract."). "Scope of authority" is defined as "[t]he range of reasonable power that an agent has been delegated or might foreseeably be delegated in carrying out the principal's business." Black's Law Dictionary (9th ed. 2009).

Therefore, as a matter of law, a manager of a limited liability company can wrongfully interfere with his company's contracts and be held individually liable for his acts. In light of this holding, the question becomes whether Appellant could be held liable under the facts of the instant case.

As a threshold matter, we find Respondents' failure to include SEL's operating agreement as part of the record constitutes a significant impediment to establishing a claim of tortious interference with a contract as we are unable to discern the precise parameters of Appellant's authority.[6] Without

[6] The operating agreement governs:

> (1) relations among the members as members and between the members and the limited liability company;
> (2) the rights and duties of a person in the capacity of manager;
> (3) the activities of the company and the conduct of those activities; and
> (4) the means and conditions for amending the operating agreement.

51 Am. Jur. 2d Limited Liability Companies § 4 (2011) (emphasis added); see S.C. Code Ann. § 33-44-103(a) (2006) (providing that under the Uniform Limited Liability Company Act of 1996, members of an LLC may enter into

an identifiable scope of authority, we are left to speculate whether Appellant's actions exceeded his authority as the managing agent of SEL.[7] Furthermore, we find that each of the actions relied upon by Respondents to support their claim can only be attributed to SEL and not to Appellant personally.

In support of their claim, Respondents primarily relied upon the sale of lots to K&L, the redesign of the development plans for Phases II and III, the termination of the contract, and the sale of the project to Essex Homes. Respondents maintain there was no legitimate business justification for these actions and, thus, did not serve the corporate interests of SEL. In turn, Respondents contend the only logical inference is that Appellant acted in his personal capacity as his actions would not have been authorized by SEL.

With respect to each of these actions, the documentation in the record establishes that SEL was the entity that sold the lots, signed off on change orders for the development plans, terminated the contract, and entered into the contract with Essex Homes. Although Appellant was the principal actor in these transactions, there is no evidence to refute that he acted within his authority as the manager of SEL.

Even if Appellant, as a member of K&L, received financial benefit from the sale of the lots to K&L, the sales were nevertheless done on behalf of SEL. Notably, Respondents relied on these lot sales to establish that they had in fact satisfied the sales requirement prior to SEL's breach of the contract. Furthermore, the sale of Phases II and III to Essex Homes was entered into by SEL after it terminated the contract with Respondents. Even

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an operating agreement, "to regulate the affairs of the company and the conduct of its business, and to govern relations among the members, managers, and company").

[7] We disagree with Respondents' contention that the contract established the limitations on Appellant's authority. The contract established the rights and duties of SEL and Respondents with respect to the development project and not the authority of Appellant with respect to SEL. See 17A Am. Jur. 2d Contracts § 1 (2004) ("[A] 'contract' has been defined as a private, voluntary, allocation by which two or more parties distribute specific entitlements and obligations.").

though Appellant engaged in negotiations during the term of the contract, these actions were also done on behalf of SEL and only provide evidence to support the breach of contract claim. The jury recognized this fact as it compensated Respondents for their losses in Phases II and III by awarding damages for the breach of contract cause of action.

Finally, by personally guaranteeing the development loan, Appellant became personally liable for the repayment of that particular financial obligation. The personal guarantee did not, however, render him personally liable in tort. See Hester Enters., Inc. v. Narvais, 402 S.E.2d 333, 335 (Ga. Ct. App. 1991) ("[A] corporate officer who does personally guarantee an obligation may be personally liable for the performance of *that* particular obligation, but such a personal guarantee does not render him personally liable on *any and all* corporate obligations.").

We conclude Respondents failed to identify how Appellant exceeded his authority as the managing agent of SEL. Because Appellant's actions can only be attributable to SEL, there is an absence of evidence to establish a separate claim that Appellant was individually liable in tort. Accordingly, we hold the trial judge erred in denying Appellant's motions for a directed verdict and JNOV on the cause of action for tortious interference with a contract. See Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999) (recognizing that an appellate court will reverse the trial judge's ruling with respect to the denial of motions for a directed verdict or JNOV only when there is no evidence to support the ruling or when the ruling is controlled by an error of law).

In view of our holding, we need not address Appellant's remaining issues regarding the award of damages. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999) (providing that an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

III.

Based on the foregoing, we find the trial judge erred in denying Appellant's motions for a directed verdict and JNOV as there is no evidence

to support the cause of action for tortious interference with a contract. Accordingly, we reverse the award of damages on this cause of action.

REVERSED.

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

The Supreme Court of South Carolina

In the Matter of Kenneth B. Massey, Petitioner.

Appellate Case No. 2010-177226

ORDER

This matter is before the Court on petitioner's Petition for Reinstatement. The petition is granted subject to the following conditions:

1. petitioner shall provide a report addressing the status of his ongoing child support obligations to the Commission on Lawyer Conduct (the Commission) every three (3) months;

2. petitioner shall work with North Carolina officials to establish a plan to repay all past-due child support obligations, including the judgment lien on his home;

3. petitioner shall adhere to all current and future orders issued by North Carolina courts which address his child support obligations;

4. if petitioner fails to file timely reports concerning his child support obligations with the Commission or fails to comply with any child support obligation, new disciplinary proceedings may be initiated against petitioner; and

5. if petitioner enters private practice, he shall be required to enter into a mentoring agreement with an active member of the South Carolina Bar for two (2) years during which petitioner and the mentor shall meet on a monthly basis to discuss issues and concerns related to petitioner's law practice and the mentor shall submit quarterly reports concerning petitioner's compliance with his mentoring obligation to the Commission.

Petitioner shall become current with the Commission on Continuing Legal Education & Specialization before practicing law.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

June 21, 2012

The Supreme Court of South Carolina

In the Matter of Howard Hammer, Respondent.

Appellate Case No. 2012-212290

ORDER

The Office of Disciplinary Counsel petitions this Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

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

IT IS FURTHER ORDERED that respondent is hereby enjoined from access to any trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain.

Within five (5) days of the date of this order respondent shall provide a sworn statement advising the Court whether he has been retained by any clients and/or has obtained any client funds since his reinstatement on June 1, 2012.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

June 22, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gregory Ford and Leslie Ford, Appellants,

v.

Beaufort County Assessor, Respondent.

Appeal From Administrative Law Court
Ralph K. Anderson, III, Administrative Law Court Judge

Opinion No. 4992
Heard November 2, 2011 – Filed June 27, 2012

AFFIRMED

John J. Pringle, Jr., of Columbia, for Appellants.

Stephen P. Hughes and William T. Young, III, of Beaufort, for Respondent.

THOMAS, J.: Gregory and Leslie Ford appeal an order issued by the Administrative Law Court (ALC) upholding the decision of the Beaufort

County Assessor (Assessor) to assess their property at the six-percent ratio instead of the four-percent ratio allowed for a legal residence. We affirm.

FACTS AND PROCEDURAL HISTORY

The Fords own a residence on Hilton Head Island. It is their legal residence and domicile. They purchased the property in 2003 and built their house on it in 2005. Initially, they lived in their home the entire year and never rented it out to others.

During the summer of 2008, the Fords leased their home for ninety-one days. They paid accommodations taxes on their rental income. While their home was leased, they lived in a rented apartment in Sea Pines. The Fords' drivers' licenses, voter registration cards, tax bills and returns, and utility bills all show the address of the subject property as their legal residence, and they have never claimed any other address as their legal residence or domicile during the time in question. In 2008, they earned $76,500 from the rental of their residence.

In August 2008, the Assessor received an anonymous letter stating the Fords, though "claiming the house as their permanent residence, and being taxed at the 4% rate," "are not in residence and are renting the house out on the weekly rental market during the summer weeks for income purposes." Based on this information, the Assessor sought further information from the Fords, who advised (1) the subject property was their "personal home," (2) they rented the property for a few weeks in the summer, and (3) they lived there for the rest of the year. They also directed the Assessor to an internet site for specific information about the rental periods and terms.

After reviewing the matter, the Assessor sent the Fords a letter informing them that their application for the four-percent assessment ratio was denied for tax year 2008 because their property was rented for more than fourteen calendar days during the tax year. The Fords appealed the

Assessor's decision to the Beaufort County Tax Equalization Board. The Board held a conference on the matter and affirmed the Assessor's decision.

The Fords then initiated this action in the ALC for a contested case hearing. The ALC held a hearing in the matter and issued an order affirming the ruling of the Board, holding (1) the Fords' home was ineligible for the four-percent assessment ratio for 2008 because it was rented for more than fourteen days during that year and (2) the sole statutory exception to the general rule that rental property does not qualify for the four-percent assessment ratio did not apply in this case. This appeal followed.

ISSUE

Did the ALC err in upholding the Assessor's decision to deny the Fords' application for the four-percent property tax ratio for their home?

STANDARD OF REVIEW

Tax appeals to the ALC are subject to the Administrative Procedures Act, and an appellate court is to review the ALC's decision for errors of law. CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 73-74, 716 S.E.2d 877, 880-81 (2011). "Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." Id. at 74, 716 S.E.2d at 881.

LAW/ANALYSIS

The primary focus of this appeal is section 12-43-220(c) of the South Carolina Code (Supp. 2011),[1] which governs the eligibility of a legal residence to be taxed on an assessment ratio equal to four percent of the fair market value of the property. A legal residence that is not eligible to be taxed at this ratio is generally taxed based on an assessment ratio equal to six

[1] Section 12-43-220 has been amended twice since this matter began; however, paragraph (c) was not affected by the changes.

percent of its fair market value. S.C. Code Ann. § 12-43-220(e) (Supp. 2011).

Section 12-43-220(c)(1) provides in pertinent part as follows:

> The legal residence and not more than five acres contiguous thereto, when owned totally or in part in fee or by life estate and occupied by the owner of the interest, and additional dwellings located on the same property and occupied by immediate family members of the owner of the interest, are taxed on an assessment equal to four percent of the fair market value of the property. . . . When the legal residence is located on leased or rented property and the residence is owned and occupied by the owner of a residence on leased property, even though at the end of the lease period the lessor becomes the owner of the residence, the assessment for the residence is at the same ratio as provided in this item. If the lessee of property upon which he has located his legal residence is liable for taxes on the leased property, then the property upon which he is liable for taxes, not to exceed five acres contiguous to his legal residence, must be assessed at the same ratio provided in this item. If this property has located on it any rented mobile homes or residences which are rented or any business for profit, this four percent value does not apply to those businesses or rental properties. For purposes of the assessment ratio allowed pursuant to this item, a residence does not qualify as a legal residence unless the residence is determined to be the domicile of the owner-applicant.

The ALC held that under section 12-43-220(c)(1), the four-percent ratio generally would not be applied to an owner-occupied legal residence if that residence is rented for profit during the applicable tax year. In reaching

this conclusion, the ALC emphasized the use of the language "any . . . residences which are rented" and interpreted this phrase to include a taxpayer's legal residence.

The Fords first take issue with the ALC's rejection of their argument about the significance of the term "this property," which is used in the next-to-last sentence of section 12-43-220(c)(1). The sentence reads as follows: "If this property has located on it any rented mobile homes or residences which are rented or any business for profit, this four percent value does not apply to those businesses or rental properties." (emphases added). Whereas the Fords argue "this property" includes only certain property contiguous to the legal residence and not the property on which the legal residence is located, the Assessor and the ALC maintain otherwise. We agree with the Assessor and the ALC.

In the first sentence of the above-quoted passage, it is apparent that the four-percent assessment "of the fair market value of the property" is a percentage of the value of the property on which the legal residence is located plus the same percentage of the value of limited surrounding acreage. Furthermore, in the sentence immediately preceding the sentence at issue here, "the property" upon which a lessee is liable for taxes obviously includes the property on which lessee's legal residence is located, as well as contiguous property not to exceed a total of five acres. We therefore agree with the ALC that the phrase "this property" in the next-to-last sentence in section 12-43-220(c)(1) includes the property on which the legal residence of an owner-occupant is located and that a legal residence of an owner-occupant is therefore subject to the six-percent assessment ratio if it is one of "any residences which are rented" and located on "this property." See McClanahan v. Richland Cnty. Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute."); Russo v. Nationwide Mut. Ins. Co., 334 S.C. 455, 458, 513 S.E.2d 127, 128 (Ct. App. 1999) ("In statutory construction, legislative intent prevails where it can be reasonably ascertained from the plain meaning of the statutory language.").

The Fords further argue they are entitled to the four-percent assessment ratio pursuant to the first sentence in section 12-43-220(c)(1) because the subject property is their legal residence and they have satisfied the requirements of section 12-43-220(c)(2), which lists what a taxpayer must do in order to receive the four-percent assessment ratio for an owner-occupied residence.[2] We disagree. Although a taxpayer may be entitled to have property taxed at the four-percent assessment ratio based on a showing that the property for which the lower assessment ratio is sought has been that taxpayer's legal residence for some part of the tax year, the right to be taxed at the lower rate is subject to qualifications within the same statute. See Duvall v. S.C. Budget & Control Bd., 377 S.C. 36, 42, 559 S.E.2d 125, 127 (2008) ("When construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect."). Here, the legislature intended to grant the preferred assessment ratio only to those owner-occupants who limit the use of their legal residences to statutorily defined parameters.

The Fords also contend the ALC erroneously interpreted section 12-43-220(c)(7) of the South Carolina Code (Supp. 2011) to be the sole exception to the rule disqualifying an owner-occupant from receiving the four-percent assessment ratio for a legal residence that is rented for profit during the tax year. Specifically, they contend subsection (c)(7) is only a "safe-harbor" and their failure to meet the requirements in this subsection should not prevent them from receiving the preferred assessment ratio. We disagree.

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[2] Under section 12-43-220(c)(2) of the South Carolina Code (Supp. 2011), "[t]o qualify for the special property tax assessment ratio . . . , the owner-occupant must have actually owned and occupied the residence as his legal residence and been domiciled at that address for some period during the applicable tax year." This section further provides that "[a] residence which has been qualified as a legal residence for any part of the year is entitled to the four-percent assessment provided in this item for the entire year . . . ."

Section 12-43-220(c)(7) provides as follows:

> Notwithstanding any other provision of law, the owner-occupant of a legal residence is not disqualified from receiving the four percent assessment ratio allowed by this item if the taxpayer's residence meets the requirements of Internal Revenue Code Section 280A(g) . . . and the taxpayer otherwise is eligible to receive the four percent assessment ratio.

Internal Revenue Code section 280A(g), to which section 12-43-220(c)(7) refers, reads as follows:

> (g) Special rule for certain rental use.—Notwithstanding any other provision of this section . . . , if a dwelling unit is used during the taxable year by the taxpayer as a residence and such dwelling unit is actually rented for less than 15 days during the taxable year, then—
>
> (1) no deduction otherwise allowable under this chapter because of the rental use of such dwelling unit shall be allowed, and
>
> (2) the income derived from such use for the taxable year shall not be included in the gross income of such taxpayer under section 61.

The ALC reasoned that because (1) a statute providing that "a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in another way" and (2) a court should interpret a particular provision in conjunction with the whole statute and the policy of the law rather than in isolation, it follows that the legislature intended for section 12-43-220(c)(7) to state the sole exception under which a legal residence that is rented during the tax year can receive the four-percent assessment ratio. We

agree with the ALC's analysis. Under section 12-43-220(c)(1), the Fords cannot claim the four-percent assessment ratio for their home, and there are no other statutory criteria under which the disqualification would be waived.[3]

Finally, the Fords complain the ALC erroneously treated the four-percent assessment ratio as an exemption or deduction and construed it against them based on this allegedly incorrect characterization. They assert the ALC did not cite any authority for the proposition that property tax assessment ratios are characterized as exemptions or deductions or that any ambiguities in a tax classification statute should be construed against the taxpayer. We disagree. The South Carolina Supreme Court has recently held that section 12-43-220 is a tax exemption statute. See CFRE, 395 S.C. at 74, 716 S.E.2d at 881 (implying section 12-43-220(c)(1) provides a statutory tax exemption and referencing "our policy of strictly construing tax exemption statutes against the taxpayer"). We therefore hold the ALC correctly construed any uncertainty in the statute against the Fords.

CONCLUSION

We agree with the ALC's interpretation of section 12-43-220(c) of the South Carolina Code and affirm the decision to deny the Fords' application for a four-percent assessment ratio on their home.

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[3] In support of their position, the Fords cite an order in a case involving different parties in which the ALC held the waiver of disqualification in section 12-43-220(c)(7) was only a safe harbor provision. Although this court affirmed the ALC, it did so in an unpublished opinion. Neither the ALC order nor this court's unpublished opinion is binding authority, and the ALC in this case was not compelled to follow either decision. See Rule 268(d)(2), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved."); 21 C.J.S. Courts § 212 (2006) ("Trial or inferior court decisions are not precedents binding other courts, including appellate courts or other judges of the same trial court.").

AFFIRMED.

FEW, C.J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Deborah Rice-Marko, John Edward Marko, Jr., The John Edward Marko, Jr. Irrevocable Trust, Evan Rice Marko, The Evan Rice Marko Irrevocable Trust, and the Evelyn G. Rice Revocable Trust, Appellants,

v.

Wachovia Corporation, Wells Fargo & Company, G. Kennedy Thompson, Donald K. Truslow, Thomas J. Wurtz, Robert K. Steel, Thomas L. Clymer, and Doe Defendants 1 Through 25, Respondents.

Appellate Case No. 2010-171446

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

Opinion No. 4993
Heard April 25, 2012 – Filed June 27, 2012

AFFIRMED

G. Trenholm Walker, Ian W. Freeman, and Daniel S. McQueeney, Jr., all of Pratt-Thomas Walker, P.A., of Charleston, for Appellants.

Stephen M. Cox, of Robinson, Bradshaw & Hinson, P.A., of Rock Hill; and Louis A. Bledsoe, III, of Robinson, Bradshaw & Hinson, P.A., of Charlotte, N.C., for Respondents.

LOCKEMY, J.: In this appeal, Deborah Rice-Marko, John Edward Marko Jr., the John Edward Marko, Jr. Irrevocable Trust, Evan Rice Marko, the Evan Rice Marko Irrevocable Trust, and the Evelyn G. Rice Revocable Trust (collectively, Appellants) argue the circuit court erred in dismissing their causes of action for fraud and fraudulent concealment, negligent misrepresentation, breach of fiduciary duty, constructive fraud, breach of duties as corporate officers, negligence and gross negligence, and violation of the South Carolina blue sky laws. We affirm.

FACTS/PROCEDURAL BACKGROUND

Appellants owned in excess of 400,000 shares of Respondent Wachovia Corporation (Wachovia) stock before Wachovia was acquired by Respondent Wells Fargo & Company on December 31, 2008. Respondents G. Kennedy Thompson, Thomas J. Wurtz, Donald K. Truslow, and Robert K. Steel (collectively, Individual Respondents) served as officers of Wachovia at various points from July 2006 through 2008.[1] Respondent Thomas L. Clymer was an officer and agent of Wachovia in Charleston, South Carolina, where Appellants were residents.

On October 1, 2009, Appellants filed a complaint alleging Respondents' misrepresentations and/or non-disclosures regarding the financial stability and performance of Wachovia from July 2006 through 2008 caused Appellants to refrain from selling their shares of Wachovia stock. Appellants alleged these misrepresentations and non-disclosures caused them to "lose millions of dollars in the value of stock they held in Wachovia." According to Appellants, but for Respondents' false representations, they would have sold all of their Wachovia stock in July 2007 when the stock value was between $49.00 and $51.00 per share. Appellants maintained they continued to receive assurances from Respondents in 2008 that Wachovia was financially stable and well-collateralized despite the fact that Wachovia's stock price continued to fall. Appellants alleged that in August 2008, when Wachovia's stock price was $16.49 per share, they again decided to forgo plans to sell their Wachovia stock after receiving e-mails and documents

[1] G. Kennedy Thompson served as Chief Executive Officer (CEO) and President of Wachovia from December 1999 through June 2, 2008. Thomas J. Wurtz served as Chief Financial Officer and Senior Executive Vice President of Wachovia. Donald K. Truslow served as Chief Risk Officer for Wachovia until August 2008. Robert K. Steel was chairman of the board, CEO, and President of Wachovia from July 9, 2008 through December 31, 2008.

from Clymer reassuring Appellants that their investment was secure. On December 30 and 31, 2008, Appellant Deborah Rice-Marko sold all of her Wachovia stock after the stock price had fallen below $1.00 per share.

In their complaint, Appellants asserted causes of action for fraud and fraudulent concealment, negligent misrepresentation, breach of fiduciary duty, constructive fraud, breach of duties as corporate officers, negligence and gross negligence, and violation of the South Carolina Securities Act of 2005. Appellants' allegations primarily concerned Wachovia's 2006 acquisition of Golden West Financial Corporation, a California-based bank and mortgage lender with a large portfolio of adjustable-rate mortgages, and Wachovia's subsequent disclosures concerning these mortgage loans. The complaint alleged Wachovia and the Individual Respondents, faced with a rapidly deteriorating housing market and a strained mortgage system, concealed information regarding underwriting standards, collateral quality, and necessary reserves for these loans. Appellants cited numerous allegedly false public SEC filings, press releases, and earnings calls made by Wachovia between October 2006 and September 2008. Appellants maintained the Individual Respondents engineered, approved, and disseminated these misstatements. Appellants also alleged Clymer participated in the scheme through direct communications with Appellants.

On December 15, 2009, Respondents moved to dismiss Appellants' complaint pursuant to Rules 9(b) and 12(b)(6) of the South Carolina Rules of Civil Procedure. The case was referred to the business court in January 2010, and a hearing was held on Respondents' motion on April 13, 2010.

On June 23, 2010, the circuit court granted Respondents' motion to dismiss, holding: (1) Appellants' claims were derivative; (2) Appellants did not allege a separate and distinct injury; and (3) Respondents did not owe Appellants a special duty. Specifically, the circuit court, citing South Carolina and North Carolina law, held Appellants did not have standing to bring direct claims against Wachovia or its officers and directors for "wrongs that diminish the value of their shares" of the corporation. The court noted that "because the injuries felt by [Appellants] were suffered equally by all Wachovia shareholders, [Appellants] cannot bring a direct action to recover their proportion of the corporation's losses." With respect to Clymer, the circuit court requested additional briefing. On August 3, 2010, the circuit court denied Appellants' motion to alter or amend. On August 19, 2010, the circuit court also dismissed Appellants' claims against Clymer. This appeal followed.

STANDARD OF REVIEW

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Id.* "If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." *Id.* "In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief." *Id.*

LAW/ANALYSIS

Fiduciary and Special Duties

First on appeal, Appellants argue they are entitled to pursue direct claims against Respondents because Respondents owed them fiduciary and special duties. We disagree.

The circuit court determined Appellants lacked standing under both South Carolina and North Carolina law to bring direct claims against Respondents. The court did not resolve the choice of law issue, noting both North Carolina and South Carolina follow the same "'well-established general rule' that shareholders do not have standing to bring direct claims for wrongs that diminish the value of their shares in a corporation." *See Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (N.C. 1997) ("The well-established general rule is that shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock."); *see also Brown v. Stewart*, 348 S.C. 33, 51, 557 S.E.2d 676, 685 (Ct. App. 2001) (holding individuals may not sue corporate directors or officers for losses suffered by the corporation).

North Carolina does not recognize a fiduciary duty between the officers and directors of a corporation and that corporation's shareholders. *See* N.C. Gen. Stat. § 55-8-30 (2011). However, the North Carolina Supreme Court has held

> a shareholder may maintain an individual action against a third party for an injury that directly affects the shareholder, even if the corporation also has a cause of action arising from the same wrong, if the shareholder can show that the wrongdoer owed him a special duty or that the injury suffered by the shareholder is separate and distinct from the injury sustained by the other shareholders or the corporation itself.

Barger, 346 N.C. at 658-59, 488 S.E.2d at 219. Although South Carolina recognizes a duty between officers and directors of a corporation and that corporation's shareholders[2], this court has held that the fiduciary obligation of dominant or controlling stockholders or directors is ordinarily enforceable through a stockholder's derivative action. *See Brown*, 348 S.C. at 49, 557 S.E.2d at 684. "A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation." *Id.* "An individual action is also allowed if the alleged wrongdoers owe a fiduciary relationship to the stockholder and full relief to the stockholder cannot be had through a recovery by the corporation." *Id.* at 50, 557 S.E.2d at 685.

Appellants argue Respondents owed Appellants both a fiduciary and a special duty to accurately portray the financial condition of Wachovia. Appellants maintain they relied on Respondents' representations due to Respondents' controlling positions and their peculiar and superior knowledge of Wachovia's financial condition. Respondents argue Appellants' claims are derivative because Appellants only seek to recover for alleged breaches of duties Respondents owed Wachovia and its shareholders, not any individual duty owed uniquely to Appellants.

We find Appellants cannot proceed with their lawsuit as individual shareholders under the "special duty" exception to the general rule outlined in *Barger*. Here, Appellants have failed to allege any facts from which it may be inferred that Respondents owed Appellants a duty that was personal to Appellants and distinct from the duty Respondents owed Wachovia and its shareholders. In their complaint, Appellants specifically alleged the Individual Respondents "set on a

[2] *See* S.C. Code Ann. § 33-8-300(a)(1)-(3) (2006) (requiring a corporate director to perform his duties in good faith, with the care of an ordinarily prudent person in a like position, and in a manner he believes to be in the best interests of the corporation).

course of action to supply misrepresentations and misinformation regarding the financial strength, stability and liquidity of [Wachovia] as an ongoing banking company and to conceal the truth from [Appellants] *and the investing public*." Appellants alleged "the Individual [Respondents], *because of their positions of control and authority as officers and/or directors of the Company*, owed a fiduciary duty to [Appellants] to disclose and communicate truthful and accurate information about the financial condition and performance of the Company." (emphasis added) Because Appellants did not allege breaches of any duties owed to them individually, they cannot bring direct claims for their stock losses.

Additionally, Appellants did not allege Clymer owed them a fiduciary or special duty or communicated with them in any way other than in their role as stockholders. In fact, in their complaint, Appellants omitted Clymer from many of the allegations involving the Individual Respondents and from their breach of fiduciary duty claim. Instead, Appellants maintained Clymer owed them a special duty because he communicated with them directly. We find Clymer's direct communications with Appellants as stockholders did not give rise to a special duty. Accordingly, the circuit court did not err in finding Respondents did not owe Appellants a special duty.

Separate and Distinct Injury

Appellants argue they are entitled to pursue direct claims against the Respondents because the losses they suffered were separate and distinct from the losses to Wachovia as a whole. We disagree.

In *Barger*, the North Carolina Supreme Court held

> a shareholder may maintain an individual action against a third party for an injury that directly affects the shareholder, even if the corporation also has a cause of action arising from the same wrong, if the shareholder can show that the wrongdoer owed him a special duty or that the injury suffered by the shareholder is separate and distinct from the injury sustained by the other shareholders or the corporation itself.

346 N.C. at 658-59, 488 S.E.2d at 219.

Here, the circuit court determined Appellants did not suffer a separate and distinct injury, noting that according to Appellants' complaint, Respondents lied to Wachovia's other shareholders, financial markets, and the investing public at large. Appellants maintain their damages fall within the separate and distinct exception because the losses they suffered were not shared equally with all Wachovia shareholders. Appellants argue their claims are based on specific misrepresentations which induced their reliance, and are not based on any corporate mismanagement resulting in lower stock values and causing injury to all stockholders. Respondents argue Appellants failed to allege any injury not shared by their fellow Wachovia shareholders. Respondents contend damages based on the decline in Wachovia's share price can only be brought derivatively.

We find Appellants cannot proceed with their lawsuit under the second exception to the general rule in *Barger* because they have not alleged a separate and distinct injury to themselves as shareholders. Appellants alleged damages based on the decline in Wachovia's stock price. Pursuant to *Barger*, such a claim can only be brought derivatively. The *Barger* court held "[a]n injury is peculiar or personal to the shareholder if a legal basis exists to support plaintiffs' allegations of an individual loss, separate and distinct from any damage suffered by the corporation." *Barger*, 346 N.C. at 659, 488 S.E.2d at 220 (internal citations omitted). In *Barger*, the court found the only injury alleged by the shareholders was the diminution in value of their shares as the result of the corporation's negligent or fraudulent misrepresentations of its financial status. *Id.* The *Barger* court held the diminution of the value of their stock is precisely the same injury suffered by the corporation itself, and therefore, the shareholders' claims were derivative. *Id.*

Here, Appellants maintained in their complaint that they were deceived as part of a larger scheme to defraud Wachovia stockholders. Specifically, Appellants alleged Wachovia "engaged in concerted actions to conceal the truth and issue reassuring misrepresentations *to financial markets and [Appellants]*" and the Individual Respondents supplied the misrepresentations to the "investing public." Because Appellants failed to allege any injury separate and distinct from the injuries suffered by other Wachovia stockholders, we affirm the circuit court.

We note the North Carolina Court of Appeals recently dismissed a complaint of seven Wachovia stockholders which contained factual allegations and legal claims similar to those of Appellants in this case. In *Estate of Browne v. Thompson*, 2012 WL 1083130 (N.C. App. 2012), the North Carolina Court of Appeals determined the special duty and separate and distinct exceptions outlined in *Barger* did not

apply to plaintiffs' claims. As in this case, the North Carolina plaintiffs alleged Wachovia's officers and directors participated in a fraudulent scheme to deceive plaintiffs and the public as to Wachovia's financial stability. 2012 WL 1083130 at 1. Plaintiffs alleged they relied on Wachovia's misrepresentations in deciding not to sell their Wachovia stock. *Id.* The North Carolina court found plaintiffs failed to allege any facts indicating defendants owed them special duty or that they suffered an injury separate and distinct from that of other stockholders. *Id.* at 2.

Law from other jurisdictions

Appellants argue the circuit court erred in applying North Carolina, Delaware and Georgia law instead of South Carolina law. We disagree.

The circuit court found both South Carolina and North Carolina law generally prohibit stockholders from bringing direct claims for wrongs that diminish the value of their shares in a corporation. Appellants contend that although the result would be the same regardless of whether South Carolina or North Carolina law is applied, the circuit court erred in applying the law of states other than South Carolina in determining whether Appellants stated a claim for relief. We find the circuit court did not err. As discussed above, Appellants failed to allege any facts supporting the "separate and distinct injury" and "special duty" exceptions to the general rule prohibiting direct claims for stock losses.

We further find the circuit court did not err in referencing Georgia and Delaware case law. The circuit court did not cite cases from these jurisdictions as binding precedent, but rather referenced them as persuasive authority. Appellants specifically argue the circuit court erred in relying on *Holmes v. Grubman*, 286 Ga. 636, 691 S.E.2d 196 (Ga. 2010) in dismissing Clymer. We disagree. In its order, the circuit court noted *Holmes* was cited in Appellants' brief, but determined *Holmes* did not support Appellants' claims. The circuit court found *Holmes* did not involve a shareholder suit against a corporation, and therefore, it was "readily distinguishable" from the present case. Accordingly, the circuit court did not find *Holmes* was "binding precedent" as alleged by Appellants.

Holder Claims

Appellants argue that although neither the South Carolina nor the North Carolina courts have ruled on the issue of whether corporate officers and directors may be held personally liable in a direct action for fraud and misrepresentation for inducing shareholders not to sell their stock, other jurisdictions have considered

such holder claims and found plaintiffs may proceed with their claims against corporate officers. Appellants contend their holder claim justifies reversal of the circuit court's granting of Respondents' motion to dismiss. We disagree. Appellants have failed to cite any South Carolina case law recognizing holder claims. In addition, the North Carolina Court of Appeals recently affirmed the trial court's dismissal of plaintiffs' holder claims in *Estate of Brown*, noting its research did not reveal a single North Carolina case recognizing holder claims. 2012 WL 1083130 at 3.

Clymer

Appellants argue the circuit court erred in finding Appellants failed to allege reasonable reliance on Clymer's misrepresentations. We disagree.

The circuit court determined Appellants did not have standing to sue Clymer directly for the decrease in value of their Wachovia stock. The court found Appellants failed to plead facts giving rise to either the special duty or the separate and distinct injury exceptions to the general rule prohibiting individual stockholder actions for derivative injuries.

Appellants allege Clymer directly advised them that "Wachovia was stable, had adequate loan reserves, and that there was not another shoe to drop." They further allege Clymer provided them with the "Wachovia: The Fundamentals" memorandum, which touted Wachovia as a "strong and stable company on solid footing." Appellants contend they relied on these direct communications with Clymer in reversing their decision to sell their Wachovia stock. Respondents argue Appellants' claims against Clymer were dismissed as derivative and not, as the Appellants argue, because the circuit did not accept Appellants allegations of reliance. Respondents contend the circuit court properly dismissed Clymer because Appellants failed to allege he owed them a special duty or caused them an injury separate and distinct from other Wachovia shareholders.

We do not agree with Appellants' allegation that the circuit court dismissed Clymer because Appellants failed to allege reasonable reliance on Clymer's misrepresentations. We find the circuit court properly determined Appellants' claims against Clymer were derivative and not subject to either of the exceptions to the rule prohibiting stockholder actions for derivative injuries. As the circuit court noted, Appellants did not allege Clymer owed them a fiduciary duty or that he had any particular contractual responsibility or obligation to them. Appellants further failed to allege Clymer owed them a special duty by stepping outside the

relationship between shareholder and corporation. We do not believe Appellants' assertion that Clymer's direct communications in forwarding the "Fundamentals" memorandum and telling Appellants that Wachovia was a "stable" corporation created a special duty.

Furthermore, Appellants have not alleged a separate and distinct injury. As the circuit court correctly noted, Appellants did not allege Clymer provided them with any information that was materially different from the information Wachovia was allegedly providing to other stockholders. The nature of Appellants' injury was a decline in Wachovia's stock price. This injury was suffered by all of Wachovia's stockholders, and therefore, Appellants' claims were derivative. Accordingly, the circuit court did not err in dismissing Clymer.

CONCLUSION

Based on the foregoing, we affirm the circuit court's granting of Respondents' motion to dismiss.

AFFIRMED.

WILLIAMS and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

David Lee Meggett, Appellant.

Appellate Case No. 2010-178446

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 4994
Heard June 5, 2012 – Filed June 27, 2012

AFFIRMED

Appellate Defender Breen R. Stevens, of Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Mark R. Farthing, all of Columbia; Solicitor Scarlett Anne Wilson of Charleston, for Respondent.

LOCKEMY, J.: David Meggett appeals his convictions of first-degree burglary and first-degree criminal sexual conduct (CSC). Meggett argues the trial court erred in (1) denying his motion for a continuance; (2) denying his motion for a mistrial and request for a curative instruction; and (3) denying his motion for a directed verdict as to the first-degree burglary charge. We affirm.

FACTS/PROCEDURAL BACKGROUND

Meggett and the Victim met in Charleston County in 2008. The two saw each other every few months. Meggett loaned Victim $200 to pay her bills and gave her rides to job interviews. Victim and Meggett had consensual sex in August 2008. Victim left Charleston in 2008 and returned in January 2009 to attend school. According to Victim, in the early morning hours of January 13, 2009, she woke up and saw Meggett sitting on the edge of her bed. Victim had not spoken to Meggett in a month and, according to Victim, he did not have permission to be in her home. The doors to Victim's home were not locked. According to Victim, Meggett asked her about the $200 she borrowed and Victim told him she would pay him at the end of the week. Meggett then moved towards the Victim and told her he was going to "take the down payment now." According to Victim, Meggett then grabbed her neck, held her against the wall, and attempted to remove her pants. Victim claimed she and Meggett struggled and she yelled for him to stop. Victim claimed Meggett choked her and then sexually assaulted her.

After Meggett left Victim's home, Victim drove herself to the hospital. Victim informed emergency room physician Dr. Joseph Bianco that she had been sexually assaulted and complained of pain in her arm and jaw. Dr. Bianco noted bruises on Victim's arm and jaw.[1] The North Charleston Police Department was notified and two officers were dispatched to the hospital. Officer Robert Gooding and Sergeant Eric Jourdan met with Victim and she reported the details of the assault. While speaking with the officers, Victim received a phone call from Meggett. According to Victim, Meggett tried to convince her to leave the hospital and asked her if she was going to tell the doctors what happened. Meggett then asked if he could come to the hospital to see Victim and she agreed. Upon his arrival, Meggett was arrested by Officer Gooding.

Victim was subsequently taken to MUSC Women's Center for a sexual assault examination. Nurse Faye LeBoeuf performed a pelvic exam and discovered a small abrasion in Victim's vagina which likely had occurred within twenty-four to seventy-two hours of the exam. According to LeBoeuf, Victim's injury could have resulted from either consensual or non-consensual intercourse. LeBoeuf found no other bruising, redness, swelling, lacerations, or tears on Victim.

[1] North Charleston Police Detective Randy Gray met with Victim the day after the incident and observed "prominent dark bruising" on Victim's neck.

Officers retrieved a comforter and blanket from Victim's bed, as well as a DNA sample from Meggett. South Carolina Law Enforcement Division (SLED) DNA analyst Jennifer Clayton examined the Victim's comforter and determined Meggett was the major DNA contributor in two of the comforter samples and the only DNA contributor in the third sample. Clayton also determined Victim was excluded as a contributor in the samples and found the presence of an unknown contributor in the second sample. Additionally, Clayton analyzed the semen from Victim's vaginal sample and was unable to develop a DNA profile from Meggett in that sample.

Meggett was indicted by the Charleston County grand jury for first-degree burglary and first-degree CSC. A jury trial was held November 8-10, 2010. At the outset of trial, Meggett moved for a continuance. Defense counsel stated the parties agreed Meggett and Victim had consensual sex on one prior occasion but they disagreed as to whether the consensual sex was a single incident or a repeated event. Defense counsel asserted Meggett, on the morning of trial, raised the issue of having a comforter from his nephew's bed in his sister's home tested for DNA evidence based on Meggett's claim he had consensual sex with Victim in the bed in the months leading up to the incident. Defense counsel asserted the comforter was in storage and would be critical to the credibility of Victim if the evidence was there. In rebuttal, the State argued the motion should be denied because (1) two years had elapsed since the incident; (2) Meggett had notice of the trial; and (3) Meggett failed to raise the issue until the morning of trial. The trial court denied the continuance motion, finding (1) the case was on the trial docket; (2) the incident occurred in January 2009; (3) it was speculative as to whether there may be something on the comforter; and (4) the comforter had no direct connection to the case other than to Victim and Meggett's prior sexual relationship.

During opening arguments, defense counsel argued to the jury that "[V]ictim and [Meggett] struck a sort of less than desirable but informal arrangement. They began to sleep together, and [Meggett] would forgive her debt, and it happened more than once." Defense counsel stated "[Victim and Meggett] had sex, and [Victim] thought that squared their debt, and [Meggett] didn't, and that's it." Defense counsel told jurors Meggett "shoved" and "pushed" Victim and his behavior was "wrong." As the trial continued, Victim and other witnesses testified about the sexual assault and resulting law enforcement investigation.

At the close of the State's case, Meggett moved for a directed verdict. Defense counsel asserted "there's a decent argument to be made for the burglary," and further argued "[t]he Victim testifies that when he comes in he's asking for the money that . . . she owes him. That would be all I have to say in that respect." The

trial court denied Meggett's directed verdict motion, finding evidence had been presented as to each element of the indicted offenses. Following the trial court's ruling, Meggett did not testify, did not offer any other testimony, and rested his case.

Subsequently, during closing arguments, defense counsel asserted Victim was living in poor conditions and "desperate times call[ed] for desperate measures." During the State's closing argument, the solicitor stated

> In case after case involving CSC, there is one singular tactic that is employed by the defense, and I don't fault [defense counsel] for . . . doing it, but recognize it, and that is attack the victim. Attack the victim, call into question - and its fine that [defense counsel] stands up here and goes I don't mean to say anything. He - that's precisely what he means. Her history of medication, the fact that she's poor, the fact that she lives in a house that doesn't really look like a middle class home. Calls her unstable, calls her a liar. In opening statement he implied, although there's no evidence of this, that somehow she's a prostitute, smear -

Defense counsel objected and argued the solicitor's statement amounted to burden shifting. Following closing arguments and the jury charge[2], the trial court heard defense counsel's objection. Defense counsel argued he did not use the word "prostitute" to describe Victim and claimed the solicitor's comment on the defense's failure to present evidence was burden shifting. Defense counsel then moved for a mistrial, moved for a curative instruction, and objected to the curative instruction given.[3] The trial court denied Meggett's mistrial motion and request for a curative instruction. The trial court determined the State's comments did not shift the burden of proof and the jury had twice been instructed that the statements of counsel during arguments were not to be considered as evidence. Subsequently, the jury found Meggett guilty of first-degree burglary and first-degree CSC.

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[2] In its charge to the jury, the trial court instructed the jury a defendant is not required to prove his innocence; the State has the burden of proving guilt beyond a reasonable doubt; and Meggett's decision not to testify cannot be used against him.

[3] It appears defense counsel considered the trial court's jury charge to be a curative instruction.

Meggett was sentenced to concurrent terms of thirty years imprisonment for each offense. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in denying Meggett's motion for a continuance?

2. Did the trial court err in denying Meggett's motion for a mistrial and request for a curative instruction?

3. Did the trial court err in denying Meggett's motion for a directed verdict as to the first-degree burglary charge?

LAW/ANALYSIS

Motion for Continuance

Meggett argues the trial court erred in denying his motion for a continuance. Specifically, Meggett maintains if he had been allowed time to have the comforter from his sister's home tested for Victim's DNA he could have produced critical evidence to discredit Victim's testimony regarding their relationship and prior sexual encounters. We disagree.

The denial of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion resulting in prejudice. *State v. Smith*, 387 S.C. 619, 622, 693 S.E.2d 415, 417 (Ct. App. 2010). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *State v. Geer*, 391 S.C. 179, 189, 705 S.E.2d 441, 447 (Ct. App. 2010) (internal quotation marks omitted).

We do not believe the trial court abused its discretion in denying Meggett's motion for a continuance.

> When a motion for a continuance is based upon the contention that counsel for the defendant has not had time to prepare his case its denial by the trial court has rarely been disturbed on appeal. It is axiomatic that determination of such motions must depend upon the particular facts and circumstances of each case.

State v. Babb, 299 S.C. 451, 454-55, 385 S.E.2d 827, 829 (1989) (quoting *State v. Motley*, 251 S.C. 568, 572, 164 S.E.2d 569, 570 (1968)). "Further, a party cannot complain of an error which his own conduct has induced." *Id.* at 455, 385 S.E.2d at 829 (citing *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984)). Here, nearly two years after he was arrested and seven months after he was notified the case would be placed on the trial docket, Meggett moved for a continuance to test the comforter. Meggett had a significant period of time to obtain the testing and his failure to do so was a result of his own inaction and not a lack of preparation time.

Furthermore, Meggett failed to offer any evidence or testimony to support his claim that probative evidence might be on the comforter. Meggett failed to offer any evidence to prove the comforter was put in storage shortly after he slept on it. Additionally, there was no evidence presented to show the comforter was not washed or cleaned in the two years prior to trial or that it was not used by anyone else. Accordingly, based on Meggett's inaction in attempting to obtain the comforter prior to requesting a continuance and the lack of evidence supporting Meggett's contention that the comforter still contained important evidence, we find the trial court did not abuse its discretion in denying Meggett's continuance motion.

Motion for Mistrial

Meggett argues the trial court erred in denying his motion for a mistrial and request for a curative instruction. We disagree.

"The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law." *State v. Bantan*, 387 S.C. 412, 417, 692 S.E.2d 201, 203 (Ct. App. 2010). "The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way." *Id.* "A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial." *Id.*

Meggett contends the solicitor improperly commented on his right to remain silent in his closing argument. As previously noted, during the State's closing argument, the solicitor stated

> In case after case involving CSC, there is one singular tactic that is employed by the defense, and I don't fault [defense counsel] for . . . doing it, but recognize it, and that is attack the victim. Attack the victim, call into question - and it's fine that [defense counsel] stands up here and goes I don't mean to say anything. He - that's precisely what he means. Her history of medication, the fact that she's poor, the fact that she lives in a house that doesn't really look like a middle class home. Calls her unstable, calls her a liar. *In opening statement he implied, although there's no evidence of this, that somehow she's a prostitute*, smear -

Citing *Doyle v. Ohio*, 426 U.S. 610 (1976), Meggett argues the solicitor's comment violated the principle that the accused has the right to remain silent and the exercise of that right cannot be used against him. Meggett also contends the solicitor improperly commented on Meggett's failure to present a defense. *See McFadden v. State*, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000) (holding a solicitor must not comment, either directly or indirectly, on a defendant's silence, failure to testify, or failure to present a defense).

We find the trial court did not abuse its discretion in denying Meggett's mistrial motion. The solicitor's statement that there was no evidence Victim was a prostitute was a comment on the evidence, or lack thereof, presented during trial. The solicitor's comment did not improperly shift the burden of proof or suggest that Meggett's guilt could be inferred from his failure to testify or present a defense. The comment was made in reply to allegations defense counsel made in his opening and closing arguments that Meggett and Victim were involved in a sex-for-money arrangement. During opening arguments, defense counsel argued to the jury that "[V]ictim and [Meggett] struck a sort of less than desirable but informal arrangement. They began to sleep together, and [Meggett] would forgive her debt, and it happened more than once." In his closing argument, defense counsel asserted Victim was living in poor conditions and stated "desperate times call for desperate measures."

The solicitor did not state that Meggett failed to present *any* evidence or a defense. Furthermore, the solicitor did not suggest to the jury that an adverse inference should be drawn against Meggett based on his failure to present evidence or testify. The solicitor only commented on the lack of evidence presented to support the inference that Victim was a prostitute. The solicitor's remark was not improper as

it was made to urge the jury to avoid drawing an inference not supported by the record. *See State v. Liberte*, 336 S.C. 648, 653, 521 S.E.2d 744, 746 (Ct. App. 1999) (holding a solicitor is entitled to call into question the credibility of a defense). Additionally, because we find the solicitor's comment was not improper, we further find the trial court did not err in denying Meggett's motion for a curative instruction.

Meggett also argues on appeal that the solicitor's closing statement was improper because it injected extraneous facts and opinions into the case and appealed to the jury's emotions. Because Meggett failed to raise these arguments to the trial court, they are not preserved for our review. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) (holding an issue must have been raised to and ruled upon by the trial judge to be preserved for appellate review).

Motion for Directed Verdict

Meggett argues the trial court erred in denying his motion for a directed verdict as to the first-degree burglary charge. Specifically, Meggett contends there was no evidence he intended to commit a crime at the time he entered Victim's home. We disagree.

"In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find that the case was properly submitted to the jury." *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998).

First-degree burglary is a statutory offense in South Carolina that is defined as follows: "A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling," and any one of several enumerated aggravating circumstances exists. S.C. Code Ann. § 16-11-311(A) (2003). Aggravating circumstances include entering or remaining in the dwelling at night and causing physical injury to a person not participating in the crime. S.C. Code Ann. § 16-11-311(A)(1)(b), (3) (2003).

Citing *State v. Haney*, 257 S.C. 89, 92, 184 S.E.2d 344, 345 (1971), Meggett argues "inconsistent circumstances" indicating he had a different intent or motive for entering Victim's home other than that inferred from the crime committed are present after his entry into Victim's home. Meggett contends the inconsistent circumstances include: (1) he arrived at Victim's home at an unknown time

between 6:00 p.m. and 12:45 a.m.; (2) he entered the unlocked doors of the house of his friend; (3) he waited for an undetermined amount of time for Victim to wake up; and (4) the first thing that happened after Victim woke up was not a rape but a conversation about the money Victim owed Meggett. According to Meggett, these specific circumstances are inconsistent with an inference that he intended to commit CSC the moment he crossed the threshold of Victim's home.

We find the trial court did not err in denying Meggett's motion for a directed verdict as to the burglary charge. Substantial evidence was presented from which the jury could reasonably conclude Meggett possessed the intent to commit a crime at the time he entered Victim's home. Our supreme court has examined criminal intent:

> The question of the intent with which an act is done is one of fact and is ordinarily for jury determination except in extreme cases where there is no evidence thereon. The intent with which an act is done denotes a state of mind, and can be proved only by expressions or conduct, considered in the light of the given circumstances. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred.

State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971) (citing *State v. Johnson*, 84 S.C. 45, 65 S.E. 1023 (1909). Thus, whether a defendant possessed the requisite intent at the time the crime was committed is typically a question for jury determination because, without a statement of intent by the defendant, proof of intent must be determined by inferences from conduct. *See Haney*, 257 S.C. at 91, 184 S.E.2d at 345. In determining whether a defendant possessed the necessary criminal intent in a burglary case, a defendant's actions after he entered a dwelling can constitute evidence of his intent at the time of his unlawful entry. *State v. Pinckney*, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000). In *Pinckney*, our supreme court explained this principle:

> For example, if a defendant entered a house and committed criminal sexual conduct (CSC), the jury could find him guilty of burglary even though there may not have been any specific evidence that at the time he entered the house he intended to commit CSC. His

> actions after entering the house (i.e. the commission of the CSC) would be evidence of his reason for entering the house and would at least support the denial of a directed verdict motion. *See e.g. State v. Faircloth*, 297 N.C. 388, 255 S.E.2d 366 (1979) (citing *State v. Tippett*, 270 N.C. 588, 155 S.E.2d 269 (1967) ("The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the house.")).

Pinckney, 339 S.C. at 349-50, 529 S.E.2d at 527-28.

Here, Meggett entered Victim's home at night without permission. Moments after Victim woke up Meggett briefly brought up the outstanding debt and then sexually assaulted her. Viewing the evidence in the light most favorable to the State, we believe Meggett's actions after entering Victim's home supported a reasonable inference that Meggett possessed the intent to commit a crime at the time of entry. Accordingly, the question of Meggett's criminal intent was for the jury to decide, and therefore, we affirm the trial court's denial of Meggett's motion for a directed verdict.

CONCLUSION

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

AFFIRMED.

WILLIAMS and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lawrence Keeter, Ronald Travis Keeter, and Rebecca Keeter, Appellants/Respondents,

v.

Alpine Towers International, Inc., and Ashley Sexton, Defendants,

Of Whom Alpine Towers International, Inc., is Respondent/Appellant.

Appellate Case No. 2009-137246

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 4995
Heard December 6, 2011 – Filed June 27, 2012

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Richard A. Harpootlian and Graham L. Newman, both of Richard A. Harpootlian, P.A., of Columbia, for Appellants/Respondents.

Charles E. Carpenter, Jr., and Carmon V. Ganjehsani, of Carpenter Appeals & Trial Support, LLC, of Columbia, and Thomas C. Salane, of Turner, Padget, Graham & Laney, P.A., of Columbia, for Respondent/Appellant.

FEW, C.J.: Lawrence "Larry" Keeter and his parents brought this action against Alpine Towers International, Inc., for strict liability, negligent design, and negligent training after Larry broke his back and became a paraplegic as a result of a fall to the ground from a climbing tower designed, manufactured, and installed by Alpine Towers. The jury awarded actual and punitive damages in favor of Larry and actual damages in favor of his parents for Larry's medical bills. After both sides filed post-trial motions, the trial court entered separate judgments in favor of Larry and his parents. Alpine Towers appeals the trial court's decision to deny its motions for directed verdict and judgment notwithstanding the verdict (JNOV) as to actual and punitive damages, and its motion for a new trial due to an alleged error as to apportionment. Larry appeals the trial court's ruling requiring him to elect between his three causes of action. We affirm the denial of Alpine Towers' motions. However, we hold the trial court incorrectly interpreted the jury's verdict and erred in requiring Larry to elect. We remand to the trial court with instructions to enter judgment in Larry's favor against Alpine Towers in the amount of $3,400,500.00 actual damages and $1,110,000.00 punitive damages.[1]

I. Facts

On May 5, 2006, the senior students at Fort Mill High School (Fort Mill) participated in a spring fling recreational field day. During field day, Larry fell more than twenty feet from the climbing tower to the ground. When he hit the ground, Larry broke a vertebra and was rendered a permanent paraplegic. He was seventeen.

Alpine Towers originally sold the climbing tower to Carowinds amusement park near Charlotte, North Carolina. Fort Mill bought the tower from Carowinds in July 2004 and hired Alpine Towers to move it, install it, and train Fort Mill's faculty to safely use it. Fort Mill's contract with Alpine Towers identifies Alpine Towers as "seller" and provides: "Installation includes all hardware, materials, . . . labor, . . . design work, . . . and staff training." The wooden climbing tower is fifty feet tall, has three sides, and is shaped liked an hourglass. The central safety feature of any climbing tower is the belay system.[2] Alpine Towers designed the belay system on

[1] The judgment in favor of Larry's parents is not affected by this appeal.

[2] Alpine Towers' instruction manual defines "belay" as "the rope or technique . . . that is used to protect a climber from falling to the ground." *See also Merriam-Webster Collegiate Dictionary* 111 (11th ed. 2004) (defining belay as "the securing of a person or a safety rope to an anchor point (as during mountain climbing)").

this climbing tower to include four participants—the climber, a primary belayer, a back-up belayer, and a faculty supervisor. The system requires the climber to wear a harness, which is secured to a climbing rope. The rope passes through a pulley at the top of the tower and down to a belay device secured to the ground at the base of the tower. The rope is threaded through the belay device, which uses bends in the rope to create friction to control the speed at which the rope passes through the device. As the climber ascends, the belayer guides the rope through the belay device to keep the rope taut. If the climber falls from the tower while climbing, the belayer uses the friction the belay device creates on the rope to keep the rope from passing back through the device, and thus protects the climber from falling all the way to the ground.

After a successful climb, or in the event the climber falls before completing the climb, the belayer lowers the climber to the ground in a controlled fashion by guiding the rope back through the belay device. The friction created on the rope allows the belayer to control the speed of the climber's descent.[3] Because of the hourglass shape of the tower, a climber being lowered to the ground by the belayer is suspended in air, away from the side of the tower.

Ashley Sexton, a senior at Fort Mill, served as Larry's primary belayer. Fort Mill trained Ashley to belay as a part of the Junior ROTC program. Larry had never been trained in belaying or climbing, but successfully climbed to the top of the tower. Ashley testified that while she was lowering Larry to the ground "the rope . . . got[] tight in the [belay device] almost as if it were stuck" and would not move. Neither Ashley nor anyone at Fort Mill had been taught what to do if the rope became stuck in the belay device. When Ashley tried to free the rope, she lost the assistance of the device, was unable to control the rope, and Larry fell more than twenty feet to the ground.

Alpine Towers designed the belay system on the climbing tower and trained Fort Mill's faculty how to use it. Alpine Towers provided no notice or warning to Fort Mill's faculty that the climbing rope could get stuck in the belay device it designed into the system. Alpine Towers also provided no training or instruction on how the belayer or faculty supervisor should handle the situation if it did. Alpine Towers chose not to incorporate into the design a readily available, automatically locking

[3] Alpine Towers' CEO explained that "not very much" strength is required to hold a climber in the air because the weight is transferred through the belay device to the rope attached to the ground, so that a lightweight belayer can easily lower even a heavy climber.

belay device Larry's experts testified would have stopped Larry's fall. Alpine Towers did not train Fort Mill's faculty to require the faculty supervisor to stand directly beside the belayer, which Alpine Towers admitted at trial should always be done to ensure that proper procedures were followed in the climb and to assist the belayers in the event of a situation like the one that resulted in Larry's fall. When Larry fell, no back-up belayer was present, and no faculty supervisor was close enough to assist Ashley.

II. Procedural History

All of Larry's damages were caused by the broken back he suffered as a result of his fall. Larry asserted three causes of action presenting three alternative theories of Alpine Towers' liability for those damages: (1) Alpine Towers was strictly liable for the manufacture and sale of a defective and unreasonably dangerous product; (2) Alpine Towers negligently designed the climbing tower without adequate safety equipment, instructions, and warnings;[4] and (3) Alpine Towers was negligent in failing to properly train Fort Mill's faculty on how to safely use the climbing tower, particularly in failing to train the faculty to teach student belayers to safely use the belay system.

Larry also filed suit against Ashley for negligence. Larry's parents filed suit against Alpine Towers and Ashley for Larry's medical bills. Larry and his parents settled with Fort Mill before filing suit and dismissed Ashley as a defendant before trial. The jury returned a verdict for Larry on each cause of action. It awarded $500.00 for strict liability,[5] $900,000.00 in actual damages and $160,000.00 in punitive damages for negligent design of the tower, and $2,500,000.00 in actual damages and $950,000.00 in punitive damages for Alpine Tower's negligence in training Fort Mill's faculty. The jury also returned a verdict for Larry's parents for $240,000.00 in actual damages.

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[4] Because Alpine Towers did the "design work" for the installation of the tower at Fort Mill, Larry's negligent design theory includes allegations of negligence in failing to design the tower to meet the specific safety needs of Fort Mill.

[5] The jury originally returned a verdict on the strict liability cause of action in favor of Larry, but with zero damages. After the trial court instructed the jury that it must either award damages to Larry or find in favor of Alpine Towers, it returned a $500.00 award.

Alpine Towers filed a post-trial motion seeking (1) judgment notwithstanding the verdict as to all causes of action and punitive damages, (2) a new trial, (3) an order requiring Larry to elect between the three causes of action, (4) set-off of the settlement paid by Fort Mill, and (5) apportionment under the Contribution Among Joint Tortfeasors Act. The trial court denied the JNOV, new trial, and apportionment motions. The court required Larry to elect between his causes of action and ordered that the settlement from Fort Mill be set-off against Larry's recovery from Alpine Towers. Larry also filed a post-trial motion asking the trial court to enter judgment in the cumulative amount of the damage awards rather than require him to elect. The court denied Larry's motion and ordered that judgment be entered in the amount of $2,500,000.00 in actual damages and $950,000.00 in punitive damages on the negligent training cause of action.

III. Alpine Towers' Appeal

A. Directed Verdict and JNOV—Actual Damages

"In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). "When we review a trial judge's . . . denial of a motion for directed verdict or JNOV, we reverse only when there is no evidence to support the ruling or when the ruling is governed by an error of law." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010).

In its motions for directed verdict and JNOV, Alpine Towers contested all liability issues, including the sufficiency of the evidence supporting each of Larry's causes of action. In its Statement of Issues on Appeal, Alpine Towers contends only that the trial court should have granted its motions because the chain of causation was broken as a matter of law. Specifically, Alpine Towers contends the chain of causation was broken by (1) "the intervening and superseding negligent acts of Fort Mill High School and Ashley Sexton in failing to follow the warnings, directions, and instructions for proper use of the Tower" and (2) "the intervening and superseding negligent acts of Fort Mill High School in failing to undertake its independent duty to properly supervise its students." However, because both Larry and Alpine Towers address in their briefs the sufficiency of the evidence supporting each of Larry's causes of action, we do as well. We find ample evidence to support the jury's verdict as to each. We also find ample evidence that Ashley's negligence and any negligence by Fort Mill was foreseeable to Alpine

Towers, and thus their negligence does not break the chain of causation from Alpine Towers' tortious conduct.

1. Strict Liability

In his strict liability theory, Larry focused on Alpine Towers' design of the climbing tower to incorporate a belay device called Trango Jaws. The Trango Jaws is operated manually and requires the belayer to properly position the climbing rope in the Trango Jaws to create the friction necessary to stop the rope and then control the rate of the climber's descent. Larry's expert witness in biomechanics and sports safety, Gerald George, Ph.D., testified that the Trango Jaws relies on the absence of human error to safely belay a climber. He explained that it was feasible to use an alternative design for the climbing tower incorporating a belay device called a GriGri.[6]

The GriGri is a mechanical device that, when properly threaded, does not rely on the absence of human error. In the event the belayer loses control of the rope, the GriGri automatically stops the rope, and thus protects the climber from falling to the ground. Larry's climbing wall safety expert, Dan Hague, testified that the GriGri "locks up automatically, . . . you're not relying on the actions of the belayer to lock the device up." He emphasized that the automatic stopping feature of the GriGri is particularly important when students are belaying climbers because of the heightened likelihood of human error. To account for this foreseeable risk, Hague "always uses the GriGri with kids." In Hague's opinion, "this injury would not have occurred had a GriGri been in use that day." As a normal part of its business, Alpine Towers sells the GriGri for a variety of uses, including on its own climbing towers. Dr. George testified that without incorporating a "fail-safe" belay device such as the GriGri into the design of a climbing tower used for students, the climbing tower is defective and unreasonably dangerous.

Alpine Towers' argument that the evidence in support of Larry's strict liability cause of action is insufficient is that there is no evidence the tower "was in a defective condition, unreasonably dangerous to the user . . . when it left the hands of the defendant." *See Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995). However, the evidence discussed above amply supports the jury's finding that it was. Moreover, the GriGri qualifies as a "reasonable

[6] The GriGri costs approximately $75, and the Trango Jaws costs approximately $24. The CEO of Alpine Towers testified the difference in cost is an "inconsequential amount of money."

alternative design" as required under *Branham v. Ford Motor Co.*, 390 S.C. 203, 225, 701 S.E.2d 5, 16 (2010). The trial court correctly denied Alpine Towers' directed verdict and JNOV motions as to strict liability.

2. Negligent Design

"A negligence theory imposes the additional burden on a plaintiff 'of demonstrating the defendant . . . failed to exercise due care in some respect, and, unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determined according to fault.'" *Branham*, 390 S.C. at 210, 701 S.E.2d at 9 (quoting *Bragg*, 319 S.C. at 539, 462 S.E.2d at 326). In his negligent design theory, Larry also relied on the evidence that Alpine Towers should have used the GriGri in designing a climbing tower to be used by students, particularly student belayers. However, in addition to evidence that the tower was defective and unreasonably dangerous without the GriGri, Larry presented evidence that Alpine Towers failed to exercise reasonable care in the design. Specifically, Larry presented evidence that Alpine Towers conducted a ten-year study ending in 1999 that concluded the majority of accidents on its climbing towers were caused by human error, specifically belayers dropping their climbers. Despite this knowledge, Alpine Towers chose not to design for human error by including a belay device that would automatically lock and prevent the rope from passing back through the device, thus preventing a fall to the ground such as the one Larry suffered.

Moreover, Larry's experts testified to several breaches of Alpine Towers' duty of reasonable care in designing the warnings and instructions on the tower. In particular, Larry's experts testified faculty supervisors should be instructed to remain within reaching distance of active belay ropes. Alpine Towers' employee John Mordhurst conceded this instruction was necessary. Mordhurst testified a faculty supervisor should be at each belay point, and "[t]hey should be . . . in a position to intervene to grab a rope, . . . so they should be right next to the belayers and belay monitors." In the 1997 edition of Alpine Towers' instruction manual for the climbing tower, the section entitled "The Belay System" includes this requirement: "[P]rograms should require staff to check the belayer's and climber's systems prior to climbing and lowering; . . . the staff member should stand directly beside the climber." However, Alpine Towers omitted the statement containing this requirement from the 2004 edition of the instruction manual, the edition it provided to Fort Mill.

Additionally, Dr. George testified Alpine Towers should have placed end user warnings on the tower for someone like Larry, who climbed for the first time without any instruction, and Ashley, who never received an instruction manual. Dr. George explained this was necessary to ensure an inexperienced climber such as Larry will know the dangers of climbing and understand how the belay system is designed to work before deciding to begin a climb. This evidence amply supports the jury's finding that Alpine Towers failed to exercise reasonable care in designing a defective and unreasonably dangerous climbing tower. Therefore, the trial court was correct to deny Alpine Towers' motions as to negligent design.

3. Negligent Training

In his negligent training theory, Larry presented evidence that despite knowing Fort Mill's faculty would not be doing most of the belaying, but rather would be teaching students to belay, Alpine Towers did not instruct the faculty how to teach belaying. Larry proved several key facts in support of this claim. First, Alpine Towers uses a written syllabus when it conducts classes to teach adults how to belay. However, it did not provide the syllabus to Fort Mill to enable Fort Mill to effectively teach students. Second, the belay system designed by Alpine Towers relies on a faculty supervisor to ensure the students are properly belaying the climbers. In addition to Mordhurst's testimony as to where the faculty supervisor should be positioned, the CEO of Alpine Towers, Joe Lackey, testified, "the staff member should stand directly behind the climber, . . . not thirty feet away." The obvious purpose of this requirement is to enable the supervisor to keep the students from making errors and, if they do, to prevent the tragic consequences Larry suffered. However, Larry presented evidence that Alpine Towers did not teach this to the faculty at Fort Mill. One member of Fort Mill's faculty who attended the Alpine Towers course testified he did not recall being told that a faculty supervisor should stand beside the belayer. When asked why the requirement that "the staff member should stand directly beside the climber" in the 1997 instruction manual was not included in the 2004 edition, Lackey responded, "I'm not sure why it was taken out."

Moreover, despite knowing that Fort Mill would be teaching students to belay and that students were more susceptible to making belaying errors than adults, Alpine Towers did not teach Fort Mill that it should test the students' competency before allowing them to belay a climber. Hague testified "as a matter of course in my industry, participants are tested," including whether they are "able to . . . belay in a competent manner, catch falls, lower somebody . . . off a climb." He explained:

> In a climbing setting you have to be able to assess whether or not the group as a whole is making progress. . . . Since we're talking about life safety here and not about math, if someone is not learning at the same rate as the group, you can't just move to the next topic. You have to slow down. You have to be able to address that one person until everybody's caught up. In addition, at the end of the training, there needs to be some type of discrete competency test.

Alpine Towers has several employees who serve on the standards committee for the Association for Challenge Courses Technology, which Lackey called a "climbing society." Despite evidence of this standard climbing industry practice, Alpine Towers did not teach Fort Mill that it needed to test, how the tests should be conducted, or what particular skills should be tested.[7]

This evidence provides ample support for the jury's finding that Alpine Towers was negligent in failing to properly train the Fort Mill faculty on how to safely use the tower, and thus the trial court properly denied Alpine Towers' motions as to negligent training.

We affirm the trial court's decision to deny Alpine Towers' motions for directed verdict and JNOV as to the sufficiency of the evidence supporting all three of Larry's causes of action.

4. Intervening Causation

The test for whether a subsequent negligent act by a third party breaks the chain of causation to insulate a prior tortfeasor from liability is whether the subsequent actor's negligence was reasonably foreseeable. "For an intervening act to break the causal link and insulate the tortfeasor from further liability, the intervening act must be unforeseeable." *McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 387, 684

[7] Ashley testified she was not given a written test, but was required to do a "demonstration" and be watched by a faculty member to make sure she "knew how to do it." There was no evidence, however, that Alpine Towers took any steps to ensure Fort Mill gave an adequate test of her competency. In fact, Alpine Towers' instruction manual says only that students "will demonstrate proficiency in belaying before being permitted to belay."

S.E.2d 566, 569 (Ct. App. 2009) (internal quotation marks omitted). The trial court properly charged the jury as follows:

> The chain of causation between a defendant's negligence and the injury itself may be broken by the independent intervening acts or omissions of another person over whom the defendant had no control. In order to decide whether an intervening act breaks the chain of causation, you must determine whether the intervening act or omission was reasonably foreseeable by the defendant. If the intervening act or omission was a probable consequence of the defendant's negligence, the defendant is responsible for the plaintiff's injuries. If, however, you find that the intervening act or omission was not foreseeable, the defendant is not liable.

By finding in favor of Larry, the jury necessarily found the actions of Ashley and Fort Mill were foreseeable, and therefore the chain of causation was not broken to insulate Alpine Towers from liability. There is ample evidence to support this finding. *See Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 621-22, 720 S.E.2d 473, 479 (Ct. App. 2011) ("Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law. . . . If there may be a fair difference of opinion regarding whose act proximately caused the injury, then the question of proximate cause must be submitted to the jury." (internal quotation marks and citations omitted)).

Larry presented evidence that Alpine Towers knew Fort Mill would be using high school students to belay climbers, that adolescents are more susceptible to belaying errors than adults, and that Alpine Towers conducted a study concluding human error is the most common cause of falls to the ground from climbing towers. Dr. George testified Alpine Towers "knew or should have known . . . of these risks." He stated it was not merely foreseeable, but "almost predictable," that high school students would not follow proper procedures for belaying climbers. Hague testified that he has trained "thousands and thousands" of people in belaying over fifteen years, including "many hundreds" of adolescents, he takes different approaches to training depending on the maturity level of the belaying student, adolescents "routinely do not" follow procedures, and Alpine Towers "could easily foresee that adolescents aren't going to follow all the procedures."

Therefore, the primary risk associated with the use of a climbing tower is that the belayer, back-up, or faculty supervisor might make an error belaying the climber. Each of Larry's theories of recovery focused on the allegation that Alpine Towers failed to design for and train against human error in belaying and the supervision of students belaying. This is not a "rare or exceptional" case in which the issue of proximate cause may be decided as a matter of law. Alpine Towers' argument that "the intervening and superseding negligent acts of Fort Mill High School and Ashley Sexton" broke the chain of causation fails because there is ample evidence in the record that precisely the same human error that resulted in Larry's injury was not only foreseeable to Alpine Towers, but was actually foreseen. Accordingly, we find the trial court properly submitted the question of proximate cause to the jury, and we affirm its decision to deny Alpine Towers' motions for directed verdict and JNOV as to intervening causation.

B. Directed Verdict and JNOV—Punitive Damages

Alpine Towers also argues the trial court erred in denying its directed verdict and JNOV motions as to punitive damages. We disagree.

"When ruling on a directed verdict motion as to punitive damages, the circuit court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party." *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 393-94, 714 S.E.2d 904, 909 (Ct. App. 2011) (internal quotation marks omitted). This court applies the same standard as the circuit court. 394 S.C. at 394, 714 S.E.2d at 910. "The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless . . . ." *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005). "Recklessness implies the doing of a negligent act knowingly; it is a conscious failure to exercise due care. If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless . . . ." *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (internal citation and quotation marks omitted).

Larry made two separate claims for punitive damages against Alpine Towers: (1) for reckless behavior in its design of the climbing tower and (2) for reckless behavior in its failure to properly train the Fort Mill faculty on how to safely use the climbing tower. The jury awarded punitive damages on each claim, so we address each independently.

As to Larry's claim for punitive damages based on Alpine Towers' reckless behavior in designing the tower, Larry presented evidence that Alpine Towers knew the majority of accidents occurring on its climbing towers were caused by human error by belayers and back-up belayers. Mordhurst conceded that of the three options for a belay device in the design of a climbing tower, "the GriGri has [the] highest likelihood of arresting the fall" of a climber and thus protecting him from falling to the ground if the belayer loses control of the rope. Lackey testified the additional cost of a GriGri is "inconsequential." Alpine Towers' decision to design its climbing tower to incorporate the Trango Jaws instead of the GriGri under these circumstances is sufficient evidence Alpine Towers was "conscious of the probability of resulting injury" from its negligence, and therefore was reckless. The trial court was correct to submit the issue of punitive damages for reckless design to the jury. 392 S.C. at 287, 709 S.E.2d at 612.

As to Larry's claim for punitive damages based on Alpine Towers' reckless behavior in failing to properly train the Fort Mill faculty, in addition to the evidence discussed above, Alpine Towers knew Fort Mill would be using student belayers, whom Alpine Towers knew to be less attentive to following procedures and more susceptible to errors in belaying than adults. Nevertheless, Alpine Towers (1) chose not to train Fort Mill's faculty to teach others, particularly students; (2) did not include in the training materials given to Fort Mill the syllabus Alpine Towers uses to teach belaying; (3) removed from its training manual the specific instruction for faculty supervisors to "stand directly behind the climber"; (4) did not teach Fort Mill to follow the industry practice of testing belayers on the basic skills of belaying before allowing them to belay climbers; and (5) did not inform Fort Mill it had the option of an automatically locking belay device such as the GriGri to compensate for the greater risk posed by the use of student belayers. This also is sufficient evidence Alpine Towers was "conscious of the probability of resulting injury" from its negligence, and therefore was reckless. The trial court was correct to submit the issue of punitive damages for reckless training to the jury. *Id.*

Accordingly, we affirm the trial court's decision to deny Alpine Towers' directed verdict and JNOV motions as to punitive damages.

C. Apportionment of Fort Mill's Fault

Alpine Towers contends it is entitled to a new trial because the trial court did not allow the jury to consider the fault of Fort Mill when it apportioned fault under

section 15-38-15 of the South Carolina Code (Supp. 2011).[8] However, our ruling affirming the jury's award of punitive damages makes it unnecessary to address this issue as the apportionment statute "does not apply to a defendant whose conduct is determined to be . . . reckless." § 15-38-15(F).

IV. Larry's Appeal

Larry appeals the trial court's post-trial ruling entering judgment in his favor in the amount of $2,500,000.00 in actual damages and $950,000.00 in punitive damages. He contends the trial court erred in interpreting the verdicts as "three awards" and requiring him to elect which cause of action would be his remedy. We agree.

"Election of remedies involves a choice between different forms of redress afforded by law for the same injury . . . . It is the act of choosing between inconsistent remedies allowed by law on the same set of facts." *Taylor v. Medenica*, 324 S.C. 200, 218, 479 S.E.2d 35, 44-45 (1996). Larry asserted three causes of action, but sought only one remedy—damages—for only one injury—a broken back. When a plaintiff seeks only one remedy, there is nothing to elect. *See Adams v. Grant*, 292 S.C. 581, 586, 358 S.E.2d 142, 144 (Ct. App. 1986) ("Where a plaintiff presents two causes of action because he is uncertain of which he will be able to prove, but seeks a single recovery, he will not be required to elect.").

The trial court in this case recognized that Larry's three causes of action sought only one remedy. In its post-trial order, the court wrote:

> Here, both products liability claims and the negligence claim represent three theories for recovery for the same injury and damages—personal injuries sustained by [Larry] in his fall. [Larry] had one fall and all his injury and damages flow therefrom regardless of the number of acts of omission or commission of [Alpine Towers].

Because Larry sought only one remedy, the doctrine of election of remedies does not apply. "As its name states, the doctrine applies to the election of 'remedies' not

[8] After the jury's verdict as to liability, the trial court required it to apportion fault between Alpine Towers and Ashley. The jury determined that Ashley was 60% at fault and Alpine Towers was 40% at fault. The jury was not asked to consider the fault of Fort Mill.

the election of 'verdicts.'" *Austin*, 387 S.C. at 57, 691 S.E.2d at 153 (defining a "'remedy' as '[t]he means by which . . . the violation of a right is . . . compensated.'" (quoting *Black's Law Dictionary* 1163 (5th ed. 1979))).

This court addressed a similar situation in *Creach v. Sara Lee Corp.*, 331 S.C. 461, 502 S.E.2d 923 (Ct. App. 1998). The plaintiff in *Creach* "bit down on a hard substance in a steak biscuit made by Sara Lee Corporation," "experience[d] severe pain," and had to undergo "extensive dental work." 331 S.C. at 463, 502 S.E.2d at 923-24. She sued Sara Lee and others "alleging negligence, breach of warranty, and strict liability." 331 S.C. at 463, 502 S.E.2d at 923. After a verdict for Creach on all three causes of action, Sara Lee asked the trial judge to require her to elect her remedy. The judge refused to do so, and this court affirmed, holding "while the complaint stated three different causes of action, only one recovery was sought and only one recovery was awarded. Under these circumstances, no election was required." 331 S.C. at 464, 502 S.E.2d at 924 (citing *Taylor*, 324 S.C. at 218, 479 S.E.2d at 44-45). *Creach* supports our holding that because Larry sought one remedy for one injury, the trial court erred in requiring him to elect.

Nevertheless, the trial court and this court must ensure that Larry does not receive a double recovery. *See Collins Music Co. v. Smith*, 332 S.C. 145, 147, 503 S.E.2d 481, 482 (Ct. App. 1998) ("It is well settled in this state that there can be no double recovery for a single wrong and a plaintiff may recover his actual damages only once." (internal quotation marks omitted)). The determination of whether a verdict grants a double recovery begins with the trial court's responsibility to interpret the verdict in order to ascertain the jury's intent. The trial court interpreted the jury's verdict in this case to be "three awards," and therefore "inconsistent" because it allowed Larry a double recovery. We find the trial court erred in its interpretation of the verdict.

The error arose from the verdict form. Because Larry asserted three causes of action, the trial court correctly fashioned the verdict form to require the jury to write its verdict for each cause of action. However, because Larry sought only one remedy—damages—and because the amount of those damages could not vary from one cause of action to another, the trial court should have required the jury to write one amount for Larry's actual damages, and should not have permitted the jury to write a damages amount for each of the three causes of action. The use of the three blanks for damages in the verdict form left the verdict ambiguous as to the amount of damages the jury intended to award.

To determine the jury's intent in an ambiguous verdict, the court should consider the entire proceedings, focusing on the events and circumstances that reasonably indicate what the jury intended. *See Durst v. S. Ry. Co.*, 161 S.C. 498, 506, 159 S.E. 844, 848 (1931) (stating "the construction of a verdict should, and can, depend upon, not only the language used by the jury, but other things occurring in the trial may be, and should be, properly regarded in determining what a jury intended to find"); *Howard v. Kirton*, 144 S.C. 89, 101, 142 S.E. 39, 43 (1928) (stating it is "the duty of the trial judge to decide what the verdict meant, and, in reaching his conclusion thereabout, it was his duty to take into consideration not only the language of the verdict, but all the matters that occurred in the course of the trial"); *see also* 75B Am. Jur. 2d *Trial* § 1545 (2007) ("In the interpretation of an ambiguous verdict, the court may make use of anything in the proceedings that serves to show with certainty what the jury intended, and, for this purpose, reference may be had, for example, to the pleadings, the evidence, the admissions of the parties, the instructions, or the forms of verdict submitted.").

To correctly interpret the verdict in this case, the trial court was required to consider several indications of the jury's intention as to damages. First, the court should have considered its own conclusion that Larry sought only one remedy—damages—and that all of his damages flowed from the broken back resulting from his fall from the tower. Thus, it was not possible for the damages to vary from one cause of action to another. Second, after the jury returned the verdicts, Larry made a motion asking the court to inquire of the jury whether it meant for the damages awarded to be cumulative. Alpine Towers did not object to the request. While the jury was still in the courtroom, the judge asked the forelady if the jury intended the verdicts to be cumulative.

> The Court: . . . Before you leave, I've got one last question. On the three causes of action you have awarded different amounts of damages. . . . Was it the jury's intention to award those cumulatively, that is they add up to [$3.4 million and $500.00] . . . or did you simply mean that the damages as to each cause of action were to be separate . . . .
>
> Forelady: Ask me that again.
>
> . . .

> The Court: . . . You have ordered [$500.00] on one, [$900,000.00] on one, and [$2.5 million] on one. Is it the jury's intention that those are to be added, that is cumulative, or is the jury's intention that as to each cause of action that award applies only to that cause of action?
>
> Forelady: It's cumulative.
>
> The Court: Okay. How about . . . as to the punitive, you had [$160,000.00] and [$950,000.00], which adds up . . . to [$1.1 million] [sic]. Is it the same for that also?
>
> Forelady: It's cumulative.

The trial court then asked each side separately if there was "anything else before the jury's dismissed?" Both Larry and Alpine Towers answered that they had nothing further, and the trial court dismissed the jury.[9]

In the context that Larry sought, and could obtain, only one damages award for the same injury, this dialogue adequately demonstrates the jury intended the damage amounts written in the three blanks on the verdict form to be added together for a total award to Larry of $3,400,500.00 actual damages and $1,110,000.00 punitive damages. However, there was more to indicate this was the jury's intention. During deliberations the jury sent a note to the court stating the jurors were deadlocked as to whether to award $4.5 million or $5 million and asking for suggestions. The court responded that it had no suggestions. The total amount of

[9] The trial court found, and Alpine Towers argues on appeal, that Larry should have sought further inquiry into the jury's intent and that his failure to do so forecloses his argument that the jury intended the verdicts to be cumulative. We disagree. Larry is the party who initially asked the court to inquire whether the jury intended the verdict to be cumulative. Larry's counsel stated to the court "you can either inquire of the jury here in the courtroom or you can send them out, whatever you're comfortable with." Alpine Towers' counsel stated, "I wouldn't oppose that request." The trial court then made the decision to ask only the forelady. The forelady's answer, "It's cumulative," was the answer Larry was looking for, and therefore Larry had no reason to inquire further on that subject. Alpine Towers, who at that point did have reason to inquire further, said nothing. Therefore, to the extent the lack of further inquiry should be considered, we believe it should be held against Alpine Towers.

damages awarded, including the amount awarded to Larry's parents, was $4.75 million,[10] which is between the two amounts listed in the note. Further, the court should have considered that it gave the jury no basis on which to find different damage awards on different causes of action. In fact, the only place in the damages instruction where the court differentiated between the causes of action at all was to explain to the jury it may award punitive damages only on the negligence theories of recovery.

This court has stated that "it is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found." *Daves v. Cleary*, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2003). In fulfilling this duty, we may not substitute our judgment for that of the jury. *See Lorick*, 153 S.C. at 319, 150 S.E. at 792 (stating the court has a right to give "effect to what the jury unmistakably found" but cannot "invade the province of the jury"). The jury's verdict in this case is readily reconciled as we have explained. We can discern no other way to interpret the verdict consistent with the applicable law and the facts of this case, nor can we find in the record any reason to believe this interpretation does not reflect the intent of the jury. Moreover, during arguments on post-trial motions, counsel for Alpine Towers explained to the trial court what he believed the jury did:

> Let me tell you what I think happened. . . . [When they sent the note asking for suggestions,] they advised that they had arrived at a general block of the amount of the damages that they wanted to give to compensate Mr. Keeter. What they then did because the verdict form is listed in such a way that it says actual damages and punitive damages leaving both blank that they went through and parceled out the total amount of compensatory damages that they wanted to award . . . . And the damages for all three claims are identical . . . , there is no differentiation on the damages . . . . [T]hey

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[10] At the point of the trial when the jury sent this note, the court had not instructed the jury it must award damages on the strict liability claim or find for the defendant. Thus, the $500.00 damages awarded on that cause of action is not included in this figure.

> arrived at a larger figure then they parceled it up to fill in the blanks.[11]

Interpreting the verdict based on "all the matters that occurred in the course of the trial," *Howard*, 144 S.C. at 101, 142 S.E. at 43, we disagree with the trial court and find the jury did not make an "inconsistent damages award." *See* 75B Am. Jur. 2d *Trial* § 1556 (2007) ("In order for a verdict to be deemed inconsistent, there must be inconsistencies within each independent action rather than between verdicts in separate and distinct actions."). Rather, we find that the jury intended the amounts to be added together for a total verdict in Larry's favor of $3,400,500.00 actual damages and $1,110,000.00 punitive damages. Accordingly, we hold the trial court erred in its interpretation of the verdicts and judgment should have been entered in the cumulative amount of actual and punitive damages the jury wrote on the verdict form for each of Larry's causes of action.

V. Conclusion

For the reasons explained above, we affirm the trial court's decision to deny Alpine Towers' motions for directed verdict, JNOV, and for a new trial. We reverse the trial court's interpretation of the jury verdict and remand with instructions that judgment be entered against Alpine Towers in favor of Larry Keeter in the amount of $3,400,500.00 actual damages and $1,110,000.00 punitive damages.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KONDUROS, J., concurs.

THOMAS, J., concurring in a separate opinion.

THOMAS, J.: I concur with the majority as to Alpine Towers' appeal. As to Larry's appeal, I concur in result. I agree that this case does not involve the need to elect remedies or an inconsistent verdict. I write separately to clarify that questioning the entire jury and then conforming the jury's verdict to the jury's intent are the best practices for ensuring a valid verdict.

[11] In fairness to counsel, the statement was made as part of his argument that the verdicts were inconsistent. However, we believe the statement accurately explains why the jury put different damage amounts in different blanks.

First, when a party raises a question about the jury's intent for the verdict, the best practice is to poll all of the jurors or allow the foreperson to answer the court's questions after consulting with the entire jury. *Lorick & Lowrance, Inc. v. Julius H. Walker Co.*, 153 S.C. 309, 314-15, 150 S.E. 789, 791 (1929). The need to clarify the jury's intent almost invariably arises when the language used on the verdict form is problematic. Without an inquiry of the remaining jurors, questioning only the foreperson unnecessarily risks that the jury's precise intent will remain unknown. This danger is heightened by the likelihood of arguments that the foreperson misunderstood the court's questions or provided a response not reflecting the entire jury's intent.

Second, if the initial inquiry shows the jury's intent differs from what the jury wrote on the verdict form, the best practice is to either send the jury back to conform the verdict to the jury's intent or have the correction made in open court with the jury's consent. *Id.* at 314-15, 150 S.E. at 791. After the jury is discharged, the court may construe the verdict in a manner that diverges from the language used by the jury only when the surrounding circumstances make the jury's intent unmistakable and the court's construction reflects that intent. *Id.* at 319-20, 150 S.E. at 792-93.

I disagree with the majority's statement in footnote 9 that Larry had no reason to seek further inquiry of the jury's intent after the foreperson testified the actual and punitive damages amounts were cumulative. The movant has the most incentive to ask the court to send the jury back to conform the verdict to the jury's intent or have the correction made in open court with the jury's consent. These practices best ensure the verdict reflects the jury's intent, and a verdict rendered in accordance with them is nearly impossible to attack by arguing the jury's intent is unclear. *See Billups v. Leliuga*, 303 S.C. 36, 39, 398 S.E.2d 75, 76 (Ct. App. 1990) (stating "a jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention," and holding the jury's intent was clear despite "some confusion in the jury's initial written verdict" because the foreperson testified as to the jury's intent, the clerk published the jury's intent after the foreperson put the intent in writing, and the remaining jurors were polled to ensure their intent complied with the published intent); *cf. Joiner v. Bevier*, 155 S.C. 340, 351, 354-55, 152 S.E. 652, 656-57 (1930) (stating the court has the "duty to enforce a verdict, not to make it" and holding that despite some initial difficulty in getting the jury to render a verdict proper in form, the jury's intent was "entirely clear" when the verdict after a second set of deliberations "corresponded exactly" with the special findings obtained prior to sending the jury back to deliberate). Moreover, if the above practices are not used, the movant risks having to meet its

burden of establishing that the jury's intent is absolutely clear using solely the surrounding circumstances of the case. *Lorick*, 153 S.C. at 319-20, 150 S.E. at 792-93. Here, the jury did not conform the verdict to its intent, nor was the jury polled.[12] Therefore, because the burden to establish the jury's intent remains on Larry as the movant,[13] he must establish the jury's intent was unmistakable based on the surrounding circumstances of the case.

Despite the uphill battle undertaken in this case to establish the jury's intent, I agree to remand for an entry of judgment against Alpine Towers in favor of Larry for $3,400,500.00 actual damages and $1,110,000.00 punitive damages. The surrounding circumstances of this case make the jury's intent unmistakable. Taken together, the forelady's testimony, the jury note, the jury charge, the total damages awarded, and the single injury alleged can lead to only one conclusion: the jury intended to award Larry $3,400,000 in actual damages[14] and $1,110,000 in punitive damages.

[12] In fairness to Larry, he asked the trial court to determine whether the verdict in his favor was intended to be cumulative. He suggested to the trial court, "[E]ither inquire of the jury . . . in the courtroom or . . . send them out." The trial court instead only questioned the foreperson in the presence of the other jurors.

[13] In discussing the movant's incentive and burden, I am not referring to our rules of preservation. This issue is preserved because Larry sufficiently raised it to the trial court by seeking to clarify the jury's intent in the above-suggested manner before the jury was discharged and the trial court ruled on his motion.

[14] This amount omits the damages awarded for the strict liability claim because the jury note was sent before the jury re-deliberated the strict liability claim.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kasseem Stephens, Appellant.

Appellate Case No. 2009-122666

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

Opinion No. 4996
Heard June 4, 2012 – Filed June 27, 2012

AFFIRMED

Chief Appellate Defender Robert Michael Dudek and Appellate Defender Dayne C. Phillips, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Brendan Jackson McDonald, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

CURETON, A.J.: Kasseem Stephens appeals his conviction and sentence for murder, arguing the trial court erred in admitting into evidence an unfairly

prejudicial and needlessly cumulative photographic array containing his "mug shot." We affirm.

FACTS

I. Incident and Investigation

On the afternoon of March 27, 2007, Sheldon Frasier parked his car in a North Charleston neighborhood next to Jamol Greene's truck, and the men conversed with a mutual friend. Frasier's fiancée, Kimberly Bates, remained in the car. Soon after Frasier and Bates arrived, a burgundy Cutlass pulled in behind the vehicles, and the driver got out. After arguing briefly with Frasier, the man produced a gun and began firing at Frasier. Bates briefly exited the car and confronted the gunman, giving Frasier the opportunity to run away. After Bates retreated, the gunman returned to the Cutlass and drove away.

Bates located Frasier at a home not far away. One of the bullets had pierced his neck and severed his carotid artery. Alive but bleeding profusely, Frasier denied knowing who had shot him. He died four days later.

Bates described the gunman to police, and as a result, on the day of the shooting, the police presented her with a photographic lineup. However, she did not recognize any of the men in the lineup.

Shortly after the incident, the police located the burgundy Cutlass not far from the scene of the shooting. Inside it, they found a business card advertising automobile detailing by "Nitty." The next day, the police learned Stephens used the nickname "Nitty" and presented Bates with a second photographic lineup. She identified Stephens as the gunman.

The police also determined the Cutlass belonged to Greene, who provided a written statement. Greene indicated Stephens had taken the Cutlass to wash it and identified him as the gunman. Stephens was indicted and tried for murder.

II. Motion to Suppress

Prior to trial, Stephens moved to suppress Bates's identification of him in the second photographic lineup, arguing (1) the lineup consisted of only six

photographs; (2) the images, which were photocopies of photographs, were in black and white and of poor quality; and (3) Bates's identification was unreliable because she viewed the gunman and the lineup during a time of very high emotional stress.

The State presented the testimony of Detective Keith Elmore, who had led the investigation of Frasier's shooting. He stated that after he learned Stephens used the nickname "Nitty," he asked the jail to prepare a six-photograph lineup including Stephens. The only identifying features Detective Elmore provided with this request were Stephens's name and date of birth. The day after the shooting, Detective Elmore showed Bates the lineup with these instructions: "I am just going to show it to you and if you see anybody pertaining to this case, whether they were the witness, [or] had anything to do with the investigation[,] . . . circle it, sign it and tell me what their involvement was." Detective Elmore testified that after Bates looked over the photographs, she pointed to Stephens and told Detective Elmore "that's the person who shot" Frasier. Bates circled Stephens's photograph and signed and dated the page.

Bates also testified. She recalled sitting inside the car when she first saw the gunman chasing Frasier. She looked at the man for approximately ten seconds. When she exited the car to confront him, she looked at the gunman face to face from a distance of eight to ten feet for approximately five seconds. Bates stated she did not recognize anyone in the first photographic lineup. With regard to the second photographic lineup, Bates described Detective Elmore handing her photographs of six African-American men of the same approximate age and build and asking if she could identify the person who shot Frasier. Bates identified Stephens as the gunman. He was the only person she identified.

The trial court denied Stephens's motion, finding "there [was] really nothing suggestive about the lineup" because each of the men had "similar features[and] very similar eye structure." In addition, the trial court observed that, while Bates was in a very emotional state when she identified Stephens, her testimony that she did not recognize any of the men in the first lineup suggested she made her identification with care.

III. Trial

When the trial court admitted the second photographic lineup into evidence, Stephens objected on the same grounds. In an off-the-record conference, he added his contention that the "mug shot" itself suggested he had a prior criminal history.

Bates's trial testimony included the events surrounding the shooting and her descriptions to the police of the Cutlass and the gunman. After relating her experiences with the two photographic lineups, she identified Stephens as the man she had picked out of the second lineup and the man who shot Frasier.

In addition, Charles Moore, Greene's brother, testified he was at home asleep on the day of the shooting. Between 4:00 and 5:00 in the afternoon, Stephens stopped by and announced he was going to wash the Cutlass. Moore recalled Stephens stayed and talked for five to ten minutes, left in the Cutlass for another five to ten minutes, and then returned to pick up a red Grand Am.

In his defense, Stephens first presented an expert witness who testified to the fallibility of human memory in eyewitness identifications. He also presented Amber Moore, sister of Greene and Moore. Amber testified she arrived home from school at about 3:30 p.m. on the day of the shooting and "went straight to sleep." She remembered being awoken by a commotion outside and being escorted out of the house. However, her memory faltered when Stephens examined her about a statement she gave police on the day of the shooting, indicating the Cutlass was parked in the driveway as late as 4:00 p.m. that day.

The jury found Stephens guilty of murder, and he received a sentence of forty years' imprisonment. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of a manifest abuse of discretion accompanied by probable prejudice. *State v. Gillian,*

373 S.C. 601, 613, 646 S.E.2d 872, 878 (2007). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

LAW/ANALYSIS

Stephens asserts the trial court erred in admitting the second photographic lineup because the unfairly prejudicial effect of the lineup significantly outweighed any probative value. In particular, he argues the unfair prejudice arose from the danger that the jury would conclude the police had his "mug shot" from a prior arrest. We disagree.

> A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in "exceptional circumstances." We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence. If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.

State v. Hamilton, 344 S.C. 344, 357-58, 543 S.E.2d 586, 593-94 (Ct. App. 2001) (citations omitted), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 107, 610 S.E.2d 494, 502 (2005).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008) (internal

quotation marks omitted). A court weighing the prejudicial effect of evidence against its probative value must base its determination upon the entire record and upon the particular facts of the case before it. *Id.*

The trial court did not err in admitting the photographic lineup. At trial, Bates and Detective Elmore testified Bates identified Stephens as the gunman when she viewed the second photographic lineup the police provided her. Stephens argues that the unfair prejudice of admitting the "mug shot" photograph substantially outweighs its probative value. He also argues that, coupled with Bates's in-court identification of him, the introduction of the photographic lineup at trial was needlessly cumulative. We disagree.

The central theme of Stephens's defense was discrediting Bates's identification of him in the second photographic lineup. In a pretrial motion, Stephens argued to suppress the lineup because Bates's identification was unreliable and unduly suggestive. During the State's case-in-chief, Stephens cross-examined Bates and Detective Elmore extensively concerning the content of the lineup and how the detective presented it to Bates. In his defense, Stephens presented only two witnesses. One of them was an expert who opined that stress and other factors surrounding a crime can further compromise an already imperfect human memory, resulting in misidentification. Finally, in his closing argument, Stephens capitalized on Bates's emotional distress and distraction at the time of the shooting, questioned whether she accurately counted the number of shots fired, and criticized the manner in which the photographs were presented to her.

Throughout the trial, Stephens consistently attacked the reliability of Bates's identification of him in the lineup. By doing so, he made the photographic lineup far more important than it might otherwise have been, thereby increasing its probative value. Only by viewing the actual lineup could the jury determine for itself whether the allegedly poor picture quality or the six-photograph format likely influenced Bates's identification. Before the trial court and this court, however, Stephens failed to demonstrate the admission of the lineup caused him unfair prejudice that outweighed the lineup's probative value. The increased probative value resulting from Stephens's attacks on the reliability of Bates's identification also means the photos were not "needlessly" cumulative. Accordingly, the trial court did not err in admitting it.

Stephens's remaining argument, that his "mug shot" in the photographic lineup implied he had a prior criminal record, is unpersuasive on its face. Our appellate courts have affirmed the admission of photographic lineups that were more suggestive of a prior criminal record than the one in this case. *See, e.g.*, *State v. Denson*, 269 S.C. 407, 412-13, 237 S.E.2d 761, 764 (1977) (finding no error in admitting photographic lineup despite the fact photographs included placards that were taped over to conceal arrest information); *State v. Robinson*, 274 S.C. 198, 199-200, 262 S.E.2d 729, 730 (1980) (affirming admission of photographic lineup comprised of full frontal, profile, and frontal head-and-shoulders images with written information blacked out); *State v. Davis*, 309 S.C. 326, 338-39, 422 S.E.2d 133, 141 (1992), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 352 n.5, 520 S.E.2d 614, 616 n.5 (1999) (affirming admission of photographic lineup using mug shots with identifying information masked). The photographic lineup in the instant case is most similar to the lineup in *State v. Ford*, 334 S.C. 444, 450 n.3, 513 S.E.2d 385, 388 n.3 (Ct. App. 1999), the admissibility of which was affirmed because each photograph showed only the subject's head and neck but no placard or clothing. Each image in Stephens's photographic lineup shows a subject's head and neck against a blank background and bears no identifying marks as to date, location, agency, or purpose of the photograph. Each subject is wearing street clothes. The photographs at issue here could have come from driver's licenses, employee identification badges, or other sources. Accordingly, the trial court did not err in finding Stephens's photograph did not imply Stephens had a prior criminal record.

CONCLUSION

We find that, at trial, Stephens adopted a strategy of attacking the reliability of Bates's identification of him in the second photographic lineup and that his strategy greatly increased the probative value of the second photographic lineup. Furthermore, we find Stephens has not demonstrated any prejudice that outweighs this probative value. Finally, we find nothing in Stephens's photograph implied he had a prior criminal record. Accordingly, the trial court's decision to admit the second photographic lineup is

AFFIRMED.

FEW, C.J., and HUFF, J., concur.